

28.5 LUBA Scope of Review – Legislative Decisions. While the “raise it or waive it” requirement of ORS 197.763(1) and 197.835(3) does not apply to legislative proceedings, where a party has an opportunity to object to a procedural error during a legislative proceeding, the party must do so in order to seek remand based on that error. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

28.5 LUBA Scope of Review – Legislative Decisions. A proposed land use that requires a conditional land use permit must be processed under quasi-judicial, rather than legislative, procedures where the applicable county code provision specifies that conditional uses in the exclusive farm use zone are subject to conditional use criteria and “shall be reviewed” according to the county’s quasi-judicial review procedures. Further, according to *Strawberry Hill 4-Wheelers v. Board of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon Supreme Court established a three-factor test to determine whether a land use matter is quasi-judicial or legislative, and where all three factors indicate that the county’s action is quasi-judicial in nature, the county also erred in processing the application under its legislative rather than its quasi-judicial procedures. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

28.5 LUBA Scope of Review – Legislative Decisions. Principles of preservation that would govern a quasi-judicial decision, e.g., the “raise it or waive it” requirements of ORS 197.763(1), do not apply to an appeal of a legislative decision. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. A city’s findings addressing future regional demand for fossil fuels, the key support for city’s prohibition on any expansion of existing fossil fuel terminals, is not supported by an “adequate factual base,” as required by Statewide Planning Goal 2, where city ignored uncontradicted projections of moderate growth in demand for fossil fuels, and instead relied on unsupported speculation that demand will actually plateau or decline. *Columbia Pacific v. City of Portland*, 76 Or LUBA 15 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. LUBA will review a decision that amends a local government’s comprehensive plan pursuant to ORS 197.835(6), for compliance with the statewide planning goals. In addition, ORS 197.835(9)(a)(C) and (D) provide that LUBA shall reverse or remand a land use decision if LUBA finds that the local government “[m]ade a decision not supported by substantial evidence in the whole record;” or “[i]mproperly construed the applicable law.” Finally, pursuant to *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002), although a local government is not required to adopt findings supporting a legislative decision, the record on appeal must be sufficient to demonstrate that “required considerations were indeed considered.” *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. A city’s process in adopting amendments to a subarea plan to approve a proposal to construct a new bridge does not violate Goal 2 where the city provided opportunities for review and comment on the proposed plan amendments by the public, and provided notice to neighborhood associations of the plan amendment proceedings, despite a very compressed period of time for public input regarding a fairly complex proposal. *Deumling v. City of Salem*, 76 Or LUBA 99 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. City comprehensive plan goals, other adopted city plans and sub-plans, Metro Regional Framework and Regional Transportation Plans, and the Oregon Transportation Plan and Oregon Freight Plan are subject to judicial notice under ORS 40.090(4) or (7). However, LUBA will not consider “adjudicative facts” or facts found within judicially cognizable documents that are asserted for an “adjudicative” purpose, *i.e.*, to provide evidentiary support or countervailing evidence with respect to an applicable approval criterion in an adjudicatory setting. *Columbia Pacific v. City of Portland*, 75 Or LUBA 552 (2017).

28.5 LUBA Scope of Review – Legislative Decisions. The law of the case doctrine is not applicable in appeals of legislative land use decisions. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

28.5 LUBA Scope of Review – Legislative Decisions. In order to successfully challenge a legislative decision, a petitioner must demonstrate that the challenged provisions are facially inconsistent with applicable law and are incapable of being applied consistently with controlling law. *Hatley v. Umatilla County*, 68 Or LUBA 264 (2013).

28.5 LUBA Scope of Review – Legislative Decisions. Where a city adopts a new transportation system plan (TSP) that includes a general alignment for a new regional trail but expressly does not authorize a specific alignment, the TSP cannot be challenged based on the adverse impacts of a specific alignment. However, the TSP can be challenged based on legal challenges to the regional trail that do not depend on a specific alignment. *Terra Hydr Inc. v. City of Tualatin*, 68 Or LUBA 279 (2013).

28.5 LUBA Scope of Review – Legislative Decisions. Findings supporting a legislative decision that amends the Oregon Highway Plan to provide a process for modifying mobility standards need not address issues raised below regarding whether future decisions approving higher mobility standards will cause increased congestion of specific transportation facilities and increase pollution contrary to Goal 6, where Goal 6 will apply directly to any future decisions approving higher mobility standards for specific transportation facilities, and such issues cannot be meaningfully addressed in a legislative decision adopting general amendments to the Oregon Highway Plan. *Setmiker v. ODOT*, 66 Or LUBA 54 (2012).

28.5 LUBA Scope of Review – Legislative Decisions. The absence of findings addressing whether an ordinance adopted on remand is consistent with applicable comprehensive plan policies is not a basis for reversal or remand, where the ordinance merely deletes text from the original ordinance subject to remand, on remand the county adopted findings concluding that the original ordinance is consistent with the plan policies, and the petitioner identifies nothing in the deletions accomplished by the remand ordinance that might cause the county to reach a different conclusion with respect to the remand ordinance. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.5 LUBA Scope of Review – Legislative Decisions. A comprehensive plan policy requiring that the county consider proximity to residential uses and seasonal wind directions when making land use decisions relative to industrial or other uses likely to pose a threat to air quality does not apply to a legislative text amendment that simply adds landfill expansions to the list of uses potentially allowed in the EFU zone. Such a policy is directed at specific development proposals

with a limited geographic focus, not legislative text amendments affecting large areas of the county. *Waste Not of Yamhill County v. Yamhill County*, 65 Or LUBA 142 (2012).

28.5 LUBA Scope of Review – Legislative Decisions. LUBA does not have the authority to apply the doctrine of severance to sever unconstitutional provisions from an ordinance and thereby affirm the ordinance on appeal. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.5 LUBA Scope of Review – Legislative Decisions. Even where no authority requires findings in support of a legislative decision, there must be enough in the way of findings or accessible material in the record to show that applicable criteria were applied and required considerations considered. Where the record of the legislative rezoning decision includes no findings or accessible material supporting the local government’s view that the Transportation Planning Rule (TPR) does not apply to the decision, the local government can avoid remand only if it demonstrates in its response brief, as a matter of law, that the TPR does not apply to the rezoning decision and is not a required consideration. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

28.5 LUBA Scope of Review – Legislative Decisions. The obligation to adopt findings under OAR 660-007-0060(2), part of the Metropolitan Housing Rule, is triggered only by plan and land use regulation amendments that are either intended to comply with the construction and density mix standards in the rule or that impact local government provisions complying with those standards. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. A legislative decision that establishes a floor area ratio (FAR) standard for residential housing does not trigger application of the construction and density mix standards in OAR chapter 660, division 7, where the petitioner fails to demonstrate that the FAR standard affects the city’s obligation to provide for an overall density of eight or more dwelling units per acre. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. Absent a focused challenge from petitioners, staff reports analyzing proposed floor area ratio (FAR) standards for residential development and concluding that the FAR standards would have no impact on future residential construction and development are sufficient to demonstrate that the FAR standards are consistent with Goal 10. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. LUBA will reject an argument that a legislative decision must be remanded to adopt findings addressing whether a proposed land use regulation is consistent with applicable comprehensive plan policies, where the petitioner identifies no local obligation to adopt findings, and the local government cites to a staff report that concludes the regulation is consistent with applicable plan policies. *J.T. Smith Companies v. City of West Linn*, 54 Or LUBA 339 (2007).

28.5 LUBA Scope of Review – Legislative Decisions. Where a petitioner appeals a legislative decision (1) that adopts a new zone potentially applicable to a number of properties but (2) does not actually apply that new zone to any property, the only challenges LUBA can meaningfully review are facial challenges to the new zone, that is, arguments that the new zone is facially

inconsistent with controlling legal standards. LUBA cannot meaningfully review hypothetical challenges that anticipate future decisions to apply the new zone to particular property. *Okray v. City of Cottage Grove*, 47 Or LUBA 297 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Where a decision includes discrete determinations that, viewed in isolation, would constitute quasi-judicial decisions, whether the decision is viewed as legislative or quasi-judicial depends on the character of the whole decision. The entire decision will either be legislative or quasi-judicial, not a hybrid of both. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Assuming, without deciding, that it is reversible error to combine a unitary legislative proceeding with a geographically and otherwise unrelated site-specific proposal, a city decision that applies a height bonus to a particular property that is within a 535-acre study area subject to a number of legislative plan and land use regulation amendments is not geographically or otherwise unrelated to the legislative proceeding. *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Although all legislative decisions need not be supported by findings when the local government can supply argument and citation to the record in its brief to demonstrate compliance with the applicable criteria, such arguments must be based on evidence contained in the record rather than created out of whole cloth. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. A decision to annex property owned by more than 60 property owners and encompassing more than 125 acres is not directed at a “closely circumscribed factual situation” or “a relatively small number of persons,” and thus is not subject to notice requirements and hearing procedures prescribed by ORS 197.763 for a quasi-judicial land use decision. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

28.5 LUBA Scope of Review – Legislative Decisions. Even absent a specific legal requirement that a legislative decision be supported by findings, remand may be necessary if LUBA and the appellate courts cannot perform their review function without the missing findings to determine whether applicable decision making criteria are satisfied. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

28.5 LUBA Scope of Review – Legislative Decisions. Where a county’s legislative decision changes the comprehensive plan designation for a property from Industrial to Primary Agriculture, and the record does not reflect that the county considered other potentially suitable designations or explained why other potentially suitable designations should not be applied, the decision and record are insufficient to demonstrate that applicable criteria were considered. *Manning v. Marion County*, 42 Or LUBA 56 (2002).

28.5 LUBA Scope of Review – Legislative Decisions. A county decision to amend a property description of a significant aggregate site in its comprehensive plan to mirror the property description contained in its mineral sites inventory, along with other, unrelated policy and

housekeeping amendments, is a legislative, and not a quasi-judicial, decision. *DeBell v. Douglas County*, 39 Or LUBA 695 (2001).

28.5 LUBA Scope of Review – Legislative Decisions. The highly deferential standard of review stated in ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), is expressly limited to *interpretations* by local governments of comprehensive plan and land use regulations. It does not apply to *enactments* by local governments of comprehensive plan and land use regulations. *Downtown Community Assoc. v. City of Portland*, 32 Or LUBA 1 (1996).

28.5 LUBA Scope of Review – Legislative Decisions. There is no statutory or administrative law requirement that *all* legislative land use decisions be supported by findings. However, where a challenged legislative land use decision was made by the local governing body and the apparently applicable legal standards at issue on appeal are local comprehensive plan provisions, the interpretation of those provisions must initially be made by the governing body in its decision. *Central Eastside Industrial Council v. Portland*, 29 Or LUBA 429 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. The absence of findings in support of a legislative decision is not in itself a basis for reversal or remand. It is possible for respondents to defend against a challenge to a legislative decision through argument in their briefs and citations to plan provisions, code provisions and evidence in the record. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. Where a legislative comprehensive plan amendment adopts policies arguably relevant to OAR 660-12-060, either the decision must be supported by findings addressing OAR 660-12-060 or respondents must demonstrate, through arguments in their briefs and citation to provisions of the local government’s plan and regulations or the record that the challenged policies comply with OAR 660-12-060. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. There is no statutory or administrative law requirement that *all* legislative decisions be supported by findings. However, where there is a local code provision requiring that findings be adopted in support of legislative decisions, the absence of such findings, or the adoption of purely conclusory findings, can provide a basis for reversal or remand. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

28.5 LUBA Scope of Review – Legislative Decisions. That a legislative land use decision is not supported by findings is not, in itself, a basis for reversal or remand, because no applicable legal standard requires that *all* legislative land use decisions be supported by findings. *Redland/Viola/Fischer’s Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. With regard to providing an explanation of the basis for a challenged legislative decision, the Goal 2 “adequate factual base” requirement will be satisfied if the decision is supported by either (1) findings demonstrating compliance with applicable legal standards, or (2) argument and citations to facts in the record, in respondents’ briefs, adequate to demonstrate compliance with applicable legal standards. *Redland/Viola/Fischer’s Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Where petitioners contend legislative land use regulation amendments are inconsistent with certain arguably relevant comprehensive plan provisions, and those plan provisions are not interpreted in the challenged decision, LUBA must remand the challenged decision for the local government to adopt the necessary plan interpretations as part of its decision. *Redland/Viola/Fischer’s Mill CPO v. Clackamas County*, 27 Or LUBA 560 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Statewide Planning Goal 2 requires that comprehensive plan and land use regulation amendments have an adequate factual base, regardless of whether they are legislative or quasi-judicial in nature. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Statewide Planning Goal 2 requires that planning decisions and actions have an adequate factual base, regardless of the legislative or quasi-judicial nature of the decision. The Goal 2 requirement for an adequate factual base is equivalent to the requirement for substantial evidence in the whole record. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. There is no legal requirement that a local government adopt findings to support a legislative land use decision. However, where the local government does not adopt findings explaining why a challenged legislative decision complies with applicable approval criteria, LUBA relies upon the responding parties to provide argument and citations to the record to assist the resolution of petitioners’ allegations. *DLCD v. Fargo Interchange Service District*, 27 Or LUBA 150 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. There is no legal requirement that local governments adopt findings in support of legislative land use decisions. Where a local government does not adopt findings explaining why a challenged legislative land use decision complies with applicable approval criteria, LUBA relies on the responding parties to provide argument and citations to the record to assist in the resolution of petitioners’ allegations. *Andrews v. City of Brookings*, 27 Or LUBA 39 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. For LUBA review of a legislative land use decision, either the legislative land use decision must be accompanied by findings addressing relevant legal standards or the local government must explain in its brief how the challenged legislative decision complies with applicable legal standards. *McInnis v. City of Portland*, 27 Or LUBA 1 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. Although nothing requires that all legislative land use decisions be supported by findings, in order for LUBA to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings demonstrating compliance with relevant legal standards or that respondent explain in its brief how the challenged legislative decision complies with applicable legal standards. *Rea v. City of Seaside*, 26 Or LUBA 444 (1994).

28.5 LUBA Scope of Review – Legislative Decisions. No statute or appellate court case requires that all legislative land use decisions be supported by findings. Absent allegations by petitioner that a legislative decision violates particular legal standards, a local government’s failure to adopt findings in support of that legislative decision addressing the statewide planning goals and local comprehensive plan is not, of itself, a basis for reversal or remand of the decision. *Oregon City Leasing, Inc. v. Columbia County*, 25 Or LUBA 129 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. ORS 215.130(1) indicates the legislature contemplated that legislative land use decisions could be adopted by the electorate. However, nothing exempts legislative land use decisions from the procedural and substantive requirements applicable to the enactment of legislation affecting land use. Therefore, a decision adopted by the electorate is subject to the requirements governing legislative land use decisions. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. While nothing requires that all legislative land use decisions be supported by findings, in order for LUBA to perform its review function, it is necessary either that legislative land use decisions be accompanied by findings of compliance with relevant legal standards or that respondents explain in their briefs how the legislative decision complies with applicable legal standards. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. There is no statutory requirement that legislative decisions be supported by substantial evidence. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 466 (1993).

28.5 LUBA Scope of Review – Legislative Decisions. That the electorate may have exceeded its authority in adopting land use legislation by initiative, is a question bearing on the merits of an appeal from such a decision, not on LUBA’s jurisdiction to review the appealed decision. *Riverbend Landfill Company v. Yamhill County*, 24 Or LUBA 607 (1992).

28.5 LUBA Scope of Review – Legislative Decisions. ORS 197.835(7)(a)(C) does not require a legislative land use decision to be supported by substantial evidence. Where petitioners cite no independent basis for a requirement that the challenged legislative land use decision be supported by substantial evidence, petitioners provide no basis for reversal or remand. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

28.5 LUBA Scope of Review – Legislative Decisions. ORS 197.835(7)(a)(C) does not impose a substantive requirement that legislative land use decisions be supported by substantial evidence in the whole record. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

28.5 LUBA Scope of Review – Legislative Decisions. Although not required by statute, findings in support of legislative amendments to a comprehensive plan may be required to permit LUBA to determine whether the plan, as amended, complies with the statewide planning goals. *Von Lubken v. Hood River County*, 22 Or LUBA 307 (1991).