

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

28.10 LUBA Scope of Review – Limited Land Use Decisions. Where a city bureau manages the city’s transportation system, including private uses in the city right-of-way, and where bureau staff have special expertise in the safe and efficient use of the right-of-way and various demands on streets, including traffic, parking, and loading, statements from the bureau (1) that studio apartments have lower turnover rates, less need for unloading large furniture, and, thus, less need for a loading space, and (2) that signed, infrequent on-street loading will not have a negative effect on the traffic safety or other transportation functions of the abutting right-of-way are evidence that would permit a reasonable person to find that an on-street loading space is adequate for a proposed studio apartment building’s loading needs such that the development continues to meet the intended purpose of, and, therefore, qualifies for an adjustment to, an off-street loading space requirement, even where there is testimony in the record from an opponent of the development regarding anticipated negative congestion and safety impacts of off-street loading. *NDNA v. City of Portland*, 80 Or LUBA 269 (2019).

28.10 LUBA Scope of Review – Limited Land Use Decisions. ORS 197.195(1) prohibits a local government from directly applying comprehensive plan requirements as a basis for its decision on an application for limited land use decision approval, where the comprehensive plan requirements have not been incorporated into the local government’s land use regulations. That prohibition is simply inapplicable to the city’s business license regulations, and ORS 197.195(1) does not prohibit a local government from conditioning its approval of a limited land use decision on compliance with its business licensing requirements. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. ORS 197.828(2)(b) authorizes LUBA to reverse or remand a limited land use decision that “does not comply with applicable provisions of the land use regulations[.]” A petitioner’s argument that a limited land use decision fails to comply with a notation on a recorded plat provides no basis for reversal or remand of the decision where the petitioner fails to establish that the recorded plat is a “land use regulation” as defined in ORS 197.015(11). *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. LUBA’s standard of review of evidentiary challenges to a limited land use decision is not the same as the standard of review of a land use decision. For limited land use decisions, LUBA may not reverse or remand a limited land use decision unless “the decision is not supported by substantial evidence in the record.” Under ORS 197.828(2)(a), in determining whether the decision is “supported by substantial evidence in

the record[]” LUBA may not remand a decision on the basis that there exists evidence in the record supporting a different decision. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. The difference between substantial evidence review of a limited land use decision under ORS 197.828(2)(a) and the more rigorous substantial evidence review of a land use decision at ORS 197.835(9)(a)(C) is legally irrelevant where LUBA concludes that the evidence in the record is evidence a reasonable decision maker would rely on under the more rigorous ORS 197.835(9)(a)(C) “substantial evidence in the whole record” standard of review. *Truth in Site Coalition v. City of Bend*, 71 Or LUBA 348 (2015).

28.10 LUBA Scope of Review – Limited Land Use Decisions. A decision to “incorporate” comprehensive plan policies into a local government’s land use regulations, to make those policies criteria directly applicable to a limited land use decision, must be accomplished by as post - acknowledgment plan amendment that expressly makes specific policies applicable approval criteria for limited land use decisions. The mere adoption of land use regulations to implement comprehensive policies does not “incorporate” such policies into land use regulations as directly applicable criteria. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

28.10. LUBA Scope of Review – Limited Land Use Decisions. A city council’s interpretation of its land use legislation that a general incorporation of the city’s comprehensive plan into its zoning ordinance is not sufficient under ORS 197.195 to make individual comprehensive plan policies decision making approval criteria for limited land use decisions is not reversible under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010). *Johnson v. City of Gladstone*, 65 Or LUBA 225 (2012).

28.10 LUBA Scope of Review - Limited Land Use Decisions. ORS 227.175(10)(a)(E)(ii), which was adopted in response to the Court of Appeals’ decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997), and specifically provides that a *de novo* appeal of a permit decision under 227.175(10)(a) may not be limited to issues raised in the local notice of appeal, does not apply to appeals of limited land use decisions. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

28.10. LUBA Scope of Review – Limited Land Use Decisions. The fact that a local decision is properly described as a limited land use decision does not mean that the decision may be directly appealed to LUBA, where the local government establishes a process where an initial limited land use decision must first be appealed to a local hearings officer. *Southeast Neighbors v. City of Eugene*, 43 Or LUBA 286 (2002).

28.10. LUBA Scope of Review – Limited Land Use Decisions. LUBA does not have jurisdiction to review a limited land use decision, where petitioner failed to timely appeal an initial decision by the planning director to a local hearings officer pursuant to local code provisions that allow for local appeals of limited land use decisions. *Southeast Neighbors v. City of Eugene*, 43 Or LUBA 286 (2002).

28.10. LUBA Scope of Review – Limited Land Use Decisions. An allegation that a city mischaracterized its decision as a limited land use decision does not itself provide a basis for

reversal or remand, absent a further allegation that the city failed to follow the procedures applicable to the decision and that petitioners' substantial rights were prejudiced by that failure. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

28.10. LUBA Scope of Review – Limited Land Use Decisions. Whatever prejudice to petitioners' substantial rights might have occurred before the initial decision maker, when the city arguably failed to provide petitioners an adequate opportunity to comment before the planning commission on whether a proposed design complied with applicable criteria, was cured by providing petitioners an opportunity to present testimony directed at applicable criteria in a subsequent appeal to the city council. *Crowley v. City of Bandon*, 41 Or LUBA 87 (2001).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Where petitioners do not explain how the city's failure to conduct a public hearing (if one was required under local code) prejudiced their substantial rights, there is no basis for reversal or remand pursuant to ORS 197.828(2)(d). *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Contrary to the contention that limited land use decisions require only cursory findings, ORS 227.173(2), which states the requirement for findings in support of a city permit approval, makes no distinction between land use decision findings and limited land use decision findings. *Design Home Construction v. City of Silverton*, 32 Or LUBA 452 (1997).

28.10 LUBA Scope of Review – Limited Land Use Decisions. There is no meaningful difference between ORS 197.195(3)(c)(B) and 197.763(1) "raise it or waive it" requirements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Where a local government provides public hearings before the planning commission and city council before making a limited land use decision, petitioner's allegations that the notice preceding the city council hearing fails to comply the requirements of ORS 197.195(3)(b) for notice of the application provide no basis for reversal or remand where petitioner fails to challenge the adequacy of the notice of hearing that preceded the planning commission hearing. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

28.10 LUBA Scope of Review – Limited Land Use Decisions. LUBA's review of limited land use decisions is limited to issues raised before the local government, unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from the proposal described in the local notice of proposed action. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Assignments of error that contend disputed conditions of approval either exceed a local government's authority under, or improperly construe, applicable law, if sustained, provide a basis for reversal or remand of a challenged decision, regardless of whether the challenged decision is a land use decision or limited land use decision. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. The term “permits,” as used in Oregon Laws 1991, chapter 3, section 7, refers to all decisions defined as “permits” when that law was enacted. The subsequent amendment to the ORS 227.160(2) definition of “permit” to exclude limited land use decisions does not apply. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. LUBA applies statutory waiver requirements to limited land use decisions the same way it applies them to land use decisions. LUBA’s review of limited land use decisions is limited to issues raised below unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from that described in the local notice of proposed action. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. If a party contends an issue petitioners seek to raise before LUBA in an appeal challenging a limited land use decision was not raised during the local proceedings, and petitioners neither identify where in the record the issues were raised below nor claim the local government failed to follow the procedures required by ORS 197.195, petitioners may not raise the issue for the first time before LUBA. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

28.10 LUBA Scope of Review – Limited Land Use Decisions. In LUBA’s review of alleged procedural errors, the substantial rights referred to in ORS 197.828(2)(d) concerning limited land use decisions are the same rights referred to in ORS 197.835(7)(a)(B) concerning land use decisions. *Mannenbach v. City of Dallas*, 25 Or LUBA 136 (1993).

28.10 LUBA Scope of Review – Limited Land Use Decisions. Under ORS 197.828(2)(d), in determining whether remand is appropriate where a local government commits procedural error, LUBA must determine whether the substantial rights of the parties were prejudiced by the error. The substantial rights of parties include the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing. *Warren v. City of Aurora*, 25 Or LUBA 11 (1993).