

**TEN SIGNIFICANT POST-FASANO APPELLATE DECISIONS,
FOUR IMPORTANT SUPREME COURT DECISIONS
AND
RECENT LUBA DECISIONS**

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Following the Oregon Supreme Court's decision in *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973), and the subsequent creation of LUBA, there have been a number of appellate court cases that have had an enduring impact on appellate review of land use decisions at LUBA and at the Oregon Supreme Court and Court of Appeals. In some cases the original legal principles announced in these cases have evolved considerably, under subsequent case law or through statutory amendments. But collectively these cases have had an important impact on land use appellate practice and review and the legal principles they announced remain constant themes in many current land use appeals.

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TEN SIGNIFICANT POST-FASANO APPELLATE DECISIONS

The Legal Effect of LCDC Acknowledgment

Byrd v. Stringer, 295 Or 311, 666 P2d 1332 (1983)

Post-acknowledgment, the acknowledged comprehensive plan and land use regulations, apply to permit decisions made pursuant to the acknowledged local provisions. The statewide planning goals do not apply to such post-acknowledgment decisions.

ORS 197.175(2)(c) provides that prior to acknowledgment, land use decisions must comply with the statewide planning goals. ORS 197.175(2)(d) provides that, after acknowledgment, land use decisions must be made in compliance with the acknowledged plan and regulations. However, the statute does not expressly clarify the role of the statewide planning goals with respect to permit decisions made under the acknowledged plan and regulations.

In March 1981, LCDC acknowledged Polk County's comprehensive plan and land use regulations to be in compliance with Goal 3. The county's Farm/Forest zone allowed a farm dwelling subject only to a finding that the dwelling is in conjunction with "farm use," *i.e.* in conjunction with the current employment of land for the purpose of obtaining a profit from raising crops or livestock. The applicants sought a building permit for a farm dwelling on a one-acre lot, on which the applicants profitably raised rabbits and grew raspberries. The county approved the dwelling. LUBA reversed, concluding that approval was inconsistent with Goal 3, which required that farm parcel sizes ensure the continuation of the existing commercial agricultural enterprise in the area. LUBA concluded that a one-acre farm, no matter how profitable its rabbit warrens, was not a "commercial" enterprise.

The Court of Appeals reversed LUBA, concluding that LCDC, in acknowledging the Farm/Forest zone, had rejected 1000 Friends' challenge to the Farm/Forest zone, in which it argued that to comply with Goal 3 the Farm/Forest zone must allow dwellings only on parcels large enough to ensure the continuation of the commercial agricultural enterprise in the area. Because the LCDC acknowledgment order had rejected that challenge and expressly approved the Farm/Forest zone without consideration of parcel size, no such consideration was required.

On review, the Supreme Court went one step further, and held more broadly that, once the plan and regulations are acknowledged, permit decisions are measured only against the acknowledged plan and regulations, and statewide planning goal requirements never apply to such decisions, regardless of whether the goal compliance issue was addressed in the acknowledgment order.

Subsequent Cases

The basic holding of *Byrd* was re-affirmed in *Foland v. Jackson County*, 311 Or 167, 180, 807 P2d 801 (1991). Goal 8 does not apply as approval standards to a destination resort siting pursuant to a refinement process that was acknowledged to comply with Goal 8. However, several statutes and cases limit *Byrd's* holding.

***Ludwick v. Yamhill County*, 72 Or App 224, 696 P3d 536 (1985).** The goals apply to amendments to acknowledged comprehensive plan and land use regulations. ORS 197.175(2)(e).

***Kenagy v. Benton County*, 115 Or App 131, 838 P3d 1076 (1992).** While the statewide planning goals do not apply directly to decisions under acknowledged comprehensive plan provisions and land use regulations, statutes do.

***Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 911 P2d 350 (1996).** An argument that an acknowledged plan policy is contrary to the goal it implements cannot be advanced under ORS 197.829(1)(d) if the argument necessarily depends on the thesis that the unambiguous terms of the plan policy are contrary to the goal.

***Central Oregon Landwatch v. Deschutes County*, 52 Or LUBA 582, 599-600 (2006).** If the terms of a local code provision implementing a goal are ambiguous, and that ambiguity can be interpreted consistently with the applicable goals and rules, ORS 197.829(1)(d) dictates that the county cannot instead choose an interpretation that is contrary to the applicable goals and rules.

Finally, pursuant to ORS 197.646(3), post-acknowledgment goal or rule amendments apply directly to land use decisions until a local government amends its comprehensive plan or land use code to be consistent with the post-acknowledgment goal or rule amendments.

The Low Hurdle for Standing to Appeal to LUBA

Jefferson Landfill Committee v. Marion County 297 Or 280, 686 P2d 310 (1984)

LUBA's standing statutes have been modified over time, with today's requirements generally only requiring a petitioner to appear before the local government and timely file an appeal. Special circumstances do require demonstrating that a petitioner is "adversely affected."

Jefferson Landfill set the ground work for modern day LUBA standing statutes. Marion County granted a conditional use permit and major partition for a landfill. LUBA dismissed an appeal of that decision for lack of standing, and the Court of Appeals affirmed. Based on a new expression of standing principles in *Benton County v. Friends of Benton County*, 294 Or 79, 653 P2d 1249 (1982), the Oregon Supreme Court reversed. The court held LUBA erred in its conclusion that petitioners lacked standing under the 1981 standing statute, which provided that a person who filed a notice of intent to appeal may petition LUBA for review if that person (a) appeared before the local government orally or in writing and (b) was entitled to notice and hearing prior to the decision *or* was a person whose interests are *adversely affected or who was aggrieved* by the decision. The court noted that the terms "adversely affected" and "aggrieved" were a significant departure from the "substantial interest" requirement under the prior writ of review procedure.

The court explained that the term "adversely affected" applies when "a local land use decision impinges upon the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to the petitioner." Examples of adverse effects include noise, odors, increased traffic and potential flooding. In contrast, the court noted that "aggrieved" is distinct from "adversely affected," and means something more than being dissatisfied with the agency's order. The court quoted from its *Benton County* decision to clarify the meaning of the term "aggrieved":

"A person whose interest in the decision has been recognized by the [decision maker] and who has appeared and asserted a position on the merits as an interested person, rather than only as a source of information or expertise can be 'aggrieved.'"

The court explained that to demonstrate aggrievement, one must show that (a) the person's interest in the decision was recognized by the decision maker, (b) the person asserted a position on the merits, and (c) the local decision maker reached a decision contrary to the position asserted by the person. The court further noted that this gives the decision maker a gatekeeping responsibility to determine who is an interested person. The court also noted that if a person's status is contested, LUBA can look to the record and any applicable ordinances to determine if that person is sufficiently interested to have standing. The court then concluded that the Landfill Committee and a sole petitioner had standing under this test.

Subsequent Cases

***Warren v. Lane County*, 297 Or 290, 686 P2d 316 (1984)**

This decision, issued the same day as *Jefferson Landfill*, clarified that the appearance requirement can be satisfied when a petitioner demonstrates that it appeared at a local government's prior level of review, where the final decision maker based some or all of its final decision on that prior review. Petitioners appeared before the planning commission, which made recommendations to the board of county commissioners. The Supreme Court determined that although petitioners did not submit documents or physically appear before the board of county commissioners, because the board of county commissioners based its land use decision on the record obtained in the prior proceeding before the planning commission, petitioners' appearance before the planning commission was sufficient to fulfill the appearance requirement.

***Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001)**

Regarding a related issue, standing to appeal a LUBA decision to the Court of Appeals, in *Utsey*, the Court of Appeals held that constitutional limitations on the justiciability of cases required that a party appealing a LUBA decision to the Court of Appeals must demonstrate that the court's decision would have a "practical effect" on that party, even though no such demonstration was required by statute. That holding was effectively overruled by the Supreme Court in *Kellas v. Dep't of Corr.*, 341 Or 471, 145 P3d 139 (2006).

***Pacific Western Company v. Lincoln City*, 32 Or LUBA 317 (1997)**

Today, there is no generally applicable statutory requirement that a person wishing to appeal to LUBA must demonstrate adverse effect or aggrievement, because prior provisions imposing a requirement that the petitioner demonstrate he or she “[i]s aggrieved or has interests adversely affected” by the decision were repealed in 1989 and replaced in LUBA’s general standing requirements at ORS 197.830(2) by the appearance requirement. It is important to note that under the current statutes the standards that govern standing to appeal to LUBA vary depending on whether the appealed decision is made with a hearing (where there is an opportunity to appear) or without a hearing (so there is no opportunity to appear). There are also special standing standards for limited land use decisions, permit decisions where there are notice failures, and post-acknowledgement plan or land use regulation amendments, all which have specific statutory standing and filing deadline requirements. ORS 197.830.

***Devin Oil v. Morrow County*, __Or LUBA __ (LUBA No. 2015-023, August 14, 2015) review pending at the Court of Appeals, oral argument heard October 26, 2015**

Recently, LUBA weighed in on one of its special standing requirements for decisions made without a hearing under ORS 197.830(3). That standing requirement invokes the traditional “adversely affected” standard set out in *Jefferson Landfill*. A LUBA majority determined that a sole allegation of economic harm does not constitute an adverse effect for purposes of establishing standing at LUBA. The majority cited *Schnitzer Steel Indus. v. City of Eugene*, 67 Or LUBA 444 (2013) for the proposition that a petitioner must plead a physical impact to their property rather than merely an economic one. In *Schnitzer Steel*, the petitioner alleged an economic adverse impact from a business located 100 miles away. Here, Devin Oil alleged economic harms due to a new competitor located 5 miles away. LUBA found no standing due to the lack of an adverse physical effect on petitioner’s property.

The dissent in *Devin Oil* contested the idea that economic harm was not sufficient to establish standing, and distinguished this case from *Schnitzer Steel* based on proximity. The dissent analyzed standing based on the assumption that a physical impact is necessary to establish an adverse effect, and concluded that a decrease in traffic to an existing business constitutes a physical impact necessary to establish an adverse effect for ORS 197.830(3) standing.

Failures of Local Process

***League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986), overruled, *Wicks-Snodgrass v. City of Reedsport*, 148 Or App 217, 939 P2d 625 (1997)**

The Court of Appeals has struggled to protect would-be petitioners and intervenors from the effect of failure of process on appeal deadlines and standing requirements. In the seminal League of Women Voters, the court held that a land use decision does not become final for purposes of appeal to LUBA until 21 days after the local government has mailed or delivered notice of the decision.

The key holding in *League of Women Voters* is quoted below:

“Although ORS 197.830[(9)] specifies that the 21-day appeal period runs from “the date the decision sought to be reviewed becomes final,” we do not think that the legislature contemplated that the simple ministerial act of giving the notice required by ORS 215.416[(10)] would not routinely occur on the same date.
* * *

“* * * [T]his is at least the fourth case which has reached this court since 1982 in which the jurisdictional effect of a failure to perform that duty or to perform it punctually has been an issue. * * *
* The cases illustrate the frequency with which this entirely avoidable problem has arisen; they also demonstrate the futility of attempting to deal with it on a case-by-case basis. We hold that, in all LUBA cases to which ORS 215.416[(10)] applies, the decision becomes final for purposes of appealing to LUBA under ORS 197.830[9] only after the prescribed written notice of the decision is mailed or delivered personally to the party seeking to appeal.”

However, in *Wicks-Snodgrass*, the Court of Appeals overruled *League of Women Voters*, concluding that that case inappropriately gave weight to policy considerations rather than the plain text of the statute, which clearly makes the date of finality rather than the date of notice the point at which the 21-day deadline to appeal to LUBA starts to run.

Subsequent Cases

In *Oakleigh-McClure Neighbors v. City of Eugene*, 269 Or App 176, 344 P3d 503 (2015), the Court of Appeals distinguished *Wicks-Snodgrass*, and revived a version of the *League of Women Voters* tolling principle with respect to motions to intervene. ORS 197.830(7) provides that a motion to intervene in an appeal to LUBA must be filed within 21 days of the date the notice of intent to appeal (NITA) is filed, and further provides that failure to file within the deadline means that the motion to intervene must be denied. In *Oakleigh-McClure Neighbors*, the city failed to provide the petitioner with accurate notice information, so petitioner initially failed to serve the NITA on the intervenor. The city later supplied the correct information, petitioner belatedly served all persons on the updated list, including intervenor, and intervenor subsequently filed a motion to intervene within 21 days of the service, but more than 21 days from the date the NITA was filed with LUBA. Citing the plain language of ORS 197.830(7), LUBA denied the motion to intervene.

The Court of Appeals reversed, concluding that a notice of intent to appeal is effectively “filed,” for purposes of determining the timeliness of a motion to intervene under ORS 197.830(7) by a person required under LUBA’s rules to be served with the notice, on the date of that service, not on the date the notice is actually filed with LUBA, when petitioner initially failed to serve the notice of intent to appeal on intervenor due to the failure of the local government to provide accurate and complete information.

Not altogether convincingly, the Court distinguished *Wicks-Snodgrass* on three grounds: (1) a timely motion to intervene is not necessary to invoke LUBA’s jurisdiction, unlike the filing of the NITA, (2) LUBA has adopted rules requiring the NITA be contemporaneously served on persons entitled to notice of the decision, but no similar administrative rules were at play in *Wicks-Snodgrass*, and (3) legislative history indicates the legislature wanted a hard 21-day deadline to intervene, but the legislature did not consider what happens if the intervenor is not contemporaneously informed of the clock-starting event, the filing of the NITA, as LUBA’s rules require.

Standing

The court has been more consistent when it comes to failed process and the ORS 197.830(2) appearance requirement to achieve standing to appeal to

LUBA. In *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227 (1989), the court held that the ORS 197.830(2) appearance requirement need not be met when the local government fails to hold a hearing at which the petitioner could appear. The court reaffirmed that principle in *Hugo v. Columbia County*, 157 Or App 1, 967 P2d 895 (1998), holding that the appearance requirement need not be met where the local government refuses to allow the petitioner to appear at the hearing.

Substantial Evidence Review

***Younger v. City of Portland* 305 Or 346, 752 P2d 262 (1988)**

LUBA reviews for “substantial evidence in the whole record”; appellate court review of LUBA rulings on substantial evidence challenges is to determine if LUBA’s decision is “unlawful in substance.”

Under ORS 197.835(9)(a)(C), LUBA is to reverse or remand a decision if the decision is “not supported by substantial evidence in the whole record.” The question before the Supreme Court in *Younger* was whether LUBA should perform its review of a decision by “considering the supporting evidence alone or by considering all the evidence in the record, including countervailing evidence.” 305 Or at 348. The Court of Appeals held that LUBA’s evaluation of substantiality properly considered only supporting evidence. 86 Or App 211, 216-18, 739 P2d 50 (1987). The Supreme Court reversed and held the statute requires LUBA to evaluate substantiality on the basis of the entire record.

The appeal concerned a comprehensive plan and zoning map amendment to allow construction of the Hollywood Fred Meyer store. Opponents argued the evidence that the city council relied on to find that traffic and economic effects of the proposed store would not violate several plan policies was so undermined by their evidence that the city council’s findings were not supported by substantial evidence in the whole record.

LUBA rejected the opponents’ argument, saying the evidentiary record was such that it would have supported the findings that the city council adopted or findings that the proposal would violate the policies. Citing *Home Builders v. Metro Service Dist.*, 54 Or App 60, 633 P2d 1320 (1981), LUBA held that in “these circumstances, we cannot say that the evidence supporting the city’s decision is not substantial evidence.”

The Court of Appeals affirmed, also relying on its decision in *Home Builders*:

“[W]here there is conflicting evidence based upon differing data, but any of that data is such that a reasonable person might accept it, a conclusion based upon a choice of any of that data is, by definition, supported by substantial evidence.” 54 Or App at 63.

The Supreme Court traced the ORS 197.835(9)(a)(C) “whole record” language back to the 1971 overhaul of the Oregon Administrative Procedures Act, which had the same “whole record” language. The APA in turn was drawn from the Model State Administrative Procedure Act (MSAPA), enacted in 1946 and substantially revised in 1961. The original and revised MSAPA called for review of the “whole” or “entire” record. The federal APA enacted in 1946 also called for review of federal agency factual determinations based on “review of the whole record.” The Supreme Court ultimately concluded that “whole” or “entire” record review was an attempt to reject review that looked at only evidence that supported the decision, sometimes referred to as the “any evidence” or “any substantial evidence” test.

The Supreme Court then explained that appellate courts do not duplicate LUBA review for substantial evidence in an appeal of a LUBA decision that resolves substantial evidence challenges. Rather the appellate courts must determine if LUBA’s decision is “unlawful in substance or procedure.”

“Therefore, where LUBA has properly understood and applied the ‘substantial evidence’ test of ORS 197.835(8)(a)(C), a reviewing court should affirm its order, notwithstanding the reviewing court’s disagreement with LUBA as to whether the evidence is ‘substantial.’ * * * This does not mean, of course, that a reviewing court must blindly accept LUBA’s evaluation of substantiality. The evidence in a particular case might be so at odds with LUBA’s evaluation that a reviewing court could infer that LUBA had misunderstood or misapplied its scope of review, and reversal or remand might be proper. * * *” 305 Or at 358-59.

Other Substantial Evidence Cases

Douglas v. Multnomah County, 18 Or LUBA 607 (1990). In *Douglas*, LUBA summarized the key substantial evidence standard of review holdings in *Younger*:

“In performing its review function to determine whether a decision is supported by substantial evidence, [LUBA] does not replicate the function of the local government decision maker and may not substitute its judgment for that of the local government simply because [LUBA] would have adopted a different finding or reached a different conclusion. Where [LUBA] concludes, based on all of the evidence in the record, that a reasonable person could have adopted the findings and reached the conclusions adopted by the local government, [LUBA] will affirm the local government’s decision, regardless of its choice between conflicting, but supported, findings or conclusions. [LUBA] affirm[s] the local government decision in such circumstances even though a reasonable person could also have adopted different findings and reached different conclusions based on the evidence in the record.” 18 Or LUBA at 617-18 (citation omitted).

***1000 Friends of Oregon v. Marion County*, 116 Or App 584, 842 P2d 441 (1992).** In commenting on the distinction between LUBA independently reweighing the evidence on appeal (which LUBA may not do) and LUBA determining whether there is substantial evidence in the whole record considering both supporting and countervailing evidence (which LUBA must do under *Younger*) the Court of Appeals observed:

“President Kennedy once observed that it is easy enough for those who do not have the responsibility for implementing what they say to talk. The line between reweighing evidence and determining substantiality in the light of supporting and countervailing evidence is either razor thin or invisible to tribunals that must locate it, as distinct from tribunals that tell others to find it. We nevertheless conclude that, in determining that the county’s finding of demonstrated need is not supported by substantial evidence, LUBA gravitated to the wrong side of the line.” 116 Or App at 588.

***Cusma v. City of Oregon City*, 92 Or App 1, 757 P2d 433 (1988).** While *Younger* was pending on appeal before the Supreme Court, Metro was seeking modification of a conditional use permit from Oregon City, under which Metro operated a solid waste transfer station. LUBA affirmed the city’s denial of the request, concluding there was substantial evidence in the record to support the

city's finding that the permit modification would violate litter and traffic standards in the city code. The Court of Appeals affirmed, citing *Younger* to reject petitioner's assignment of error directed at LUBA's substantial evidence ruling: "In the absence of exceptional circumstances, which are not present here, we may not substitute our view for LUBA's about whether there was substantial evidence to sustain a local finding, as distinct from reviewing LUBA's order to assure that it used the right approach in determining whether there was." 92 Or App at 6-7.

***Eckis v. Linn County*, 110 Or App 309, 313, 821 P2d 1127 (1991).** In conducting substantial evidence review "LUBA is not required to search the record, looking for evidence with which the parties are presumably already familiar. The identification of the evidence is part of advocacy."

***McCoy v. Marion County*, 16 Or LUBA 284 (1987).** *McCoy* addresses two important principles for substantial evidence review in the context of permit denial decisions. First, only one adequate finding of noncompliance with a mandatory approval standard is required to sustain a decision denying permit approval on appeal. If there is one such finding, supported by substantial evidence, it does not matter if other findings are not supported by substantial evidence, because the decision would still have to be affirmed. Second, because a land use permit applicant has the burden of proof, in arguing that a local government erred in finding the applicant failed to carry his or her burden of proof regarding a mandatory approval standard, the applicant on appeal to LUBA must establish that the local record, viewed as a whole, establishes that petitioner carried his or her evidentiary burden as a matter of law.

Multi-Stage Approvals: Deferring Applicable Criteria

***Meyer v. City of Portland,*
67 Or App 274, 678 P2d 741 (1984)**

Multi-stage approvals are a common feature of the land use program. LUBA and the courts have long struggled with how to review decisions where some uncertainty (or perhaps a great deal of uncertainty) exists regarding whether there is sufficient evidence to show that a mandatory approval standard is met at an early stage (where there are hearings and opportunities for public participation). In that circumstance the evidence may suffice to establish that technical solutions exist and the approval standard is satisfied. Meyer is such a case. But in other cases, where there is more uncertainty, the requested early stage approval will have to be denied unless the required finding of compliance can be deferred to a subsequent stage of approval. In that circumstance hearings and public participation may be required in the latter stage where the deferred finding will be made, even if local law does not require a hearing or participation at that later stage.

In *Meyer*, the city's code required a finding at the stage of tentative PUD approval that building sites can be safely developed. Concerns were raised regarding landslide potential. The city approved the tentative PUD, subject to conditions requiring that geotechnical studies be submitted prior to final PUD approval verifying that particular building sites can be safely developed. LUBA affirmed, concluding that the record demonstrated that it was "feasible" for the site to be safely developed. The Court of Appeals affirmed, characterizing "feasibility" as not mere technical feasibility, but where substantial evidence supports findings that solutions to certain problems (landslide potential) posed by a project are "possible, likely and reasonably certain to succeed." Based on such evidence, the court held the city can make a present finding that the approval standard is met, subject to conditions designed to ensure that the standard is met.

Subsequent Cases

***Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).**

In *Rhyne*, LUBA attempted to set out a local government's options when the state of the evidence regarding compliance with a permit approval standard is such that the local government is not sure that the applicant has fully demonstrated that the standard is met.

“Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances. * * *” 23 Or LUBA at 447-48 (footnotes omitted).

***Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007) (*Gould II*)**

The county's code required a mitigation plan for first stage conceptual master plan approval of a destination resort, and that the plan demonstrate that

any negative impact on fish and wildlife resources will be completely mitigated. The county found compliance with that requirement, based on a mitigation report that described what the mitigation plan that will be developed in future consultations with wildlife agencies will look like, plus a condition requiring submittal of the mitigation plan before final master plan approval. LUBA affirmed, citing *Meyer*, but the Court of Appeals reversed, concluding that a present finding of compliance with the mitigation plan standard cannot be made without the plan. The Court suggested that a permissible option would be defer a finding of compliance with the standard to the final master plan stage, but only if it infused that final master plan stage with the same participatory rights as were provided at the conceptual master plan stage.

***Gould v. Deschutes County*, 227 Or App 601, 611-12,
206 P3d 1106 (2009) (*Gould IV*).**

On remand, the county took up the suggestion and completely deferred consideration of compliance with the mitigation plan requirement to final master plan approval, with a promise to provide full public participatory rights at the final master plan approval stage. LUBA affirmed, but the court again reversed, concluding that complete deferral of an approval standard to a second approval stage is appropriate only if the local government justifies deferral by finding that compliance is “feasible” in the sense that compliance is attainable, not in the *Meyer* sense that compliance is demonstrated by identifying solutions that are likely and reasonably certain to succeed. The court explained:

“Although we agree that a *Meyer* justification is not necessary to postpone consideration of DCC 18.113.070(D), we do not agree that *no* justification is necessary. Instead, a finding that compliance with DCC 18.113.070(D) is “feasible,” in the sense of a possibility of attainment, is necessary in order to justify a decision to forgo denial of the CMP and to approve it with the deferral condition. * * * Petitioner and others appeared at the hearing on the CMP and argued that the application should be denied based on the record created at that hearing. ORS 215.416(9) requires that the county explain its decision that the CMP application should not be denied, but instead should be conditionally allowed. That explanation necessarily must rule out denial as the outcome required by the hearing record. Denial of an application, as opposed to postponement of consideration, is

required if satisfaction of the approval criteria is not possible even with additional evidence. Moreover, a necessary justification for a condition of approval of a land use permit is that the condition can be met, that its satisfaction is feasible. For those reasons, a finding of feasibility—that compliance with the approval criterion is possible—explains the reason for not denying the application and imposing the condition of approval under ORS 215.416(9) and DCC 22.28.010 and is required by those policies.” 227 Or App at 611-12.

***Willamette Oaks, LLC v. City of Eugene*, 232 Or App 29, 220 P3d 445 (2009)**

The city approved a zone change from medium-density residential to high-density, but no specific development was proposed. The city imposed a condition requiring that the applicant must obtain a planned unit development approval when a specific development proposal is submitted, provide a traffic impact analysis, and demonstrate consistency with both county transportation requirements and the TPR, prior to any development. That planned unit development approval would have required a hearing and public participation. LUBA affirmed that approach.

The Court of Appeals reversed, concluding that while there are some circumstances or regulatory schemes where it is permissible to defer to a subsequent approval stage a demonstration of compliance with applicable criteria, the TPR is written in such a way that the question of whether the uses allowed under the proposed zone significantly affect a transportation facility cannot be deferred to a subsequent permit approval, but must be addressed prior to approving the zone change.

***Root v. Klamath County*, 63 Or LUBA 230, 254 n 15 (2011).**

In *Root*, LUBA suggested that a permissible way to avoid the conundrum of attempting to demonstrate a zone change that affects a large area complies with the TPR (*i.e.*, will not significantly affect transportation facilities), when actual development and traffic impacts are not known, would be to apply an overlay zone to the large area rezoning that would preclude development until a second zone change was approved to remove the overlay zone from the property to be developed. Under that approach, the TPR would apply to the second zone change decision (removing the overlay), which is

made at a time when the nature and extent of the development is known, not to the initial zone change decision.

See also Columbia Riverkeeper v. Columbia County, 70 Or LUBA 171, *aff'd*, 267 Or App 637, 342 P3d 181 (2014). (Goal exception standards cannot be deferred to a permit proceeding).

Discretionary vs. Non-Discretionary Decisions

Doughton v. Douglas County
82 Or App 444, 728 P2d 887 (1986) (*Doughton I*)

The exception to LUBA’s jurisdiction for ministerial decisions made under “clear and objective” standards does not apply to a permit for a dwelling customarily provided in conjunction with farm use.

Doughton v. Douglas County
88 Or App 198, 744 P2d 1299 (1987) (*Doughton II*)

A building permit may qualify as a statutory discretionary land use permit, which is subject to the statutory notice and hearing requirements.

Doughton I

An exception to LUBA’s review jurisdiction was provided under former ORS 197.015(10)(b) for a “ministerial decision of a local government made under clear and objective standards * * *.” Similarly worded exceptions appear today at ORS 197.015(10)(b)(A) and (B). Under Douglas County’s land use regulations, the following use was allowed as a permitted use in the county’s exclusive farm use zone:

“One single-family dwelling and other buildings and accessory uses customarily provided in conjunction with farm use on a property meeting the minimum requirements of Sec. 3.4.200.” 82 Or App at 446.

It was undisputed in *Doughton* that the standards at Sec. 3.4.200 were clear and objective. LUBA concluded that determining at the threshold whether a proposed dwelling qualified as “customarily provided in conjunction with farm use” would require fact finding, but LUBA concluded that inquiry does not involve standards:

“The inquiries required in determining whether a proposed farm-dwelling should be [classified as customarily provided in conjunction with farm use] do not involve standards in the sense that term is used in ORS 197.015(10)(b). Rather they concern the threshold question of how to classify the proposal under the zoning ordinance so as to determine which ‘standards’ govern its approval.”

The Court of Appeals reversed LUBA, finding that both the approval standards and the threshold determination regarding whether the dwelling qualified as a dwelling that is “customarily provided in conjunction with farm use” must be resolved by reference to clear and objective standards. Because the question of whether the dwelling qualified as a dwelling customarily provided in conjunction with farm use was not governed by any county standards at all, the Court of Appeals concluded that the ORS 197.015(10)(b) exception for ministerial decisions subject to clear and objective standards did not apply:

“The purpose of ORS 197.015(10)(b) is to make certain local government actions unreviewable as land use decisions, because they are really nondiscretionary or minimally discretionary applications of established criteria rather than decisions over which any significant factual or legal judgment may be exercised. If particular decisions can automatically follow from the existence of general standards which are unaffected by factual variables, the decisions are within the statute’s scope.” 82 Or App at 449.

Doughton II

Following the Court of Appeals’ remand in *Doughton I*, LUBA concluded the building permit qualified as a discretionary “permit,” as ORS 215.402(4) defines that term:

“‘Permit’ means discretionary approval of a proposed development of land under ORS 215.010 to 215.438 or county legislation or regulation adopted pursuant thereto.” 88 Or App at 200.

LUBA remanded for the county to provide notice and a right to a hearing.

The county appealed LUBA's remand decision, and the Court of Appeals affirmed LUBA's remand decision. In doing so, the Court of Appeals rejected the county's argument that the building permit was not an ORS 215.402(4) discretionary land use permit, simply because the county allowed farm dwellings outright and the county's land use legislation did not require an application for a discretionary permit or a hearing.

“We disagree with the county. Its argument posits that ORS 215.416(1) allows it to circumvent the need for discretionary action in connection with a use which cannot be allowed without the exercise of discretion by not requiring an application for a permit to conduct the use. As we have done repeatedly before, we reject the premise that counties have the authority to abridge the notice requirement and other procedures which are required by state law in connection with land use decisions. *See, e.g., League of Women Voters v. Coos County*, 82 Or App 673, 729 P2d 588 (1986); *Overton v. Benton County*, 61 Or App 667, 658 P2d 574 (1983). The notice and hearing requirements of ORS 215.416 are legislative mandates. Moreover, they are directly tied to the LUBA appeal rights and appellate procedures which ORS 215.422 and ORS 197.830 to 197.845 require with respect to discretionary county land use decisions involving the issuance of permits. As respondent argues, the term ‘[w]hen required or authorized by [county legislation]’ in ORS 215.416(1) is not a condition precedent to the county's compliance with the requirements of ORS 215.416; the term relates to what the applicant must do to obtain a discretionary permit, not to what the county must do in deciding whether to issue one. The other subsections of the statute answer the latter question. LUBA correctly held that the county must give notice and provide hearing rights.” 88 Or App at 202.

Subsequent Jurisdictional and Statutory Permit Cases

***Kunkel v. Washington County*, 16 Or LUBA 407 (1988).** A county permit in *Kunkel* authorized emergency disposal of livestock on a 160 acre EFU-zoned parcel. The applicant shipped lambs by oceangoing ships from New Zealand to the Port of Portland in lots of 27,000 animals. The animals were to be quarantined for 30 days upon arrival in Portland and the permit was sought to allow the sheep to be destroyed and buried in the event of disease. This case

has come to be referred to as the “lambfill case.” LUBA denied the county’s motion to dismiss, concluding the county’s decision regarding whether the proposed lambfill qualified as a farm use was not governed by clear and objective standards. LUBA also concluded the permit qualified as a statutory permit and LUBA remanded so that the county could provide notice and a hearing or right to local appeal.

Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651 (1990). The application sought approval for a boarding school to be operated by a religious sect, which was to be blended with farming operations on 305 acre property in the county’s farm and forest zone. The facts and legal issues in the appeal were complex and resulted in two LUBA decisions and a trip to the Court of Appeals. LUBA’s final decision highlighted the uncertainty that is inserted into the land use process by the statutes’ use of the concept of “discretion” to determine (1) whether LUBA has jurisdiction, (2) whether statutory permit notice and hearing requirements apply, and (3) whether the goal post statute applies to prevent application of newly adopted approval standards (after the religious sect submitted an application for approval of its proposed use, the county amended its farm and forest zone to make private schools a conditional use rather than a permitted use):

“Review by this Board and the appellate courts to determine whether decisions (such as decisions to approve or deny applications for building permits for uses permitted outright) involve discretion presents obvious problems. It can result in decisions the local government thought to be exempt from LUBA review and public hearing requirements being found subject to both. * * * It may also, as in this case, result in an applicant for a building permit having protection under ORS 215.428(3) that other applicants for building permits involving nondiscretionary standards do not have. However, any uncertainty engendered by the possibility of such review is a creature of the statutes that make applicability of the jurisdictional exception in ORS 197.015(10)(b), the public hearing requirements in ORS 215.416(3) and (11), and the certainty of approval standards provision in ORS 215.428(3) turn on whether particular decisions are discretionary.” 18 Or LUBA at 644 n 15.

***Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 789 (1991).** The city issued a development permit to allow construction of a methadone clinic in the city's Office Commercial zone. The central legal issue was whether a methadone clinic qualified as a "medical clinic," which was allowed outright in the Office Commercial zone. The city argued that LUBA did not have jurisdiction because the development permit qualified as a building permit issued under "clear and objective standards." LUBA denied the motion to dismiss, concluding that the exception did not apply, because the city's zoning ordinance had no definition of "medical clinic" and no standards for deciding whether a methadone clinic qualified as a medical clinic. 22 Or LUBA at 796.

***Hollywood Neigh. Assoc. v. City of Portland*, 22 Or LUBA 267 (1991).** On the merits, after LUBA denied the city's motion to dismiss, the city agreed to provide a hearing and issue a decision on the merits that included findings explaining the city's position regarding whether the methadone clinic qualifies as a "medical clinic." The *Hollywood Neigh.* case was one of the cases that led to adoption of an exclusion to the statutory permit definition, which is codified now at ORS 227.160(2)(b), and excludes city decisions that "determine[] the appropriate zoning classification for a particular use" inside the city's UGB. Therefore zoning classification decisions may be land use decision, but they are not statutory permits that require notice and a hearing.

***Tirumali v. City of Portland*, 169 Or App 241, 7 P3d 761 (2000).** In this case whether a house conformed with the city's zoning height limit depended on the correct interpretation of "finished grade" from which the height limit was measured. LUBA concluded the exception for building permits issued under clear and objective standards applied and dismissed. *Tirumali v. City of Portland*, 37 Or LUBA 859 (2000). The Court of Appeals concluded "finished grade" was susceptible to at least two plausible interpretations, which the Court of Appeals concluded meant that the exception to the definition of land use decision for building permits issued under clear and objective standards did not apply, with the result that LUBA had review jurisdiction.

***Tirumali v. City of Portland*, 41 Or LUBA 231 (2002).** In its decision following the Court of Appeals' remand, LUBA addressed one of the potential problems LUBA had earlier identified in *Kirpal Light Satsang* (building permits that qualify as statutory permits require statutory notice and hearings).

In *Tirumali*, LUBA concluded its cases addressing this issue had all addressed situations where one of the issues was whether the use was allowed in the zone at all. LUBA held in *Tirumali* that in cases where a building permit is issued for a use that is permitted outright, that building permit is not converted into a statutory permit (with notice and hearing requirements), simply because the local government interpreted an ambiguous term in a land use regulation in the course of issuing the building permit for a permitted use. The discretion required to apply the ambiguous term means such building permits are appealable to LUBA, but that discretion does not mean the building permit is automatically reversible for failure to follow statutory permit requirements (as some of LUBA's earlier decisions had suggested). LUBA recently reiterated this holding in two cases challenging building permits for multi-family dwelling projects in the City of Portland. *Kerns Neighbors v. City of Portland*, 67 Or LUBA 130 (2013); *Richmond Neighbors v. City of Portland*, 67 Or LUBA 115 (2013).

Waiver and Law of the Case

Beck v. City of Tillamook,
313 Or 148 (1992) (Beck IV)
105 Or App 276 (1991) (Beck III)
20 Or LUBA 178 (1990) (Beck II)
18 Or LUBA 587 (1990) (Beck I)

Law of the case applies in land use appeals.

A. Issues Conclusively Decided in Prior Appeals

Four statutes are central to the reasoning in *Beck*. ORS 197.835(11)(a) requires LUBA (“to the extent possible consistent with the time requirements of ORS 197.830(14)”) to decide “all issues presented to it when reversing or remanding” a land use decision or limited land use decision. ORS 197.850 provides for judicial review of a LUBA final order. ORS 197.763(7) provides that when a local government reopens a record to admit new evidence, parties may raise new unresolved issues that relate to the new evidence. ORS 197.835(3) provides that “issues shall be limited to those raised by any participant before the local hearings body as provided by ORS [197.763(1)].”

The appeal concerned a conditional use permit for a homeless shelter. The question before the Supreme Court in *Beck IV* concerned whether the above statutes required the petitioners in *Beck I* to seek judicial review of the legal issues that LUBA decided against them at that time, or whether they could wait until after the remand and a second appeal to LUBA to do so. The Court relied on the above four statutes to conclude, consistent with the Court of Appeals’ decision, that the petitioners were foreclosed from raising issues on review that were conclusively decided against them by the first final LUBA decision.

First, the Court emphasized that ORS 197.835(9) (now 11) allows LUBA to “narrow the scope of the remand to those issues that require further exploration. Doing so can avoid redundant proceedings and thereby facilitate [the Legislative Policy that] * * * time is of the essence in reaching final decisions in matters involving land use.” *Beck IV*. 313 Or at 152. The Court quoted ORS 197.850, and held: “[r]eading ORS 197.835[11] and ORS 197.850 together, and applying them to *Beck I*: All issues decided in *Beck I* were subject

to judicial review – exclusively as provided in ORS 197.850 – when LUBA issued *Beck I*, even though LUBA was remanding the case.” *Beck IV*, 313 Or at 153.

Second, the Court concluded that the logical corollary to ORS 197.763(7)’s direction that when the record is reopened to admit new evidence, new issues that relate to that evidence may be raised is that “when the record is reopened at LUBA’s direction on remand, the ‘new issues’ by definition include the remanded issues, but not the issues that LUBA affirmed or reversed on their merits, which are old, resolved issues.” *Beck IV*, 313 Or at 153. Finally, the Court concluded that the “raise it or waive it” rule now at ORS 197.763(1) requires that “[i]f the record is reopened for consideration or reconsideration of specific issues * * * then a subsequent appeal to LUBA generally is limited to such of those issues that an appellant may wish to raise.”

B. Issues That Could Have Been Raised in Prior Appeals

In *Beck IV*, the Court cited with approval *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 746 P2d 728 (1987). *Mill Creek Glen Protection* holds that the “law of the case” doctrine bars parties from raising issues in a second appeal to LUBA that could have been but were not raised in a first appeal from the same land use decision. The Court in *Mill Creek Glen Protection* characterized the issue as one of “waiver” rather than the more “mystical” law of the case doctrine. *See also Portland Audubon v. Clackamas County*, 14 Or LUBA 433, *aff’d* 80 Or App 593, 722 P2d 745 (1986) (LUBA concluded that the law of the case doctrine applies to proceedings before it).

C. Issues Not Raised in Prior Appeals of Legislative Decisions

***Hatley v. Umatilla County*, 256 Or App 91, 301 P3d 920 (2013)**

The law of the case doctrine does not apply to legislative decisions. When after a remand from LUBA of a legislative decision (1) the local government adopts a new piece of legislation rather than amending and readopting the original ordinances and (2) the new piece of legislation differs from the original legislation in substance, a party is not limited to raising only new issues challenging the new legislation.

**D. Issues Not Raised in Local Appeal of an Initial Local Decision
(Exhaustion of Remedies Waiver)**

Miles v. City of Florence, 190 Or App 500, 79 P3d 382 (2003)

ORS 197.763 (the raise it or waive it statute) only requires a petitioner at LUBA must have raised an issue prior to close of the “final evidentiary hearing.” ORS 197.763(1). In *Miles* petitioner raised an issue before the planning commission, at which the evidentiary phase of the proceeding concluded. But petitioner did not raise that issue in its notice of appeal to the city council, an appeal that was conducted on the record. But ORS 197.825(2)(a) requires a party to exhaust his or her administrative remedies before filing an appeal with LUBA. The Court of Appeals interpreted ORS 197.825(2)(a) also to require a potential LUBA appellant to raise an issue in any required notice of local appeal, even if that notice of appeal is filed after the close of the evidentiary phase. A party who fails to raise an issue in a local appeal may not raise the issue on appeal to LUBA, even if the issue was raised at some point during the local proceedings and is therefore not barred under ORS 197.835(3) and ORS 197.763(1). Some have referred to this as “exhaustion waiver,” to distinguish it from *Beck* “law of the case waiver” and statutory “raise it or waive it” waiver.

Urban Uses on Rural Lands

1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 724 P2d 268 (1986)

To convert rural lands to urban uses requires compliance with Goal 14 (Urbanization) requirements or an exception to Goal 14.

In adopting its comprehensive plan and land use regulations for acknowledgement by LCDC in the early 1980's, Curry County approved over 70 exception areas (10,400 acres), with the largest ones being for unincorporated rural communities. 1000 Friends took the position that for many of those exception areas (comprising approximately 4,000 acres), the exceptions to Goals 3 (Agricultural Lands) and 4 (Forest Lands) were not sufficient to permit the proposed quasi-urban levels of development on those exception lands. 1000 Friends argued that to allow quasi-urban levels of development on "rural" lands (lands outside an acknowledged urban growth boundary), an exception to Goal 14 (Urbanization) was also required. LCDC and the Court of Appeals had rejected that argument, concluding that the exceptions the county approved to Goals 3 and 4 were sufficient and that an additional exception to Goal 14 was not required.

Previous LUBA decisions and appellate court decisions lent some support to 1000 Friends' Goal 14 argument. The Supreme Court, relying principally on LCDC's recently enacted Goal 14 administrative rule (OAR chapter 660, division 14) and its decision one year earlier in *Perkins v. City of Rajneeshpuram*, 300 Or 1, 706 P2d 949 (1985), concluded that when a county adopts or amends a comprehensive plan with the *de facto* result that it converts rural land to urban uses, the county must apply and comply with Goal 14 or justify an exception to Goal 14.

"In practice, once an objector has charged that a decision affecting 'rural land' outside an urban growth boundary is prohibited by Goal 14, a local government may do any one of three things: (1) make a record based on which LCDC enters a finding that the decision does not offend the goal because it does not in fact convert 'rural land' to 'urban uses'; (2) comply with Goal 14 by obtaining acknowledgment of an urban growth boundary, based

upon considering of the factors specified in the goal; or (3) justify an exception to the goal.” 301 Or at 477.

LCDC and the county presented a spirited defense of LCDC’s acknowledgment order, but the Supreme Court ultimately rejected arguments that the Goal 3 and 4 exceptions sufficed as *de facto* exceptions to Goal 14 as well. The Supreme Court explained that the question of whether existing uses of rural lands are of a nature that makes commercial agriculture or forestry impracticable, which would justify an exception to Goals 3 and 4, is not sufficient to establish that those same uses make *all rural uses* of the exception area impracticable. 301 Or at 496-97.

On the far thornier issue of what types or levels of use constitute urban or quasi-urban uses that must comply with Goal 14 and be located inside a UGB, or be an exception to Goal 14, the Supreme Court accepted 1000 Friends concession that “one house per ten acres is generally ‘not an urban intensity,’” and also accepted LCDC’s concession that “‘half-acre residential lots to be served by community water and sewer’ are ‘urban type.’” 301 Or at 504-05. Those extremes leave a lot of gray potentially quasi-urban ground in between, and the Supreme Court noted that because LCDC had not seen fit to attempt to draw a bright line between urban and rural uses, the court would not attempt to do so either. The court did recognize that public water systems and particularly public sewer systems are indicative of urban use but beyond that a variety of factors might be relevant, including proximity to an existing UGB, the size and extent of commercial and industrial uses, residential density, parcel sizes, etc. The court rejected arguments that a county could rely on Goal 11’s restrictions on the level and intensity of public facilities in rural areas to ensure that there would be no urban or quasi-urban level development.

Other Goal 14 (Quasi-Urban) Cases

***Hammack & Associates, Inc. v. Washington County*, 89 Or App 40, 747 P2d 373 (1987).** The Court of Appeals agreed with LUBA that the outdoor performing arts center proposed for a 45-acre parcel located just outside the Metro UGB constituted an “urban” use and would require an exception to Goal 14. The decision included the following description of the proposal:

“The proposed outdoor performing arts center includes an amphitheater with 5,000 permanent fixed seats and a terraced

sloping lawn above the fixed seating capable of accommodating an additional 10,000 people. The stage and fixed seating would be covered by a tent to provide shelter and act as an acoustical resonating chamber. Traffic to be generated would range from 3,750 to 9,000 vehicles, and parking would be provided on site. The center would connect to sewer and water service available on adjoining urban land from the City of Wilsonville.” 89 Or App at 42.

Cox v. Yamhill County, 29 Or LUBA 263 (1995). In Cox, the disputed Goal 3 exception would allow a church on rural agricultural land to serve approximately 60 families, more than half of whom lived outside the nearby City of Amity UGB. LUBA concluded churches are not inherently urban in nature and that no Goal 14 exception was required for a church that would serve a primarily rural congregation.

DLCD v. Klamath County, 38 Or LUBA 769 (2000). The zoning map amendment in this case allowed 680 acres located 2 ½ miles north of the Klamath Falls UGB to be developed with a mixed residential and commercial PUD at a density of one residential unit per 5 acres and with no community water or sewer system, but with no minimum lot size such that clustering would be permissible to permit higher densities on portions of the site if off-set by lower densities on other parts of the site. LUBA concluded the 5-acre maximum residential density was not sufficient to ensure the PUD would not convert rural land to urban use.

Keicher v. Clackamas County, 39 Or LUBA 521 (2001). ORS 215.283(1)(w) (now ORS 215.283(1)(s)) allows “[f]ire service facilities providing rural fire protection services” on rural, EFU-zoned land. A fire station for a rural fire district with only five percent of its area within a UGB, and where 67 to 76 percent of incident responses would be to rural areas, is allowed by the statute and is not inconsistent with Goal 14.

Friends of Yamhill County v. Yamhill County, 49 Or LUBA 529 (2005). The comprehensive plan and zoning map amendment in this case allowed expansion of a rental storage business located on rural land adjacent to the McMinnville UGB to include buildings with up to 39,000 square feet of storage space along with additional areas for outdoor storage of RVs. Citing its proximity to the McMinnville UGB and the fact that customers would almost

exclusively be residents of the City of McMinnville, LUBA concluded the proposal was not consistent with Goal 14, notwithstanding that the permitted building area was similar to the building area allowed under LCDC rules at the time in rural unincorporated communities.

VinCEP v. Yamhill County, 215 Or App 414, 171 P3d 368 (2007). The applicant proposed a 50-room luxury hotel on agricultural land in the Red Hills of Dundee a few miles from Dayton, Lafayette and Dundee. One issue was whether the proposal required exceptions to both Goals 3 (Agricultural Lands) and Goal 14 (Urbanization). LCDC has adopted administrative rules to refine the process for approving exceptions to Goal 14. OAR 660-014-0040. LCDC has also adopted administrative rules to refine the process for approving exceptions to the Goals generally for a number of specified uses and for other unspecified uses. OAR 660-004-0020 and 0022. In *VinCEP*, LUBA construed the rule language to allow the applicant's Goal 14 exception under OAR 660-014-0040 to obviate the need for a second exception to Goal 3. The Court of Appeals reversed, construing that same rule language and contextual rule language to require separate exceptions from Goal 3 and Goal 14. The Court cited the Supreme Court's *Curry County* decision and pointed out that at least the alternatives analysis part of the exception process calls for a very different inquiry under Goals 3 and 14.

Wood v. Crook County, 55 Or LUBA 165 (2007). The Rural Aviation Community zone at issue in this case required 10-acre minimum lot sizes and prohibited community sewer. Petitioner's challenge that the new zone would allow quasi-urban development was rejected by LUBA, because the petitioner simply speculated that uses allowed by the new zone were so uncertain that the new zone could result in conversion of rural land to quasi-urban uses.

Oregon Shores Conservation Coalition v. Coos County, 55 Or LUBA 545 (2008). The proposed RV park in this case was to be located one mile from a UGB and include 179 spaces for "Park Trailer" RVs with water, sewer and electric hookups and would function as permanent or semi-permanent housing. LUBA concluded such a proposal requires an exception to Goal 14.

Linn County Farm Bureau v. Linn County, 61 Or LUBA 323 (2010). A full service RV campground with water, sewer and electric hookups for 196 RVs, located approximately 2-3 miles from the nearest UGB, would not function as permanent or semi-permanent housing and does not constitute an urban use for which a Goal 14 exception is required.

Comprehensive Plan as Quasi-Constitutional

Baker v. City of Milwaukie 271 Or 500, 533 P2d 772 (1975)

Comprehensive plan is a “constitution” for land use planning, superior to zoning ordinances; where a city adopts a comprehensive plan, it is required to zone in accordance with the plan to ensure that implementation of the plan will not be frustrated.

Plaintiff brought a mandamus action to compel the city and its officials to conform city zoning regulations to a subsequently adopted comprehensive plan. The city successfully argued in trial court that there was no statutory requirement that zoning be in accordance with a plan and that the plan, adopted by resolution, could not supersede zoning regulations adopted by ordinance. The trial court sustained city’s demurrer to the alternative writ, and plaintiff appealed. The Court of Appeals reversed—but not on grounds favorable to plaintiff—and held that there is no duty to adopt a written comprehensive plan. The Court of Appeals rejected the contention that zoning “in accord with a well-considered plan” required that city zoning conform to an adopted comprehensive plan, and again plaintiff appealed.

The Supreme Court allowed plaintiff’s petition for review and held that a city, once it has adopted a comprehensive plan, has a duty to zone in accord with that plan; any zoning ordinance which allows a more intensive use than that prescribed in the plan must fail. The Supreme Court reasoned that the comprehensive plan is the controlling land use planning instrument for a city, and upon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. The Supreme Court also noted that, because the relationship between planning and zoning is analogous to that between a constitution and legislation in which the former provides legal parameters for the latter, the comprehensive plan is a “constitution for all future development within the city.” The comprehensive plan is flexible and subject to change when the needs of the community demand, but, unlike a constitution, it is subject to amendatory procedures similar to those followed in enacting ordinary legislation.

Subsequent Cases

***Allison v. Washington County*, 24 Or App 571, 548 P2d 188 (1976).** The comprehensive plan which each county adopts is part of a broad policy-oriented program for orderly land development throughout the state, and has been likened to a constitution.

***Damascus Community Church v. Clackamas County Board of Commissioners*, 32 Or App 3, 573 P2d 726 (1978).** Where there is no conflict between the comprehensive plan and a zoning ordinance, the zoning ordinance governs.

***Bennett v. City of Dallas*, 96 Or App 645, 773 P2d 1340 (1989).** To determine whether comprehensive plan policies are mandatory approval criteria that apply to quasi-judicial land use decisions, look to the context and express language of the policies.

***Trademark Construction, Inc. v. Marion County Board of Commissioners*, 155 Or App 84, 962 P2d 772 (1998).** A policy component of a comprehensive plan may serve an exclusively advisory function where the component itself and relevant local governing body legislation describe it and treat it as a “guide” or “guideline only”; the fact that a plan is more general than zoning legislation and serves as a guide for the substance of that legislation does not mean that nothing in the plan is mandatory.

***Friends of the Hood River Waterfront v. City of Hood River*, 263 Or App 80, 326 P3d 1229 (2014).** Whether the city’s interpretation of its comprehensive plan is inconsistent with the plan, or the purposes or policies underlying that plan, depends on whether the interpretation is plausible, given the interpretive principles that ordinarily apply to the construction of ordinances; to receive deference, a city’s interpretation of implementing land use regulations must be plausibly squared with the text and context of the applicable provision of the plan.

Deference to Local Government Interpretations

***Clark v. Jackson County,* 313 Or 508, 836 P2d 710 (1992)**

Under ORS 197.835(9)(a)(D), LUBA is granted review authority over a county's interpretation of a local land use ordinance; if a county has construed an ordinance in a manner that clearly is contrary to the enacted language, LUBA acts within its scope of review in finding that the county improperly construed the applicable law; LUBA is to affirm a county's interpretation of its own regulation unless LUBA finds it inconsistent with the express language of the regulation or apparent purpose or policy

Introduction

While *Clark v. Jackson County* is generally considered to be the lead case when it comes to LUBA's scope of review of interpretations of local land use laws, no discussion of *Clark* and its prodigy would be complete without some discussion of at least two cases that preceded *Clark*, which help demonstrate how the appellate courts have changed course at times over the years in their formulation of how LUBA and the appellate courts should go about reviewing challenges to local government interpretations of local land use laws.

Before-Clark

***Allius v. Marion County*, 64 Or App 478, 481, 668 P2d 1242 (1983).** Four years after LUBA was created, the Court of Appeals cited several of its earlier decisions and the Supreme Court's decision in *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978) in describing a deferential standard of review that LUBA and the courts are to apply to local government interpretations of local laws: "Our review begins with a recognition that this court will defer to a local body's interpretation of its own enactments, if the interpretation is reasonable."

***McCoy v. Linn County*, 90 Or App 271, 275-276, 752 P2d 323, (1988).** Five years after its decision in *Allius*, the Court of Appeals appears to have felt that LUBA was according too much deference to local government interpretations

of local land use laws and made it clear, for the time being at least, that LUBA's job was to ensure that the local government was correctly interpreting the law rather than determining whether challenged interpretations were reasonable:

“The quoted statement from *Alluis v. Marion County, supra*, and similar language in other decisions of this court, have often been understood to imply that the enacting body's after-the-fact interpretation of local legislation is entitled to more weight on review than its correctness warrants and that deference must be accorded to a local interpretation which is wrong but not “unreasonably” so. We reiterate what we made clear in *Gordon v. Clackamas County*, * * * and what the Supreme Court made reasonably clear in *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978), that the meaning of local legislation is a question of law which must be decided by the courts and other reviewing bodies to which it is presented. Although the local interpretation must be considered on review, the reviewing tribunal's acceptance or rejection of the interpretation is to be determined solely by whether, in the tribunal's opinion, the interpretation is right or wrong.”

***Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).**

LUBA reversed the county's approval of a conditional use permit for mining shale on a 40-acre portion of a 400-acre tract zoned EFU. The county's code required a finding that the land was generally unsuitable for farm use. The county applied that standard to the 40 acres to be mined, but LUBA interpreted the code to require a finding that the larger 400 acre tract is generally unsuitable for farm use. The applicant landowner appealed. The Court of Appeals reversed and remanded, and a neighbor then sought Supreme Court review.

The Supreme Court held that LUBA exceeded its statutory authority on review by imposing on the acknowledged ordinance an interpretation that contradicted the county's interpretation, where the county's interpretation was consistent with the wording, purpose, and policy of its acknowledged ordinance. The Supreme Court held that LUBA is to affirm a county's

interpretation of its own ordinance unless LUBA determines that the “county’s interpretation is inconsistent with the express language of the ordinance or its apparent purpose or policy.” 313 Or at 515.

After Clark

***West v. Clackamas County*, 116 Or App 89, 840 P2d 1354 (1992).** “The question is not whether the hearings officer’s interpretation is ‘right,’ but whether it is wrong enough to be reversible under *Clark*.”

***Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 943 P2d 992 (1992).** “[T]he question under *Clark* for LUBA and [the appellate courts], as to both the city’s determination that the provisions were in conflict and of how to reconcile them, is not whether the city was “right” but whether it was clearly wrong.”

***Langford v. City of Eugene*, 126 Or App 52, 867 P2d 535 (1994).** LUBA’s responsibility in cases to which *Clark* and ORS 197.829(1)(a)-(c) apply is to review the local interpretation, and “not to provide an independent interpretation of local land use legislation[.]”

***Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854 (1994).** “We emphasize again, as we have on several occasions since the Supreme Court’s decision in *Clark*, that the question for LUBA and us is not what the local legislation in fact means, but whether the local government’s interpretation of it is so wrong as to be beyond colorable defense.”

***Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994).** The *Clark* decision does not require LUBA to give deference to the interpretation of local land use laws by someone other than governing body, such as hearings officer, when there was no appeal of the hearing officer’s decision to the responsible political body.

***Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, rev. den. 324 Or 322, 927 P2d 598 (1996).** For a local governing body’s interpretation to be “clearly wrong” and therefore reversible under *Clark*, the

local interpretation must be such “that no person could reasonably interpret the provision in the manner the local body did.”

***Alliance for Responsible Land Use in Deschutes County v. Deschutes County*, 149 Or App 259, 267-68 942 P2d 836 (1997).** *Clark* deferential standard of review is not limited to express interpretations. Where an implicit interpretation is sufficient for review, that implicit interpretation is entitled to *Clark* deference.

***Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003).** The Court of Appeals rejects the “clearly wrong” short-hand description of the standard of review under ORS 197.829(1)(a)-(c): “To the extent our summary description of the standard of review under *Clark* suggests that LUBA must sustain all but the most unreasonable interpretations of local land use controls, that description is inaccurate. The legitimacy of an interpretation of a local plan and ordinance provision depends on its consistency with the terms of the provision, the context of the provision, and the purpose or policy behind the provisions. Conversely, the validity of the interpretation is not determined solely by the reasonableness of an argument created to support it. The *Clark* decision and ORS 197.850(9), which was enacted after *Clark*, are more correctly characterized as consistent with the rules of construction announced in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993).”

***Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).** When a local government plausibly interprets its own land use regulations by considering and then choosing between or harmonizing conflicting provisions, that interpretation must be affirmed unless the interpretation is inconsistent with all of the “express language” that is relevant to the interpretation, or is inconsistent with the purposes or policies underpinning the regulations.

***Delta Property Co. LLC v. Lane County*, 271 Or App 612, 352 P3d 86 (2015).** In *Delta Property v. Lane County*, 69 Or LUBA 305 (2014), LUBA declined to extend deference under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010) and found the county commissioners erroneously determined the county’s inventory of significant aggregate mineral resources was as depicted on a map that showed fewer sites than the map that petitioner argued was the acknowledged Goal 5 inventory of significant mineral and aggregate resources. That map included petitioner’s property; the

map identified by the county commissioners did not. The reason LUBA gave for declining review under ORS 197.829(1) was that the Lane County Board of Commissioners was only one of three governing bodies that adopted the inventory. On appeal, the Court of Appeals reversed and held Lane County was entitled to deferential review under ORS 197.829(1). On remand to LUBA, applying the deferential standard of review required by ORS 197.829(1) and *Siporen*, LUBA affirmed the county commissioners' decision. *Delta Properties v. Lane County*, ___ Or LUBA ___ (LUBA No. 2013-061, September 7, 2015).

FOUR IMPORTANT SUPREME COURT DECISIONS

Significant Impacts Test Land Use Decisions

Peterson v. Klamath Falls
279 Or 249, 566 P2d 1193 (1977)

The “significant impacts” jurisdictional test for LUBA was judicially created and applied in a pre-acknowledgement world. This pre-LUBA case determined that local government planning actions that have significant impacts on present or future land uses must comply with the statewide planning goals.

Peterson brought a challenge in circuit court to a City of Klamath Falls ordinance that annexed 141 acres of farmland. The central legal issue was whether the annexation was an “exercise [of] planning or zoning responsibilities” so that under ORS 197.175(1) the county should have applied the statewide planning goals. The circuit court upheld the ordinances. On appeal, the Court of Appeals affirmed, concluding that the annexation was not an action that affected land use “much less an exercise of judicial planning or zoning responsibilities.” 279 Or App at 227-28. The Supreme Court reversed. The Supreme Court determined that local planning responsibilities include “not only local planning decisions which relate to immediate land use objectives but also planning decisions which relate to the uses to which that land will be put in the future.” In other words, the court determined that a local government’s planning responsibilities include “local planning activities which will have a significant impact on present or future land uses.” The court looked to statutory context for this determination including statutorily listed planning commission powers to plan for regulating future growth, and interim statewide planning goal language that directed local governments to provide for orderly and efficient transition from rural to urban land use.

Subsequent Cases

***City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982)**

This case arose after enactment of the statutes that created LUBA. North Main Street in Pendleton had been dedicated in 1915, but a never-developed portion of the right of way had been developed by nearby property owners as a neighborhood park. To facilitate residential development of adjoining parcels, the city adopted an ordinance that authorized improvement of the undeveloped right of way and created a local improvement district to finance the construction. Opponents appealed to LUBA and LUBA remanded based on the city's failure to consider whether the roadway construction was consistent with the city's comprehensive plan and statewide planning goals. The Court of Appeals affirmed, as did the Supreme Court. At the time, the city's comprehensive plan was before LCDC for initial acknowledgment. The Supreme Court rejected arguments that the ordinance was a non-reviewable "fiscal" decision, noting that the opponents were opposing construction of the roadway, not the LID financing mechanism. The Supreme Court then recognized the roadway had been dedicated many years ago, but speculated that the facts on the ground may have changed making road construction "improvident and improper now." 294 Or at 132. Citing its decision in *Peterson*, the Supreme Court concluded the destruction of the park to allow construction of the road now would have a significant impact on present or future land uses. The Supreme Court conceded that the significant impact test is a "nebulous standard," and distinguished decisions that had significant impacts on land use such as construction of a major arterial road or a bridge from decisions that had *de minimis* impacts such as resurfacing a street or repairing a pot hole. 294 Or at 133.

***CBH Company v. City of Tualatin*, 16 Or LUBA 399 (1988)**

Just as a statutory land use decision must be a "final" decision, a significant impacts test land use decision must be a "final" decision, because it cannot have significant impacts on land use unless it is a final decision.

***Oregonians in Action v. LCDC*, 19 Or LUBA 107 (1990)**

By statute a number of decisions that might otherwise be reviewable by LUBA, such as decisions concerning final subdivision or partition plats, are expressly excluded from LUBA's jurisdiction. In *Oregonians in Action v. LCDC*, LUBA held that the significant impacts test does not operate to give

LUBA review jurisdiction over such decisions simply because they may have significant impacts on land use.

***Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162, 170 (2013)**

“* * * LUBA will decline to apply the significant impacts test to allow the Board to review decisions that merely implement earlier statutory land use approvals, even if those implementing decisions are the proximate step leading to actual construction or other actions affecting land use.”

***Baker v. City of Gearhart*, 69 Or LUBA 227, 233
(LUBA No 2013-069, April 2, 2014).**

In *Baker*, LUBA questioned the remaining viability of the significant impacts test in modern land use appeals as it was “a test that was announced by the Oregon Supreme Court at a time where many local governments did not have acknowledged comprehensive plans and land use regulations[.]”

Fiscal Decisions

State Housing Council v. City of Lake Oswego
48 Or App 525, 617 P2d 655 (1980),
rev dismissed, 291 Or 878, 635 P2d 647 (1981)

Decisions affecting land use are outside of LUBA's jurisdiction if they are principally fiscal in nature.

In a pre-LUBA decision, the Court of Appeals identified the fiscal decision exception to land use review. The State Housing Council brought a proceeding before the Land Conservation and Development Commission (LCDC) contending that the city did not consider the statewide planning goals in adopting an ordinance which imposed a system development charge on new construction. LCDC upheld the ordinance, determining that the systems development charge was not a land use action. On review, the Court of Appeals held that LCDC's jurisdiction only allowed for review of the exercise of land use planning responsibilities by units of government for compliance with the statewide planning goals. More importantly, the court determined LCDC lacked jurisdiction to review the adoption and administration of local taxation and budget policy that might have an impact on land use. Therefore the ordinance imposing the system development charge was not a land use action, and compliance and the statewide planning goals was not required.

The Supreme Court granted review, but prior to issuing its final decision, the law changed. At the time of LCDC's decision, it had authority to review "a comprehensive plan provision or any zoning, subdivision, or other ordinance or regulation" for compliance with the goals. Amendments in 1979 shifted review to the Land Use Board of Appeals (LUBA), allowing LUBA to review "land use decisions" defined as including the adoption, amendment, or application of a "zoning, subdivision or other ordinance that implements a comprehensive plan." In 1981, the definition of land use decision was further revised to include review of "land use regulations" defined as "any local government zoning ordinance, land division ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan." Due to this changing statutory landscape, the Supreme Court issued a Per Curium opinion dismissing the case. The court noted that it was best for the agencies to have

the first opportunity to consider the revised statutory scheme, and to further revise the criteria for when fiscal actions constitute land use regulations.

Subsequent Cases

LUBA has applied *Housing Council* in a number of different contexts to conclude that even though decisions may affect land use, they are outside of LUBA's jurisdiction if they are principally "fiscal" in nature. See *Lewis v. City of Bend*, 45 Or LUBA 122 (2003) (decision creating a local improvement district is not a land use decision); *Jesinghaus v. City of Grants Pass*, 42 Or LUBA 477 (2002) (creation of reimbursement district not a land use decision); *Baker v. City of Woodburn*, 37 Or LUBA 563, *aff'd*, 167 Or App 259, 4 P3d 775 (2000) (same); *The Petrie Company v. City of Tigard*, 28 Or LUBA 535 (1995) (repeal of sewer reimbursement district not a land use decision). *Conte v. City of Eugene*, 66 Or LUBA 95 (2012) (a decision that approves a property tax exemption for multiple-family housing under ORS 307.600 is a fiscal decision excluded from LUBA's jurisdiction).

In a 1982 decision, LUBA considered whether the *Housing Council* fiscal exception applied to a city decision that imposed a \$2,050 appeal and transcript fee as a precondition of allowing a local land use appeal to proceed. LUBA concluded the fiscal exception applied, and concluded it did not have jurisdiction to review the appropriateness of the appeal and transcript fee. *Friends of Lincoln County v. Newport*, 5 Or LUBA 346 (1982). But following that decision, LUBA has consistently ruled, to the contrary, that land use permit application and appeal fee decisions do not qualify for the fiscal exception and are reviewable by LUBA. *Montgomery v. City of Dunes City*, 61 Or LUBA 123 (2010).

Disqualifying Bias

1000 Friends of Oregon v. Wasco County Court
304 Or 76, 742 P2d 39 (1987), cert. den. 486 US 1007, 108 S Ct 1733 (1988)

A distinction exists between personal bias, where a decision will directly affect the decision maker, and prejudgment bias, where a decision advances a cause supported by the decision maker; a petitioner must demonstrate that the public officials charged with bias are incapable of making a decision on the basis of the evidence and argument presented

LUBA held that certain undisclosed business dealings between a county judge and persons seeking to incorporate a city did not invalidate the judge's vote in favor of holding an election on petition to incorporate the city, and parties opposing the incorporation sought review. The Court of Appeals reversed, and held that the judge's past dealings invalidated his vote. Parties seeking incorporation then appealed.

The Supreme Court reversed the Court of Appeals and affirmed LUBA, and held that a different standard of disqualification than that for judges applies to quasi-judicial decision makers. County commissioners are politically elected to positions that do not separate legislative from executive and judicial power, and the role combines lawmaking with administration that is sometimes executive and sometimes adjudicative. This combination creates tension between a board member's policymaking role (active pursuit of a particular view of the community's interest) and adjudicative role (maintenance of an appearance of having no such view when decisions are to be made by an adjudicatory procedure). Furthermore, positions are generally part-time and without pay, meaning that board members make their living from ordinary pursuits and private transactions in the community; thus, business activity and outside income restrictions imposed on judges for the sake of appearance do not apply by analogy to such board members.

The Supreme Court also held that Fourteenth Amendment due process standards for disqualification did not require the county judge to disqualify himself. Due process requirements that a government official be disqualified for conflict of interest "tighten" with three separate variables: (1) the more the officer or agency purports to act as a court; (2) the closer the issues and interests at stake resemble those in traditional adjudications; and (3) a

disqualifying element continuum ranging from appearances of bias, through possible temptation and generic self-interest, to actual personal interest in the outcome of the decision.

Subsequent Bias Cases

***Eastgate Theatre, Inc. v. Board of County Commissioners of Washington County*, 37 Or App 745, 588 P2d 640 (1978).** A commissioner's previous involvement with a land use matter in a different capacity does not necessarily require disqualification where the involvement is not of a sufficient nature or magnitude to pose the kind of partiality intended to be prohibited by *Fasano*.

***Beck v. City of Tillamook*, 113 Or App 660, 833 P2d 1327 (1992).** Substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.

***Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002), *aff'd* 183 Or App 581, 54 P3d 636 (2002).** The city voted to deny a church's application for a permit necessary to construct a new church building. Shortly after that vote, two new city councilors were elected, both members of the church. The initial denial decision was appealed to LUBA, and the new city council requested that LUBA grant a voluntary remand without reaching the merits. The city council then voted to approve the church expansion. In the subsequent appeal, the impartiality of the two church member city councilors was challenged. LUBA rejected one of those challenges, but sustained the other. The new city councilor LUBA found not to be impartial had participated as a party before the planning commission as an advocate for the new church building before the first city council decision. And while the matter was pending before the city council during the remand proceedings, he signed a petition supporting the proposal. In addition, during a candidate forum while he was running for city council he stated: "he did not feel the need to be objective regarding the [church] and further stated that 'we [the church] will fight this even if we have to fight all the way to the Supreme Court.'"

***Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014).** *Columbia Riverkeeper* concerned a proposed LNG pipeline through Clatsop County that would connect with a previously approved terminal in the

City of Warrenton. The Clatsop County board of commissioners initially approved the pipeline. But after a new board of commissioners was seated, the approval decision was withdrawn by the new board of commissioners for reconsideration pursuant to ORS 197.830(13)(b). One of the newly elected Clatsop County Commissioners was a longtime opponent of LNG facilities and had earlier participated as a party at LUBA and the Court of Appeals opposing the terminal in the City of Warrenton that the proposed pipeline would connect with. Following a long and ultimately unsuccessful effort by the pipeline applicant to challenge the county's withdrawal of the initial decision in circuit court, the newly elected board of commissioners voted to deny the application, with the new county commissioner who had participated in the earlier City of Warrenton appeal voting to deny the pipeline permit. In a split decision, LUBA concluded the county commissioner was biased and should not have participated. In reaching that conclusion, the LUBA majority considered all of the county commissioners' actions opposing the larger LNG project, as well as other LNG projects, and relied particularly on his participation in the City of Warrenton appeal of the terminal and his vote to withdraw the decision, just before the deadline for doing so expired, on the day he was sworn in as a county commissioner, to conclude he was biased. The Court of Appeals reversed, concluding that the City of Warrenton appeal and the Clatsop County pipeline applications were separate and that LUBA should not have considered the county commissioner's participation as a party in the Warrenton appeal in considering the bias challenge in the separate county pipeline matter.

Structure of the EFU Zone

Brentmar v. Jackson County, 321 Or 481, 900 P2d 1030 (1995)

The complicated architecture of the EFU zone is a major feature the land use program. Uses allowed under ORS 215.213(1) and 215.283(1), so-called Category 1 uses, are allowed outright, and counties cannot adopt additional restrictions or regulations on Category 1 uses (although LCDC can). Uses allowed under ORS 215.213(2) and 215.283(2) (Category 2 uses) are conditional uses, and counties may attach conditions, adopt additional restrictions and regulations, even prohibit them entirely.

ORS 215.213(1)(a) and ORS 215.283(1)(a) (1993) provided that “[p]ublic or private schools” “may be established” on EFU zoned land.² The county code made schools a conditional use, subject to standards such as “minimal effect on the livability of abutting properties.” The county denied Brentmar’s application for an agricultural and horticultural school based on noncompliance with county conditional use standards. LUBA and the Court of Appeals affirmed.

The Supreme Court reversed, concluding after analysis of text, context and legislative history that a county may *not* apply local standards to uses allowed under ORS 215.213(1) and 215.283(1), but may apply local standards to uses allowed under ORS 215.213(2) and 215.283(2). The statutory text on this point is ambiguous. Category 1 uses “may be established” on EFU lands, while Category 2 uses “may be established, subject to the approval of the [county.]” That textual difference aside, nothing in the statutes clearly prohibits a county from applying additional local regulations to Category 1 uses. However, the Court found the legislative history dispositive, with a clear intent to create a two-category system, with uses allowed under ORS 215.213(1) and 215.283(1) treated as “uses of right,” which may not be subject to any local criteria.

² Schools have since been made “Category 2” uses. *See* 215.283(2)(aa).

Subsequent Cases

In *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997), the Supreme Court distinguished *Brentmar*, and held that LCDC regulations that restricted Category 1 uses on high-value farmland did not exceed LCDC's statutory authority or conflict with any statute, even if those regulations have the effect of prohibiting uses otherwise permissible under the applicable statute. *See also Bruggere v. Clackamas County*, 168 Or App 692, 7 P3d 634 (2000) (LCDC has authority to impose additional limitations on lot of record dwellings than imposed by ORS 215.700).

In *Josephine County v. Garnier*, 163 Or App 333, 987 P2d 1263 (1999), the Court of Appeals concluded that *Brentmar* established only that counties may not impose additional criteria on Category 1 uses, but *Brentmar* did not insulate Category 1 uses from all state and local government safety regulations, such as building regulations. Simply because a school is located in an area zoned for exclusive farm use, for example, does not mean that the school building does not have to meet state and local fire, building and other public safety regulations that apply to all such buildings, regardless of their location.

RECENT LUBA DECISIONS

Determining Which Property Owners Receive Notice

***MacKenzie v. City of Portland*, __ Or LUBA __ (LUBA No. 2014-099),
March 10, 2015**

The “property that is the subject of the notice” for purposes of providing 197.763 notice to nearby property owners consists of the lots or parcels that the applicant owns or controls and on which development is proposed, plus any additional off-site areas to be developed by the applicant. A local government may rely on tax lot boundaries to determine the exterior boundary of the lots or parcels that form the “property,” absent some reason to believe that tax lot boundaries do not correspond to the relevant lot or parcel boundaries.

The Japanese Garden Society proposed to expand its facility on 12.5 acres of land that it leases from the City of Portland Parks, located on a 25-acre area, consisting of three tax lots, that is itself part of the 400+-acre Washington Park owned by the city. The city provided notice to neighbors within 400 feet of the exterior boundaries of the three tax lots that include the 12.5-acre leasehold. Petitioners reside outside the notice area, but are adjacent to other portions of Washington Park. On appeal to LUBA, petitioners argued that the “property that is the subject of the notice” is the entire 400-acre Washington Park area owned by the City of Portland. Because petitioners owned property adjacent to Washington Park, petitioners contended, the city erred in failing to provide them notice of the application.

LUBA rejected that argument. ORS 197.763 does not define “property,” and does not require that the “property” include contiguous lots or parcels in common ownership. Because development was limited to the 25-acre area that included the leasehold proposed for development, the city did not err in using the boundary of that 25-acre area, rather than the entire 400-acre city park, to determine the notice area. LUBA also rejected petitioners’ argument that the city cannot rely on an assessor’s map showing tax lot boundaries, but must include in the record deeds or other evidence of the actual lot or parcel boundaries. Absent some reason to believe that tax lot boundaries do not correspond to the relevant lot or parcel boundaries, LUBA held, the city is not obligated to place in the record evidence of the lot or parcel boundaries, but may rely on assessor’s maps or similar evidence of tax lot boundaries.

Plausibility in County Interpretations

***Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No. 2014-080,
January 30, 2015), *rev'd and remanded in part, aff'd in part*,
272 Or App 666, ___ P3d ___ (2015).**

The complexity of a county's multi-step destination resort approval process cannot be the only consideration in determining whether the applicant is at fault for not substantially completing the conditions of conceptual master plan approval with the two year period required under the county's land use regulations. A board of county commissioners' interpretation of the code to the contrary is "implausible" and is not sustainable under ORS 197.829(1) and Siporen v. City of Medford, 349 Or 247, 243 P3d 776 (2010).

This decision is the latest in a number of LUBA and appellate court decisions regarding challenges to a proposal to develop Thornburg Resort, a proposed destination resort in Deschutes County in the vicinity of Eagle Crest Resort.

The issue in this appeal is whether the conceptual master plan approval that the applicant received some time ago had expired. To avoid that result, the county had to find that the applicant had substantially exercised (completed) the conditions of conceptual master plan approval or that any failure to do so "is not the fault of the applicant." The conceptual master plan approval included 42 conditions of approval. The applicant had not complied with 23 of those conditions, primarily because final approval was required before they could be completed and the decision granting final master plan approval had been remanded by LUBA. The board of commissioners had concluded that the fault for petitioners' failure to complete the conditions of approval was the complexity of the county's three-step destination resort approval process. LUBA conclude that while that was perhaps an unusual interpretation, it was not inconsistent with the text of the county code and therefore not reversible under ORS 197.829(1) and *Siporen*.

On appeal, the Court of Appeals reversed:

“[W]e understand the county to have made the complexity of the three-step process the *only* consideration in determining whether the applicant was at fault for failing to comply with those

contingent conditions, and we conclude that that is an implausible interpretation of the DCC.” 272 Or App at 679 (emphasis in original).”

Wedding Event Facilities in the EFU

***Smalley v. Benton County*, __ Or LUBA __ (LUBA No. 2014-110, March 17, 2015); *Central Oregon Landwatch v. Deschutes County*, __ Or LUBA __ (LUBA No. 2015-034, August 17, 2015)**

A wedding event facility is not allowed on EFU-zoned land as either an “on-site filming” facility or a “private park.”

These two cases involve attempts to wag a dog via vigorous back and forth motion of a posterior appendage. In *Smalley*, the applicant sought county approval of a wedding event facility as “on-site filming” allowed on EFU-zoned land pursuant to ORS 215.306, under the theory that because the wedding participants frequently video-taped their weddings, the event facility fit within the category of “on-site filming.” As defined at ORS 215.306(4), “on-site filming” includes the “Production of advertisements, documentaries, feature film, television services and other film productions that rely on the rural qualities” of the EFU zone in more than an incidental way. The applicant argued that video-taping a wedding constituted the production of a “documentary” within the meaning of ORS 215.306(4). The county rejected that argument, concluding that the video-recording of a wedding is accessory and incidental to the wedding, not a primary “filming” use that could qualify under ORS 215.306. LUBA agreed with the county’s analysis.

In *Central Oregon Landwatch*, the applicants sought and obtained county approval for a wedding event facility as a “private park,” which is a conditional use allowed in the EFU zone. In earlier cases, LUBA had held that the defining characteristic of a “park” is that the primary use is recreational in nature. The county took the position that while a wedding or similar event is not a “recreational” activity, some of the post-ceremonial activities associated with a wedding, such as the wedding dinner, dancing, lawn games, etc, constituted “recreational” activities that qualified the proposed use as a park. The county accepted the applicant’s position that the post-ceremonial activities were the primary use of the property, while the wedding or ceremony itself was incidental, akin to an award ceremony after a sporting event. LUBA disagreed, concluding that as proposed the events themselves are the focal, primary uses of the property, and any post-event activities that occur are incidental to those primary uses. LUBA noted that, but for the wedding or event, the participants would not be allowed on the property for recreational or any other purpose.

Forest Template Dwellings

West v. Multnomah County, 70 Or LUBA ___ (LUBA No 2014-048, September 30, 2014), aff'd 269 Or App 518, ___ P3d ___ (2015)

Applying a county code definition of “dwelling unit,” a dilapidated, vacant, boarded up and uninhabitable dwelling that was built in 1906 may not be counted in determining whether the required number of dwellings existed in 1993 and continue to exist within a 160-acre template so as to authorize approval of a forest template dwelling.

Statutory authority to approve forest template dwellings was passed in 1993. For property capable of producing more than 85 cubic feet of wood fiber per acre per year, a forest template dwelling may be approved if there are at least 11 other lots or parcels within a 160 acre template centered on a tract and at least three dwellings existed on those 11 other lots or parcels in 1993. LCDC, by administrative rule, has added an additional requirement that those three dwellings must “continue to exist” at the time of forest template dwelling approval. Multnomah County had by ordinance increased the required number of dwelling from three to five.

The only issue on appeal was whether one of the five dwellings the applicant relied on qualified as a “dwelling that continued to exist.” That dwelling was in an extremely dilapidated state, had not been occupied for many years, and for many years had been assessed at less than \$2,500. Neither the statute, nor LCDC’s rule, nor the Multnomah County code defined the key word “dwelling[.]” The applicant looked to the county code definition of “Dwelling (Single Family Detached)” which provided “a detached building designed for one dwelling unit.” Under that definition, the applicant argued the state of repair of the dwelling was irrelevant. The hearings officer rejected that argument and looked instead to the county code definition of “dwelling unit” which called for the structure to be currently providing living facilities. The hearings officer also relied in part on the requirement that dwelling must “continue to exist.” As an alternative basis for his decision, the hearings officer found the dwelling was at best a nonconforming use that had lost its right to continue to exist through interruption or abandonment.

LUBA affirmed, agreeing with both reasons given by the county. On appeal, the Court of Appeals agreed that “the code definition of ‘dwelling unit’

requires a dwelling to provide, in the present tense, complete living facilities.” The Court of Appeals found that reason dispositive, and did not consider petitioner’s challenge to the interrupted/abandoned nonconforming use reasoning.

Vested Rights

Wal-Mart Stores, Inc. v. City of Hood River, __ Or LUBA __ (LUBA No. 2015-004), July 8, 2015, aff'd, 274 Or App 261(2015).

A vested right is the right to complete or fully implement a use that, once completed, will be a nonconforming use. A vested right can be lost through discontinuance, e.g. by failing to continue progress toward completion within some time frame after the use becomes nonconforming.

In 1991, Wal-Mart obtained approval to construct a 72,000-square-foot commercial retail store, and a (2) 30,000-square-foot “future expansion.” The main store was constructed and has operated continuously since. In 1997, the city amended the applicable zone to prohibit commercial retail, which made the main store a nonconforming use. In 2011, Wal-Mart applied to the city for approval to (1) alter the main store and (2) construct the “future expansion” as a vested right, based on the 1991 approval.

After several detours, the city council finally concluded that its city code nonconforming use provisions govern vested rights, including a standard providing that the right to the nonconforming use is lost if the use is discontinued for more than 12 consecutive months. The city council concluded that, after retail commercial use was prohibited on the site in 1997, Wal-Mart could preserve its vested right to construct the future expansion only if it avoided a 12-month period in which it took no actions to pursue completion, e.g. pull building permits and begin construction. Because Wal-Mart allowed 14 years to pass without taking any steps at all toward completion, the city council concluded, its vested right was lost.

On appeal, Wal-Mart argued that the city council erred in interpreting its code to “retroactively” extinguish its vested right, at the end of a 12-month period following the 1997 zone change. According to Wal-Mart, application of the discontinuance provisions of the city code should be delayed until the applicant seeks a vested rights determination and the city issues a final decision concluding that the applicant has a vested right. LUBA rejected that argument, commenting that vested rights are generally treated the same as nonconforming uses under ORS 215.130, the statute applicable to counties governing nonconforming uses, and that a nonconforming use under the statute can be lost or discontinued prior to the applicant filing an application to verify the nonconforming use right. LUBA noted that the city is not bound by ORS

215.130, and could possibly have interpreted its discontinuance provisions to allow vested rights to be treated more generously than nonconforming uses, but the city in the present case had not, and LUBA affirmed the city council's code interpretation under ORS 197.829(1).

Proposed Mining and Goal 5

Central Oregon Landwatch v. Deschutes County, ___ Or LUBA ___ (LUBA No. 2015-011/012, August 17, 2015).

Fleeing Sage Grouse will not cause a conflict with grazing on surrounding lands.

This was the fourth appeal of a county decision that added a 385-acre property to the county's inventory of significant mineral and aggregate sites and rezoned the property Surface Mining. By this time a number of legal issues had been raised and resolved. One of the remaining legal issues had to do with how large the impact area needed to be to perform the conflicts analysis that is required under the Goal 5 rule to allow mining on the site. Specifically, one of the remaining issues was whether the proposed mine would conflict with agricultural practices on surrounding grazing lands. One of the sub-issues within that issue was whether the mine would disturb sage grouse using nearby habitat causing the sage grouse to relocate which in turn could result in BLM curtailing cattle grazing in areas where the sage grouse relocate.

A prior appeal had already determined that the proposal would not conflict with a sage grouse lek located some distance from the proposed mining site. One of the prior appeals had also concluded that impacts on sage grouse habitat generally did not have to be considered, if it had not been included on the county's inventories of significant Goal 5 resource sites. On the very limited issue that remained to be decided in this appeal, LUBA concluded the county's findings that the proposed mine would not cause sage grouse to relocate onto BLM properties subject to grazing leases and therefore would not result in conflicts with grazing on those lands was sufficient and supported by the record.

These cases of course predate LCDC'S sage grouse rule.

Historical Preservation

Lake Oswego Preservation Society v. City of Lake Oswego, 70 Or LUBA 103 (2014), rev'd 268 Or App 811, 344 P3d 26 (2015), rev allowed 357 Or 164, 351 P3d 52 (2015), oral argument held November 10, 2015.

Question before the Oregon Supreme Court: *If the original property owner either objected to the imposition of a local Goal 5 historic designation or never was asked, and the property was then conveyed to a successor, may the successor obtain removal of the Goal 5 historic designation pursuant to ORS 197.772(3) as the "property owner"?*

ORS 197.772, adopted in 1995, provides in relevant part:

“(1) Notwithstanding any other provision of law, a local government shall allow a property owner to refuse to consent to any form of historic property designation at any point during the designation process. * * *

“* * * * *

“(3) A local government shall allow a property owner to remove from the property a historic property designation that was imposed on the property by the local government.

In 1990, the city placed a historic dwelling and barn on its inventory of historic sites. The property owner objected to designation of the historic dwelling and barn. During a reconsideration proceeding, the barn burned down. The city withdrew designation of the barn, and proceeded to designate the house only. The property owner did not withdraw his original objection to the dwelling, but did not appeal the city decision further. At some point the original property owner transferred ownership of the dwelling to a new owner. In 1995, the legislature adopted ORS 197.772. In 2013, the new owner sought to remove the designation from the dwelling pursuant to ORS 197.772(3), in order to demolish the structure. The city granted the request, and amended its comprehensive plan to remove the dwelling from the city’s inventory of historic sites.

Lake Oswego Preservation Society appealed the city decision to LUBA. LUBA found that designation had been “imposed on the property” for purposes of ORS 197.772, notwithstanding that the owner at the time of designation did not continue to object to designation of the dwelling after the barn designation was removed. Turning to ORS 197.772(3), LUBA found that ORS 197.772(3) is ambiguous regarding whether the term “property owner” referenced in that subsection includes subsequent purchasers, or is limited to the property owner at the time of designation. LUBA noted that the same term “property owner” is used in ORS 197.772(1) under circumstances that clearly refer to the property owner at the time of designation. However, the text of ORS 197.772 did not make legislative intent on this point clear, so LUBA consulted legislative history.

The 1995 legislative history was, surprisingly, somewhat helpful. The minutes of the House subcommittee in which ORS 197.772 originated made clear that if the owner at the time of designation did not object to the designation, he could not come back later and request removal under ORS 197.772(3). A question arose whether a subsequent purchaser could seek removal under ORS 197.772(3). The sponsor of the bill answered that he hadn’t “thought about that situation.” To address that situation, the subcommittee adopted Amendment L, stating that the “designation runs with the property,” apparently intending to place subsequent purchasers on the same footing with the owner at the time of designation, *i.e.* if the original owner objected at the time of designation, a subsequent purchaser could seek removal, but if the original owner did not object, and thus could not seek removal, then a subsequent purchaser also could not seek removal. However, the language of Amendment L was later stripped out of the bill in conference, for unstated reasons. LUBA inferred from this legislative history that the legislature did not intend ORS 197.772(3) to apply to subsequent purchasers, because (1) the sponsor of the bill indicated that applying ORS 197.772(3) to subsequent purchasers was not something he had “thought about,” and (2) the legislature stripped out Amendment L, which was intended to address subsequent purchasers and apparently put them on the same footing as the owner at the time of designation. Because that inference was not compelling, LUBA proceeded to apply a canon of statutory construction, and chose the narrower interpretation of ORS 197.772(3), because it did the least damage to Goal 5. LUBA reversed.

On appeal to the Court of Appeals, the court read the legislative history differently, concluding that the legislature was broadly concerned with the

ability to rectify designations that had been imposed on the property without the owner's consent, and was not concerned with the identity of the property owner at the time removal of that imposed designation is requested. However, the court did not address the legislative history concerning Amendment L that LUBA had found significant. Because the legislature imposed no express qualifications on who is a "property owner" for purposes of ORS 197.772(3), the court concluded that the term is broad enough to include subsequent purchasers.

The Lake Oswego Preservation Society appealed the Court of Appeals' decision to the Supreme Court, and oral argument was November 10, 2015. Stay tuned.