

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** When the Court of Appeals remands a LUBA decision that affirmed a local government decision requiring a condition of approval that petitioner argued constituted an unconstitutional exaction of property prohibited by the Fifth and Fourteenth Amendments to the U.S. Constitution, because the Court of Appeals agreed with petitioner that the dedication is unconstitutional unless the hearings officer finds that the impacts of the proposed development would substantially impede the governmental interest advanced by the city’s standards which the conditions of approval were imposed to meet, LUBA will remand that portion of the decision to the hearings officer for reconsideration where the hearings officer adopted no findings on that point. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Where a city code provides that a property owner must, as a condition of permit or partition approval, either provide the improvements or pay into an improvement fund if a street adjoining property without direct access to the street does not have standard full-width improvements, and petitioner argues that the code provision is not applicable to his proposed property partition, LUBA will sustain, in part, petitioner’s challenge upon remand from the Court of Appeals, where the arguments on appeal have evolved and it is apparent that remand is necessary for the hearings officer to adopt findings regarding LUBA’s underlying conclusion that the hearings officer was correct in concluding that the condition requiring a waiver of remonstrance against a street or stormwater facility improvement was justified under *Clark v. City of Albany*, 31 Or LUBA 375, 380, *aff’d*, 144 Or App 192, 924 P2d 877 (1966), and did not constitute a taking. *Hill v. City of Portland*, 78 Or LUBA 334 (2018).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** While the county presumably has a legitimate governmental interest in preserving wildlife migration corridors, under RLUIPA, 42 USC § 2000cc *et seq.*, the county cannot treat religious assemblies in the wildlife area (WA) Overlay zone on less favorable terms than non-religious assemblies with similar impacts on wildlife. Accordingly, the board of county commissioners correctly concluded that the express exclusion of churches in the county code from the WA overlay zone, while allowing nonreligious assemblies and institutions as conditional uses, violates the so-called Equal Terms provision of RLUIPA because churches are not treated equally. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Where the county found that county code provisions, which expressly exclude churches in the wildlife area (WA) Overlay zone, while allowing nonreligious assemblies and institutions as conditional uses, violate the Equal Terms provision of RLUIPA, 42 USC § 2000cc *et seq.*, under the Article VI of the United States Constitution, the Supremacy Clause, a county would almost certainly lack authority to deny applications for a proposed church located on property within the WA overlay zone, based on nonconformance with local or state regulations that the county had concluded cannot be applied to the proposed use consistently with RLUIPA. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Where LUBA concludes a county provision violates the so-called Equal Terms provision of RLUIPA, 42

USC § 2000cc *et seq.*, which focuses on protecting religious assembly from unequal treatment, petitioner’s argument that intervenors’ religious use of their dwelling does not qualify as a “church,” and therefore that ORS 215.441 does not apply to authorize activities customarily associated with the practice of the religious activity, does not provide a basis for us to remand the decision. Even if intervenors’ religious use of their dwelling and property does not constitute a “church” for purposes of ORS 215.441 or ORS 215.283(1)(a), that has no bearing on whether the county is obligated, under the Equal Terms provision, to treat religious assemblies and institutions no less favorably than secular assemblies and institutions. *Central Oregon Landwatch v. Deschutes County*, 78 Or LUBA 516 (2018).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** ORS 197.835(2)(b) and OAR 661-01-0045(1) authorize LUBA to consider evidence outside the record where the proponent demonstrates that there are disputed allegations in the parties’ briefs regarding the “unconstitutionality of the decision.” However, where petitioners do not intend to argue that a city’s decision is unconstitutional, but rather that the city erred in failing to comply with its city charter requirement for a vote, based on the city’s reliance on a statute that petitioners believe unconstitutionally infringes on the city’s charter authority, LUBA will deny petitioners’ motion to take evidence because evidence on the constitutionality of a statute is not one of the bases for taking evidence outside the record under ORS 197.835(2)(b) and OAR 661-010-0045(1). *Renken v. City of West Linn*, 78 Or LUBA 1070 (2018).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** No unconstitutional exaction of private property occurs when a city requires an applicant to improve to the width, grade and materials standards designated by the city engineer a newly created pathway that was approved and required as part of a previously approved partition of the property. Such a requirement does not run afoul of *Koontz v. St. Johns Water Management District*, 570 US 595, 133 S Ct 2586, 186 L Ed 2d 697 (2013), because requiring the pathway to be improved makes it usable by the occupants of the dwellings on the newly created parcels and by the public. *Locke v. City of Portland*, 76 Or LUBA 423 (2017).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** LUBA need not address assignments of error alleging that a condition of approval requiring an applicant seeking a four-lot subdivision to construct a road violates the needed housing statutes or the Takings Clause of the U.S. Constitution, where LUBA has already concluded on sub-statutory and sub-constitutional grounds that the city erred in imposing the condition. *Tokarski v. City of Salem*, 74 Or LUBA 124 (2016).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** ORS 475B.340(2) and ORS 475.500(2) allow local governments to adopt “reasonable regulations” on marijuana production, processing, and sales. Absent any argument that establishes a protected First Amendment interest in marijuana production, cases that address the reasonableness of restrictions on protected First Amendment activity have no relevance to interpreting the phrase “reasonable regulation” used in ORS 475B.340(2) and ORS 475.500(2). *Diesel v. Jackson County*, 74 Or LUBA 286 (2016).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Where constitutional limitations placed on the city by the Fifth Amendment to the U.S. Constitution do not allow the city to require dedication of more than one-half of a new street that is required by the local code to total 45 feet in width, a petitioner fails to demonstrate that that local code provision or any other authority allows the city to require dedication of more than one-half of the required street. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** A street connection study that reflects a portion of a possible hammerhead turnaround on property adjacent to a proposed PUD is not a taking of the property without just compensation under the Fifth Amendment to the U.S. Constitution, where the street connection study does not require any adjacent property to be dedicated or the possible hammerhead turnaround to ever be built. *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132 (2014).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Standing to appeal a post-acknowledgment plan amendment to LUBA is governed by ORS 197.620(1), which requires only that the petitioner participate in the proceedings below. No statute governing LUBA requires that petitioners who wish to advance a facial constitutional challenge to an ordinance at LUBA must first demonstrate that the ordinance injures their legally protected interests. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** To advance a facial challenge under the Takings Clause of the Oregon Constitution to an ordinance that allegedly requires an uncompensated physical invasion of private property and acquisition of a property easement, a petitioner need not demonstrate that the mere enactment of the ordinance effects a physical invasion or acquisition of property. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** 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).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Regional plan amendments that will require a city to amend its zoning ordinance to include specific provisions to protect industrial land from being converted to office and commercial use do not violate a city's constitutional home rule authority. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Because Congress intended the Religious Land Use and Institutionalized Persons Act (RLUIPA) to subject land use regulations to at least the same level of scrutiny as would apply under the Free Exercise Clause of the U.S. Constitution, analysis of whether an administrative rule prohibition on churches on high-value farmland violates RLUIPA is also dispositive of the same claim under the Free Exercise Clause. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Prohibiting uses that are inconsistent with agriculture on high-value farmland, such as churches, while allowing agricultural-supportive structures and uses on high-value farmland, such as barns, wineries and farm stands, is rationally related to the policy of preserving high-value farmland for agricultural use, and neither treats religious assemblies on unequal terms with nonreligious assemblies nor discriminates against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Prohibiting establishment of new uses on high-value farmland, such as churches or golf courses, while allowing expansion of existing churches or golf courses on high-value farmland does not treat religious assemblies on unequal terms with nonreligious assemblies or discriminate against assemblies on the basis of religion in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** The Religious Land Use and Institutionalized Persons Act (RLUIPA) does not require local governments to provide for churches in all zones within its jurisdiction, or prohibit local governments from excluding churches from some zoning districts. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Whether a zoning prohibition on churches imposes a “substantial burden” on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA) depends on whether the jurisdiction’s zoning scheme as a whole fails to provide adequate opportunity to site a church within the jurisdiction. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** The actual financial circumstances of a religious assembly, its financial ability to acquire land zoned for a church, and the existence of market-based constraints that apply equally to religious and non-religious land users, have no bearing on whether exclusion of churches in some zones within a jurisdiction imposes a “substantial burden” on religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Evidence that a church is unable to acquire land with desired characteristics at a desirable price within an urban growth boundary is insufficient as a matter of law to demonstrate that an administrative rule prohibiting churches on high-value farmland owned by the church imposes a “substantial burden” on the church’s free exercise rights, under the Religious Land Use and Institutionalized Persons Act (RLUIPA). *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** A city commits no error in proceeding with a decision on an application for a subdivision, and does not

violate a subdivision opponent's due process rights, where a quiet title action is pending to resolve an ownership dispute between the opponent and the subdivision applicant, but the applicant is the record fee owner of the property. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** That conditional use permit applicants for approval of a bed and breakfast home occupation may not have been aware that the conditional use permit would be conditioned on the applicants terminating a special events business that the county concluded was not allowed in the county's EFU zone does not violate the applicants' rights to due process where they were allowed: (1) to challenge the administrative decision in a quasi-judicial hearing before a hearings officer, (2) to appeal the hearings officer's decision to the board of county commissioners, (3) to appeal that decision to LUBA, and (4) would be entitled to seek judicial review of LUBA's decision. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** A conditional use permit condition of approval that the applicants terminate a special events business that was operated as part of a permitted bed and breakfast inn does not unconstitutionally impose an overbroad or vague limit on the bed and breakfast owners' constitutionally protected religious activity and speech. *Cookman v. Marion County*, 44 Or LUBA 630 (2003).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Because a letter from city planning director and county memorandum setting out circumstances surrounding a compromise is not sufficient to establish an agreement between the parties establishing rights and obligations, the Contracts Clause, Article I, section 21, of the Oregon Constitution, is not applicable. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Even if immunity provisions of ORS 467.131 and 467.133 violate the remedies clause, Article I, section 10, of the Oregon Constitution, that infirmity does not implicate the limited preemption provisions of ORS 467.136 or the total preemption provisions of ORS 166.170 through 166.176. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** When finding a statute unconstitutional would not provide an independent basis for reversal or remand, LUBA will not consider the constitutionality of the statute. *City of Sherwood v. Washington County*, 38 Or LUBA 656 (2000).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Where, during the local proceedings, no party referred to the Equal Privileges and Immunities Clause of Article I, section 20, of the Oregon Constitution, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by name, article and section or amendment number, or their operative terms, petitioner is precluded from raising violation of these constitutional provisions as an issue in an appeal to LUBA. ORS 197.763(1); 197.835(2). *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Petitioner’s claim that his business was treated differently from another business, in violation of Article I, section 20, of the Oregon Constitution, because the other business was granted an “exemption” from a restrictive ordinance requirement, provides no basis for reversal or remand of the challenged decision where the decision does not purport to grant an “exemption” to any business. *Kaady v. City of Cannon Beach*, 26 Or LUBA 424 (1994).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** LUBA will not consider claims of constitutional violations that are not supported by legal argument. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Federal preemption of local authority to regulate is not presumed. Rather it is necessary to determine whether preemption was the “clear and manifest purpose of Congress.” *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Nothing in the federal regulatory scheme relating to the regulation of parachute jumping purports to foreclose state and local land use regulation of the ground based impacts of parachuting. *Skydive Oregon v. Clackamas County*, 25 Or LUBA 294 (1993).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Because a constitutional taking claim is not dependent upon a local government’s adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** The choice between achieving the public purpose of encouraging forest uses by police power regulation or eminent domain lies with the county, absent some showing that the police power regulation selected by the county is in fact a public conservation easement for which compensation must be paid. *Lardy v. Washington County*, 24 Or LUBA 567 (1993).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Because a constitutional taking claim is not dependent upon a local government’s adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Where a petitioner alleges a land use decision results in a taking under Article I, section 18, of the Oregon Constitution, but relies entirely on arguments advanced in support of allegations that the decision constitutes a taking under the Fifth Amendment of the U.S. Constitution, LUBA will limit its review to petitioner’s federal taking claim. *Nelson v. Benton County*, 23 Or LUBA 392 (1992).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Where the maximum penalty for each separate violation of an ordinance is 500 dollars, and there is no possibility of imprisonment for violating the ordinance, the penalties provided by the ordinance are civil, not criminal, in nature. Therefore, a vagueness challenge based solely on the constitutional vagueness analysis applied where criminal sanctions are possible, provides no basis for reversal or remand of such ordinance. *Cope v. City of Cannon Beach*, 23 Or LUBA 233 (1992).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Because a local government is not required to consider whether denying a request for land use approval would constitute an unconstitutional taking of private property without just compensation, a local government’s findings on such constitutional issues provide no basis for reversal or remand. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Unlike a local government, LUBA is specifically required by statute to consider arguments that a local government decision is unconstitutional and to reverse or remand an unconstitutional decision. Therefore, procedural errors a local government may have committed in considering constitutional issues during local proceedings are harmless errors. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** In view of the Oregon Supreme Court’s explicit reservation of judgment concerning whether it will look to U.S. Supreme Court Fifth Amendment “takings” jurisprudence to further develop the appropriate tests to be applied in considering Article I, section 18, takings claims under the Oregon Constitution, LUBA will not do so. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Petitioners must seek relief from application of a velocity flooding overlay designation to the subject property through the variance process provided in the local government’s flood damage prevention ordinance, before they may obtain LUBA review of any constitutional “taking” claims. *Alexiou v. Curry County*, 22 Or LUBA 639 (1992).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Undeveloped claims of unconstitutionality provide an insufficient basis for LUBA to reverse or remand a challenged decision. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** Personal bias sufficiently strong to disqualify a public official must be clearly demonstrated. A petitioner has the burden of demonstrating that the public official was incapable of making a decision based on the evidence and argument before him. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.** If a challenged plan and zone map amendment was adopted in compliance with the applicable criteria, it cannot be considered arbitrary and, therefore, is not invalid “spot zoning.” Where petitioners fail

to show an applicable standard is violated by the city's decision, no basis for reversal or remand is established. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.**

Different treatment under the law does not necessarily amount to a violation of constitutional rights to equal protection under the Fourteenth Amendment to the U.S. Constitution or equal privileges and immunities under Article I, section 20, of the Oregon Constitution. Where petitioners fail to explain why the different treatment amounts to a violation of those constitutional provisions, petitioners' constitutional challenges will be rejected. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.**

Petitioner's claim that the city erroneously refused to provide a transcript of proceedings before a hearings officer for his appeal of the hearings officer's decision to the city council will be denied where petitioner (1) identifies no code section requiring the city to provide a transcript, and (2) fails to develop an argument in support of his contention that due process requires that a transcript be provided. *Vestibular Disorders Consult. v. City of Portland*, 19 Or LUBA 94 (1990).

**28.8.3 LUBA Scope of Review – Grounds for Reversal/Remand – Unconstitutionality.**

When alleging that their rights to due process under the 14th Amendment to the U.S. Constitution were violated because of bias by the local decision maker, petitioners must show that the local decision maker was incapable of making a decision on the basis of the evidence and argument before it. *Eckis v. Linn County*, 19 Or LUBA 15 (1990).