

26.2.8 LUBA Jurisdiction – Land Use Decision: Statutory Test – Limited Land Use Decision.

A zone verification is not a statutory land use “permit” as defined at ORS 227.160(2)(b), and the city is not required to provide notice of the decision or opportunity for a local appeal of the decision. However, a zone verification decision is subject to LUBA review and a 21-day appeal period. ORS 227.175(11); ORS 197.830(5)(b). *Leyden v. City of Eugene*, 79 Or LUBA 151 (2019).

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When a hearings officer makes a zone classification decision, such as a Zone Verification, the Zone Verification is a final land use decision. Thus, such decisions are appealable to LUBA “in the same manner as a limited land use decision.” ORS 227.175(11)(b); ORS 197.830(5). LUBA has exclusive jurisdiction to review land use decisions and limited land use decisions. ORS 197.825. The fact that a zone verification is not a statutory permit removes certain procedural requirements that apply to statutory permits, such as notice and the opportunity for a hearing. However, the fact that a zone verification is not a statutory permit does not mean that a zone verification is not a final land use decision for purposes of LUBA review, including the general prohibition on collateral attack. *Richardi v. City of Eugene*, 78 Or LUBA 299 (2018).

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A limited land use decision may be approved through a notice and comment process, and a local government may provide a right of local appeal. ORS 197.195(5). In such an appeal, the appeal hearing may be based on the existing administrative record or new evidence may be allowed. Should an appeal hearing allow the introduction of new evidence, the hearing is subject to the quasi-judicial hearing procedures set forth in ORS 197.763. In such a situation, a hearings officer may properly consider new evidence and analysis offered by the local government, as well as a petitioner’s response, and LUBA’s review includes the hearings officer’s consideration of that evidence and those issues. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

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

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Where respondents respond to petitioner’s argument that a proposed development violates comprehensive plan standards by arguing in their response brief that the challenged decision is a “limited land use decision” and the plan policies therefore do not apply under ORS 197.195(1) because the plan policies have not been incorporated into the city’s land use regulations, and petitioner does not respond to that argument at oral argument or seek permission to respond in a reply brief, petitioner’s assumption that the plan policies apply is inadequate to state a basis for reversal or remand. *LO 138 LLC v. City of Lake Oswego*, 71 Or LUBA 195 (2015).

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Where an application for city subdivision approval includes a request for planned unit development approval that allows the property to be divided in ways that the property could not be divided

without planned unit development approval, the decision granting planned unit development subdivision approval is a land use decision, not a limited land use decision. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

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A decision approving a manufactured home subdivision is a limited land use decision subject to LUBA’s jurisdiction. That the decision includes a condition of approval that imposes or references system development charges does not mean that the decision is excluded from LUBA’s jurisdiction as a “fiscal” decision under the reasoning in *State Housing Council v. City of Lake Oswego*, 48 Or App 525, 617 P2d 655 (1980). *D & B Home Investments v. City of Donald*, 51 Or LUBA 1 (2006).

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The definition of “limited land use decision” in ORS 197.015(12)(a) does not distinguish between preliminary and final plat approval. Both types of approval may be final decisions or determinations concerning approval or denial of a subdivision, and thus limited land use decisions subject to LUBA review. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

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Even if an implicit exception for nondiscretionary limited land use decisions can be read into the definition at ORS 197.015(12), final plat approval of a planned unit development may be discretionary. Depending upon the particular circumstances of each preliminary plat approval and attendant conditions, the determination of whether final plat approval should be granted may involve the exercise of significant factual and legal judgment. *Bauer v. City of Portland*, 38 Or LUBA 715 (2000).

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Because the city’s decision to allow a continuation of an existing conditional use permit is not a limited land use decision under ORS 197.015, a subsequent statement of appeal rights in a notice letter provided by the city is not dispositive of whether petitioner’s appeal was timely filed. *Lloyd Dist. Community Assoc. v. City of Portland*, 30 Or LUBA 390 (1996).

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Where a decision to eliminate conditions of approval requires local review under code zone change standards, the decision is a land use decision, and not a limited land use decision. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

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The limited land use decisions described by ORS 197.015(12)(b) fall somewhere between (1) outright permitted uses for which approval involves no discretionary review; and (2) uses allowed subject to application of discretionary approval standards that may require denial of the use altogether (as opposed to discretionary approval standards that only regulate the use’s physical characteristics). *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

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A local government wishing to identify in its plan or land use regulations uses qualifying for approval as limited land use decisions under ORS 197.015(12)(b) must make it clear the

discretionary approval standards applied to such uses may only be applied to regulate the use's physical characteristics and may not be used to deny approval of the use altogether. *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

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A decision approving a tentative subdivision plat for land within an urban growth boundary is a “limited land use decision.” ORS 197.015(12)(a). *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

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A city's failure to incorporate comprehensive plan provisions applicable to limited land use decisions into its land use regulations, as required by ORS 197.195(1), means only that applicable plan provisions continue to apply to limited land use decisions. It has no bearing on whether a development proposal meets the ORS 197.015(12) definition of “limited land use decision.” *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

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A letter by a city planning director concerning the application of code provisions relevant to the validity of tentative plan approvals and approval of final plats, for certain subdivisions within an urban growth boundary, is a limited land use decision. *Forest Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 215 (1994).

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Where no land use standards govern a local government decision to allow the applicant to abandon a permit application that led to a permit decision remanded by LUBA and instead to submit a new application governed by amended approval standards, the decision does not, by itself, constitute a land use decision or limited land use decision. *Fechtig v. City of Albany*, 27 Or LUBA 666 (1994).

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Where the petition for review alleges the challenged decision applies provisions of a local government plan and land use regulations, it is not fatal to LUBA's jurisdiction that the petition for review improperly characterizes the decision as a “land use decision” rather than a “limited land use decision.” *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

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To constitute a “limited land use decision” under ORS 197.015(12), the challenged local government decision must relate to “a site within an urban growth boundary” (UGB). For purposes of determining whether a challenged decision is a limited land use decision, there is no established UGB until the local government's plan and land use regulations are completely acknowledged. *Schatz v. City of Jacksonville*, 25 Or LUBA 327 (1993).

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A decision granting subdivision final plat approval is reviewable by LUBA as a limited land use decision. ORS 197.015(12)(a); 197.825(1). *Warren v. City of Aurora*, 23 Or LUBA 507 (1992).