25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. While ORS 197.763(6)(a) does not require "magic words" for a party to exercise their right to have either the record held open or the hearing continued, where the local government provides notice of that right at the beginning of the hearing, a process question about whether a request for a continuance or to keep the record open can be made is not sufficient to exercise that right. *Norman v. Washington County*, 80 Or LUBA 500 (2019).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where state statute requires that a local government provide either a public hearing before ruling on an application for a statutory permit or an opportunity for an appeal that includes a *de novo* public hearing, although the local government may require a notice of appeal that sets forth with reasonable particularity the issues that the appealing party will raise at the hearing, the local government may not, consistent with the statute, (1) make that notice requirement a jurisdictional bar to obtaining the hearing, (2) limit the issues specified to five types of issues, or (3) approve or reject requests for hearings based on a qualitative assessment of how well the appellant has explained the issues specified. *Landwatch Lane County v. Lane County*, 79 Or LUBA 96 (2019).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local code provision requires applicants for destination resorts to demonstrate that "[a]ny negative impact on fish and wildlife resources will be completely mitigated so that there is no net loss or net degradation of the resource," where a proposed resort's consumptive use of groundwater is anticipated to impact the quantity and quality of water in an offsite stream, and where the applicant's final master plan includes a mitigation plan requiring the applicant to replace the water consumed by the resort with a quantity and quality of water that will maintain fish habitat in the stream, the local government may not impose a condition of approval allowing the applicant to demonstrate that the source of the mitigation water provides the requisite quantity and quality of water at a later date without review or input by interested persons. *Gould v. Deschutes County*, 79 Or LUBA 561 (2019).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When a county opts to approve a permit without a public hearing, any person who is adversely affected or aggrieved, or who is entitled to notice of the decision may appeal a decision made without a hearing. The county cannot require participation prior to a decision, either by attending a conference (that may or may not have occurred), or providing written comments, or in any other manner. Additionally, the county may not enact additional restrictions to prevent a person who is entitled to file an appeal under the ORS 215.416(11)(a)(A) right to file a local appeal. *Hood River Valley Residents Comm. v. Hood River County*, 78 Or LUBA 282 (2018).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A condition of planned unit development (PUD) approval that requires the applicant to obtain a city engineer's public works permit to improve the pavement of a city street does not represent a deferral of findings of compliance with a PUD approval standard requiring that the PUD be supported by a "safe and adequate transportation system," where the public works permit process will not evaluate compliance with the PUD approval standard, but consider only compliance with whatever standards apply to a city engineer public works permit. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in imposing a condition of approval deferring consideration of compliance with a comprehensive plan policy requiring the applicant and county to undertake a process to consult and resolve differences with local Native American tribes before approving development in an estuary, where the deferral is to an *ad hoc* proceeding without any assurances that the deferred proceeding will actually occur, and the deferral is not supported by findings demonstrating that deferral is permissible under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009). *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Deferral of compliance with an approval standard to a subsequent proceeding under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), or *Gould v. Deschutes County*, 227 Or App 601, 206 P3d 1106 (2009), may not be permissible at all where the approval standard at issue invokes a particular process that is explicitly linked to submittal of the development application, requiring consultation and dispute resolution between the applicant, the local government, and a sovereign Native American Tribe before development approval. *Oregon Shores Conservation Coalition v. Coos County*, 76 Or LUBA 346 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where during the hearing a party objects that a city councilor disclosed the existence, but not the substance, of *ex parte* communications, the objection is sufficient under ORS 197.763(1) to raise an issue regarding the adequacy of the disclosure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Remand is necessary where two city councilors disclose the existence, but not the substance, of an *ex parte* communication, and the record includes no basis to conclude that the substance of the communications was incidental or immaterial. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city councilor's social media communications with constituents regarding an application for an annexation pending before the city council are *ex parte* communications that must be disclosed under ORS 227.180(3). *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where LUBA sustains an assignment of error that a city councilor failed to disclose *ex parte* communications, but the city councilor is no longer on the city council, and the decision must be remanded for other reasons which will require a new decision adopted by a new city council, LUBA will decline to expand the scope of remand to require the former councilor to disclose the substance of the *ex parte* communications. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where during deliberations on an application for an annexation under a new state statute, a city councilor

mentions a city attorney letter discussing the costs of joining litigation to challenge the statute, the letter is exempt from disclosure as an *ex parte* communication under ORS 227.180(4), and the city commits no procedural error in failing to include the letter in the record of the annexation proceeding. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where city procedure on an annexation proposal provides a first evidentiary hearing before the planning commission, followed by a second evidentiary hearing before the city council, the planning commission hearing is the "initial evidentiary hearing" for purposes of ORS 197.763(6)(a), which requires the local government to grant a request for a continuance or open record period that is made prior to the conclusion of the initial evidentiary hearing. The local government is not required to grant such a request made at subsequent evidentiary hearings. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.763(6)(b) or (c), where a party requests in writing the opportunity to respond to new evidence submitted at a continued hearing or during an open record period, any such opportunity is limited to responses to new evidence submitted during the continued hearing or the first open record period. A hearings officer is not compelled by ORS 197.763(6)(b) or (c) to allow a party to submit, during a second open record period, responses to evidence submitted during the initial evidentiary hearing. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A zoning classification decision described in ORS 227.160(2)(b) is not a statutory "permit" decision described in ORS 227.160(2), requiring notice and opportunity for a hearing, unless the decision goes beyond classifying a proposed use and applies discretionary standards to approve or deny the proposed use. *Central Eastside Industrial Council v. City of Portland*, 74 Or LUBA 221 (2016).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.763(6)(a) through (c), prior to the conclusion of the initial evidentiary hearing any party may request an opportunity to present additional evidence. In that event, the hearing body must either continue the hearing or leave the record open to receive the additional evidence, and failure to do so is a procedural error. However, where the party making the request appeals and is given a de novo hearing before the local appellate body at which it is allowed to submit additional evidence, the hearings body's error did not result in prejudice to the party's substantial rights and therefore provides no basis for LUBA to remand. *Pinnacle Alliance Group, LLC v. City of Sisters*, 73 Or LUBA 169 (2016).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government provides written prehearing notice to petitioner and in fact holds a hearing on a proposal to annex and rezone property, the part of ORS 197.830(3) that delays the deadline for filing a notice of intent to appeal a decision that is rendered "without providing a hearing" until 21 days after a petitioner receives actual or constructive notice does not apply. *Phillips v. City of Happy Valley*, 71 Or LUBA 5 (2015).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Modifying a condition of approval to change the source of water used for irrigating landscaping does not obligate the local government to also review and approve a landscaping plan as part of the hearing on the modification, where an unmodified condition provides for review and approval of the landscaping plan as an administrative decision to be issued prior to building permits, and the petitioner's argument that review of the landscaping plan will be discretionary and must be made under proceedings providing notice and hearing is a collateral attack on the unmodified condition. *Foland v. Jackson County*, 70 Or LUBA 247 (2014).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Failure to provide hearing participants an adequate opportunity to rebut an *ex parte* communication may not warrant remand, if the communication includes no factual or legal assertions relating to a basis for approval or denial. However, remand is necessary to provide an adequate opportunity for rebuttal where the *ex parte* communication concerns disputed testimony regarding whether and how many neighborhood associations oppose the project, and the decision makers believe such testimony to be relevant to an approval criterion that requires the project to meet the overall needs of the community. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. To provide a meaningful opportunity for hearings participants to rebut a disclosed *ex parte* communication, the decision-maker must (1) consider any objections that the initial disclosure was inadequate and (2) make some response to specific requests for additional information or clarifications that are reasonably necessary for participants to develop rebuttal to material factual and legal assertions in the communication. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Communications between a staff person and the decision maker, and between a staff person and a party, are not *ex parte* contacts. However, a decision maker could potentially receive an *ex parte* contact where a staff person conveys a communication from a party to the decision maker that concerns the land use decision under consideration. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. An affidavit indicating that one week after issuing the final decision a decision maker knew that the applicant had agreed to the proposed conditions is an insufficient showing that an *ex parte* contact might have occurred during the hearing to warrant depositions under OAR 661-010-0045, where there is no indication when or how the decision maker acquired that knowledge. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Even assuming that a staff member conveyed to a decision maker during the proceedings below that the applicant had agreed to proposed conditions, that communication is not the kind of communication that requires the decision maker to disclose and offer other parties the opportunity to rebut. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. To constitute an *ex parte* communication that obligates a local government to provide an opportunity for rebuttal, the content of the communication must include something concerning the land use decision at issue that is capable of rebuttal. Where the only content of the alleged communication is that the applicant has agreed to city-proposed conditions, there is simply nothing to rebut or respond to. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirements for continuances and open record periods in ORS 197.763(6)(a), (b) and (c) only apply to the initial evidentiary hearing and do not apply to subsequently continued hearings or open record periods. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government does not err by granting additional seven-day open record periods following the conclusion of an initial seven-day open record period, where the local government's code specifically authorizes additional continuances and open record periods. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Whether a building permit also qualifies as a statutory "permit," as ORS 227.160(2) defines that term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where there is no question under applicable land use regulations that a proposed apartment building is permitted outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

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outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory "permit," as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Following closure of a quasi-judicial land use hearing following an open record period under ORS 197.763(6)(c), that statute authorizes any participant to request an opportunity "to respond to" any new evidence submitted during the open record period. If such a request is made, "the hearings authority shall reopen the record pursuant to [ORS 197.763(7)]." A city council may not refuse to reopen the record, based on an assumption that the evidence a permit opponent will submit will not "respond" to new evidence, and it may not limit the requesting participant to "rebuttal" of party opponents. *Friends of the Hood River Waterfront v. City of Hood River*, 67 Or LUBA 179 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A hearings officer's failure to clearly explain to petitioner that the applicable procedures limit final written argument to the applicant does not constitute procedural error; indeed, allowing petitioner to submit final written argument as petitioner requested would violate the applicable procedures. *Purtzer v. Jackson County*, 67 Or LUBA 205 (2013).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The fact that a city believed it was making a decision on the last day allowed by the ORS 227.181 for a decision after remand does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing. The city could have rejected the new evidence and avoided the procedural conundrum that it apparently believed it faced or could have left the record open to respond to the new evidence under ORS 197.763(4)(b). *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where an applicant's final written argument rebuts evidence submitted by opponents regarding three mining sites by discussing information about the three sites from the county's inventory of mining sites already in the record, that rebuttal does not introduce "new evidence" into the record contrary to ORS 197.763(6)(e). *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government defers a finding of compliance with an applicable discretionary approval criterion to a future review proceeding, it must ensure, either in a condition of approval or by necessary operation of its code, that the second review proceeding is infused with the same participatory rights as those provided in the initial review proceeding. A condition of approval that simply provides that a geologic hazard analysis required for tentative plan approval will be provided "prior to any structural development" is insufficient to ensure that geologic hazard approval standards will be addressed in a proceeding that provides the same notice and hearing required of the initial

proceeding on the tentative plan. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where it is not clear under a county's code that the planning commission proceeding on a final master plan application for a destination resort will necessarily be conducted as an ORS 197.763 quasi-judicial hearing with notice, the final master plan proceedings appear to be ministerial under the code, and nothing in the tentative master plan approval requires hearing and notice, the county errs in deferring discretionary tentative master plan approval standards to the proceedings on the application for final master plan approval without ensuring that those proceedings will infused with the same participatory rights as the tentative master plan approval. *Oregon Coast Alliance v. Curry County*, 63 Or LUBA 324 (2011).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. An argument that the county erred in accepting "new evidence" in the applicant's final written argument contrary to ORS 197.763(6)(e) does not provide a basis for reversal or remand, where the petitioner makes no effort to demonstrate that the alleged new evidence is in fact new evidence, or challenge the county's findings that the final written argument included no new evidence. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A petitioner fails to establish a basis for reversal or remand under ORS 227.186 (Measure 56 Notice) where the notice of hearing that the local government gave was given within the time required by ORS 227.186, that notice appears to substantially comply with ORS 227.186 and petitioner merely states it is not clear from the record that the statutorily required notice was given. *Home Builders Association v. City of Eugene*, 59 Or LUBA 116 (2009).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The obligation to conduct a "hearing at least for argument" under ORS 227.180(1)(a)(B) only applies when a city council conducts a review of a lower body's decision. The obligation does not apply when the city council declines review thereby making the lower body's decision the city's final determination. *Mazorol v. City of Bend*, 59 Or LUBA 260 (2009).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The provisions of ORS 197.763(6), dealing with when and how hearings may be continued or the record left open for additional evidence, only apply to the initial evidentiary hearing in a proceeding. Any evidentiary hearing on remand from LUBA is not the initial evidentiary hearing and ORS 197.763(6) does not apply. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a hearing is not the initial evidentiary hearing as is usually the case on remand, when a party submits new evidence as part of its rebuttal to another's party's evidence, as long as that new evidence is limited to rebutting the other party's evidence the other party has no right to surrebuttal. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 215.416(11)(a)(E)(ii) prohibits local governments from limiting issues that can be raised in an appeal of a permit decision made without a prior hearing to those issues specified in the local notice of appeal. A local government cannot avoid that prohibition by allowing parties to raise the issue at the appeal hearing, and then summarily dismissing the local appeal for failure to specify the basis for the appeal in the local notice of appeal. *Woodard v. Yamhill County*, 56 Or LUBA 141 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Because a city council meeting to deliberate on a land use application is a "hearing" for purposes of ORS 227.180(3) and code provisions requiring declaration of *ex parte* contacts at a hearing and the right of the participants to rebut the substance of such contacts, it is also a "hearing" for purposes of a code provision allowing the participants to challenge the qualifications of any city councilor for bias. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The ORS 215.422(3)(b) requirement that the governing body make a public announcement of the content of an *ex parte* communication and offer the parties the right to rebut the substance of the communication at the first hearing following the communication is not satisfied by entering the communication into the record of the land use proceeding at an irregular meeting for which participants to the land use proceeding have no notice or reasonable opportunity to attend. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government re-opens the record to accept "new evidence, arguments or testimony" from the applicant, ORS 197.763(7) requires the local government to do so at a hearing or meeting that is a previously announced or noticed continuation of earlier evidentiary proceedings, or otherwise provide reasonable notice to the participants of earlier evidentiary proceedings that the decision maker intends to re-open the evidentiary record. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government re-opens the record under ORS 197.763(7) to accept new evidence, argument or testimony, it must offer any participant who requests it an opportunity to "raise new issues" regarding the new evidence, argument or testimony. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city approves a floodplain permit to construct a driveway within a floodplain, the city does not err in conditioning approval on obtaining a separate encroachment permit from the city to authorize encroachment of a portion of the driveway into a public right-of-way. Such a condition does not impermissibly "defer" any determination of compliance with the floodplain permit before the city. *Brodersen v. City of Ashland*, 55 Or LUBA 350 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the preliminary subdivision plat approval appears to defer a determination of compliance with a

discretionary subdivision approval standard to the final plat decision, but does not explain why the standard does not apply at the time of preliminary plat approval, LUBA will remand the decision to the county to determine when the standard applies and, if it applies at the time of final plat approval, whether the proceedings that govern final plat approval are consistent with the county's statutory obligation to address discretionary land use standards as part of a public process that affords notice and opportunity for public input. *Reeves v. Yamhill County*, 55 Or LUBA 452 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government impermissibly defers a finding of compliance with an approval standard requiring that the proposed use will not impose an undue burden on the transportation system, where the local government makes no findings of compliance with respect to a disputed intersection, but instead imposes conditions of approval requiring the applicant to submit a traffic study to determine impacts on the intersection, and to execute a development agreement determining the applicant's contribution to improve the intersection, under a process that does not provide for a hearing or public participation. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The first of three options under *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), is to find that "feasible solutions to identified problems exist" and impose necessary conditions to ensure compliance with approval standards. LUBA will reject a claim that a local government has implicitly exercised the first option under *Rhyne*, where there is no evidence in the record that the proposed use complies with a particular approval standard, and no findings of compliance or feasibility of compliance. *Western Express v. Umatilla County*, 54 Or LUBA 571 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the local government on remand allows the permit applicant an opportunity to rebut the permit opponent's response to the new evidence, it must allow other parties an opportunity to rebut the permit opponent's response; but the local government is not obligated on remand to allow other permit opponents an additional opportunity to enhance their evidentiary presentation. *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A land use compatibility statement that determines the appropriate zoning classification for a proposed use of land within an urban growth boundary may constitute a "zoning classification" decision as defined by ORS 227.160(2)(b), and thus not constitute a statutory "permit" that would require the city to provide notice and an opportunity for hearing. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in accepting new information into the record after the public hearing on a matter is closed without allowing other parties an adequate opportunity to respond to the new evidence. *Gunzel v. City of Silverton*, 53 Or LUBA 174 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in deferring a requirement for submission of a geotechnical analysis to a later

stage of the proceedings that does not provide for notice or hearing. *Township 13 Homeowners Assoc. v. City of Waldport*, 53 Or LUBA 250 (2007).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A planning director decision not to refer a revocation request to the planning commission for a hearing is not a "permit" decision as that term is defined at ORS 227.160(2), because it does not constitute the "discretionary approval of a proposed development of land." *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A proceeding to revoke a permit is more analogous to an enforcement action than to a permit proceeding under ORS 227.175, and thus is not subject to the statutory procedural and other requirements applicable to permit proceedings. *Emami v. City of Lake Oswego*, 52 Or LUBA 18 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under a preliminary subdivision approval standard requiring a finding, based on the preliminary grading plan, that it is feasible for the *final* grading plan to comply with code standards governing final grading plans, a finding to that effect is not a deferral of findings of compliance with the standards governing final grading plans. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Absent some authority to the contrary, in approving a preliminary grading plan the local government is not required to determine what procedures will govern consideration of the final grading plan. Where the decision approving the preliminary grading plan does not determine and is not required to determine the procedures that govern the final grading plan, LUBA will reject arguments that the local government erred in failing to impose conditions requiring the county to provide notice and opportunity to request a hearing in considering the final grading plan. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Although a local government is obligated to open the evidentiary record to allow the parties to address any new criteria that may be applied on remand from LUBA, where a local government applies the same criterion on remand that it did in its initial decision and merely cites different comprehensive plan policies to explain how it interprets that criterion, the local government is not obligated to reopen the evidentiary record. *Neighbors 4 Responsible Growth v. City of Veneta*, 52 Or LUBA 325 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When on remand a local government conducts an evidentiary hearing regarding a modified application, the local government may not restrict participation in the public hearing to parties to the original LUBA appeal. *Lengkeek v. City of Tangent*, 52 Or LUBA 509 (2006).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where neither the local government nor LUBA has jurisdiction to resolve the legality of a condition requiring necessary facilities to be constructed prior to obtaining final approval of a two-step subdivision approval process, the local government may (1) adopt findings establishing that fulfillment of the

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Technical revisions to a tentative subdivision plan need not be decided with public participation, and a condition of tentative subdivision plan approval requiring that, prior to submittal of the final plat, county staff will "red-line" the plat and return to applicant's surveyor for corrections is not an impermissible deferral of findings to the second step of a two-step process. *Angius v. Washington County*, 50 Or LUBA 33 (2005).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Limiting issues addressed in a decision following a *de novo* hearing under ORS 214.416 to issues specifically raised in the local notice of appeal is inconsistent with ORS 215.416(11)(a)(E), which provides that the "testimony, argument and evidence shall not be limited to issues raised in a notice of appeal[.]" *Sisters Forest Planning Comm. v. Deschutes County*, 48 Or LUBA 78 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government errs in deferring a determination of compliance with a discretionary permit criterion requiring that development protect riparian vegetation and aesthetic resources to a subsequent staff review that does not provide for notice or hearing. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city is required to apply discretionary criteria in issuing a temporary approval decision, and that temporary approval decision is the only effective city decision that authorizes a broadcast tower and sets the stage for issuance of building permits to construct the tower, that temporary approval decision constitutes "discretionary approval of a proposed development of land" and is therefore a "permit," within the meaning of ORS 227.160(2). The city must either provide a public hearing before issuing an ORS 227.160(2) permit, or provide the opportunity for a local *de novo* appeal of that permit decision after it is issued. *Curl v. City of Bend*, 48 Or LUBA 530 (2005).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The ORS 197.763(6)(b) right to request that a hearing be continued must be exercised prior to the close of the initial evidentiary hearing. Where the initial evidentiary hearing was held before the planning commission, a party has no right under ORS 197.763(6)(b) to request a continuance in a subsequent hearing before the city council, notwithstanding that the planning commission was evenly divided and could not reach a majority vote to approve or to deny an application for subdivision approval. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city's decision to follow quasi-judicial procedures in adopting a decision concerning a two-mile long highway project affecting a large portion of the city does not convert a legislative decision into a quasi-judicial decision. A city need not require that parties in a legislative land use proceeding follow any particular order in presenting evidence. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Nothing in the ORS 197.763 statutory procedures for quasi-judicial land use decisions prohibits an applicant from reserving its entire presentation at a continued hearing to its final rebuttal. If an applicant submits new evidence at that continued hearing, ORS 197.763(6) allows a party to request an opportunity to submit additional written evidence to respond to that new evidence. *Ramsey v. City of Philomath*, 46 Or LUBA 241 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A planning commission permit approval can defer findings of compliance with a conditional use standard requiring that proposed structures "complement" the design of the area, by relying on subsequent review by an architectural review committee, where the committee's review provides the same notice and opportunity for hearing required by state law for the conditional use decision, and the committee will determine compliance with the deferred standard as part of its architectural review. *McCulloh v. City of Jacksonville*, 46 Or LUBA 267 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Once an administrative permit approval decision is appealed locally, ORS 227.175(10)(a)(A) and (D) require that a city provide a *de novo* appeal and a decision on that appeal. A city fails to provide the statutorily required *de novo* appeal when it relies on a committee rule that is not part of the zoning ordinance and was not adopted by the city council to decide that a 2-2 vote of the committee results in denial of the appeal. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. That comprehensive plan policies apply to a challenged grading permit, and thus the permit is a "land use decision" as defined by ORS 197.015(10), does not necessarily mean that the city is obligated to provide a hearing on the grading permit. Not all permits that are land use decisions are also statutory "permits" as defined by ORS 215.402 and 227.160 and subject to statutory requirements to provide a hearing or opportunity for a hearing. *Jaqua v. City of Springfield*, 46 Or LUBA 566 (2004).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city commits no error by processing a lot line adjustment as a quasi-judicial land use matter before the planning commission rather than as a ministerial matter before the planning department, where the lot line adjustment decision requires that the city exercise significant legal and factual judgment. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 227.178(2), even if a city believes that an application is incomplete or it needs more information to render a decision, the city must conduct a hearing and render a decision based on the information submitted, if the applicant insists. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. It is inconsistent with the statutory scheme for processing permit applications at ORS 227.160 *et seq.* for city planning staff to reject a permit application because staff believes more information is necessary

or because staff believes additional or different applications are necessary for approval. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. While a city may deny a permit application if the applicant fails to submit information that is necessary for approval, under ORS 227.175 that decision must be made by a hearings officer or proper designate, after a hearing or other procedure that affords the applicant and others to present evidence and argument. Under the statute, planning staff may not effectively prejudge the merits of the application by rejecting an application that staff feels cannot be approved in the form submitted. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 227.180 does not require that a city council hold a *de novo* hearing on appeal of a land use decision after a *de novo* hearing by the city planning commission. *Scheyer v. City of Hood River*, 43 Or LUBA 112 (2002).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a county order establishes a fee of $700 to, among other things, request a hearing on a permit application or file a local appeal of a permit decision rendered without a hearing, LUBA will remand the order where the $700 fee appears to violate the $250 maximum fee established by ORS 215.416(11)(b), and the county offers no defense of the order. *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a county holds the record open to permit opponents of an application to submit additional evidence and allows additional time for the applicant to respond to any new evidence submitted, in the absence of a request by the opponents for an opportunity to submit surrebuttal evidence, ORS 197.763(6)(c) does not require that the county provide such an opportunity and the county's failure to provide such an opportunity is not error. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government's decision to request that an applicant prepare revised findings to respond to a LUBA remand does not, by itself, obligate the local government to provide a hearing following LUBA's remand. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Parties that seek to demonstrate that a local government erred by adopting an interpretation of local land use legislation after the opportunity for argument and evidentiary presentations closes must demonstrate (1) that the interpretation was unforeseeable, and (2) that the party can produce new evidence that is different from evidence in the record and is directly responsive to the unanticipated interpretation. *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where LUBA remands a land use decision for inadequate findings, parties have no unqualified right to demand a hearing to present additional argument or evidence under *Morrison v. City of Portland*, 70 Or

App 437, 689 P2d 1027 (1984). *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 185 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where an applicant's final legal rebuttal under ORS 197.763(6)(e) is not limited to legal arguments and includes factual assertions, but petitioner fails to demonstrate that the factual assertions concerned a legally relevant issue, such factual assertions provide no basis for reversal or remand. *Donnell v. Union County*, 40 Or LUBA 455.

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 215.060 provides that a county governing body's actions regarding its comprehensive plan are without legal effect unless the governing body conducts one or more public hearings with advance public notice. However, ORS 215.060 does not impose any explicit requirements for the required public hearings. *Waibel v. Crook County*, 40 Or LUBA 67.

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A county governing body's decision to enter a settlement agreement that includes an agreement that the governing body will adopt certain ordinances does not render the public hearings that are subsequently held prior to adopting such ordinances something other than the kind of public hearing required by ORS 215.060, where the county counsel advised the governing body that it was free not to adopt the settlement ordinances and a transcript of the local proceedings shows the governing body did not believe it was legally bound to adopt the settlement ordinances without modification. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirement imposed by *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), for a fair and impartial tribunal does not apply to legislative land use proceedings. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

25.3.4 Local Government Procedures – Compliance With Statutes – Hearings. ORS 227.175 sets forth certain minimum procedural requirements for processing permit applications, but does not prohibit or regulate informal, nonbinding proceedings for preliminary approvals of PUDs that may precede the public hearing(s) required by statute. *Neighbors for Sensible Dev. v. City of Sweet Home*, 40 Or LUBA 21 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When a local government accepts and relies on evidence submitted after the close of the record, without offering participants an opportunity for rebuttal, the decision will be remanded even though a petitioner mistakenly characterizes the procedural error as improper *ex parte* contact. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The ORS 227.175(10)(a)(D) requirement that an appeal with a *de novo* hearing be provided where permit decisions are initially made without a hearing is not violated where the reviewing body is permitted to review the decision on appeal fully, but is limited to remanding the decision to the initial local decision maker. ORS 227.175(10)(a)(D) addresses the nature of the required hearing and does not

address the nature of the local remedies on appeal that the city must provide. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282 (2001).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Even though petitioners may have obtained a continuance or caused the record to be left open had they made either request, a local government is not required to provide a continuance or leave the record open unless it is requested. *Lange-Luttig v. City of Beaverton*, 39 Or LUBA 80 (2000).

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A governing body's refusal to admit audio tapes of the planning commission proceedings into the record on appeal is not reversible error, where the party seeking to enter the tapes into the record fails to demonstrate that the refusal to admit the audio tapes in some way prejudiced the party's participation in the local proceedings. *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a partial transcript of a planning commission hearing contains relevant testimony, a local governing body errs by refusing to accept that partial transcript during its *de novo* appeal hearing. That the local governing body's review is *de novo* does not mean the local governing body may refuse to accept relevant evidence simply because the evidence was also submitted to a lower level decision maker. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 215.416(11)(a), a hearings officer is obligated to conduct a *de novo* hearing that allows the introduction and consideration of all relevant evidence notwithstanding that the evidence could have been presented to the initial decision maker, but was not. *Johnson v. Clackamas County*, 37 Or LUBA 73 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the city does not dispute petitioners' allegations that city council members are honorary members of the applicant's organization and that the council members received and failed to disclose the existence and substance of *ex parte* communications during the proceedings below, LUBA will remand the decision for disclosure and an opportunity to rebut those communications. *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Petitioner's failure to cite ORS 215.402 to 215.428 as authority for its position that the challenged decision required notice and an opportunity for a hearing does not require that LUBA reject the assignment of error where (1) it is clear from its brief that respondent was aware that ORS 215.402 to 215.428 require notice and an opportunity for a hearing for land use decisions that constitute "permits"

under ORS 215.402(4), and (2) the city argues in its brief that the challenged decision does not constitute a "permit" decision, within the meaning of ORS 215.402(4). *Friends of the Creek v. Jackson County*, 36 Or LUBA 562 (1999).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city improperly accepts evidence submitted into the record as part of the final written argument allowed by ORS 197.763(6), that submission is not an "ex parte" communication within the meaning of ORS 227.180(3). *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government refuses to consider petitioner's letters and refuses petitioner's requests to present testimony during the local proceedings, the appearance requirement of ORS 197.830(2) is obviated. *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the procedure followed by the county to approve a permit only provided the applicant a right to participate or appeal, the county may not rely on ORS 215.416(11)(a) to contend petitioner lacks standing to appeal because petitioner is not "adversely affected." *Hugo v. Columbia County*, 34 Or LUBA 577 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If the city committed a procedural error by approving final subdivision and PUD plans without providing a hearing or opportunity for local appeal, such error provides no basis for remand where the petitioner at LUBA was allowed to submit 65 pages of comments to the city prior to its decision. *Rochlin v. City of Portland*, 34 Or LUBA 379 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The local government may be required to reopen the evidentiary hearing where the local government (1) changes to a significant degree an established interpretation of an approval standard; (2) the change makes relevant a different type of evidence that was irrelevant under the old interpretation; and (3) the party seeking to submit evidence responsive to the new interpretation identifies what evidence not already in the record it seeks to submit. *Gutoski v. Lane County*, 34 Or LUBA 219 (1998).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Presenting evidence that petitioner knew a final hearing was scheduled for a certain date would not establish that a petitioner knew that a final decision was actually adopted on that date. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 33 Or LUBA 845 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government's findings cannot defer a determination on discretionary approval criteria to a later

stage without providing the same notice and comment period provided in the initial proceeding. *Harcourt v. Marion County*, 33 Or LUBA 400 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(6)(c) requires a participant to file a written request with the local government for an opportunity to respond to new evidence submitted during the period after a hearing that the record is left open. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(6)(e) allows an applicant seven days after the record is closed to all other parties to submit final written arguments in support of the application. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

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

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government is not required to conduct a hearing, ORS 197.830(3) does not apply, nor does that statute operate to allow a party's lack of notice of a decision to toll the time limit for appeal. *DLCD v. Polk County*, 33 Or LUBA 30 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.835(4)(a), petitioners may raise new issues before LUBA if the city failed to follow applicable local procedures as required by ORS 197.195(3)(a). If the local code requires a public hearing as an applicable procedure, the city's failure to follow that procedure would allow petitioners to raise the issue before LUBA. *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The provisions of ORS 197.763(6)(c) only apply to the "initial evidentiary hearing," and therefore do not require the city council to reopen the record for rebuttal upon the request of a participant in a subsequent evidentiary hearing. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The county violates ORS 215.422 when it reopens the record to accept a report received by a commissioner from intervenor, but does not provide an opportunity for other parties to rebut the substance of the *ex parte* communication. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Because the county's violation of ORS 215.422 is not a procedural error, petitioner is not required to show that his substantial rights were prejudiced by the county's error in order to obtain a remand. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.763(6), the local government is only obligated to leave the record open for seven days after the *initial* evidentiary hearing; language in a local hearing notice to the contrary cannot create additional requirements under that statute. *Gross v. City of Tigard*, 32 Or LUBA 93 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where intervenors submit a memorandum to the city council after the closing of the record, but before a final decision is adopted, ORS 197.763(6) requires the city to provide petitioners an opportunity to respond to such material. *Tucker v. City of Adair Village*, 31 Or LUBA 382 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirement of ORS 197.763(4)(b) that a staff report be available seven days prior to a land use hearing is a procedural requirement; under ORS 197.835(9)(c), its violation is ground for reversal or remand only if petitioner demonstrates that his substantial rights were prejudiced. *Simonds v. Hood River County*, 31 Or LUBA 305 (1996).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a city makes a land use decision without providing a required hearing, ORS 197.830(3) extends the LUBA appeal period. However, ORS 197.830(5) limits the extension to three years unless petitioners establish that the required notice was not provided. *Caraher v. City of Klamath Falls*, 30 Or LUBA 204 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When county provides a hearing on appeal of a planning director's decision made without a hearing, but the hearings officer concludes she lacks jurisdiction over the appeal, the county has not provided a hearing on the decision, and petitioner may appeal to LUBA pursuant to ORS 197.830(3). *Franklin v. Deschutes County*, 30 Or LUBA 33 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. When the city zoning ordinance makes final approval of a tentative subdivision plan a limited land use decision appealable to LUBA, a decision applying the ordinance is not a "tentative decision" that can be appealed locally at a hearing pursuant to ORS 227.175(10). *Azevedo v. City of Albany*, 29 Or LUBA 516 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government violates a substantial right when it charges more than the maximum appeal fee allowed by ORS 227.175(10)(b) for a hearing requested under ORS 227.175(10)(a). *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a local government chooses to treat an application as one for a land use decision, rather than a limited land use decision, and a local appeal as one under ORS 227.175(10)(a), it may not charge more than the maximum appeal fee allowed by ORS 227.175(10)(b). *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. While ORS 215.416(11) allows a county to make land use permit decisions without a hearing, it protects an individual's right to participate in a local hearing by requiring that notice of the decision be given to affected persons and that the opportunity for a *de novo* local appeal be provided. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government makes a permit decision without a hearing, pursuant to local procedures implementing ORS 215.416(11) or 227.175(10), the provisions of ORS 197.830(3) allowing a person to appeal a decision to LUBA if the local government does not provide a hearing do not apply, because the local government did not fail to provide a hearing or the notice of such hearing required by state or local law. *Tarjoto v. Lane County*, 29 Or LUBA 408 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763 governs how a quasi-judicial land use hearing is conducted, not whether one is required. ORS 197.763 does not confer a right to a quasi-judicial land use hearing where such a right does not otherwise exist. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 215.422(4), a communication between a member of the board of commissioners and county staff is not an *ex parte* contact required to be disclosed pursuant to ORS 215.422(3). Therefore, that the board chairman did not disclose in the local record the contents of his conversation with the county code compliance officer is not error. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a local government fails to give a person an individual written notice of hearing to which that person is entitled under state or local law, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Orenco Neighborhood v. City of Hillsboro*, 29 Or LUBA 186 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where new information in support of an application is received by a local government on the last day the record is left open, pursuant to a request that the record be left open under ORS 197.763(6), an opposing party is entitled to a continuance under ORS 197.763(4)(b), if it requests a continuance. A request for a continuance under ORS 197.763(4)(b) is not specifically required to be made before the evidentiary record closes. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. In a quasi-judicial hearing on a land use application, an applicant has a right to rebut evidence submitted by opponents. However, if the applicant's rebuttal includes "additional documents or evidence * * * in support of the application," ORS 197.763(4)(b) gives opponents a right to request a continuance. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the local government wishes to defer a determination of compliance with an applicable approval standard

it must ensure that the later approval process provides any statutorily or locally required notice and an opportunity for input. *Hilderbrand v. Marion County*, 28 Or LUBA 703 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where during the local proceedings petitioners affirmatively waived their right to request a continuance, petitioners cannot raise the local government's failure to provide such a continuance as a basis for reversal or remand in an appeal to LUBA. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government commits error by approving a modified partition application after the local evidentiary hearing is closed and refusing petitioner an opportunity to comment on the modified application before approving it. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 215.422(3), parties in county permit proceedings are entitled to disclosure on the record of the substance of any *ex parte* communications and an opportunity to rebut the substance of the *ex parte* communication at the first hearing following the communication. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(4)(b) establishes a remedy for failure to comply with ORS 197.763(4)(a). Where a document supporting a land use application was not available for review prior to the initial local evidentiary hearing, as required by ORS 197.763(4)(a), but the local government continued the hearing to a later date and made a copy of the document available for review in its planning office prior to the continued hearing, the local government complied with ORS 197.763(4)(b). *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.195, which establishes minimum procedural requirements for making limited land use decisions, does not require that local governments provide either a public hearing or a local appeal. ORS 227.175(3) and (10) do not apply to limited land use decisions, because they are not "permits," as defined in ORS 227.160(2). *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Although it is uncertain whether ORS 203.810 concerning prosecution of county offenses applies to a county zoning ordinance enforcement proceeding, that the county is represented in such proceedings by a non-attorney planning staff member does not violate ORS 203.810(2), if a county ordinance provides for county representation in such proceedings by county staff members other than the district attorney or county counsel. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 197.763(5)(a) requires that a statement listing the applicable substantive criteria from the local government comprehensive plan and code be made at the beginning of a quasi-judicial land use hearing. Where such a statement is not made, or other requirements of ORS 197.763 are not met,

petitioners may raise new issues in an appeal to LUBA. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Allegations that the local decision maker failed to disclose *ex parte* contacts, as required by ORS 215.422(3), provide no basis for reversal or remand where there is no admission by the decision maker or other evidence, either in the record or offered through a motion for evidentiary hearing pursuant to ORS 197.830(13)(b), that an *ex parte* contact occurred. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a permit applicant receives a public hearing and decision from a local government and, under the local code, an appeal to the governing body may be decided without further public hearing, the governing body commits no error by denying the applicant's appeal at a public meeting without further notice or public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where the local code provides a possibility of, but not a right to, a second public hearing on appeal of a hearings officer's decision, the appeal may be denied without providing an additional public hearing, and the code need not include standards for determining whether to grant an additional public hearing. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local hearing is provided and a party is entitled to written notice of the decision under ORS 215.416(10), ORS 197.830(8) rather than ORS 197.830(3) establishes the deadline for filing a notice of intent to appeal. Under ORS 197.830(8), a notice of intent to appeal must be filed within 21 days after a decision becomes final. *DLCD v. Crook County*, 25 Or LUBA 826 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If the *contents* of an *ex parte* communication are not publicly announced and placed in the record, as required by ORS 227.180(3), a city official's request for responses to the *ex parte* communication does not provide the opportunity for rebuttal required by ORS 227.180(3)(b). *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city decision maker receives an *ex parte* contact, failure to follow the procedures required by ORS 227.180(3) constitutes a basis for remand by LUBA, regardless of whether the party seeking remand objected during the proceedings below. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. That a local governing body ultimately adopts an interpretation of an applicable code standard that is different from that adopted by the hearings officer, and declines to reopen the evidentiary record, does not provide a basis for reversal or remand where (1) there was no "established" local interpretation of the code standard, (2) the governing body's interpretation does not make relevant any new type of

evidence, and (3) petitioner does not identify any evidence it wishes to submit if the evidentiary hearing is reopened. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government fails to give a person an individual written notice of hearing to which the person is entitled, the local government fails to provide a hearing with regard to that person, within the meaning of ORS 197.830(3). *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Under ORS 197.830(3), where a local government renders a decision without providing a hearing, an appeal to LUBA must be filed within 21 days of actual notice of the decision, where notice of the decision is required, or within 21 days of the date a person knew or should have known of the decision, where no notice of the decision is required. *Leonard v. Union County*, 24 Or LUBA 362 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirement of ORS 197.830(6)(b) that a person wishing to intervene in an appeal at LUBA have appeared during the local government proceedings is obviated where a city fails to observe statutory notice and hearing requirements of ORS 227.173 and 227.175 prior to issuing the challenged decision granting approval for a permit. *Hood River Sand v. City of Mosier*, 24 Or LUBA 604 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A local government may, by imposing conditions or otherwise, defer a final determination concerning compliance with an applicable permit approval standard to a later stage. However, if the decision to be made at the later stage is itself discretionary, the approval process for the later stage must provide the statutorily required notice and opportunity for hearing, even though the code may not require such notice and hearing. *McKay Creek Valley Assoc. v. Washington County*, 24 Or LUBA 187 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. By statute, adjoining property owners within specified distances of property for which discretionary development approval is requested are entitled to notice of the local proceedings and an opportunity for a public hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a local government concludes a permit applicant has submitted insufficient evidence to demonstrate it is feasible to comply with an applicable approval criterion, it may defer the required determination of compliance with that standard to a later stage in the approval process, but must assure that statutory notice and hearing requirements are observed in that later stage of approval. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where additional evidence in support of an application is received after the notice of hearing required by ORS 197.763(3) is provided, the parties are entitled to request a continuance under ORS 197.763(4)(b), but a continuance need not be granted unless it is requested. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where parties are entitled to a continuance following the introduction of new evidence in support of an application under ORS 197.763(4)(b), and make it clear they wish to present additional evidence at a later hearing, a local government commits error in not continuing the evidentiary hearing, even though a continuance under ORS 197.763(4)(b) was never explicitly requested. *Reed v. Clatsop County*, 22 Or LUBA 548 (1992).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where a city approves a permit without providing the public hearing or notice of decision and opportunity for a local appeal required by ORS 227.175(3) and (10), a notice of intent to appeal at LUBA is timely filed if it is filed within 21 days after petitioners received actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where adoption of the challenged decision required the exercise of factual and legal judgment, the decision required the exercise of discretion and, consequently, approves a "permit." Under these circumstances, it is error for the local government to fail to provide petitioner with notice and opportunity for hearing, where at least some of petitioner's members were entitled to notice if a public hearing had been scheduled. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. A city attorney's statement at the beginning of the city council hearing, to the effect that parties are welcome to rebut *ex parte* communications, satisfies the requirement of ORS 227.180(3)(b) that a public announcement of the parties' right to rebut the substance of an *ex parte* communication be made at the first hearing following the communication. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Pursuant to 215.406(1) and 215.422(2), a county governing body may designate a hearings officer to conduct hearings on permit applications and may provide that the hearings officer's decision is the final county decision. *Wickwire v. Clackamas County*, 21 Or LUBA 278 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. Where there is no local appeal available and a local government fails to provide the notice of hearing or hearing required by ORS 227.175(3) and (5) or 215.416(3) and (5) before making a decision on a permit, such permit decisions may be appealed to LUBA within 21 days after a person receives actual notice of the permit decision. *Citizens Concerned v. City of Sherwood*, 21 Or LUBA 515 (1991).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. The requirements of ORS 197.763(4)(b) and the local code that staff reports be available a certain number of days prior to land use hearings are procedural requirements; their violation is grounds for reversal or remand of the local government's decision only if petitioner demonstrates prejudice to its substantial rights. ORS 197.835(7)(a)(B). *Forest Park Estate v. Multnomah County*, 20 Or LUBA 319 (1990).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. ORS 227.175(10), allowing city approval or denial without a hearing, if notice of the decision is given and an opportunity for an appeal at the city level provided, applies only to *permit* applications, not to zone changes. *Torgeson v. City of Canby*, 19 Or LUBA 623 (1990).

25.3.4 Local Government Procedures – Compliance with Statutes – Hearings. If a county neither (1) holds a public hearing before making a decision on an application for a "permit," as defined in ORS 215.402(4), nor (2) provides an opportunity to appeal that decision at the county level, it fails to comply with the requirements of ORS 215.416(3), (5) and (11). *Flowers v. Klamath County*, 18 Or LUBA 647 (1990).