

31.2.1 Permits – Types – Building. To some extent, the ministerial decision exclusion from LUBA’s jurisdiction in ORS 197.015(10)(b)(A) is separate and distinct from the building permit exclusion from LUBA’s jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

31.2.1 Permits – Types – Building. The statutory distinction between ORS 197.015(10)(b)(B) and ORS 197.015(10)(b)(A) reflects a recognition that building permits are substantively different from more generic land use decisions and that the legislature intended that LUBA’s jurisdiction over building permit decisions would be (1) limited and (2) evaluated under a different standard. *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

31.2.1 Permits – Types – Building. Where a city approves a building permit for a temporary mass shelter under the city’s Housing Emergency Ordinance because it satisfies the development standards in the city’s Central Employment (EX) zone, where the petitioner argues not that the EX zone development standards that the city applied in approving the building permit are not “clear and objective” but, rather, that the city was required but failed to apply other land use standards in approving the building permit, and where LUBA concludes that none of those other land use standards are applicable approval criteria, the city’s decision is subject to the building permit exclusion from LUBA’s jurisdiction in ORS 197.015(10)(b)(B). *Madrona Park, LLC v. City of Portland*, 80 Or LUBA 26 (2019).

31.2.1 Permits – Types – Building. LUBA will reject an argument that a building permit approval is a “permit” as defined at ORS 227.160(2) (discretionary approval of the development of land), where all arguably discretionary determinations regarding the nature and categorization of the proposed use were previously resolved in an unappealed zoning classification decision, and the building permit decision on appeal simply relied on the zoning classification decision. *McCullough v. City of Eugene*, 74 Or LUBA 573 (2016).

31.2.1 Permits – Types – Building. Where an applicant obtains from the city a zoning classification decision concluding that a specific type of housing development is an allowed use, but noting that if the use is changed to provide services to persons other than residents of the development, the development must be approved as a conditional use, and the applicant thereafter seeks and the city approves building permits based on the same specific housing development proposed in the zoning classification decision, the city is not required to impose conditions to preclude the applicant from changing the use to one that requires conditional use approval. *McCullough v. City of Eugene*, 74 Or LUBA 573 (2016).

31.2.1 Permits – Types – Building. A building permit decision that does not apply any comprehensive plan and land use regulation is not a statutory “land use decision” defined at ORS 197.015(10)(a), even if the building at issue was initially approved as part of a planned unit development decision that is on remand from LUBA. The remanded decision is not a comprehensive plan or land use regulation for purposes of ORS 197.015(10)(a). *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

31.2.1 Permits – Types – Building. A decision can be wrong or erroneous, yet not qualify as a statutory “land use decision” defined at ORS 197.015(10)(a). Even if a local government lacked

authority to issue a building permit, or otherwise erred in approving that permit, where the petitioner does not establish that any comprehensive plan provision or land use regulation applied to the building permit, the permit is not within LUBA's jurisdiction, and any errors committed in issuing the decision can only be challenged in circuit court. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

31.2.1 Permits – Types – Building. LUBA will decline to apply the “significant impact” land use decision test to allow the Board to review building permit decisions that merely implement earlier statutory land use decisions, even if the building permit decisions are the proximate step leading to actual construction and other actions affecting land use, and even if some of the earlier statutory land use decisions were remanded by LUBA and still before the local government. Extending the significant impacts test to allow LUBA's review over such building permits would represent an end run around the statutory scheme for reviewing land use decisions. *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162 (2013).

31.2.1 Permits – Types – Building. Whether a building permit also qualifies as a statutory “permit,” as ORS 227.160(2) defines that term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

31.2.1 Permits – Types – Building. Where there is no question under applicable land use regulations that a proposed apartment building is permitted outright in the applicable zone, and the only ambiguities concern the development regulations that apply in approving the apartment use, those ambiguities mean the building permit approving the apartment building is a land use decision and that none of the ORS 197.015(10)(b) exclusions for nondiscretionary decisions apply. But that building permit is not a statutory “permit,” as ORS 227.160(2) defines that term, since the use is permitted outright and the only ambiguities concern the development standards that apply to that permitted use. *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

31.2.1 Permits – Types – Building. Whether a building permit also qualifies as a statutory “permit,” as ORS 227.160(2) defines that term does not turn on the complexity of the applicable land use regulations. Whether the building permit qualifies as a statutory permit turns on whether the applicable land use regulations are ambiguous about (1) the nature of the proposed use or (2) whether the proposed use is among the uses that are identified in the land use regulation as permitted. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013).

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31.2.1 Permits – Types – Building. In approving a building permit for a building “customarily provided in conjunction with farm use” in the EFU zone under ORS 215.213(1)(e) or 215.283(1)(e), one factual variable a county should consider is whether the building is intended to be used as an accessory building to non-farm uses authorized on the property, such as a private use airport, instead of or in addition to an accessory to farm use of the property. *Bratton v. Washington County*, 65 Or LUBA 461 (2012).

31.2.1 Permits – Types – Building. A local government correctly concludes that no timely local appeal of a building permit was filed where nothing in two letters sent to the city after the permit was granted indicated that the letters were intended to constitute appeals of the building permit. *Ortman v. City of Forest Grove*, 55 Or LUBA 426 (2007).

31.2.1 Permits – Types – Building. Where a local code provision is expressly directed at building permits and a hearing officer finds that the provision does not apply to a request for subdivision approval, and petitioners do not assign error to those findings, petitioners’ assignment of error that the hearings officer should have applied the provision in approving the subdivision will be denied. *Bickford v. City of Tigard*, 52 Or LUBA 301 (2006).

31.2.1 Permits – Types – Building. Absent some explanation for why a building permit decision that modifies a condition of partition approval involves the kind and degree of discretion that distinguishes a statutory “permit” as that term is defined at ORS 215.402(4) from other kinds of permits, LUBA will not presume that challenged permit is an ORS 215.402(4) permit. *Neelund v. Josephine County*, 52 Or LUBA 683 (2006).

31.2.1 Permits – Types – Building. Land use regulations that allow “on-site” signs but prohibit “off-site” signs are not clear and objective, as applied to a proposal to construct a sign advertising a business located on a different parcel than the sign, and a building permit decision approving such a sign as a permitted use is not subject to the ORS 197.015(10)(b)(B) exception to LUBA’s jurisdiction. *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003).

31.2.1 Permits – Types – Building. A building permit may also constitute a statutory “permit” as defined by ORS 227.160 or 215.402, and thus require a local government to provide notice and opportunity for hearing before taking action on that permit, where approval or denial of the permit requires a discretionary determination regarding whether the proposed use is allowed or not allowed under applicable land use regulations. *Frymark v. Tillamook County*, 45 Or LUBA 486 (2003).

31.2.1 Permits – Types – Building. Approval of a building permit for a use that is unquestionably a permitted use in the applicable zone is not a “permit” as defined in ORS 227.160(2)(a) simply because, in issuing the permit, the local government interprets an ambiguous term in a land use regulation that applies to that permitted use. An interpretation of such a regulation in such circumstances is not the type of “discretionary approval” that results in a “permit” under ORS 227.160(2)(a). *Tirumali v. City of Portland*, 41 Or LUBA 231 (2002).

31.2.1 Permits – Types – Building. A planning director’s interpretation that the base point from which a building height is calculated is established by determining the elevation of property after fill has been placed on the property is correct where the context makes it clear that some manipulation of the elevation may be done so long as the fill has been placed pursuant to approved grading plans. *Tirumali v. City of Portland*, 41 Or LUBA 231 (2002).

31.2.1 Permits – Types – Building. An otherwise clear and objective building permit, as that concept is used in ORS 197.015(10)(b)(B), remains clear and objective even if, as applied in a particular circumstance, it undermines the purpose or policy that it implements. *Tirumali v. City of Portland*, 37 Or LUBA 859 (2000).

31.2.1 Permits – Types – Building. A calculation mistake made during the course of applying a clear and objective building permit standard does not render a decision applying that standard a land use decision. *Tirumali v. City of Portland*, 37 Or LUBA 859 (2000).

31.2.1 Permits – Types – Building. Where a planning commission decision states the planning commission voted to “approve” a “recommendation to grant the building permit,” and respondent identifies no zoning code provision specifically assigning decision making responsibility for building permits to another decision maker, LUBA will conclude the planning commission approved the building permit. *Mills v. City of Yachats*, 29 Or LUBA 1 (1995).

31.2.1 Permits – Types – Building. The city council must provide an appeal of a planning commission decision to approve a building permit, regardless of whether the planning commission was the proper body to approve a building permit, where the planning commission in fact approves the building permit and the zoning code provides that “any action of the planning commission pursuant to [the zoning code] may be appealed to the city council.” *Mills v. City of Yachats*, 29 Or LUBA 1 (1995).

31.2.1 Permits – Types – Building. Where a local government approved a conditional use permit for a nonforest dwelling in 1992, and petitioner’s notice of intent to appeal simply identifies the local government’s 1994 building permit approval as the appealed decision, petitioner’s appeal has the legal effect of appealing only the 1994 building permit decision. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Where petitioner’s claim is that a building permit violates clear and objective standards, petitioner fails to establish a basis for LUBA’s jurisdiction over the appeal. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Petitioner’s argument that a decision to approve a building permit is a land use decision because the decision requires the application of a LCDC enforcement order fails where the enforcement order does not establish land use standards for the issuance of building permits. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Where conditions of a prior nonforest dwelling approval do not require a determination of compliance with any discretionary land use standard, the fact that a

building permit may only be issued after it is determined that such conditions are satisfied provides no basis for LUBA's jurisdiction. *Broderson v. Jackson County*, 28 Or LUBA 645 (1995).

31.2.1 Permits – Types – Building. Where petitioner appeals local government decisions issuing a building permit and denying a request for a local appeal of the building permit, and petitioner's notice of intent to appeal is filed more than 21 days after petitioner had actual notice of the building permit decision but within 21 days of the decision that there is no right to a local appeal, the notice of intent to appeal is untimely filed with regard to the building permit decision and the only issue to be resolved in the LUBA appeal is whether the local government determination that there is no right to a local appeal of the building permit decision is erroneous. *Mills v. City of Yachats*, 28 Or LUBA 736 (1994).

31.2.1 Permits – Types – Building. A local government decision approving a building permit is a "land use decision" subject to review by LUBA if it involves the application of the goals, a comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b)(A) or (B). *Sullivan v. City of Ashland*, 27 Or LUBA 411 (1994).

31.2.1 Permits – Types – Building. LUBA will not reverse or remand a local government decision refusing to issue a building permit for a structure to be placed on a parcel unlawfully divided, pursuant to a local code requirement that no building permit may be issued if the parcel of land on which a structure is to be placed or used is in violation of any local ordinance. *Woosley v. Marion County*, 24 Or LUBA 231 (1992).

31.2.1 Permits – Types – Building. Where a local code requires that a stream corridor and buffer zone be established prior to development of property, once the corridor and buffer zone are established by the local government as part of a minor partition decision, it is unnecessary for the local government to reexamine those boundaries in order to issue building and tree cutting permits for parcels created by the partition. *Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992).

31.2.1 Permits – Types – Building. A decision approving a building permit is a land use decision subject to LUBA's jurisdiction only if the building permit approval decision involves the application of the goals, comprehensive plan or a land use regulation and does not qualify as a ministerial decision under ORS 197.015(10)(b). *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

31.2.1 Permits – Types – Building. Where the only determinations that must be made for the approval of a building permit are whether the applicant has certifications concerning septic approval and electrical and plumbing permits, and those determinations do not involve application of the goals, comprehensive plan, or land use regulations, the approval of the building permit is not a land use decision subject to LUBA's jurisdiction. *Tuality Lands Coalition v. Washington County*, 22 Or LUBA 319 (1991).

31.2.1 Permits – Types – Building. A city is not prohibited from issuing a building permit pursuant to an unappealed planning commission decision, notwithstanding that a second application seeking to expand the scope of the project approved by the unappealed planning

commission decision was denied by the city council. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

31.2.1 Permits – Types – Building. A local government cannot deny building permits for approved conditional uses based on subsequent local code interpretations, where the subject conditional use permit remains effective and was not appealed locally or to LUBA. *Townsend v. City of Newport*, 21 Or LUBA 286 (1991).

31.2.1 Permits – Types – Building. Where petitioners’ local notice of review specifically identifies as the subject of the appeal a building permit (the only local government decision concerning the proposed use of which petitioners were aware), but also indicated an intent to request review of any local decision authorizing the proposed use, LUBA will interpret petitioners’ local notice of review to appeal both the building permit and an earlier zoning clearance decision required for issuance of the building permit. *Komning v. Grant County*, 20 Or LUBA 481 (1990).

31.2.1 Permits – Types – Building. A zoning clearance approval which requires determinations on whether a proposed use is incidental and subordinate to an existing use, and whether and the extent to which an existing use is a lawful nonconforming use, requires interpretation and the exercise of judgment within the meaning of ORS 197.015(10)(b)(A) and (C) and, therefore, is a “permit” under ORS 215.402(4). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

31.2.1 Permits – Types – Building. Where *all* determinations involving application of the acknowledged county plan and code are made in the county site plan review decision, and issuance of a building permit is not dependent on site plan approval, issuance of a building permit does not demonstrate compatibility of the subject use with the acknowledged county plan and regulations. *Sparacino v. Klamath County*, 18 Or LUBA 804 (1990).