

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. An appeal of a LUCS for a DEQ permit for a natural gas pipeline is excluded from LUBA’s review under ORS 197.015(10)(b)(H)(ii) and (iii) where the LUCS correctly determines that no future land use reviews are required for some portions of the project and that other portions of the project require future land use reviews, and where the LUCS does not purport to approve or deny those reviews. *McCaffree v. City of North Bend*, 81 Or LUBA 32 (2020).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. The Land Conservation and Development Commission has adopted OAR 660-031-0026, which identifies state agency permits that must be compatible with local land use regulations, and OAR 660-031-0035, which authorizes state agencies to rely on local land use compatibility statements when issuing such permits. Oregon Liquor Control Commission decisions regarding returnable bottle redemption centers are not listed at OAR 660-031-0026, and therefore a local government planner’s checkmark on an OLCC form indicating a redemption center is allowed in the applicable zone is not a land use compatibility statement. *Glenwood 2006, LLC v. City of Beaverton*, 76 Or LUBA 162 (2017).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. To invoke the exclusions to LUBA’s jurisdiction at ORS 197.015(10)(b)(H), for certain land use compatibility statements (LUCS) decisions, the proponent must demonstrate that the LUCS decision correctly categorized the proposed land use in a manner that falls within one of three categories. Where the challenged LUCS decision does not identify or categorize the proposed land use at all, LUBA cannot determine if the decision correctly categorizes the proposed land use, and thus determine whether the exclusions at ORS 197.015(10)(b)(H) apply. *Bishop v. Deschutes County*, 75 Or LUBA 504 (2017).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H)(iii) excludes from LUBA’s jurisdiction a land use compatibility statement (LUCS) that identifies required local land use reviews that the applicant must obtain in order to carry out the proposed activity. However, where a LUCS suggests that the applicant could seek an exception to Statewide Planning Goal 5 in order to eliminate the requirement to obtain a permit to develop within a Goal 5 resource area, the suggestion to obtain a Goal 5 exception does not identify a type of required local land use review for purposes of ORS 197.015(10)(b)(H)(iii). *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. The exclusion at ORS 197.015(10)(b)(H)(iii) for land use compatibility statements (LUCS) that identify local land use reviews is not triggered by a suggestion in a LUCS that the applicant avoid the requirement to obtain approval of a revegetation plan required by a subdivision condition of approval, by filing an application to eliminate or modify the subdivision condition of approval. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. The exclusion at ORS 197.015(10)(b)(H)(iii) for land use compatibility statements (LUCS) that identify local land use reviews does not apply where the LUCS not only identifies the required local land use review, but also approves or denies the identified review. However, where

the LUCS applicant submitted along with the LUCS request a land use application seeking approval of a re-vegetation plan, but the LUCS decision does not expressly address, approve, or deny the application, LUBA will not presume that the LUCS decision implicitly denied the application. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. LUBA will tentatively deny a motion to dismiss based on the exclusion at ORS 197.015(10)(b)(H)(iii) for land use compatibility statements (LUCS) that identify local land use reviews, where (1) based on the record and pleadings LUBA cannot tell if the exclusion applies and (2) the appeal of the LUCS decision is consolidated with an appeal of a related land use decision regarding the availability of local appeal of the LUCS decision. Until it is determined whether a local appeal of the LUCS decision was available, and hence whether the LUCS decision was a final decision capable of review by either LUBA or the circuit court, it is premature to resolve the jurisdictional question. *Todd v. Clackamas County*, 73 Or LUBA 369 (2016).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. Where LUBA concludes that it lacks jurisdiction over an applicant’s appeal of an adverse land use compatibility statement, the appeal must either be dismissed or transferred to circuit court if a motion to transfer is filed. LUBA lacks authority to reverse a decision it has no jurisdiction over. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. A county is not obligated to accept an applicant’s characterization of its proposed use and scope of use for purposes of issuing a land use compatibility statement. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. A governing body’s code interpretation made in the course of rendering a decision on a request for a land use compatibility statement is subject to the deferential standard of review at ORS 197.829(1). Even without that deferential standard of review, the county correctly concluded that a proposal to store irrigation water in two newly excavated but unapproved reservoirs is not an outright permitted use as the operation of an “existing irrigation system,” but rather a use that requires conditional use approval as the “excavation” for “reservoirs” in conjunction with an irrigation system. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. That a decision on a request for a land use compatibility statement (LUCS) involves the exercise of discretion or interpretation of code language to determine whether the proposed use is permitted outright or requires future land use reviews does not mean that the exclusions at ORS 197.015(10)(b)(H) do not apply. Many LUCS decisions that otherwise fall within the exclusions at ORS 197.015(10)(b)(H) require the interpretation of code language, which is often necessary to determine how to correctly categorize the proposed use. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. Where a county land use compatibility statement correctly categorizes a proposed use

as one that requires future land use reviews and thus falls within the exclusion from LUBA's jurisdiction at ORS 197.015(10)(b)(H)(iii), a petitioner's argument that the proposed use requires *additional* future land use reviews does not provide a basis for LUBA to determine that it retains jurisdiction over the appeal of the decision. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H) is silent regarding what procedures a local government may apply to a request for a land use compatibility statement (LUCS). LUBA's conclusion that a LUCS decision is excluded from LUBA's jurisdiction does not mean that the county lacked "land use jurisdiction" to process the LUCS request pursuant to land use procedures that provide for local appeal. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H)(i) excludes from the definition of "land use decision" land use compatibility statements determining that a prior local government land use decision authorized a use that "encompasses" the proposed state agency action. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the prior local government decision merely verified a portion of the nonconforming use, but that verification did not authorize or "encompass" the proposed septic expansion. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. ORS 197.015(10)(b)(H)(ii) excludes from the definition of "land use decision" any land use compatibility statements determining that the proposed state agency action is "allowed without review" under local comprehensive plan and regulations. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the expansion is accomplished by verifying and altering the scope of the nonconforming use, which necessarily requires discretionary review. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. Under ORS 197.015(10)(b)(H)(i), adopted in 2010, "land use decision" does not include a local government decision that a proposed state agency action is compatible with the local government's comprehensive plan and land use regulations if (1) the local government has already made a land use decision authorizing a use that encompasses the state agency action, (2) the use is allowed without review, or (3) the use requires a future land use review. As ORS 197.015(10)(b)(H)(i) is worded, LUBA's jurisdiction over a local government compatibility determination turns on whether that determination is correct. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. In order for one of the exclusions for compatibility determination at ORS 197.015(10)(b)(H) to apply, the decision must purport to fall within the exclusion or on its face fall within the exclusion. Arguments that the local government should have made its compatibility determination in a manner that would bring it within a different exclusion, based on findings the local government did not make, are not a basis to apply the different exclusion and thereby

conclude that LUBA lacks jurisdiction over the compatibility determination. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

26.2.10 LUBA Jurisdiction – Land Use Decision: Statutory Test – Compatibility Statement Exception. A 1980 reasons exception and comprehensive plan and zoning amendment to allow for a waste disposal facility “authorizes” subsequent expansions of that landfill within the rezoned area for purposes of the exclusion to LUBA’s jurisdiction at ORS 197.015(10)(b)(H)(i), where the 1980 decision specifically contemplated that the facility would expand incrementally over time, with filled disposal cells capped and reclaimed, while the active landfill operation moves on to new disposal cells. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).