

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city’s interpretation of its former version of a city code requirement that required that an appeal request include either the appeal fee or a fee waiver that had been approved by the planning director prior to the appeal deadline, and LUBA affirmed the city’s interpretation, but the city code has since been amended and the city’s code no longer requires a fee waiver be approved prior to the appeal deadline, and instead allows a local appellant to submit a fee waiver request and appeal request together, the city is not bound by its prior code, nor its interpretation of its prior code, and prior LUBA case law applying prior city code is no longer controlling. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the Court of Appeals determines that LUBA’s decision was “unlawful in substance” pursuant to ORS 197.850(9)(a) because LUBA affirmed the city’s interpretation of Goal 8, Policy 1, and according to the court, the city’s interpretation of Goal 8, Policy 1 is not affirmable under ORS 197.829(1) because the city’s interpretation does not “plausibly account for the text and context of the policy,” the appropriate disposition according to OAR 661-010-0071(2)(d) is for LUBA to remand the decision to the city for further proceedings, specifically for the city to adopt a sustainable interpretation of Goal 8, Policy 1, and apply that policy, as interpreted to the application before it. *Crowley v. City of Hood River*, 79 Or LUBA 77 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city’s code lists a number of “factors” to be considered in approving an annexation, including “[a]dequacy and availability of public facilities and services to service potential development,” but the city’s code does not require that the city identify how infrastructure will be paid for, or by whom, as part of an annexation decision, and the city’s findings suggest the city’s capital improvement program (CIP) will be amended prior to development to list the new water main as a public facility, although the city does not intend to rely upon the CIP as a source of funding or authority for the new water main, petitioners have not established a CIP amendment must be required as a condition of approval or that the city otherwise erred in assigning a positive value to this factor in approving the proposed annexation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city rezones a portion of a property designated mixed use corridor (MUC) on the city’s comprehensive plan, from FU-10 (future urban 10-acre) to NC (neighborhood commercial), and petitioners argue that the NC zone is inconsistent with the city’s comprehensive plan which directs the city to “[f]ocus transit-oriented, higher intensity, mixed-use development along selected transit corridors,” because the subject property is not near a transit corridor, petitioners’ premise—that the MUC plan designation is used only where the city intends to promote transit-oriented development along transit corridors—is incorrect. The MUC plan designation is implemented by four commercial zoning districts: one of which is the NC zone, which is not a transit-oriented zone, and is clearly not intended to be placed along transit corridors. Therefore, the city’s decision to rezone its property to NC is not inconsistent with the property’s MUC comprehensive plan designation. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners fail to establish that the city erred in concluding that rezoning a property to neighborhood commercial is consistent with Statewide Planning Goal 5 when the rezoning the subject property constitutes a PAPA for purposes of applying Goal 5, which provides that local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource by allowing new uses that “could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list.” The city’s PAPA is a very limited one, that in relevant part simply applies the zones implementing the city’s comprehensive plan designations that the acknowledged comprehensive plan has already designated for the corresponding uses. Because the challenged PAPA simply implements that acknowledged plan designation choice with the exercise of little or no discretion, the PAPA does not authorize any “new uses” for purposes of OAR 660-023-0250(3) and Goal 5. *Renken v. City of Oregon City*, 79 Or LUBA 82 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a parcel is lawfully created, but later divided unlawfully under ORS 215.750(1)(a), a county may rely on the parcel as it existed prior to the unlawful division in determining whether a unit of land qualifies for a forest template dwelling on January 1, 2003. Under ORS 92.017, such parcel “remain[s] discrete” unless it is “further divided, as provided by law.” *Landwatch Lane County v. Lane County*, 79 Or LUBA 111 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local ordinance prohibits development within a floodway without a permit and provides an exemption for agricultural uses under which “temporary, removable structures should be allowed during drier months if their removal can be assured by late fall,” but where the ordinance does not contain an express requirement that the structures be moved to or stored on the subject property, a hearings officer errs in deciding that such an exemption cannot be applied simply because the record does not include any evidence that the subject property contains a usable storage area outside the floodplain. *Armstrong v. Jackson County*, 79 Or LUBA 161 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a code provision states that the “provisions of this code shall be interpreted as minimum requirements. When this code imposes a greater restriction than is required by other provisions of law \* \* \* the provisions of this code shall control,” and petitioners argue that the city erred in applying the least restrictive, rather than the most restrictive interpretation of the city’s code requirement that minimum lot size be determined by “slope,” by allowing project applicants to measure slope after grading, rather than before grading, to maximize their potential minimum developable lot size, but petitioners do not identify what other provision of law imposes a lesser restriction as regards to minimum lot size that the city should have applied, petitioners have not provided a basis for reversal or remand. *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Even if a local government’s interpretation of its code were less plausible than petitioners’ preferred interpretation, the “existence of a stronger or more logical interpretation does

not render a weaker or less logical interpretation ‘implausible’ under the *Siporen [v. City of Medford]*, 349 Or 247, 243 P3d 776 (2010)] standard.” *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012). *Estroff v. City of Dundee*, 79 Or LUBA 189 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the city code defines “net density” to mean “the number of dwelling units per acre of land in actual residential use and reserved for the exclusive use of the residents in the development,” and excludes public and private streets, the city did not err in including in the net density acreage calculation parking drives designed primarily to provide vehicular circulation to parking spaces in the apartment complex for resident and visitor parking and a leasing office and maintenance building. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a cross-petitioner seeks a remedy not available to it by statute, it is an obstacle to LUBA’s review of the cross-assignment of error. LUBA lacks authority to affirm in part, and reverse in part a local government’s approval of cross-petitioner’s project application. ORS 197.835(1). Even assuming that the city erred by applying Willamette Greenway standards to cross-petitioner’s housing project application, because they are not “clear and objective,” the city’s decision approving the development could not be reversed because it is not “prohibited as a matter of law.” If LUBA agreed with cross-petitioners, the correct disposition would be remand, except that remand was not requested and would have no effect on the city’s decision approving the application. In such a situation, LUBA will consider the request a contingent cross-assignment of error. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Goal 15 guidelines and county code requirements that require to “the greatest possible degree, necessary and adequate public access will be provided along the Willamette River by appropriate legal means,” can be met where the city finds that current public access along the river provided by a public riverfront path is adequate, and the city does not err in construing the provision as requiring access only “along” the river instead of “to” the river. *Hulme v. City of Eugene*, 79 Or LUBA 218 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county’s comprehensive plan is a working document that must be updated to reflect existing conditions and future planning obligations. Where nothing in the statewide planning goals or the county’s comprehensive plan prohibits amendments to expand areas in the county to which certain plan designations may be applied, provided those areas meet all applicable statutory and rule requirements, such amendments do not provide grounds for remand or reversal. Counties have wide latitude to adopt and revise their comprehensive plans and zoning ordinances; amendments to the comprehensive plan need only comply with the statewide planning goals. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Goal 14 prohibits urban uses on rural lands. Where a county’s text amendments to its comprehensive plan do not allow any urban uses on rural land, but merely expand the

allowable locations in the county that could be the subject of an application to change the plan designation to rural industrial, and the text amendments require the applicant to demonstrate that the proposed use for which the rural industrial plan designation change is consistent with all statewide planning goals, including Goal 14, a petitioner's arguments that the amendments violate Goal 14 do not provide a basis for reversal or remand. *Central Oregon Landwatch v. Deschutes County*, 79 Or LUBA 253 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city council's interpretation of a local code provision which provides that, "[i]n the event of a tie [vote by the city council], the [planning commission's] decision which is the subject of appeal \* \* \* shall stand," as not limiting the number of times that the city council may vote on a matter is not inconsistent with the express language of that provision and therefore affirmable under ORS 197.829(1)(a). *Vannatta v. City of St. Helens*, 79 Or LUBA 271 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government gives only one reason for denying an application, where LUBA concludes that that reason was based on inapplicable criteria, where the local government does not identify any applicable standards on appeal to LUBA that would require further review, and where the applicant does not challenge the conditions of approval that the local government would have otherwise imposed, LUBA will reverse the local government's decision pursuant to ORS 197.835(10)(a). *Oster v. City of Silverton*, 79 Or LUBA 447 (2019).

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**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the county approves an amendment to a planned development approval for a resort, golf course and aerial challenge course, and petitioner argues the county improperly construed the applicable provisions of the county's code, but petitioner has not ultimately challenged the board of county commissioners' interpretation, or otherwise explained why LUBA is not required to affirm that interpretation under ORS 197.829(1), petitioner has provided no basis for reversal or remand. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioner argues the county committed a procedural error that prejudiced his substantial rights when the board of county commissioners failed to consider a written statement that petitioner submitted to the board of commissioners at the hearing, but petitioner does not establish that the board of county commissioners actually failed to consider petitioner's written statement, and petitioner failed to object to the alleged procedural error below, petitioner has not established that the county committed a procedural error or violated an applicable legal standard. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a county’s development ordinance provides that the county shall not approve a minor partition unless the proposal complies with the county’s zoning ordinance that specifies that minimum parcel size for all new parcels in designated big game habitat “shall be 160 acres or larger if required by the underlying zone,” the zoning ordinance does not provide any exceptions to the minimum parcel size requirement, and there is no dispute that the subject property is located within designated big game habitat, “considerations” such as existence of a farm dwelling, other structures, and intense farm use do not provide a legally sufficient basis for deviating from the minimum parcel size requirement, and such a partition is prohibited as a matter of law. *ODFW v. Lake County*, 78 Or 53 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners did not demonstrate that the county hearings officer erred where local county standards apply to development in “areas designated as floodways [as found on Federal Emergency Management Agency (FEMA) maps] or by methods described” elsewhere in the code, and the county hearings officer determined that because the development was not located within the “floodway,” those standards did not apply. This is so, even where petitioners argue the FEMA maps are inaccurate and another section of code authorizes the county floodplain administrator to determine where the floodway is currently located based on “actual field conditions,” but the county administrator has chosen not to exercise the authority granted in that section. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the county hearings officer agreed that the proposed project involved “the alteration of a watercourse” and that therefore standards applied which required the project applicant to show that the development “will not diminish the carrying capacity of a watercourse” by submitting “certification by an Oregon registered professional engineer,” that in the engineer’s opinion the watercourse “will not be diminished,” the applicant has met those requirements by submitting the certification by a licensed engineer, even though another section of the county’s code requires the applicant to “submit technical data” and a “Conditional Letter of Map Revision” from FEMA “when an alteration of a watercourse results in the expansion, relocation or elimination of the special flood hazard area [SFHA]” because the engineer certified that the project has not resulted in the expansion, relocation or elimination of the SFHA. *Meyer v. Jackson County*, 78 Or LUBA 150 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioner’s argument that a proposed detached accessory structure for an “art studio” is not a permissible “accessory” structure allowed in the Impacted Forest Lands (F-2) zone provides no basis for reversal or remand where petitioner cites to no local code, state statute or administrative rule governing forest lands, suggesting limitations on accessory structures to a primary dwelling that is otherwise allowed on forest lands under state law. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A petitioner’s argument that locating an art studio several hundred feet from an

existing dwelling on forest land instead of adjacent to the dwelling and within the dwelling's existing fire breaks does not provide a basis for reversal or remand, where the petitioner does not identify any rule or other requirement that an accessory structure be clustered with the existing dwelling. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reject petitioner's argument that a proposed "art studio" is in reality an "accessory dwelling" in the forest zone in violation of state and local law where the county hearings officer imposed several conditions intended to ensure that the proposed "art studio" would not be used as an "accessory dwelling," and petitioner's speculation that the applicant might violate one or more conditions of approval provides no basis for reversal or remand. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer's finding that land in the forest zone upon which development is proposed is "flat" is not supported by substantial evidence where the finding is supported only by the applicant's assertion that the relevant slope is "less than 3" percent, but the record includes two topographic maps that appear to show that the slope exceeds 10 percent, which if so triggers additional fire safety requirements. *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although the county concedes it erred in denying a plan amendment and zone change application based on the belief that the subject property was, at the time the county made its decision, within a designated urban reserve area, when the LCDC's urban reserve designation regarding the subject property had not actually become final at the time in question, LUBA will not remand the decision if the county's decision identifies at least one valid basis for denial that is affirmed on appeal. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a county's comprehensive plan policy provides that "areas" may be designated rural commercial when the areas (1) have a "historical commitment" to commercial uses, or (2) the "areas" are "located within an Unincorporated Community" and have "direct access to a road of at least collector classification," petitioner has not demonstrated that the county commissioners' findings regarding the meaning of "area" are inadequate or that the county's reliance on a previous interpretation as authority for interpreting the term "areas" as used in rezoning criteria to refer only to the property being considered for rezoning, and not also to include the surrounding area, was in error where petitioner cites to no contextual differences suggesting that the term "areas" should be interpreted differently than the same term used in similar rezoning standards, or authority suggesting the county has an obligation to adopt specific findings regarding the parties' alternative interpretations. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will uphold a county's interpretation of its own comprehensive plan policy regarding when a property may be designated rural commercial where the county evaluated

the historic uses of the subject property and concluded that those uses did not demonstrate a “historical commitment to commercial uses,” after concluding that (1) temporary commercial uses, (2) incidental or accessory commercial uses to permitted residential or farm uses on the property, and (3) the current unlawful commercial uses on the property were not sufficient to demonstrate “historical commitment” of the property to commercial use, where the county chose to focus on “commitment” which the county understood to require an inquiry into the nature of the historic uses on the property and a determination of whether commercial uses have constrained the scope of the uses on the property such that going forward only commercial uses are feasible, rather than defining commitment in terms of years of commercial use. *Stafford Investments, LP v. Clackamas County*, 78 Or LUBA 320 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county’s decision is “outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances,” pursuant to ORS 197.835(10)(a)(A), where petitioner’s application for marijuana production meets a county’s clear and objective standards for marijuana production on EFU-zoned land, no evidence was submitted that contradicted petitioner’s assertion that it could and would meet the county’s marijuana production standards, and the county relied upon factors and considerations in denying petitioner’s application that are not contained in the applicable approval criteria. Accordingly, the proper disposition of the county’s denial is reversal with an order instructing the county to grant approval of the application. *MJAI Oregon 5, LLC v. Linn County*, 78 Or LUBA 366 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where in evaluating petitioner’s zone verification request pursuant to Eugene Code (EC) 9.2741(2), the city failed to consider the ORS 197.312(5) requirement that all accessory dwellings must be allowed “subject to reasonable local regulations relating to siting and design,” the proper remedy is for LUBA to remand the decision to the city for the city to consider in the first instance whether EC 9.2741(2) is a “reasonable local regulation[] relating to siting and design” pursuant to ORS 197.312(5). *Kamps-Hughes v. City of Eugene*, 78 Or LUBA 457 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioner argues that the city erred by failing to apply a national historic trail master plan and national historic trail district guidelines to applicant’s proposed project, presenting evidence that the city “effectively” adopted the master plan by “endorsing” it during planning commission meetings over the years, the city’s “endorsement” does not amount to “adoption” of the plan and guidelines, nor does “incorporation by reference” transform an “ancillary” document into mandatory approval criteria. *Nicita v. City of Oregon City*, 78 Or LUBA 463 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer’s interpretation is inadequate for review before LUBA where the hearings officer finds that that a proposed bed and breakfast inn designed for occupancy by an employee caretaker and up to eight non-resident guests qualifies as a “bed and breakfast inn,” without explaining how a caretaker occupancy is consistent with the county code which defines a bed and breakfast inn as an “owner-occupied” “single-family dwelling unit.” *Elenes v. Deschutes County*, 78 Or LUBA 483 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county hearings officer errs in denying a forest template dwelling application on the sole basis that petitioner had not provided a fire safety inspection, where the applicable ordinance provision entitled “Wildfire Safety Requirements” requires “[o]ther measures as recommended by the fire agency commenting on the application or the County Fire Safety Inspector,” and no fire agency recommended any measures or a fire inspection in any submitted comments. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer correctly interprets ORS 215.740(3) in concluding that the minimum acreage requirement that applies to an application for a forest template dwelling is the minimum acreage for the applicant’s tracts located in western Oregon where the forest template dwelling is proposed to be located, rather than the non-contiguous parcel located in an adjacent county designated as eastern Oregon. ORS 215.740 allows an owner seeking a dwelling on a tract that is located in western Oregon to rely on non-contiguous land in another adjacent county to meet the minimum acreage requirements; it does not require that the minimum acreage requirements for the non-contiguous county be the applicable standard. *Blu Dutch LLC v. Jackson County*, 78 Or LUBA 495 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** That a county’s amended Transportation System Plan (TSP) includes language recommending that the county acquire property to develop a transportation facility does not mean that whatever land use permits are required to actually construct the facility under the local code or state law are thereby waived. The county could choose to approve whatever land use permits are required under law at the same time it approves an amendment to its TSP, but the latter is not a substitute for the former, or vice versa. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A project applicant is not required to file and win a quiet title action in circuit court as a condition precedent to filing the application simply because another party disputes the applicant’s title to the property on which the proposed development is to occur. When a party disputes the applicant’s title under a legal theory that can only be resolved in circuit court, neither the county nor LUBA is in a position to resolve the legal dispute over whether the applicant/deed owner’s title is good. For that reason, the county is also not obligated to adopt findings resolving the title dispute. In circumstances where consent or lack of ownership has a bearing on an approval criteria, we have held that the decision maker may be required to impose conditions to ensure that the required consent is obtained prior to construction. However, where ownership of the subject property is not an approval criterion, we have never held that the applicant has the obligation to quiet title in the subject property where some doubt is raised during the proceedings below as to the legality of that title, or that the decision maker is obliged to adopt findings addressing the likelihood that the applicant will prevail in a quiet title action. *VanDyke v. Yamhill County*, 78 Or LUBA 530 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** It is not sufficient for petitioners to simply point out that the sound study that



was prepared to develop a Statewide Planning Goal 5 program to protect an aggregate resource site does not measure noise in precisely the manner required by the Oregon Department of Environmental Quality (DEQ) rules, without any attempt to show that any deviations from required sound measuring locations could have the effect of allowing noise levels that violate DEQ standards. Where the applicant's expert took the position that the selected sound measuring locations did not have the effect of inflating the ambient noise level or otherwise rendering those sound measurements inaccurate, at least some effort to challenge the expert's position is required to show the deviations may have led to inaccurate sound readings for purposes of determining if DEQ noise standards will be met. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The OAR 660-023-0180(1)(b) requirement to minimize conflicts does not require an absolute guarantee that a proposed mining operation will never violate Oregon Department of Environmental Quality (DEQ) standards. A local government does not err by finding that DEQ noise standards will be met, based on the applicant's sound study, and by imposing a condition of approval that mining be monitored for noise in the future and any changes in mining be made in the future to fully comply with DEQ noise standards, without requiring that mining cease until the mine fully complies with DEQ noise standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** OAR 340-225-0040 and OAR 340-225-0050 modeling requirements to determine whether a proposed mining operation will comply with ambient air quality and new source air particulate standards are not mere procedural requirements an applicant is free to ignore. The applicant and local government must either perform the required modeling or demonstrate that the modeling is unnecessary to demonstrate the proposed mining will comply with the air particulate standards. *Save TV Butte v. Lane County*, 77 Or LUBA 22 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although a city code requires that the city's zoning map, the Metro Plan map and Metro Refinement Plan maps must be consistent, a city does not err by amending its zoning map and the Metro Plan map without adopting a conforming amendment to the Metro Refinement Plan map, where another code section provides that amendments to the Metro Plan map result in automatic conforming changes to the Metro Refinement Plan map by operation of law. *Meisenheimer v. City of Springfield*, 77 Or LUBA 96 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city commission's interpretation of a city manager's general authority to exercise "supervision over all city property" to be broad enough to include authority for the city manager to refuse to consent to a proposed historic landmark designation for city-owned property is not reversible under ORS 197.835(9)(a)(D) ("[i]mproperly construed the applicable law"). *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The ORS 197.772(2) right to refuse to consent to historic designation of property, which is given to "property owners," is not limited to owners of private property. A city

may refuse to consent to historic designation of city-owned property, where a neighborhood organization files an application to designate that city-owned property as an historic landmark. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The Goal 5 rule, at OAR chapter 660, division 023, includes a “standard” process for inventorying, evaluating and protecting natural resources, at OAR 660-023-0030 through -050, that includes rules for evaluating the ESEE consequences for allowing, limiting, or prohibiting uses that conflict with a natural resource site. The Goal 5 rule also includes “special” standards and procedures for specific types of Goal 5 resources, including those that govern aggregate mineral resources, at OAR 660-023-0180. According to OAR 660-023-0020(1), sometimes both the standard process and a special process apply; sometimes the special process supersedes the standard process in whole, or in part, and in case of conflict the specific process controls. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** OAR 660-023-0180(5)(a) requires the local government to identify conflicts with existing and approved uses located within a determined “impact area” limited in size to 1,500 feet from the boundaries of the mining area, unless factual information indicates “significant potential conflicts” beyond 1,500 feet. After deciding to allow mining under OAR 660-023-0180(5), the county must also go on to consider whether to allow, limit, or prevent new or future conflicting uses within the impact area pursuant to OAR 660-023-0180(7). For this limited inquiry, the county must conduct the analysis pursuant to the standard ESEE process in OAR 660-023-0040 and -0050. OAR 660-023-0040(3) requires local governments to “determine an impact area for each significant resource site. The impact area shall be drawn to include only the area in which allowed uses could adversely affect the identified resource,” which means that unlike the impact area determined under OAR 660-023-0180(5)(a), the impact area determined under OAR 660-023-0040(3) is not initially limited to 1,500 feet and the geographic extent of the impact area is determined by evaluating whether “allowed uses could adversely affect the identified resource,” rather than evaluating whether there is factual information indicating “significant potential conflicts” beyond an initial 1,500 feet. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners have not established that a county’s failure to determine an impact area for purposes of OAR 660-023-0180(7) pursuant to the standard ESEE process at OAR 660-023-0040(3) is more than harmless error, where it is not clear that an impact area determined under OAR 660-023-0040(3) would be larger or different than the one the county established under OAR 660-023-0180(5)(a), petitioners have not identified any new conflicting uses within a more expansive impact area that could adversely impact the mining site and that therefore should have been limited or prevented based on the arguably more sensitive OAR 660-023-0040(3) test, compared to the “significant potential conflict” test that the county employed under OAR 660-023-0180(5)(a), and because the applicant is the only party that could possibly be harmed by employing a potentially smaller impact area as determined under OAR 660-023-0180(5)(a), and the applicant is not challenging that potentially smaller impact area but rather is actively defending it on appeal. *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In the context of a post-acknowledgment plan amendment to inventory a significant aggregate site and allow mining of that site under Goal 5, if the local government concludes based on its ESEE analysis that new conflicting uses should be allowed within the impact area under the existing comprehensive plan and land use regulations, the local government’s program to achieve the goal in that regard may consist of simply relying on its acknowledged comprehensive plan and land use regulations to protect the resource site from new conflicting uses pursuant to OAR 660-023-0040(2)(a). *Rogue Advocates v. Josephine County*, 77 Or LUBA 452 (2018).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The city planning commission improperly construed the plain language of a code section that requires that the “front lot line” of a corner lot “must” be considered the narrower street frontage “except when [city staff] determine[] topographical or access problems make such a designation impractical” when it relied on the historical site plan and orientation of the existing house on the corner lot to designate the front lot line, because those considerations are not “topographical or access problems.” *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

**28.8.5 28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a municipal code requires that the “front lot line” of a corner lot “must” be considered the narrower street frontage “except when [city staff] determine[] topographical or access problems make such a designation impractical,” the city’s decision was not supported by substantial evidence in the record pursuant to ORS 197.835(9)(a)(C) when it determined that the lack of sidewalks on the narrower frontage, and the absence of a door on the side of the house facing the narrower frontage were “access problems” that made designating the narrower street frontage the front lot line “impractical.” *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners seek reversal or remand of the city’s decision pursuant to OAR 661-010-0071, and LUBA’s decision agrees with petitioners that the city’s decision improperly construed the municipal code and was not supported by substantial evidence in the record, but it is possible on remand that the petitioner’s proposal could demonstrate compliance with the municipal code without significant changes to the proposed development, remand is the appropriate remedy. *McMonagle v. City of Ashland*, 76 Or LUBA 1 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A site suitability characteristic that property must be 22 acres in size to allow development of a “Lifestyle Center” is not appropriate under Goal 14 and OAR 660-024-0060(5), where the city fails to explain why a general subregional need for between 27 and 37.9 acres of land for commercial development must be satisfied by the “Lifestyle Center” proposed by the UGB amendment applicant on a single 22-acre site. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Goal 14 and OAR 660-024-0060(5) do not permit use of a site suitability

characteristic to reject alternative sites if those sites cannot be developed at a cost that is commensurate with the cost of developing a Lifestyle Center on a site owned by the UGB amendment applicant or simply because those alternative sites face development constraints. The correct inquiry is whether alternative sites “cannot reasonably \* \* \* accommodate[]” the identified need. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Whether property is “available for purchase” is not a valid site suitability characteristic to be used to eliminate alternative sites that are already within the Urban Growth Boundary (UGB) from consideration, when determining whether a UGB amendment is necessary to add land to the UGB. Requiring sites to be currently available for purchase sets too low a threshold, impermissibly narrows the statutory, goal and rule alternatives analysis, and is not authorized pursuant to Goal 14 and OAR 660-024-0060(5). *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city improperly rejected alternative sites already within the Urban Growth Boundary (UGB) pursuant to the Goal 14 and OAR 660-024-0060(5) alternatives analysis for determining whether a UGB amendment is necessary, when it rejected some sites because they were not already zoned commercial but the site the city ultimately selected was also not currently zoned commercial. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although OAR 660-024-0060(5) grants authority to local governments to consider “proximity” as a required alternative site characteristic when considering alternative sites under Goal 14 and OAR 660-024-0060(5) for a potential amendment to the Urban Growth Boundary (UGB), a city may not divide the city into four subregions and eliminate any requirement to consider alternative sites inside or outside the UGB for meeting identified subregional needs simply because those alternative sites are not located within the subregion. *DLCD v. City of Klamath Falls*, 76 Or LUBA 130 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city council does not err by failing to impose a condition requiring that a hotel be reduced in height to address potential land use conflicts, where the city council finds a shorter hotel is not needed to avoid potential land use conflicts. Whether a hotel of the height proposed will present land use conflicts with neighboring properties is a subjective determination, and where LUBA concludes the record establishes the city council’s decision not to impose a condition was within its discretion, LUBA will deny an assignment of error that challenges the city council’s failure to impose the condition. *Hagan v. City of Grants Pass*, 76 Or LUBA 196 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A condition of approval that allows an applicant to pipe a portion of a creek required to extend sanitary sewer lines under a creek “only if it can demonstrate the necessity of doing so with a licensed engineering analysis as the only feasible means to connect wastewater service in this location” in order to locate Controlled Income Rent housing units, common areas, and infrastructure on property violates ORS 197.307(6)(2001)’s prohibition against applying

special conditions that are not “clear and objective” to needed housing. *Wiper v. City of Eugene*, 75 Or LUBA 109 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A County Court’s interpretation of a comprehensive plan residential density standard that limits residential density in deer winter range to one dwelling unit per 160 acres to only consider nonfarm dwellings when computing density is not affirmable under ORS 197.829(1)(a) and *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010), where there is no textual support in the wildlife density standard itself for only counting nonfarm dwellings in computing density and the comprehensive plan policies the density limit was adopted to implement also do not support distinguishing between farm and nonfarm dwellings in computing density. *Central Oregon Landwatch v. Crook County*, 75 Or LUBA 186 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city council’s decision to amend its zoning ordinance to treat transient occupancy vacation rental use of residences differently from the use of the same residences as second homes, long-term rentals or domiciles is not inconsistent with comprehensive plan policy to “preserve and maintain the predominately residential character of [the city] through appropriate zoning and land use development regulations,” as the city interprets the policy. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A comprehensive plan policy to “maintain present residential density levels in established neighborhoods” has nothing to do with the number of days a residence is occupied. Therefore, a zoning ordinance amendment that favors year-round domicile and long-term rental use of residences, as opposed to short term vacation rental use, does not violate the residential density policy. *Whittemore v. City of Gearhart*, 75 Or LUBA 374 (2017).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** 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).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city’s development code permits only two extensions of tentative subdivision approval, and the city grants a third extension, the city’s decision will be reversed where the city does not file a brief and intervenor-respondent concedes the city’s interpretation that a third extension is permissible is not sustainable, even under the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 262, 243 P3d 776 (2010). *Pinnacle Alliance Group LLC v. City of Sisters*, 74 Or LUBA 265 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will remand rather than reverse a county decision that erroneously concludes that a 2005 permit is still valid to authorize issuance of building permits for what is now

a nonconforming use, where the applicant originally filed for a vested rights determination, and planning staff originally evaluated the application as one for alteration of a nonconforming use, but those theories were not addressed in the county's final decision. *Landwatch Lane County v. Lane County*, 74 Or LUBA 299 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will deny an assignment of error that argues that an application fails to comply with provisions of a neighboring city's municipal code where the provisions of the neighboring city's code do not apply to the application. *Martin v. City of Central Point*, 74 Or LUBA 312 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the issue is whether a statute and corresponding code provision that both authorize agricultural buildings and prohibit their conversion to other uses was in effect when a horse barn/arena was constructed in 2000, and the statute and corresponding code provision were first enacted in 2014, LUBA will conclude that the statutory and code authorization and prohibition do not apply to the horse barn/arena. *Kaplowitz v. Lane County*, 74 Or LUBA 386 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will affirm a hearings officer's interpretation of a code provision that prohibits the filing of an application within two years that is "substantially similar" to an application that the county denied as requiring a high degree of similarity. Under the rules of interpretation, LUBA will affirm the hearings officer's conclusion that an application to develop a 62-lot subdivision on land zoned R 10 is not substantially similar to a previously denied application to develop a 72-lot subdivision on land zoned R 10, where the new subdivision proposes approximately 15 percent fewer lots, an increase in average lot size of approximately 20 percent, a decrease of approximately 100 daily trips, an increase in on-street parking, and wider streets. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will affirm a hearings officer's interpretation of a code provision that requires the county to (1) incorporate tree preservation into a development plan "wherever feasible," and (2) balance the preservation of natural features with the needs of development provided such balancing shall not require a reduction in the number of lots or dwelling units that would otherwise be permitted, to not require additional trees beyond the 90 of 423 that were proposed to be preserved where preservation of the additional trees would require a reduction in the number of lots or dwelling units that would otherwise be permitted. *Reinert v. Clackamas County*, 74 Or LUBA 427 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city's plan designation as Employment and Industrial for 308 acres of land that is added to Metro's urban growth boundary is "derived from and generally consistent with" the original ordinance adding the area to the UGB, even though the original ordinance designated more than 308 acres of land as Employment and Industrial, where the original ordinance is later amended by a new Metro ordinance that decreases the amount of land designated Employment and Industrial, pursuant to a Metro Code provision that allows Metro to amend the regional plan

designations from time to time based on revised employment forecasts. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioner’s assignment of error in an appeal of a county decision denying his request that the county reconsider a previously denied application for verification of a nonconforming use is directed at the merits of the original decision that denied his application for verification of a nonconforming use, rather than the merits of the subsequent county decision that denied petitioner’s request to reconsider the same application that had earlier been denied, the assignment of error provides no basis for reversal or remand where the decision whether to reconsider the original decision is governed by different criteria than the original denial decision. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a development code permits an applicant to resubmit the same application for verification of a nonconforming use less than two years after it was denied if the denial decision was based on a material mistake of fact, a hearings officer does not misconstrue the code in concluding that a denial decision that is based on conflicting evidence is not the same thing as a decision that is based on a material mistake of fact. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Arguments that a local government incorrectly refused to accept documents for the record and that the local government was not sufficiently clear about which documents it was refusing to accept for the record are properly presented as assignments of error in a petition for review, and are not a basis for a record objection. *Nicita v. City of Oregon City*, 74 Or LUBA 633 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** It is likely that the Court of Appeals would not require that a land use hearings officer ruling on a request to alter a nonconforming use must apply the legal principle stated in *Parks v. Tillamook Co. Comm./Spliid*, 11 Or App 177, 196-97, 501 P2d 85 (1972), that nonconforming uses are disfavored and subject to strict scrutiny under state law. However, where it does not appear that the *Parks* principle played any role in the hearings officer’s decision, the hearings officer’s citation to *Parks* provides no basis for reversal or remand. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where an assignment of error itself can be read to allege that a hearings officer committed a particular analytical error in reviewing an application to alter a nonconforming use, but the arguments that are put forth in support of the assignment of error have nothing to do with that arguable analytical error, petitioners fail to adequately state and develop a challenge to the analytical error. In that circumstance, LUBA will limit its review to the arguments petitioners actually present. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 215.203(2)(a) provides that “farm use” includes the “preparation” of “products or by-products raised on \* \* \* land for human or animal use[.]” A straw pressing operation that compresses straw that is initially baled in the field after it is cut such that the bales are easier to transport to their eventual end use as feed but that does not change the straw in any way or change the fact that it is ready for use as feed after it is baled and remains ready for use as feed after it is compressed is “preparation” of the straw within the meaning of ORS 215.203(2)(a). *Gilmour v. Linn County*, 73 Or LUBA 90 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where an assignment of error challenges an interpretation that the decision on appeal does not adopt, the assignment of error does not establish a basis for reversal or remand. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Notwithstanding statements that a hearings officer considered all documents in the record, where a hearings officer expressly declines to consider a proposed zoning diagram under the erroneous assumption that the diagram is not based on the adopted comprehensive plan map, remand is necessary for the hearings officer to consider the proposed diagram free of that mistaken assumption. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government correctly construes a local code provision as not requiring an existing street that provides access to a proposed planned unit development to be upgraded to meet the standards in the local code for streets that are dedicated to the public as part of a development approval, where the text of the provision and context provided by other provisions supports that construction. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where one of seven factors that the comprehensive plan describes as “guid[ing] the determination of the most appropriate zone” guides the county to consider “[a]vailability of transit” and provides that “land within walking distance (approximately one-quarter mile) of a transit stop should be zoned for smaller lots,” a hearings officer errs in concluding that land within approximately one-quarter mile of a transit stop is not within “walking distance” because sidewalks are not present. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the comprehensive plan sets out seven factors that “guide the determination of the most appropriate zone,” a hearings officer errs in weighing some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where one of seven factors that the comprehensive plan describes as “guid[ing] the determination of the most appropriate zone” guides the county to consider “proximity to jobs,



shopping, and cultural activities” and guides that areas in proximity to jobs, shopping and cultural activities should be considered for smaller lots, a hearings officer errs in concluding that land that is proximate to jobs and shopping should not be zoned for smaller lots based on the hearings officer’s negative assumptions about the quality of the jobs and shopping. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where one of seven factors that the comprehensive plan describes as “guid[ing] the determination of the most appropriate zone” guides that areas that have historically developed on large lots should “remain zoned consistent with the existing development pattern,” and the hearings officer interprets the “existing development pattern” to be synonymous with the existing zoning, remand is required in order for the hearings officer to explain why a change from 10,000-square-foot lots to 8,500-square-foot lots in an area with some 8,500-square-foot lots is not “consistent with the existing development pattern.” *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the comprehensive plan sets out seven factors that “guide the determination of the most appropriate zone,” and the factors are not competing policies and do not work at cross purposes, a hearings officer errs in weighting some of the factors as less important than other factors without any support for that weighting in the express language of the factors or other parts of the comprehensive plan. *Lennar Northwest, Inc. v. Clackamas County*, 73 Or LUBA 240 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will deny an assignment of error that argues that a city is precluded from requiring review of the siting of an arterial street for compliance with applicable standards and criteria in the city’s code merely because the city has previously accepted a dedication of the right-of-way for the arterial street, where the city code provisions that petitioner relies on do not provide that dedicated rights-of-way are exempted from land use review, but merely set out the procedure for and effect of a dedication. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Language in a right-of-way dedication that grants the city a right-of-way for “road, pedestrian, drainage, and utility purposes, on, over, across, under, along, and within” the land described tends to support a conclusion that the interest conveyed is in the nature of an easement or right to use the property for those purposes and not a fee interest. Accordingly, the city is not the “owner” for purposes of a city code section that requires an “owner” of property to join in or file the application for development approval. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the relevant code sections explain that a conceptual development plan provides general concepts for development on a site, and a detailed development plan provides the specifics for development on a site and is required following or simultaneously with approval of a conceptual development plan, an applicant for development of a road that is approved in a

conceptual development plan is required to obtain approval of a detailed development plan for the road. *GPA I, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the city code requires that a development’s sewer facilities must be consistent with the sewer master plan and the sewer master plan calls for an upgraded 15-inch sewer line in a street that adjoins the development, city findings that explain a temporary cross-basin connection to provide sewer service to the development is acceptable because sewer flows from the development are inadequate to result in a properly functioning 15-inch sewer line, and the development approval is conditioned on the development connecting to the adjacent 15-inch sewer line when it becomes available in the future, are adequate to explain why the temporary cross-basin connection is not inconsistent with the code and sewer master plan. *Graser-Lindsey v. City of Oregon City*, 72 Or LUBA 25 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA’s scope of review under ORS 197.835(9) includes authority to determine whether the decision on review “[i]mproperly construed the applicable law[.]” Where LUBA has jurisdiction to review a land use decision, it also has jurisdiction to review challenges to that decision’s construction of “applicable law,” even if that “applicable law” is not a statewide planning goal, a comprehensive plan provision or a land use regulation. *Carlsen v. City of Portland*, 39 Or LUBA 93, 98-100, *aff’d in part, remanded in part on other grounds*, 169 Or App 1, 8 P3d 234 (2000). *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** While local laws that do not qualify as land use laws might be so unrelated to land use laws that LUBA’s scope of review to consider violations of “applicable law” would not include such laws, a city’s business licensing regulations qualify as “applicable law” under ORS 197.835(9)(a)(D), where those business licensing regulations are intertwined with the land use issues in a LUBA appeal. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will affirm a city council’s conclusion that a retaining wall is a “foundation” as that term is defined in the city’s land use regulations, where the evidence in the record supports a conclusion that the retaining wall provides primary support for a parking lot by transmitting the loads imposed by the parking lot to the earth. *Knapp v. City of Jacksonville*, 72 Or LUBA 299 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA may consider a challenge that a decision approving a conditional use permit is inconsistent with a resolution that bars extension of sewer outside a sewer district, even if the resolution is not itself a land use regulation, where the resolution qualifies as “applicable law,” and is therefore within LUBA’s scope of review. ORS 197.835(9)(a)(D). *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city council’s findings appear to find that public sewer is a required public facility that is not available to property that is proposed for development, and the city council nevertheless approves development that will be served by an individual septic system without explaining why that action is consistent with a zoning standard that requires that all required public facilities have capacity and are available or can be made available to the development, remand is required. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a zoning ordinance requires a hydrology report and there is nothing in the record that is denominated as a hydrology report, LUBA will reject an argument that the decision should be remanded due to the lack of a hydrology report, where there is a geological/geotechnical report that appears to address the concerns that are identified in the zoning code requirement for a hydrology report. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A code requirement for a finding that it is “safe to build” need not be interpreted to require that there is absolutely no risk associated with development. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the zoning ordinance does not require that the city require implementation of all of a geology report’s recommendations, a city’s failure to impose a geology report’s recommended prudent course of action as a condition of approval is not a basis for reversal or remand. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer is not required to interpret and apply a county code provision that is similar, but not identical, to a different county code provision that was at issue in a thirteen-year-old board of county commissioner’s decision that applied to a different application and property in the same way that the board of commissioners previously applied the different code provision. *Head v. Lane County*, 72 Or LUBA 411 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA’s review of planning commission interpretations is governed by ORS 197.835(9)(a)(D), rather than by ORS 197.829(1). And under ORS 197.835(9)(a)(D), LUBA must determine whether the planning commission “[i]mproperly construed the applicable law,” “without according the deference required by *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992).” *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** After determining that a proposal to remove 500,000 cubic yards of rock constituted mining and that mining was not listed as an allowable use in the applicable zoning district, a city does not commit reversible or remandable error by then proceeding to consider

whether the proposal could be allowed under development code standards that allow approval of unlisted uses. *S. St. Helens LLC v. City of St. Helens*, 71 Or LUBA 30 (2015).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a hearings officer’s findings appear to substitute a common law nuisance standard for the applicable code standard, but the hearings officer never applies the identified common law nuisance standard, LUBA will view the findings as surplusage rather than an improper attempt to substitute an inapplicable standard for the applicable standard. *Morton v. Clackamas County*, 70 Or LUBA 7 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government errs in denying an application for approval of a “residential” development for failure to comply with an approval standard that applies to “commercial, institutional and office park uses.” *Parkview Terrace Development LLC v. City of Grants Pass*, 70 Or LUBA 37 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA concludes that applicable local nonconforming use law might not regulate a change from one conforming use to another conforming use in a nonconforming structure, but no party challenges a hearings officer’s conclusion that local nonconforming use law does regulate such a change of use, LUBA will consider petitioner’s challenge to the adequacy of the hearings officer’s findings that an existing structure qualifies as a nonconforming use and that the proposal may be approved as an alteration of a nonconforming use. However, LUBA will not preclude the hearings officer from considering on remand whether the nonconforming use regulations apply in that circumstance. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** When faced with a highly subjective criterion that requires the city to identify and balance the advantages and disadvantages of a comprehensive plan amendment, a petitioner must do more than point to disagreement with the outcome of that balancing in order to successfully challenge the city’s decision. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where no provision of the city’s code or comprehensive plan or any other law requires the city to base its decision on data provided by a local traffic study, and the Institution of Traffic Engineers (ITE) Manual describes the circumstances in which a local traffic study may be needed to validate the ITE trip generation rates in hortatory, rather than mandatory terms (the analyst “should” collect local data and establish a local rate”), the local government does not improperly construe the applicable law in failing to require a local traffic study to validate the trip generation estimates in the ITE Manual. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Neither a biological assessment nor 44 CFR § 60.3(a)(2), which requires local governments that participate in the National Flood Insurance Program ensure that all necessary federal permits are obtained prior to issuance of a floodplain development permit, require the city to consider whether the proposal complies with the Endangered Species Act where the biological

assessment does not impose mandatory obligations on the city, and where no floodplain development permit is sought. *Hess v. City of Corvallis*, 70 Or LUBA 283 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A conclusion that some historic types and levels of industrial uses of the property are part of the rural character of the area does not mean that the existing or proposed types and levels of industrial uses allowed under the Rural Industrial designation are consistent with the rural character of the area. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer errs in concluding that a 1994 decision to rezone property also approved use of a road where nothing in the 1994 decision indicates that the county approved the use of the road, the decision did not approve any uses of the property and the road is located off of the property that was the subject of the 1994 rezoning decision, on property that was subject to different zoning and land use approval requirements. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer errs in concluding that a 1997 decision approving a site plan for aggregate extraction approved use of a road located on property that was not included on the site plan, where nothing in the language of the decision supports that conclusion. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An ordinance that contains language in its preface section that suggests that it is intended to be prospective is not retroactive, and the local government may not rely on the ordinance to revive and extend a void conditional use permit that expired by operation of law. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An argument that a decision fails to comply with a Goal guideline provides no basis for reversal or remand. Guidelines to statewide planning goals are advisory and do not constitute mandatory standards that must be applied in making land use decisions subject to the goals. *Reading v. Douglas County*, 70 Or LUBA 458 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer errs in reading a code provision to include the word “tower” where the code provision as it was adopted by ordinance does not include the word “tower.” It is not within the hearings officer’s authority to correct even an unintentional omission of language by “insert[ing] what has been omitted[.]” ORS 174.010. *Weston Kia v. City of Gresham*, 70 Or LUBA 483 (2014).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A plan amendment that designates 33 acres for high-density residential development is not inconsistent with a plan policy requiring a minimum of 28 acres of high-density residential, including seven acres to provide public open space, notwithstanding the failure to

specifically designate seven acres for open space, where the 33 designated acres can supply the required seven acres of open space. *Shamrock Homes LLC v. City of Springfield*, 68 Or LUBA 1 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county ordinance requiring setbacks for wind turbines from rural residences, UGBs and unincorporated communities is not preempted by state statutes and administrative rules that regulate energy development and siting, where the state statutes and rules do not evidence the legislature’s express or implied intent to preempt the field of energy regulation, development and siting. *Hatley v. Umatilla County*, 68 Or LUBA 264 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county ordinance requiring setbacks for wind turbines from rural residences, UGBs and unincorporated communities is not preempted by state statutes and administrative rules that regulate energy development and siting, where the state statutes and rules explicitly recognize and provide a role for local comprehensive plan and land use regulations in demonstrating that an energy facility complies with the statewide planning goals. *Hatley v. Umatilla County*, 68 Or LUBA 264 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where identifying the intersections that must be included and studied in a transportation impact analysis is governing by the local government’s code, and under the code an intersection should have been included and studied, a city decision that the intersection need not be studied because it was not identified at an earlier scoping stage is error. *Oregon Coast Alliance v. City of Newport*, 68 Or LUBA 318 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local code definition of “lot” as an “area of land owned by or under the lawful control and in the lawful possession of one distinct ownership” does not have the legal effect of aggregating adjacent, separately owned areas of land. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will affirm as correct a hearings officer’s interpretation that a local code provision that requires aggregation of contiguous parcels in common ownership for development of a “Lot of Record” in a particular zoning district is not self-effecting. Such a code provision does not have the effect of aggregating contiguous parcels in common ownership merely because the parcels were, for three years, included in the particular zoning district, where no development was proposed or completed during the three-year period when the property was included in the zoning district. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will affirm as correct a hearings officer’s conclusion that a prior dwelling approval for one property did not aggregate adjacent contiguous parcels in common ownership, where nothing in the local code criteria that applied to the prior dwelling approval required aggregation in order to obtain a development permit, and the dwelling approval was not

conditioned on aggregation of the parcels. *Mackenzie v. Multnomah County*, 68 Or LUBA 327 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** City council statements that a proposed plan and zoning map amendment to allow higher density would be “a partial answer to global warming” and generate “affordable housing” and expressions of confidence that a good outcome could be negotiated between opponents and the applicant in design review provide no basis for reversal or remand even though they may have no bearing on whether applicable approval criteria are satisfied. Generally LUBA review is limited to the final, written decision and does not extend to comments that may be made during the proceeding that lead to that final written decision. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not interpret a definition of “multi-dwelling structure” to preclude construction of a building that straddles a lot line, where the definition is written to distinguish “multi-dwelling structures” from attached dwellings which must be located on their own lot. *Beaumont-Wilshire Neighbors v. City of Portland*, 68 Or LUBA 393 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county does not err in generally identifying the extent of the surrounding neighborhood for purposes of determining whether a proposed conditional use airport will have minimal impacts on the surrounding neighborhood, where the decision makes reasonably clear that the county considered impacts from the proposed airport on other residential properties from noise generated from the proposed airport and from the risk of air crash on take off or landing crashes, and the petitioner does not point to any property or area that the county failed to consider as part of the “surrounding neighborhood.” *Yih v. Linn County*, 68 Or LUBA 412 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 197.829(1)(d) effectively obligates a local government to interpret an ambiguous code provision if possible in a manner not contrary to the applicable statewide planning goals and administrative rules, not only where the code provision directly implements a goal or rule protecting resource lands, but also where the code provision is a general provision applicable to all zones, including resource zones, and is not intended to implement any particular goal or rule. *White v. Lane County*, 68 Or LUBA 423 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA determines that a local governing body’s interpretation of particular requirements of its comprehensive plan is inconsistent with the express language of the comprehensive plan requirements, it is unnecessary for LUBA to also consider whether the interpretation is inconsistent with the purpose and underlying policy of the comprehensive plan requirements. *Friends of the Hood River Waterfront v. City of Hood River*, 68 Or LUBA 459 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The fact that some changes to uses allowed in a zoning district that are adopted

by a legislative land use regulation amendment could also have been accomplished through a quasi-judicial rezoning decision does not provide a basis for recharacterizing a legislative land use decision as a quasi-judicial land use decision. *Stevens v. Clackamas County*, 68 Or LUBA 490 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government errs in construing a previous decision that deferred finding compliance with an applicable approval criterion to final planned unit development stage to restrict the local government’s obligation to determine whether the applicable criterion that was deferred is satisfied by only considering whether the information required by a condition of approval was submitted, where the previous decision makes clear that the local government completely deferred making a determination of compliance with the applicable criterion to the final PUD stage. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 33 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the applicable land use regulations do not require that the owner of the property that is the subject of a permit application sign the application or join in the application, a local government errs by denying the application on the basis that the property owner opposes the permit application. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government errs in finding that a previously approved variance is no longer legally effective, based on a finding that (1) the sign that was approved “can never exist” and (2) the facts that existed at the time of the variance was approved no longer exist, where the findings do not explain why a sign with the characteristics of the sign that was originally approved “can never exist,” or why the change in facts has the legal effect of making the variance legally ineffective. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where there is nothing in the applicable land use regulations that requires the applicant for a sign permit pursuant to a previously approved variance to demonstrate that it is not possible to construct a conforming sign, the local government errs in denying the sign permit based on the applicant’s failure to demonstrate it is not possible to construct a conforming sign instead. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 43 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not consider whether a county has authority to approve conditional zoning where the applicant modified its proposal making conditional zoning unnecessary before the board of commissioners could make a decision about whether the county had such authority. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** State law that generally makes EFSC the sole authority to determine what constitutes the “applicable substantive criteria” when EFSC evaluates an application for a wind power generation facility preempts a county code provision that purports to dictate the county code



requirements that will be included in the “applicable substantive criteria” applied in EFSC proceedings. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 197.829(1)(d) authorizes LUBA to reject an interpretation of a land use regulation that implements a statute, land use goal or rule, if the interpretation is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. ORS 197.829(1)(d) is not a vehicle to require LUBA to reject an interpretation of a land use regulation that does not implement any statute, land use goal or rule, even if the interpretation may be inconsistent with federal laws that the land use regulation implements. *Protect Grand Island Farms v. Yamhill County*, 67 Or LUBA 278 (2013).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city decision’s characterization of “townhouses” as single family dwellings, even if incorrect, provides no basis for reversal or remand where petitioners fail to establish that the city’s characterization has some bearing on an applicable approval standard. *Rosenzweig v. City of McMinnville*, 66 Or LUBA 164 (2012).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Despite a reasonably strong textual and contextual argument in support of a different interpretation, a city’s interpretation of the phrase “facilities operating at 1,000 watts [Effective Radiated Power] ERP or less “ that ERP should be calculated by channel and not by antenna is not inconsistent with the express language of the city’s regulation or with the purpose of the regulation, and is required to be affirmed, where the meaning of the key term used in the provision at issue, “facility,” is not clear, is not defined in the code, and the dictionary definition of the word is not particularly helpful in discerning the intent of the city in enacting the provision. ORS 197.829(1)(a). *Hill v. City of Portland*, 66 Or LUBA 250 (2012).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the Court of Appeals remands a decision to LUBA to address the proper application of the Transportation Planning Rule (TPR), at OAR 660-012-0060, and on remand to LUBA the parties dispute the meaning of a TPR provision, LUBA need not resolve that dispute when during the pendency of the appeal the TPR is amended to delete the disputed TPR provision, and the TPR as amended will govern the local proceedings on remand from LUBA. *Setniker v. Polk County*, 65 Or LUBA 49 (2012).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** There may be limits on a county’s discretion to allow land use violations to continue without challenge, but where a petitioner cites no authority that a county committed legal error by deciding not to revoke a wind turbine operator’s conditional use permit or take other action to correct a land use violation, petitioner fails to establish a basis for reversal or remand of the decision. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where DEQ has determined that for budgetary reasons it will no longer enforce

its noise regulations, counties are free to enforce those noise standards if they wish, but they are not required to do so. *Mingo v. Morrow County*, 65 Or LUBA 122 (2012).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the city code makes the planning commission the city’s final decision maker, but limits the planning commission’s review on appeal to errors committed by the hearings officer, the planning commission lacks authority to consider legal challenges to the city’s appeal fee. In that circumstance, LUBA lacks authority to reverse or remand the planning commission decision to the planning commission based on a legal challenge to the city’s local appeal fee. *Treadmill Joint Venture v. City of Eugene*, 65 Or LUBA 213 (2012).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Because the legislature in adopting ORS 197.829(1) both codified and modified the holding in *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the legislature may have intended ORS 197.829(1) to be a comprehensive statement of the circumstances under which the *Clark* deferential standard of review is applied to a governing body’s local code interpretations, and did not intend LUBA to extend the reasoning in *Clark* to circumstances not covered by the statute, such as a governing body’s interpretation of the text of a prior land use decision adopted by the planning commission. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In order to allow effective review of an as-applied appeal fee challenge in circumstances where, due to local regulations, the delegated local final decision maker does not have authority to accept new evidence or to consider appeal fee challenges, the local final decision maker must allow the fee challenger to submit argument and evidence into the record so that LUBA can perform its review function. *Willamette Oaks LLC v. City of Eugene*, 63 Or LUBA 75 (2011).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The validity of a conservation easement acquired by the city from the applicant’s predecessor-in-interest as a condition of partition approval cannot be challenged in the context of a subsequent decision that relies on the easement to deny an application for development within the easement. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a breeding kennel arguably qualifies as animal husbandry, and animal husbandry is a farm use, a local government interpretation that the breeding kennel qualifies as a farm use is not inconsistent with the express language, purpose and policy of the land use regulation. *Siebert v. Crook County*, 63 Or LUBA 379 (2011).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The doctrine of judicial estoppel is invoked in some circumstances to preclude a litigant from asserting a position in a judicial proceeding that is inconsistent with a position the litigant successfully asserted in a different judicial proceeding. Even if judicial estoppel could apply in a LUBA appeal, it would not apply so broadly as to prevent a local government from

correcting an earlier erroneous interpretation of its land use regulations. *Jacobsen v. City of Winston*, 63 Or LUBA 405 (2011).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where free-standing signs are expressly prohibited by the applicable underlying zoning district, an unconstitutional content-based exemption in the sign regulations that would otherwise apply to allow free-standing signs in that zoning district provides no basis for allowing free-standing signs in that zoning district. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where sign regulations partially exempt regulated signs from underlying zoning requirements, including setback requirements, but the sign regulations are unconstitutional in their entirety due to a separate content-based exemption in the sign regulations, proposed signs must be denied if they violate setback requirements in the underlying zone because the exemption from those setback requirements is ineffective if the sign regulations are unconstitutional in their entirety. *Onsite Advertising Services LLC v. Washington County*, 63 Or LUBA 414 (2011).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where PUD modifications are subject to “the applicable criteria used for the initial approval,” a city hearings officer errs in concluding that only the criteria that are specifically mentioned in the initial approval decision apply. Just because criteria are not specifically mentioned in the initial approval decision findings does not mean the unmentioned criteria were not “used” in granting the initial approval. *Athletic Club of Bend v. City of Bend*, 63 Or LUBA 467 (2011).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An Oregon Department of Transportation (ODOT) decision to adopt an interchange area management plan that calls for closure of a particular access without the additional formal review that is called for in an intergovernmental agreement between ODOT and a city may constitute a violation of the intergovernmental agreement, but it does not provide a basis for reversing or remanding ODOT’s decision to adopt the an interchange area management plan. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Under common law a property owner has a right of access to public thoroughfares. However, that common law right of access does not extend to a right to access of a particular type or at a particular location. *Parker Johnstone Wilsonville Honda v. ODOT*, 62 Or LUBA 116 (2010).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a petitioner fails to challenge all the reasons a hearings officer gives for finding that a proposed wind turbine facility will not force a significant change in or significantly increase the cost of accepted farm practices on nearby farms, petitioner’s challenge to the adequacy of one of the reasons the hearings officer gave provides no basis for reversal or remand. *Falls v. Marion County*, 61 Or LUBA 39 (2010).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners assign error to a local government construction of applicable local land use law, the question for LUBA is whether the local government’s interpretation must be sustained under ORS 197.829(1), not whether petitioners’ interpretation is sustainable or a better interpretation than the local government’s interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Under ORS 197.829(1), *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), a local government’s interpretation and LUBA’s review of that interpretation are guided by the principles articulated in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). Where the local government’s interpretation finds almost no support in the relevant text of the land use regulation and comprehensive plan, LUBA will not defer to that interpretation. *Siporen v. City of Medford*, 59 Or LUBA 78 (2009).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a petitioner simply alleges that a decision that amends a comprehensive plan policy is not consistent with the purposes of comprehensive plan growth management policies or Statewide Planning Goal 14 (Urbanization), but petitioner does not identify any comprehensive plan policy purposes or the allegedly inconsistent requirement of Goal 14, petitioner provides no basis for reversal or remand. *Hildenbrand v. City of Adair Village*, 58 Or LUBA 43 (2008).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the Court of Appeals adopts an interpretation of a city plan policy and the city’s decision is remanded because the Court of Appeals concludes the city’s and LUBA’s interpretation of the plan policy in approving an urban growth boundary amendment was erroneous, the city is free following remand to amend the plan policy, and is not bound to reapply the plan policy to the urban growth boundary amendment as it was interpreted by the Court of Appeals. *Hildenbrand v. City of Adair Village*, 58 Or LUBA 43 (2008).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where it is not clear whether a county believes a prior county decision delineated the boundaries of a resort unincorporated community, but petitioners do not allege that the appealed county decision that adopts a large scale map that precisely delineated the resort unincorporated community boundaries violates the OAR 660-022-0020 standards that govern such delineations, petitioners provide no basis for reversal or remand. *Friends of the Metolius v. Jefferson County*, 58 Or LUBA 284 (2009).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A division of land that creates an EFU-zoned parcel that is smaller than the 80-acre minimum set forth in ORS 215.780(1) violates that statute, and the land division is prohibited as a matter of law. *Jouvenat v. Douglas County*, 58 Or LUBA 378 (2009).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Reversal is warranted under ORS 197.835(10)(a)(B) where a city denies a partition application based on a code provision that is not an approval standard and that does not authorize denial of the application, and where no other code provision cited by the city provides a basis for denial. Denial under such circumstances is “outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances.” *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA reverses a denial under ORS 197.835(10)(a) and orders the local government to approve the “application,” the application includes any (1) applicant-proposed conditions of approval and (2) conditions imposed in an initial decision that the applicant has not objected to or attempted to appeal to the final decision maker. However, the “application” does not include conditions of approval that the applicant objected to or attempted to appeal to the final decision maker. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a county adopted a comprehensive plan policy that called for a 160-acre minimum lot size to protect big game winter range, but subsequently amended its zoning ordinance to provide for an 80-acre minimum lot size in the same area, that inconsistency created a plan/zoning ordinance conflict. If the county wishes to eliminate the inconsistency in favor of the 80-acre minimum lot size, it must demonstrate that the 80-acre minimum lot size leaves the county’s Goal 5 program to protect big game winter range consistent with Goal 5. *Johnson v. Jefferson County*, 56 Or LUBA 25 (2008).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city applies a street vacation criterion that requires the city to find “a greater public benefit would be obtained from the vacation than from retaining the right-of-way in its present status” and finds the required benefit would be realized by the new secure parking area that would be constructed in the vacated right-of-way adjacent to a new Justice Center, remand is not required simply because petitioner would have applied that “greater public benefit” criterion differently and retained the right-of-way for transportation purposes. With such a subjective standard, different reasonable persons could easily reach different conclusions about the public benefit to be derived from the proposed street vacation. *Olson v. City of Springfield*, 56 Or LUBA 229 (2008).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** While it may be incorrect to refer to a 43-lot subdivision with many two-acre lots as “rural,” simply because it is located outside an urban growth boundary, a county commits no error in referring to the subdivision as rural in applying a subdivision approval criterion that requires a finding that the subdivision “will not create urban-farm conflicts,” where the county did not rely entirely on that characterization in applying the urban-farm conflicts standard. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A zoning regulation that neither authorizes nor prohibits road construction in

exclusive farm use zones provides no basis for reversal or remand of a decision that approves a subdivision of exclusive farm use zoned land, pursuant to Ballot Measure 37 waivers, where that subdivision will require the construction of some roads. *Hines v. Marion County*, 56 Or LUBA 333 (2008).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the hearings officer’s sole basis for denying an application was his erroneous conclusion that the applicant failed to demonstrate compliance with a provision of the county’s land development ordinance that did not apply to the proposed development, but the petitioner does not explain why the decision warrants reversal rather than remand, LUBA will remand the decision. *Curtain v. Jackson County*, 55 Or LUBA 79 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA sustains an assignment of error because the county’s approval of the subdivision application is “prohibited as a matter of law,” reversal rather than remand is the appropriate disposition. *Dunn v. Yamhill County*, 55 Or LUBA 206 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reject a hearings officer’s interpretation of local declaratory ruling provisions to permit the planning director to “initiate” a declaratory ruling application by joining an application improperly filed by a third party, where the text and context of the declaratory ruling provisions state that the planning director may only “initiate” an application by “filing an application” accompanied by the required information. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local code requires the applicant for a declaratory ruling to carry the initial and ultimate burden of proof and persuasion regarding the question submitted, a hearings officer errs in allowing the applicant to simply demonstrate that there is an interpretative dispute and leave it to third parties to take positions on that dispute and provide the only information to resolve that dispute. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 92.017, which provides that a lawfully created lot remains a discrete lot until the lot lines are vacated, does not assist petitioner where LUBA concludes that lot lines were vacated as provided by law. *McKeel v. Multnomah County*, 55 Or LUBA 608 (2008).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer does not err in approving development notwithstanding that the applicant failed to comply with a code requirement to determine levels of service based on existing intersection signal timing, where the code contemplates that the city may vary from the strict letter of the code to address unusual situations, based on expert recommendations, and the hearings officer agreed with the applicant’s experts that due to ongoing transportation construction in the area it would serve no purpose to consider existing signal timing. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although a city may deny a conditional use permit application on the basis that there is not substantial evidence to support findings that all applicable approval criteria are met, a city may not simply deny a conditional use permit application that has already been deemed complete under ORS 227.178(2) for failure to provide requested information. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If a city gives notice that additional information is required in support of a conditional use permit application, but nevertheless continues to review and make a decision on that application despite the permit applicant’s failure to provide the requested additional information, the local government may not simply cite that failure to provide the requested information as the basis for denying the permit application. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not defer to a local government’s interpretation of the phrase “necessary for and accessory to” forest management as meaning “convenient and efficient” to forest management, where such an interpretation is contrary to the plain meaning of the word “necessary,” the express language of the provision at issue, and other language in the provision. *Greenhalgh v. Columbia County*, 54 Or LUBA 626 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government’s failure to provide notice to the Department of Land Conservation and Development of a proposed amendment to the zoning map requires remand. *NE Medford Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners may not ignore a hearings officer’s findings that particular adjustment/variance criteria do not apply in a particular circumstance and then argue only to LUBA that the proposal violates those adjustment/variance criteria. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners’ assignment of error challenging a hearings officer’s decision to consider whether the adjustment/variance criteria that had been applied from the beginning during the local proceedings were the correct adjustment/variance criteria will be denied, where petitioners fail to assign error to the hearings officer’s explanation for why he reconsidered whether those criteria were the correct criteria to apply and petitioners make no effort to argue that the hearings officer’s explanation is faulty in some way. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a zoning ordinance requires a “site specific investigation by a registered geologist or engineer,” and the local government finds that a preliminary site evaluation prepared by a geologist was sufficient to constitute the required site specific investigation, a petitioner’s

objection that the preliminary site evaluation is insufficient will be rejected, where petitioner fails to challenge the city's findings that explain why the city viewed the preliminary site evaluation as sufficient. *Jebousek v. City of Newport*, 52 Or LUBA 435 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings official does not improperly substitute state agency permit approval criteria for a local subdivision drainage criterion, where she denies subdivision approval based on a finding that the applicant failed to demonstrate that proposed drywells that would be needed for adequate drainage could be approved by the Oregon Department of Environmental Quality or that there were alternative methods of drainage if the drywells could not be approved. *Weiskind v. City of Eugene*, 52 Or LUBA 753 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not consider an argument that an annexation is barred by a statute that was adopted and took effect after the annexation was approved, where LUBA would be required to consider extra-record evidence to do so, the local government objects to LUBA's consideration of that extra-record evidence and petitioner does not file a motion requesting an evidentiary hearing at LUBA. *Leupold & Stevens, Inc. v. City of Beaverton*, 51 Or LUBA 65 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 268.354(1), which provides that in addition to other statutory requirements "boundary changes within a metropolitan service district are subject to the requirements established by the district," is an adequate statutory grant of authority to allow the district to adopt legislation that delays the effective date of an annexation ordinance while the annexation ordinance is on appeal to the district. *City of Happy Valley v. City of Damascus*, 51 Or LUBA 141 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a review criterion that applies to a city boundary change on review by Metro unambiguously requires that the boundary change must be consistent with agreements between the city and other necessary parties, a memorandum of understanding to which the city is not a party could not provide a basis for Metro to deny the annexation ordinance under that review criterion. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Reversal, not remand, is the appropriate remedy where a challenged property line adjustment purports to reconfigure the lot lines of three adjacent lots of an existing subdivision to create two lots out of the pre-existing three lots, and the reconfiguration cannot be achieved through a single property line adjustment or through serial adjustments. *Borton v. Coos County*, 51 Or LUBA 478 (2006).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reject a petitioner's argument that a tree plan does not adequately protect trees, simply because the tree plan recognizes that during the development process trees slated for removal in the tree plan may be saved, where the local code merely requires that an



applicant for development approval prepare a tree plan and states that “[p]rotection [of trees] is preferred over removal wherever possible.” *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a petitioner shows that a county’s findings are inadequate, but the quality of the evidentiary record and the findings that could reasonably be adopted based on that record are disputed, remand is the appropriate remedy where (1) petitioner does not show that a county’s decision is “outside the range of discretion allowed the [county] under its comprehensive plan and implementing ordinances,” which would require reversal of the county’s decision and an order to approve the permit under ORS 197.835(10)(a) or (2) that the county’s decision to deny the permit “violates a provision of applicable law and is prohibited as a matter of law,” which would justify a decision by LUBA to reverse the county court’s decision under OAR 661-010-0073(1)(c). *Hellberg v. Morrow County*, 49 Or LUBA 423 (2005).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will decline to interpret a local provision in the first instance under ORS 197.829(2), where the provision is subject to several potential interpretations, some of which, if adopted, would require reversing the decision. In such circumstances, remand is appropriate to allow the governing body to interpret the provision in the first instance. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not resolve a petitioner’s challenge to a county’s interpretation of a comprehensive plan policy where, under the facts found by the county and affirmed by LUBA, the plan policy would be applied the same way under either petitioner’s or the county’s interpretation. Under such circumstances, the interpretative dispute between the parties is merely hypothetical, and the alleged misinterpretation provides no basis for reversal or remand. *Doob v. Josephine County*, 48 Or LUBA 227 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Code language that prohibits a city from requiring design changes that are “materially different from customary development in the area” is not properly interpreted to mandate that the city impose a roof height that is customary within the area, or prohibit the city from approving a roof height that is not customary. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** 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).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Concern about the potential for conversion of industrially planned and zoned lands to commercial and office uses is a legitimate area of metropolitan concern within the jurisdiction of the Metropolitan Service District. *City of Sandy v. Metro*, 48 Or LUBA 363 (2005).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a zoning ordinance requires preparation of a management plan to protect wildlife resources when siting a house in a significant wildlife habitat area and the local government approves the dwelling without the required management plan, remand is required, notwithstanding that there may be documents in the record from which the required management plan could be developed. *Burton v. Polk County*, 48 Or LUBA 440 (2005).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** While it might be error for a local government to rely on findings demonstrating compliance with a less rigorous “balancing” standard to demonstrate compliance with a more rigorous “no adverse impact” standard, the reverse is not necessarily true: the local government may be able to rely on findings of compliance with the more rigorous standard to demonstrate compliance with a less rigorous standard. *Cadwell v. Union County*, 48 Or LUBA 500 (2005).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reverse rather than remand a decision approving a property line adjustment, where the decision erroneously approves something other than a property line adjustment, and the decision and respondent offer no theory as to how the city could lawfully do what the decision purports to do. *South v. City of Portland*, 48 Or LUBA 555 (2005).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A code provision that authorizes continuation of existing uses that are unlawful or in violation of applicable land use laws is inconsistent with such laws. *Okray v. City of Cottage Grove*, 47 Or LUBA 297 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city cites no authority for the city engineer to agree to reduce the speed limit for a proposed road rather than requiring that the road be constructed to city standards for vertical sag curves, LUBA will remand the city’s decision. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county’s approval of a five-acre-lot subdivision inside the UGB with a condition requiring that the applicant record CC&Rs that effectively prohibit further subdivision of those five-acre lots violates ORS 197.752. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** It is not within LUBA’s scope of review to address whether existing code design review standards comply with the ORS 197.307(3)(b) requirement for “clear and objective” approval standards, in the context of a post-acknowledgment plan amendment that rezones property to allow uses that will be subject to approval under the existing design review standards, where the challenged decision does not amend the design review standards or attempt to bring any part of the city’s code into compliance with ORS 197.307(3)(b). *NWDA v. City of Portland*, 47 Or LUBA 533 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where two pages of legal argument are attached to a local appellant’s jurisdictional statement of the grounds for local appeal, and the county refuses to consider those two pages simply because they are unsigned and include a non-appellant’s fax header, the county commits error. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where local appellants (1) sign a local appeal form, (2) indicate “see attached” in the part of the appeal form where the grounds for the local appeal are to be specified, and (3) attach two pages that identify alleged legal errors in the decision, it is error for the county to refuse to consider the attached pages simply because there is no signature at the bottom of those pages and the pages include the fax header of a non-appellant. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not assume a county rejected a local appeal, where petitioner and the county dispute whether the county rejected petitioner’s attempted local appeal or whether petitioner voluntarily withdrew his local appeal to correct identified deficiencies and later failed to refile the local appeal, and the record does not establish that the county rejected the local appeal. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a county’s local appeal form invites five local appellants to utilize a single local appeal form and attach documents in support of the appeal to that local appeal form, the county may not impose additional signature and express incorporation requirements that are not reflected in the form to limit the right of individual local appellants to rely on attached documents to support their local appeal. *Burke v. Crook County*, 46 Or LUBA 413 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** For the purposes of ORS 197.830(3), a notice of hearing that explains that a county is considering the annexation of property to a sewer district adequately describes the proposed action to be taken by the county, even if the area described in the notice is later amended to delete one parcel. *Miner v. Clatsop County*, 46 Or LUBA 467 (2004).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local code provision expressly requires that a proposed subdivision must “conform to” the comprehensive plan, the local government errs in interpreting the code to preclude the possibility that there are any comprehensive plan provisions that might apply directly to the subdivision proposal. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA concludes that relevant local code provisions make the comprehensive plan requirements potentially applicable to an application for subdivision approval and that a particular comprehensive plan provision applies and is not merely aspirational, and the local government approved the subdivision without addressing the comprehensive plan provision,

the subdivision approval decision must be remanded. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government has adopted no local highway design safety standards, it commits no error by applying American Association of State Highway and Transportation Official standards to reject a subdivision opponent’s intersection site distance concerns, notwithstanding that it has not adopted those standards and may have been laboring under the incorrect assumption that it had adopted those standards. *Paddock v. Yamhill County*, 45 Or LUBA 39 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city code provision requires that a design review decision maker consider impacts on neighboring land values, and the code also grants discretion to the decision maker to modify a proposed site design to better conform to code standards, a city errs in failing to consider proposed modifications to a site design to minimize impacts to neighboring land values. *Freeland v. City of Bend*, 45 Or LUBA 125 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners’ assignment of error is based on the erroneous assumption that a code standard that prohibits home occupations that are “objectionable due to [emissions]” prohibits *any* discernable emissions, and petitioners do not challenge city findings that the emissions that can be expected from a proposed home occupation will not be objectionable, the assignment of error provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government adopts unchallenged findings explaining that a demonstration that a proposed conditional use complies with all relevant zoning ordinance criteria is also sufficient to establish that the conditional use complies with the comprehensive plan, petitioners’ challenge at LUBA that the conditional use is inconsistent with particular comprehensive plan provisions that are not specifically addressed in the conditional use decision provides no basis for reversal or remand. *Roe v. City of Union*, 45 Or LUBA 660 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** OAR 660-023-0180 establishes a comprehensive regulatory scheme for reviewing mining applications. A county errs when it denies an application for mining in part because it does not comply with local approval criteria that are unrelated to OAR 660-023-0180. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county may not approve a nonfarm dwelling on a parcel created after January 1, 1993, under ORS 215.284(2)(c), which requires that the parcel on which a nonfarm dwelling is to be located be created prior to January 1, 1993, in order to remedy what it perceives to be an injustice. *Harris v. Jefferson County*, 44 Or LUBA 205 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A decision that approves a nonfarm dwelling on EFU land notwithstanding that the application does not comply with the applicable criteria set out at ORS 215.284(2)(c) will be reversed. *Harris v. Jefferson County*, 44 Or LUBA 205 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county did not err in determining that for the purposes of tallying the number of parcels within a 160-acre template, “parcels” are not limited to those units of land created by partitioning, and include other units of land that qualify as “parcels” under the county’s definition of the term. *Testa v. Clackamas County*, 44 Or LUBA 402 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that does not include the “text” of the proposed amendment as defined by OAR 660-018-0020(2) is inadequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that includes the text of the proposed amendment as that term is defined in OAR 660-018-0020(2), but was submitted approximately 23 days prior to the city’s initial evidentiary hearing is adequate to perform the notice function required by ORS 197.610(1). *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city has a process requiring that proposed amendments to a comprehensive plan and zoning code be subject to hearing and review by the planning commission and proposed design review guidelines be subject to hearing and review by the design commission, a notice of proposed amendment regarding the matters before the planning commission is not sufficient to apprise DLCD or others who receive notice pursuant to ORS 197.610(2) of the design review proceedings. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An initial notice of a proposed post-acknowledgment amendment submitted to DLCD pursuant to ORS 197.610(1) and OAR 660-018-0020(1) that erroneously states that the initial evidentiary hearing had been held and does not indicate whether further opportunities to provide evidence are available is not adequate to satisfy ORS 197.610(1), which requires that notice of proposed post-acknowledgement land use amendments be submitted to DLCD at least 45 days prior to the initial evidentiary proceedings on those amendments. *No Tram to OHSU v. City of Portland*, 44 Or LUBA 647 (2003).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners may not argue that a city’s decision to deny its application was for the purpose of avoiding the 120-day decision deadline set out at ORS 227.178, when the

challenged decision was rendered five days after that deadline. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 184 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reverse rather than remand a decision, where the local government has twice denied development based solely on code interpretations that LUBA found to be clearly erroneous, and there is little likelihood that remand could result in a sustainable denial. *Church v. Grant County*, 43 Or LUBA 291 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Pursuant to ORS 197.830(3), a city decision maker must disclose all *ex parte* contacts at the first opportunity and must inform participants of their right to rebut the substance of the disclosure. However, a city's failure to inform a petitioner of his right to rebut the substance of an *ex parte* disclosure will not result in reversal or remand where (1) the disclosure of the *ex parte* contact was promptly made; (2) petitioner had more than one opportunity to object to the adequacy and the content of the disclosure; and (3) no party appears to dispute the facts alleged in the disclosure. *DLCD v. City of Gold Beach*, 43 Or LUBA 319 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA may not overlook the fact that a new land use regulation is facially noncompliant with a Metro standard that the regulation is intended to implement, simply because the regulation requires compliance with unspecified standards of a sewerage agency that allegedly comply with the Metro standard. Even if the sewerage agency standards comply with the Metro standard, it is questionable whether the city may adopt noncompliant regulations and rely on a separate local government or agency to ensure compliance with the Metro standard. *Stallkamp v. City of King City*, 43 Or LUBA 333 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not remand a decision based on an allegation that the decision maker failed to follow the consultation and coordination requirements of OAR 340-252-0060, where the record makes clear that all parties required by the rule to be consulted were aware of and actively participated in the process leading to the challenged decision, and any failure to follow the procedures set out by the rule was attributable to someone other than the decision maker. *Witham Parts and Equipment Co. v. ODOT*, 42 Or LUBA 435 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** OAR 660-004-0000(2) does not, as a matter of law, impose a requirement that an applicant for an exception to Goal 3 to permit a single-family dwelling on a 10-acre parcel first exhaust all other potential avenues to obtain approval for that single-family dwelling. *DLCD v. Yamhill County*, 42 Or LUBA 126 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a code criterion can be interpreted to impermissibly shift the burden of proof from an applicant to an appellant in a local land use appeal, but it is reasonably clear that the county did not apply the code criterion to shift the burden in that manner, petitioner's assignment

of error that the county improperly shifted the burden of proof will be denied. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where it is not apparent that a county adopted one or more conditions of approval to address the impacts described in ORS 215.296(1), petitioner’s argument that the county’s conditions of approval are not “clear and objective,” as is required by ORS 215.296(2), provides no basis for reversal or remand. *Oregon Natural Desert Assoc. v. Grant County*, 42 Or LUBA 9 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A post-acknowledgment amendment to an ordinance implementing Goal 5 must be remanded, where the city failed to provide the notice to DLCD required by ORS 197.610(1) and 197.615(1). *Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 453 (2002).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A decision that only partially complies with a set of legal requirements that do not allow for partial compliance may be remanded on that basis. *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city council’s decision to allow the prevailing party to draft proposed findings in support of a decision to rezone property provides no basis for reversal or remand. *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A zoning ordinance provision that expresses a preference for nonstructural over structural solutions to erosion and flooding problems does not apply to an application for recreational vehicle park expansion that proposes erosion or flooding measures, at least where the proposal does not make structural erosion or flood control measures likely or inevitable. *Willhoft v. City of Gold Beach*, 41 Or LUBA 130 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Any error that may have been committed by failing to provide a proposed comprehensive plan amendment to DLCD 45 days before the first evidentiary hearing was corrected on remand by offering to provide the proposal to DLCD more than 45 days before the evidentiary hearing on remand, where there is no contention that DLCD failed to receive the proposal or failed to provide notice of the proposal in accordance with ORS 197.610(1) and DLCD advises the county that it does not oppose the proposal. *Donnell v. Union County*, 40 Or LUBA 455 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although rezoning a 1.94-acre parcel from residential to commercial may not violate comprehensive plan policies that require an adequate supply of urban land to meet urban needs and support of transportation systems by locating housing near work and shopping areas, a

local government errs in finding that those polices are irrelevant. *Swyter v. Clackamas County*, 40 Or LUBA 166 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** While a development may have to eventually comply with federal laws, such as the Endangered Species Act, unless local approval criteria or federal law provisions require that the local decision that approves the development also demonstrate compliance with federal law, the decision need not do so. *McNern v. City of Corvallis*, 39 Or LUBA 591 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Any error in failing to comply with code provisions for amending the Metro UGB is harmless, where the pertinent code provisions are not based on statute, goal or rule; the provisions have been superseded by new standards that would apply on remand; and it is undisputed that the decision does not violate the new standards. *Citizens Against Irresponsible Growth v. Metro*, 39 Or LUBA 539 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local ordinance that institutes a process to remove property from a Goal 5 historic resources inventory but fails to include a method to determine whether the historic designation was “imposed” on the property, within the meaning of ORS 197.772(3), is inconsistent with that statute. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government may not apply only local code provisions to an application to remove property from a historic resources inventory, where the local code provisions are inconsistent with statutory provisions permitting removal of certain properties from a historic resources inventory. *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** After a city has approved a permit application, the city may not apply code provisions to require that development occur within a particular time frame when the permit was initially approved without the application of those code provisions, and the city’s past practice did not include the imposition of the development deadlines contained in those code provisions. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 193 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In reviewing land use decisions, LUBA’s scope of review is not limited to arguments regarding the local government’s application of land use regulations or other land use standards; LUBA may also consider arguments that the decision violates applicable non-land use standards. *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the Court of Appeals directs LUBA to consider on remand an assignment of error directed at the local government’s application of a policy that is not a land use regulation or otherwise a land use standard, LUBA will consider the policy to be “applicable law” for



purposes of LUBA's scope of review under ORS 197.835(9)(a)(D). *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city does not err by failing to apply comprehensive plan annexation policies in reviewing an application for annexation, where those policies were adopted after the application for annexation was submitted and became complete. *Hubenthal v. City of Woodburn*, 39 Or LUBA 20 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An access road to a winery is an accessory use to the winery. When the zoning for the location of the proposed access road does not allow wineries, the access road cannot be established as an accessory use on that part of the property. *Roth v. Jackson County*, 38 Or LUBA 894 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** As long as the expansion of the public use airport continues to serve the same class of airplanes pursuant to OAR 660-012-0065, the expansion is considered to be consistent with Goals 3, 4, 11, and 14, and an exception to those goals is not required. *Lentz v. Lane County*, 38 Or LUBA 669 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the city's code requires that connections to the city sewer be made within 90 days after receiving official notice to do so, a local government's decision to extend the deadline for compliance does not provide a basis for reversal or remand in the absence of a showing that the required official notice was given, or that the extension of the compliance deadline is otherwise prohibited. *Reynolds v. City of Sweet Home*, 38 Or LUBA 507 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** DEQ administrative rules do not require that restroom facilities be connected to a public sewer system. In the absence of such a requirement, the use of portable toilets rather than plumbed restrooms does not require the revocation of a conditional use permit for an RV park. *Reynolds v. City of Sweet Home*, 38 Or LUBA 507 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city's interpretation of its code to allow for modifications of conditions of approval is not "clearly wrong" where the code allows for modification of a conditional use and the city interprets the modification provision to allow for amendments to conditions where the use continues to meet the purpose of the conditional use provisions, or the permit holder has established a valid basis for extending the time period for compliance. *Reynolds v. City of Sweet Home*, 38 Or LUBA 507 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioner fails to establish error in approving a subdivision without environmental review required for development in an environmental zone, where the applicant proposes no development in an environmental zone and the only impact on an off-site

environmental zone is the release of storm water at predevelopment rates. *Bauer v. City of Portland*, 38 Or LUBA 432 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Failure to list applicable criteria in a pre-hearing notice in violation of ORS 197.763(3)(a) allows petitioner to raise issues at LUBA relating to the omitted criteria without having raised those issues before the local government. However, failure to list applicable criteria does not, in itself, provide a basis for reversal or remand. *Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A neighborhood association’s failure to provide specific notice to a permit applicant that the neighborhood association was going to consider appealing the applicant’s permit approval at its regular meeting does not violate ORS 192.640(1) of the Public Meeting Law, where the permit approval was issued on the same day as the regular meeting, and the statute specifically authorizes consideration of principal subjects that are not included in the notice of public meeting. *St. Johns Neighborhood Assoc. v. City of Portland*, 38 Or LUBA 275 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A land use decision maker commits no error by failing to require that an applicant for approval of a transmission tower justify the proposed height of the tower, where the relevant statutes impose different approval criteria depending on the height of the tower but do not require that the proposed tower height be justified. *Dierking v. Clackamas County*, 38 Or LUBA 106 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a county approves aggregate mining in an airport overlay zone under a standard that allows water impoundments that do not significantly increase bird strike hazards, but the county does not address another local standard that appears to flatly prohibit such impoundments, LUBA will remand the decision to the county to resolve the apparent conflict between the two standards. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a zoning ordinance standard requires consideration of residential appearance and function of an “area” in approving a bed and breakfast facility, and a hearings officer’s selection of a two-block area for analysis is based on assumed walking distance to cars parked off-site and is no less plausible than petitioner’s rationale for selecting a larger area for analysis, the hearings officer does not misconstrue the applicable law. *Hatfield v. City of Portland*, 37 Or LUBA 664 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A petitioner’s arguments that a zoning ordinance amendment violates a plan policy discouraging uses that are not water dependent provides no basis for remand, where the challenged decision raises the maximum building height and does not approve any particular use of the property. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** An argument that a city erred by failing to adopt findings addressing a plan policy that is 22 single-spaced pages long and broken down into many subparts is inadequately developed, where the city adopted findings addressing two parts of the policy and petitioner makes no attempt to explain what other parts of the policy petitioner believes are applicable. *Marine Street LLC v. City of Astoria*, 37 Or LUBA 587 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA finds that an administrative rule provision is valid, and the appealed decision approves an application solely on the basis that the administrative rule is invalid, the appealed decision must be reversed. *Bruggere v. Clackamas County*, 37 Or LUBA 571 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the city council’s review of a planning commission decision is limited to whether the lower decision is supported by substantial evidence, and petitioner argues that the city council exceeded its review authority by reweighing the evidence, LUBA will deny the assignment of error where it concludes that the city council understood and applied the substantial evidence standard correctly. *Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472 (2000).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Imposition of an ineffective condition as part of a comprehensive plan map amendment may result in remand where the condition is necessary to ensure compliance with a relevant approval criterion. However, such an ineffective condition does not provide a basis for reversal or remand where it is not shown that the condition is necessary to ensure compliance with plan map amendment approval criteria. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a decision maker discloses *ex parte* contacts at the beginning of the local proceedings, petitioners must request clarification of the *ex parte* contacts or otherwise object to the adequacy of the disclosure during the local proceedings. Because petitioner failed to object below, petitioner’s assignment of error does not provide a basis for reversal or remand. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the statute authorizing counties to permit home occupations is amended to remove the limitation that the home occupation be conducted entirely within a dwelling or accessory building, but the county’s home occupation ordinance still reflects the former statute, the county is not required to apply its home occupation ordinance consistently with the stricter requirements of the former statute and case law interpreting that statute. *Greer v. Josephine County*, 37 Or LUBA 261 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not conclude that the statutory definition of high-value soils excludes soil complexes in which listed soils form the predominant part, where petitioner fails to establish

a sufficient basis to form that conclusion. *Tri-River Investment Co. v. Clatsop County*, 37 Or LUBA 195 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Metro may adopt a functional plan with site-specific requirements without necessarily exceeding its authority under ORS 268.030(3) to “provide for those aspects of land use planning having metropolitan significance.” *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA rejects as a matter of law a county’s erroneous interpretation of its comprehensive plan as imposing a 2.3-acre minimum residential density, procedural errors the county may have committed in considering evidence outside the record in reaching that erroneous interpretation provide no additional basis for remand. *Columbia Hills Development Co. v. Columbia County*, 36 Or LUBA 691 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government is not estopped from following the appeal procedure that is required by its code where it is unclear whether county staff (1) made any false statements to the applicant concerning appeal procedures, (2) were aware that any of their representations were incorrect, or (3) intended that the applicant take any action based on such representations; and the applicant does not identify how she was induced to act differently by the county’s representations. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reverse a land use decision only where the decision is prohibited as a matter of law. *Wood v. Crook County*, 36 Or LUBA 143 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government’s modification of standards applicable to a planned unit development rests on independent alternative grounds, petitioner’s demonstration of error in one alternative ground provides no basis to reverse or remand the challenged decision where petitioner fails to challenge the other alternative ground. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a hearings officer’s findings are inadequate to explain why a proposed use that qualifies as a permitted use as a “household” does not also fall within the definition of a “nursing home,” which is only allowed as a conditional use, a remand would normally be required. However, where the facts are not disputed, and LUBA is presented with a straightforward question of law, it may consider whether the proposed use falls within the definition of “nursing home.” *Neels v. Clackamas County*, 36 Or LUBA 54 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a county code applies the same “stability” standard that is required by ORS 215.284(1)(d) and (2)(d) for nonfarm dwellings to approval of recreational vehicle parks, it

is not bound by case law that interprets and applies the statutory standard, where LUBA did not determine in its decision remanding the decision to the county that it must interpret the code standard in the same manner that the statute has been interpreted. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county code “stability” standard that does not implement the statutory nonfarm use “stability” standard is not subject to case law interpreting the statutory “stability” standard, but such a code “stability” standard necessarily connotes a temporal period and a scope of causative impact for analysis. However, a county’s interpretation of the local “stability” standard as focusing on short-term effects and direct impacts rather than long-term and cumulative impacts is not clearly wrong and therefore must be affirmed by LUBA. *Ray v. Douglas County*, 36 Or LUBA 45 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a plan policy provides that the purpose of a rural industrial zone is to allow industrial uses in close proximity to the resources upon which they rely, but it is not clear how that policy applies and the list of allowed uses in the rural industrial zone does not appear to be consistent with the policy, LUBA will remand the decision so that the local government can interpret the plan policy in the first instance. *James v. Josephine County*, 35 Or LUBA 493 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In determining whether to reverse or remand a land use decision, the question is whether it is the land use decision or the land use proposal that is defective. *Angius v. Washington County*, 35 Or LUBA 462 (1999).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A hearings officer’s determination that an EFU-zoned property is not necessary to provide a proposed public service is not inconsistent with a drainage master plan and does not constitute an impermissible collateral attack on the drainage master plan, where the drainage master plan was not adopted in accordance with post-acknowledgment procedures and only identifies the site as a “preferred” site. *Clackamas Co. Svc. Dist. No. 1 v. Clackamas County*, 35 Or LUBA 374 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city does not err in regulating conditional uses differently from uses permitted outright even if a particular conditional use is similar to a use permitted outright. *Williamson v. City of Arlington*, 35 Or LUBA 90 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although Oregon Laws 1997, chapter 859 (HB 2605) repeals two sections of the legislation that directed DLCD to adopt the Airport Planning Rule (APR), the 1997 legislation does not completely supersede the APR or DLCD’s authority to adopt rules regarding airport planning. *Northwest Aggregates Co. v. City of Scappoose*, 35 Or LUBA 30 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city cannot find it is feasible to comply with all approval criteria based on a site plan for only four of the total 15 lots and defer submission of a complete site plan, and the record does not clearly support a determination of compliance with the approval criteria where the complete site plan is not included in the record. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government may approve a partition and defer determination of an applicable approval criterion, provided the subsequent approval process provides the same notice and opportunity for public input as the original proceeding and the approval criteria are not so dependent on each other that they must be applied together. *Sunningdale-Case Heights Assoc. v. Washington Co.*, 34 Or LUBA 549 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** While petitioners may raise issues concerning compliance with approval criteria that are not identified in the local notice of hearing, petitioners must supply some explanation why they believe a “purpose statement” should be viewed as an approval criterion; petitioners may not simply assume that it is a criterion. *Rouse v. Tillamook County*, 34 Or LUBA 530 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Because a county’s interpretation of its code to allow deferral of compliance with an approval criterion to a later stage with no opportunity for public hearing is contrary to ORS 197.763(2) and 215.416, LUBA owes that interpretation no deference under ORS 197.829(1). *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government misapplies the applicable law by prohibiting seasonal farmworker housing that is permitted by statute, LUBA will remand and not reverse where the statute permits the local government to condition and even deny an application for seasonal farmworker housing, and thus the result is not prohibited as a matter of law. *Shadrin v. Clackamas County*, 34 Or LUBA 154 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), does not establish procedural requirements independent of those required by state statute or local ordinance. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 197.835(10)(a)(B), which allows LUBA to reverse a local government’s decision and order development approval when denial of the application was for the purpose of avoiding the 120-day limit of ORS 215.428, does not apply to good faith denials on the merits of the application, whether timely or untimely. *Miller v. Multnomah County*, 33 Or LUBA 644 (1997).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In adopting land use regulations, including emergency and temporary land use

regulations, a city is bound by the substantive and procedural requirements established by ORS 197.610 and Statewide Planning Goals 1 and 2. These statutory and Goal requirements must be followed notwithstanding contrary city charter provisions. *Western PCS, Inc. v. City of Lake Oswego*, 33 Or LUBA 369 (1997).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city’s error in converting an appeal of a quasi-judicial decision into a *de novo* legislative proceeding is substantive rather than procedural, and its decision is prohibited as a matter of law. *Anderson v. City of Shady Cove*, 33 Or LUBA 173 (1997).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The word “shall,” used in a regulation, expresses what is mandatory. A local government interpretation to the contrary is indefensible and will not be affirmed by LUBA. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Mandatory code requirements cannot be subverted by a local government interpretation. *DLCD v. Tillamook County*, 33 Or LUBA 163 (1997).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a condition of approval requires that the developer shall provide a “turnaround” at the end of a platted street, and the existence of the turnaround will bring the street within the definition of a cul-de-sac under local code, the city’s tentative plat approval must be remanded where it does not satisfy the applicable local criteria for a cul-de-sac. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the city’s comprehensive plan expressly requires that new subdivisions shall have sidewalks, the city may not use the variance procedures of its subdivision ordinance in order to grant an exception to the comprehensive plan sidewalk requirement. *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the county’s interpretation of a local ordinance allows dog kennels that were in existence in 1986 to be established as permitted uses without a showing of compliance with the ORS 215.296 farm impact standards, the county’s interpretation violates ORS 215.283(2). *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the county’s interpretation of a local ordinance regarding nonconforming uses allows an abandoned nonconforming dog kennel use to be reinstated, that interpretation violates OAR 660-33-120, which prohibits new kennels on high-value farmland. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will defer to the county governing body’s interpretation of a plan policy

as being applicable when development approval is sought rather than when the plan map is amended. *Helvetia Community Assoc. v. Washington County*, 31 Or LUBA 446 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioner’s conjecture regarding one hypothetical development scenario does not provide a basis for a determination that the city’s decision does not conform to the applicable criteria. *Fechtig v. City of Albany*, 31 Or LUBA 410 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Statements made by individual decision makers during local government hearings that express erroneous interpretations of law or legally improper reasons for adopting a land use decision provide no basis for reversal or remand unless such statements are adopted in the final written decision or findings supporting the written decision. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Local governing body may not determine an appeal to be moot and reinstate an earlier, rescinded decision, based on petitioner’s collateral challenge to the authority of the planning director to rescind that earlier decision, when the rescission decision was not timely appealed. *Petterson v. Klamath County*, 31 Or LUBA 402 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Application of a local zoning ordinance to allow a nonconforming use that has been interrupted or abandoned to be resumed, violates ORS 215.130(7) and must be reversed. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The city’s failure to address aspirational criteria stated in the city’s comprehensive plan does not provide a basis for reversal or remand. *Stewart v. City of Brookings*, 31 LUBA 325 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioner does not establish that alleged inadequacies in the findings relate to any applicable approval criteria, petitioner has provided no basis for reversal or remand. *Stewart v. City of Brookings*, 31 LUBA 325 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If a county recognizes a citizens planning advisory committee (CPAC) chosen in violation of election procedures previously adopted by resolution and incorporated by reference in its comprehensive plan, it ignores a substantive violation of its plan and land use regulations, and the CPAC is a nullity. *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a comprehensive plan policy is couched in mandatory terms, but does not state an approval standard, the county’s failure to address that policy in its decision is not error. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).



**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a hearings officer’s interpretation that the county’s street frontage requirement mandates street frontages be on a public road or street is contrary to the plain language of the county’s zoning ordinance, a denial of a partition based solely on that interpretation will be reversed. *Miller v. Clackamas County*, 31 Or LUBA 104 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If the local government’s interpretation of its own code regarding the scope of a proposed partition contravenes the express language of the code, LUBA will not defer to that interpretation. *Tognoli v. Crook County*, 30 Or LUBA 272 (1996).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the inapplicability of a local code provision is clear on its face, or petitioner’s challenge to its applicability is so untenable as to obviate the need for the local government’s authoritative interpretation, a remand for such purpose is unnecessary. *Cummings v. Tillamook County*, 30 Or LUBA 17 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although LUBA may not itself order a local government to refund a fee charged for a local appeal, local fee payment issues are part of the land use appeals structure, capable of violating applicable legal standards and providing a basis for remand. *Gensman v. City of Tigard*, 29 Or LUBA 505 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners fail to identify any applicable legal standard allegedly violated by the county’s decision, petitioners have supplied no basis for reversal or remand of the challenged decision. *Collier v. Marion County*, 29 Or LUBA 462 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If a code provision simply provides the decision maker “may require” an applicant to submit a traffic capacity analysis, but petitioners identify no legal standard arguably requiring such an analysis in the instant case or establishing standards for local government decisions on whether to require such an analysis, the local government’s failure to require such an analysis does not provide a basis for reversal or remand. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although LUBA owes no deference to a hearings officer’s interpretation of a local enactment, LUBA may remand a challenged decision in cases where the interpretation at issue is not explained in the findings or differs from an earlier interpretation, in order to give the hearings officer an opportunity to interpret the local enactment in the first instance. *Moore v. Clackamas County*, 29 Or LUBA 372 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 197.829 governs this Board’s scope of review in reviewing local

government governing bodies' interpretations of local enactments. ORS 197.829(4) has nothing to do with whether a particular statutory provision applies directly as an approval standard for a local government land use decision. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 238 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** When reviewing a local governing body's decision, LUBA cannot interpret local enactments in the first instance. Where petitioners challenge a local governing body's decision on the basis of failure to comply with certain arguably applicable comprehensive plan and code provisions, and the challenged decision contains neither an interpretation of the applicability of the plan and code provisions, nor a determination of whether they are satisfied, the challenged decision must be remanded. *McCrary v. City of Talent*, 29 Or LUBA 110 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government does not identify specific provisions in its comprehensive plan which it contends provide the basis for challenged land use regulation amendments, under ORS 197.835(5)(b), LUBA is required to reverse or remand the land use regulation amendments if they do not comply with applicable provisions of the Statewide Planning Goals. *Churchill v. Tillamook County*, 29 Or LUBA 68 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where respondents do not identify specific provisions in the applicable comprehensive plan, which they contend provide the basis for challenged zone changes, under ORS 197.825(5)(b) LUBA is required to reverse or remand the zone changes if they do not comply with applicable provisions of the Statewide Planning Goals or their implementing rules. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioner alleges the local government's notice of public hearing violates local code requirements, but petitioner fails to provide LUBA with the local code requirements allegedly violated, LUBA will deny the assignment of error. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** There can be no possible rational dispute that an adjustment changing the number of parking spaces required for a proposed development does not violate a code prohibition against adjustments that are "exception[s] to the procedural steps of a procedure or to change assigned procedures." *Champion v. City of Portland*, 28 Or LUBA 618 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In reviewing a decision adopted by the local governing body, LUBA must review the governing body's interpretation of local code provisions and may not interpret the local code in the first instance, unless there is "no possible rational dispute" regarding the correct interpretation of the local code. *Foster v. Coos County*, 28 Or LUBA 609 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA is not required to defer to a hearing's officer's interpretation of the local

code under ORS 197.829 or *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992). Rather, LUBA's review of a hearing officer's interpretation is to determine whether the interpretation is reasonable and correct. *Ellison v. Clackamas County*, 28 Or LUBA 521 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the record demonstrates that two city council members had numerous *ex parte* contacts with the applicant and failed to disclose those contacts and provide an opportunity for rebuttal, as required by ORS 227.180(3), remand is required. *Smith v. City of Phoenix*, 28 Or LUBA 517 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The “public need” standard formerly imposed on quasi-judicial zone changes under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973), does not apply to comprehensive plan amendments, unless the applicable comprehensive plan or land use regulations impose such a “public need” standard. *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477 (1995).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the challenged decision is adopted by the governing body, LUBA may not interpret the applicability of arguably applicable comprehensive plan policies. Rather, the governing body must interpret the applicability of such plan policies in the first instance. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the local government determined comprehensive plan objectives are mandatory approval standards in a recently appealed local decision, it may not later determine that plan objectives are mere guidelines and not mandatory approval standards in a different decision appealed to LUBA, in the absence of some explanation for the disparity. *Welch v. City of Portland*, 28 Or LUBA 439 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the local code simply provides the planning director may reject an application concerning a property where a violation of local or state law is found to exist, but does not require that the planning director do so, petitioner's allegations concerning improper or fraudulent past actions by the local government concerning the property fail to provide a basis for reversal or remand. *Scholes v. Jackson County*, 28 Or LUBA 407 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Read together, ORS 215.263(7) and ORS 215.284(2)(c) prohibit the further division of an EFU-zoned parcel created before January 1, 1993, on which a nonfarm dwelling has already been approved. Therefore, a county decision approving division of such a parcel is erroneous as a matter of law and must be reversed. *Harrell v. Baker County*, 28 Or LUBA 260 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a challenged decision was not adopted by the governing body of the local

government, LUBA owes no deference to the interpretations of local enactments expressed in that decision. *Pickrell v. City of Portland*, 28 Or LUBA 103 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** 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).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government does not exceed its authority under a code section authorizing it to control “the nature and scale of development” by prohibiting development of two lots, as configured in a proposed seven-lot subdivision. *Davis v. City of Bandon*, 28 Or LUBA 38 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a challenged decision determines certain comprehensive plan policies are mandatory approval standards applicable to the proposed action, but LUBA cannot determine from the decision what the local government believes those policies require, the decision must be remanded for the local government to interpret the policies. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where comprehensive plan and zoning map amendments simply change the designation and zone of a county park to ones that allow parks as a conditional use, the amendments are not inherently inconsistent with an existing dedication of the subject property for public use as a park. Therefore, that the amendments may not comply with statutory requirements for vacation of such a dedication provides no basis for reversal or remand. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a challenged decision adopts a new plan policy stating the city will allow a particular commercial-designated area to be developed “to serve both neighborhood commercial needs and as a community commercial center,” but declines to change a plan policy that commercial development of the area should be at an intensity consistent with General Office or Neighborhood Commercial zoning, LUBA will remand the decision for the city to interpret the relevant plan and code provisions in the first instance. *Graville Properties, Ltd. v. City of Eugene*, 27 Or LUBA 583 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** When LUBA reviews land use decisions for compliance with relevant approval standards, it does not matter whether the challenged decision is consistent with prior decisions, so long as the decision correctly interprets and applies the applicable standard. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a challenged decision incorrectly concludes arguments based on an arguably applicable comprehensive plan provision are precluded by the acknowledgment of an earlier decision, and does not interpret that plan provision, LUBA must remand the decision for the local government to interpret the plan provision in the first instance. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA lacks authority to interpret local comprehensive plan provisions in the first instance. Where certain comprehensive plan policies are arguably applicable to a development application and the challenged decision approving or denying that application does not include an interpretation of those policies, LUBA must remand the decision so the local government can interpret and apply its plan policies. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the applicability of local comprehensive plan or land use regulation provisions is ambiguous, the local government is entitled to considerable deference in determining their applicability. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government interpretation of its comprehensive plan and zoning code, that approval of a school at a particular site requires compliance with a plan policy concerning schools, is not so wrong as to be reversible under ORS 197.829, notwithstanding that the relevant zoning district lists schools as a permitted use at the subject site. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners contend a land use regulation amendment fails to comply with the statewide planning goals and implementing rules, and respondents fail to identify specific provisions in the local comprehensive plan that provide the basis for the challenged amendment, LUBA will assume no such provisions exist, and under ORS 197.835(5)(b) LUBA has authority to reverse or remand the land use regulation amendment if it does not comply with the statewide planning goals or implementing rules. *1000 Friends of Oregon v. Marion County*, 27 Or LUBA 303 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Statements by individual decision makers made early in the local proceedings, that granting adjustments to code requirements would have a negative impact on the neighborhood, do not show the decision makers ignored applicable criteria in later adopting a final written decision granting the adjustment. It is the final written decision that is subject to LUBA review. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners' allegations that an applicant cannot simultaneously seek the benefit of two separate local code provisions allowing deviations from code height and setback

requirements provide no basis for reversal or remand, where nothing in the code precludes seeking approval under both provisions. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city has a population of less than 2,500 people, the city’s comprehensive plan and land use regulations do not implement the “needed housing” provisions of either ORS 197.307(6) or Goal 10 and, therefore, the city’s interpretation of its plan and land use regulations is not subject to reversal or remand on the basis of inconsistency with statutory and goal standards relating to “needed housing.” *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government denies an application based on noncompliance with certain comprehensive plan housing policies, petitioners’ argument that other plan housing policies should also be applied provides no basis for reversal or remand, where petitioners fail to establish how the local government’s failure to apply the other policies undermines its decision to deny the application based on the policies it did apply. *Shelter Resources, Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners contend the challenged decision does not demonstrate compliance with an applicable comprehensive plan policy, but fail to explain how the findings adopted by the local government addressing that policy are inadequate, LUBA will reject their contention. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If petitioners contend the challenged decision fails to demonstrate compliance with certain local comprehensive plan and code provisions that are not addressed in the challenged decision, and those provisions are capable of being interpreted as approval standards under the permissive scope of review standard of ORS 197.829, LUBA must remand the decision to the local government to interpret and apply the plan and code provisions in the first instance. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** It is questionable whether a local government could ever be equitably estopped from requiring compliance with applicable comprehensive plan and land use regulation requirements. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Even if misstatement of material fact can provide a basis for equitable estoppel against a local government requiring compliance with applicable comprehensive plan and land use regulation requirements, an erroneous legal conclusion cannot provide a basis for such an equitable estoppel. *DLCD v. Benton County*, 27 Or LUBA 49 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** After *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), it is not clear

whether general rules of statutory construction are relevant in LUBA review of local government interpretations of their own comprehensive plans and land use regulations. Even if they are, general rules of statutory construction are not absolute. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will defer to local government decisions giving different interpretations to the same language appearing in different sections of its code, where there are related code provisions that provide some justification for the different construction of such identical code language. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government operates within its interpretive discretion under ORS 197.829 when it interprets a code requirement that a proposed conditional use “fully accords with all applicable standards of the County and State Laws or regulations” to be satisfied, where the applicant demonstrates during the local proceedings that there are “no unusual circumstances or conditions which would prevent [subsequent] issuance of required regulatory approvals.” *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA is not required to remand a decision for a local government interpretation of its code, where the interpretive issue raised by petitioner is so untenable that LUBA can reject it without an authoritative determination by the local decision maker. *Towry v. City of Lincoln City*, 26 Or LUBA 554 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government interpretation of its sign ordinance that regardless of whether a sign is an awning, fascia or other sign type, it is subject to certain measurement requirements, is not contrary to the express words, policy or context of the ordinance, and LUBA will defer to it. *Heath Northwest, Inc. v. City of Portland*, 26 Or LUBA 535 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Under ORS 197.829, it is unclear whether LUBA is to defer to a local government interpretation of a prior local government decision or whether LUBA is required to determine whether the local government interpretation is reasonable and correct. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Allegations that the local decision maker failed to disclose *ex parte* contacts, as required by ORS 215.422(3), provide no basis for reversal or remand where there is no admission by the decision maker or other evidence, either in the record or offered through a motion for evidentiary hearing pursuant to ORS 197.830(13)(b), that an *ex parte* contact occurred. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Allegations that a local code provision consolidating commonly owned parcels

conflicts with ORS 92.017, which provides that a lawfully created lot or parcel shall remain a discrete lot or parcel, are rendered moot and provide no basis for reversal or remand, where the parcels in question were combined in an approved and recorded plat. *Van Veldhuizen v. Marion County*, 26 Or LUBA 468 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA may not interpret a local government’s enactments, in the first instance, to determine what constitutes the local approval standards for, and how those standards apply to, a challenged decision. Rather, LUBA is required to review the local government’s interpretation of its own enactments. *Rea v. City of Seaside*, 26 Or LUBA 444 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the local code makes filing a transcript of the initial local hearing an essential part of perfecting a local appeal, and contains no provision providing procedures or standards for granting an extension of time to file such transcript, LUBA will affirm a local government’s decision to dismiss a local appeal because the transcript was not filed within the required time. *Bjerk v. Deschutes County*, 26 Or LUBA 439 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A petitioner’s assignment of error will be rejected where it simply alleges code violations, without supplying any supporting argument, or alleges inconsistent findings and lack of substantial evidence, without identifying the challenged findings. *Draganowski v. Curry County*, 26 Or LUBA 420 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners contend the challenged decision does not demonstrate compliance with an applicable approval standard, and the decision does not interpret the standard sufficiently for LUBA to review that interpretation and consider petitioners’ arguments, LUBA will remand the decision to the local government. *Bottum v. Union County*, 26 Or LUBA 407 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Failure to determine the cumulative impacts of a proposal provides no basis for reversal or remand of a decision unless petitioner establishes that some legal standard requires a determination of cumulative impacts. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In the absence of a legal requirement that a local government determine an applicant’s intent with regard to a development proposal, a local government has no obligation to determine such intent or to examine an applicant’s prior history of compliance with land use or other regulations. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioner fails to identify applicable legal standards regarding wetlands or explain why the proposal violates such applicable legal standards, petitioner supplies no basis



for reversal or remand of the challenged decision. *City of Barlow v. Clackamas County*, 26 Or LUBA 375 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** 1993 Oregon Laws, chapter 792, section 43, codifies *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), with the exception that LUBA is not required to defer to a local government’s interpretation of its regulations if that interpretation is contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. *Testa v. Clackamas County*, 26 Or LUBA 357 (1994).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Under Oregon Laws 1993, chapter 792, section 43(4), LUBA is not required to affirm a local government’s interpretation of its own code provision if that interpretation is “contrary to a state statute, land use goal or [administrative] rule that the [code provision] implements.” *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A county may not amend its transportation plan in ways which conflict with the Oregon Bicycle Bill requirements set out at ORS 366.514(1), even though those statutory requirements would apply in any event. *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reject an assignment of error alleging a local government transportation plan conflicts with Oregon Bicycle Bill requirements concerning provision of bicycle trails, where petitioner fails to show any of the 27 roadway designations included in the transportation plan are incapable of accommodating some form of bicycle trail where ORS 366.514(1) requires that bicycle trails be provided. *Bicycle Transportation Alliance v. Washington Co.*, 26 Or LUBA 265 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If a local government does not provide notice to DLCD of a post-acknowledgment comprehensive plan or land use regulation amendment, as required by ORS 197.610 and 197.615, it improperly construes substantive provisions of applicable law and, under ORS 197.835(7)(a)(D), the challenged post-acknowledgment amendment decision must be remanded. *Oregon City Leasing, Inc. v. Columbia County*, 26 Or LUBA 203 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA cannot interpret a local government’s ordinances in the first instance, but rather must review the local government’s interpretation of its ordinances. Consequently, the failure of the local government to make the initial interpretation of local ordinance provisions is a basis for remand. *Friends of Bryant Woods Park v. Lake Oswego*, 26 Or LUBA 185 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners contend the local government may not rely on particular plan provisions in denying a plan map amendment, but the local government did not rely upon those

provisions in denying the requested plan map amendment, petitioners' challenge provides no basis for reversal or remand. *Ericsson v. Washington County*, 26 Or LUBA 169 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners contend certain information required by the local code “prior to the approval of subdivisions” must be in the record at the time of tentative plat approval, and the challenged tentative plat approval decision does not interpret the local code with regard to *at what stage* of the subdivision approval process the required information must be submitted to the county, LUBA must remand the decision for the local government to interpret its code in the first instance. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a question of proper interpretation of a comprehensive plan provision is raised during local proceedings, the interpretation required for LUBA review of the decision on appeal must be provided in the decision. The local government may not supply the interpretation in its brief on appeal. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Under ORS 197.835(7)(a)(D) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), LUBA must defer to a local government’s interpretation of “applicable law” adopted by the local government, regardless of whether that applicable law is a zoning ordinance or conditions of approval imposed by a prior quasi-judicial order. *Perry v. Yamhill County*, 26 Or LUBA 73 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local decision erroneously concludes a previous local decision did not grant conditional use approval for a nonfarm dwelling where (1) the previous decision states it approves a nonfarm dwelling, and (2) the local government treated the previous application as requesting nonfarm dwelling approval. *Rodriguez v. Marion County*, 26 Or LUBA 50 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government decision determines the effect of a previous decision, LUBA may not review the legal sufficiency of the previous decision. *Rodriguez v. Marion County*, 26 Or LUBA 50 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a member of a decision making body fails to disclose an *ex parte* contact until after the evidentiary record is closed, ORS 227.180(3) is violated, and LUBA must remand the decision. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Use of comprehensive plan forestland division standards as an aide in determining whether a property includes sufficient forestland to be designated in the comprehensive plan for forest uses under Goal 4 is not an improper use of the forestland division standards. *Westfair Associates Partnership v. Lane County*, 25 Or LUBA 729 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioner argues the local government erred by approving a conditional use permit without the consent of all owners of the subject property, but identifies no plan, code or other legal standard requiring that such consent be obtained, LUBA cannot grant relief. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The proper interpretation of state statutes is a question of law for LUBA to decide, and is not subject to the limitations that *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) places on LUBA’s review of interpretations of local enactments. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a city decision maker receives an *ex parte* contact, failure to follow the procedures required by ORS 227.180(3) constitutes a basis for remand by LUBA, regardless of whether the party seeking remand objected during the proceedings below. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Findings supporting approval of a PUD that determine there are solutions available to various landslide, drainage and related problems affecting the subject property, and that those solutions are possible, likely and reasonably certain to succeed, are adequate to establish that the local government did not improperly defer compliance with relevant PUD standards. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 25 Or LUBA 601 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the challenged decision includes contradictory findings regarding compliance with an applicable local code approval standard, LUBA cannot interpret the standard itself, but rather must remand the decision to the local government to interpret the standard in the first instance. *Larson v. Wallowa County*, 25 Or LUBA 537 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** That an existing garage violates lot line setback requirements provides no basis for denial of a requested subdivision of the adjoining property to be served by a private roadway running along the lot line in front of the existing garage. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Arguments that a proposed subdivision roadway alignment violates a Fire Bureau policy provides no basis for reversal or remand of the subdivision approval decision, where the Fire Bureau policy is not a mandatory subdivision approval standard. *Day v. City of Portland*, 25 Or LUBA 468 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The fact that a challenged local government decision does not include an interpretation of a particular local code provision, alleged to be applicable by petitioners, does not

provide a basis for reversal or remand if the code provision in question is *not* ambiguous or susceptible to different sustainable interpretations. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the local code defines “traveler’s accommodations” to include an establishment rented to travelers for a fee, on a daily or weekly basis, and the local government interprets that code definition as not excluding cabins that are occupied by owners for less than 36 days per year, such an interpretation is not clearly contrary to the local code, and LUBA will defer to it. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA is required to defer to a local government’s interpretation of its own ordinances, so long as the proffered interpretation is not clearly wrong. *Oregon Raptor Center v. City of Salem*, 25 Or LUBA 401 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Petitioners’ contention that the local government erred in finding the statewide planning goals do not apply to the challenged decision provides no basis for reversal or remand where the challenged decision also adopts alternative findings addressing the goals, and petitioners do not challenge the adequacy of those findings. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 283 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A local government’s failure to establish compliance with aspirational plan provisions which “encourage” and provide guidance about what a local government should do, is not a basis for LUBA to reverse or remand a challenged decision. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** ORS 197.279(2) establishes the procedures required for adoption of a wetland conservation plan. A local government’s failure to adopt a wetland conservation plan, provides no basis for reversal or remand of a challenged decision, because local governments are not required to adopt such plans. *Clarke v. City of Hillsboro*, 25 Or LUBA 195 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Although ORS 92.010 to 92.190 do not specifically envision a subdivision approval process that combines approval of a subdivision and a lot line adjustment, neither do those statutes prohibit such a process. Absent such a prohibition, a local government commits no error in following such a combined process. *Miller v. Washington County*, 25 Or LUBA 169 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA is required to defer to a local government’s interpretation of its own ordinances, unless that interpretation is contrary to the express words, policy or context of the local enactment. LUBA may not interpret a local government’s ordinances in the first instance, but

rather must review the local government's interpretation of its ordinances. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a relevant ordinance provision is capable of more than one meaning, the challenged decision does not expressly interpret the ordinance provision, and LUBA cannot infer the local government's interpretation from the decision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *O'Mara v. Douglas County*, 25 Or LUBA 25 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government determines that a recreational cattle roping use was lawfully established on the date restrictive zoning was applied, because it constituted a farm use allowed outright by the subject zone, LUBA will defer to that interpretation so long as it is not clearly contrary to the express words, policy or context of the ordinance. *Smith v. Lane County*, 25 Or LUBA 1 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the term "vacant" in a local government's code is undefined, but the code states that undefined terms have their "normal dictionary meaning," the local government may adopt one of the available ordinary dictionary definitions of the term "vacant," and LUBA will defer to that definition of the term so long as it is not clearly contrary to the context of the code provision in which the term "vacant" is found. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will reject a petitioner's contention that a comprehensive plan map amendment does not comply with a plan policy requiring preservation of water quality, where the petitioner fails to challenge findings addressing that plan policy and argues only that a specific development proposal, which is not the subject of the challenged decision, does not comply with that plan policy. *Trumper v. Washington County*, 24 Or LUBA 552 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA may not interpret a local government's ordinances in the first instance, but rather must review a local government's interpretation of its ordinances, and the local government interpretation must be adequate for LUBA's review. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If a local government has interpreted the local code in the challenged decision, LUBA must defer to that interpretation unless it is clearly contrary to the enacted language or the apparent purpose or policy of the provision. *Leabo v. Marion County*, 24 Or LUBA 495 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA lacks authority to invalidate LCDC administrative rules. *Reeves v. Washington County*, 24 Or LUBA 483 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where LUBA must determine whether an ambiguous code provision (*i.e.*, one that is capable of more than one sustainable interpretation) is applicable to a challenged decision, and the challenged decision does not contain a reviewable interpretation of that provision, LUBA must remand the decision for the local government to interpret the provision in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners contend a local government erred in failing to apply a code provision to the challenged decision, and the decision contains no interpretation of that code provision, but the code language unambiguously establishes that the provision in question is not applicable to the challenged decision, LUBA is not required to remand the decision so the local government can interpret its code in the first instance. *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In reviewing a local government’s interpretation of its own ordinance, the question LUBA must resolve is not whether the local government interpretation is “right,” but rather whether it is “clearly wrong.” *Terra v. City of Newport*, 24 Or LUBA 438 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** If a challenged permit decision misconstrues an acknowledged land use regulation, that provides a basis for reversing or remanding the decision under ORS 197.835(6) and (7)(a)(D). It does not mean the challenged decision is a land use regulation amendment. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the question for LUBA to resolve is not whether a local government interpretation of its own code is “right,” but rather whether it is “clearly wrong.” *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA may not interpret a local code in the first instance, but rather must review a local government’s interpretation of its code. However, a local government interpretation of its code must be adequate for LUBA’s review and may not consist of a mere conclusory statement. *DLCD v. Crook County*, 24 Or LUBA 393 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In rendering a decision on a permit, a city is required to hold at least one public hearing or provide notice of the decision and an opportunity for an appeal. A city’s failure to do so requires that the decision be remanded. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** In the absence of a statutory policy pertaining to forestlands that, like the

statutory policy concerning EFU land, requires the preservation of forestland in large blocks, LUBA cannot require that a local government interpret and apply its nonforest use “generally unsuitable” land approval standard in the same manner as the similarly worded statutory standard pertaining to nonfarm uses on EFU land. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local code requires a proposed nonforest dwelling site to be on land generally unsuitable for forest uses, that standard can be interpreted to mean either that the proposed nonforest dwelling site itself, or that the entire forest parcel, must be generally unsuitable for forest uses. LUBA will defer to the local government’s choice between those permissible interpretations. *DLCD v. Coos County*, 24 Or LUBA 349 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners do not explain why specific provisions of a comprehensive plan designation or zoning district applied to forestlands are inconsistent with Goal 4 or the Goal 4 rule, petitioners provide no basis for reversal or remand. *Gonzalez v. Lane County*, 24 Or LUBA 251 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local code requires that one of several considerations must be “achieved” to approve a setback reduction request, and there are adequate findings that one of those considerations is achieved, it provides no basis for reversal or remand that other considerations may not also be achieved. *Barker v. City of Cannon Beach*, 24 Or LUBA 221 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners fail to cite any applicable standard prohibiting the cutting of trees in a comprehensive plan “Distinctive Natural Area,” their assertion that cutting trees is inconsistent with the subject parcels’ Distinctive Natural Area designation provides no basis for reversal or remand of the challenged decision. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will defer to a local government’s interpretation of its code so long as the proffered interpretation is not “clearly contrary to the enacted language,” or “inconsistent with express language of the ordinance or its apparent purpose or policy.” An interpretation of a local code provision to require that in order to be recognized as separately developable, a parcel must have been in separate ownership on a particular date, is not “clearly contrary” to the terms of, or “inconsistent with the express language” or “apparent purpose or policy” of, the code provision. *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** It is the local government which, in the first instance, should interpret its own enactments. Where a local government has not interpreted and applied applicable provisions of its code, and it is not clear how those code provisions apply to the subject application, LUBA will

remand the challenged decision so that the local government may do so. *Gage v. City of Portland*, 24 Or LUBA 47 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the record establishes that a proposed street will have the characteristics of both a local street and minor collector street, the question of the proper street designation is debatable, and the choice of which designation to apply is within the local government’s discretion. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government neither adopts findings demonstrating compliance with a permit approval standard, nor finds it is feasible to comply with that standard, but instead defers the required determination of compliance with that standard to a later stage of the approval process where only the applicant has a right to notice and to participation and to appeal the decision, the decision must be remanded. *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Under ORS 197.835(5)(b), an amendment to a local government land use regulation is subject to reversal or remand for failure to comply with the Statewide Planning Goals, unless the comprehensive plan contains “specific policies \* \* \* which provide the basis for” the amended regulation. *Ramsey v. City of Portland*, 23 Or LUBA 291 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where, under the correct interpretation of an approval standard and the undisputed relevant facts in the record, the subject application *cannot* satisfy the approval standard, LUBA will reverse a challenged local government decision approving the application. *McKay Creek Valley Assoc. v. Washington County*, 23 Or LUBA 85 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** To the extent an LCDC enforcement order establishes “applicable law” for a land use decision, LUBA is authorized to determine whether the land use decision properly interprets and applies that law. *Schatz v. City of Jacksonville*, 23 Or LUBA 40 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The prohibition in ORS 271.725(1) against condemnation of conservation easements does not bar a local government from achieving, through its plan and land use regulations, some of the same objectives that it could achieve through conservation easements. *Dodd v. Hood River County*, 22 Or LUBA 711 (1992).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Absent zoning ordinance provisions to the contrary, a PUD preliminary master plan approval is a “development permit” and where the zoning ordinance requires that an environmental assessment “be filed prior to the issuance of any development permit,” it is error to approve a PUD preliminary master plan prior to the filing of the required environmental assessment. *Gerl v. City of Lincoln City*, 22 Or LUBA 512 (1992).



**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** A city permit decision rendered without providing the public hearing or notice of decision and opportunity for local appeal required by ORS 227.175(3) and (10) must be remanded so that the city may comply with the statutory requirements. *Citizens Concerned v. City of Sherwood*, 22 Or LUBA 390 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government erroneously failed to apply a somewhat ambiguous code provision to the challenged decision, LUBA will remand the decision for the local government to interpret and apply its code provision in the first instance. *J.C. Reeves Corp. v. Clackamas County*, 22 Or LUBA 360 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government erroneously concluded the proposed use is not subject to regulation under its code and, therefore, did not interpret or apply applicable code provisions, LUBA must remand the challenged decision to the local government, so it can interpret its own code in the first instance. *Tylka v. Clackamas County*, 22 Or LUBA 166 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** That a nonconforming use is inconsistent with comprehensive plan provisions that did not exist or apply on the date the use became nonconforming provides no basis for reversal or remand, because ORS 215.130(5) provides the use may continue notwithstanding such inconsistency. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Erroneous expressions of plan or code interpretation by the decision maker, whether expressed before or after the decision is reduced to writing and becomes final, provide no basis for reversal, if such erroneous expressions are not included in the written decision or findings supporting the written decision. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where erroneous plan and code interpretations are not included in a land use decision maker's written decision, they do not constitute a procedural error or irregularity warranting reversal or remand under ORS 197.835(7)(a)(B) or an evidentiary hearing under ORS 197.830(13)(b). *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government approves a conditional use permit for a use that LUBA determines is allowed by neither the local code nor applicable statutes, the decision must be reversed. *Greuner v. Lane County*, 21 Or LUBA 329 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** LUBA will not conclude that a hearings officer, in reviewing a request for conditional use approval, improperly relied on prior land use violations by the applicant to refuse

to consider approval with conditions, unless such refusal is clearly stated in the decision. *Simonson v. Marion County*, 21 Or LUBA 313 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where the local government failed to interpret and apply a local approval standard to a permit application, and LUBA is unable to determine, as a matter of law, the correct application of the approval standard, LUBA will remand the appealed decision so the local government can interpret and apply the approval standard in the first instance. *Lung v. Marion County*, 21 Or LUBA 302 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government finds that otherwise applicable street width standards need not be satisfied in a proposed subdivision under a local code provision allowing narrower roads where consistent with “a plan for the neighborhood,” and petitioners do not challenge that finding, petitioners’ arguments that the subdivision violates street width requirements must be rejected. *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Allegations of violation of federal requirements governing National Environmental Policy Act requirements provide no basis for reversal or remand of a decision governed exclusively by state law. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where an applicable approval criterion only requires that the challenged decision *identify* certain adverse impacts and *consider* mitigation measures that could be imposed at subsequent approval stages, the local government is not required to *adopt* mitigation measures as part of the challenged decision. *Seto v. Tri-Met*, 21 Or LUBA 185 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where petitioners contend that under ORS 215.428(3), the county erred by applying standards adopted after their permit application was initially filed, petitioners claim the county “improperly construed the applicable law.” ORS 197.835(7)(a)(D). *McCaw Communications, Inc. v. Polk County*, 20 Or LUBA 456 (1991).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Comprehensive plan policies which contain aspirational language regarding goals to be implemented through the adoption of land use regulations are not mandatory approval criteria for individual permit applications and, therefore, it is unnecessary for LUBA to determine whether a decision approving a permit complies with such plan policies. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Absent an argument specifically challenging a local government’s findings that a plan amendment and zone change will allow only a rural level of development on the subject rural land, LUBA has no basis to conclude that the county erred in determining its decision complies with Goal 14. *DLCD v. Klamath County*, 19 Or LUBA 459 (1990).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** Where a local government uses a two-stage approval process and determines whether a proposed zoning map amendment complies with applicable goal, plan and land use regulations in the first stage, petitioners may not fail to appeal the first stage approval decision and later assert goal, plan and land use regulation violations in a challenge of the local government’s decision granting approval of the second stage. *Headley v. Jackson County*, 19 Or LUBA 109 (1990).

**28.8.5 LUBA Scope of Review – Grounds for Reversal/Remand – Noncompliance with Applicable Law.** The meaning of local legislation is a question of law which must be decided by LUBA on appeal. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990).