

# — Oregon Municipal Handbook —

## **CHAPTER 25: LAND USE AND DEVELOPMENT**



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## Chapter 25: Land Use and Regulations

Oregon is unique, regulating land use by creating a mandatory framework for land-use planning that is subject to review by the state. The purpose of Oregon’s land use laws has been to preserve farms and forestland and to encourage cities to be dense.

Compared to other states, Oregon's land use process is more centralized. In Oregon, one board (the Land Conservation and Development Commission) and one state agency (the Department of Land Conservation and Development) guide, review, and monitor land use planning throughout the state according to statute and rule. Yet, at its essence, land use is primarily a function of local governments deciding how to develop land with input from its citizens.

This chapter will discuss the brief history of Oregon’s land use regulations, local land use regulations, local government land use actions and appeals from land use actions.<sup>1</sup> Please consult with your city attorney to review the legal implications of any particular land use action.

### I. BRIEF HISTORY OF LAND USE IN OREGON

In 1919, the state of Oregon granted authority to cities to plan and zone; this was challenged in court and upheld as valid in 1925, two years before the U.S. Supreme Court established a national precedent for such authority.<sup>2</sup>

Following World War II, the development of the farmlands into subdivisions of the Willamette Valley brought concern because it was starting to look more and more like Southern California, a resemblance many Oregonians sought to avoid. In 1955, the Oregon Legislature adopted a comprehensive law to regulate subdivisions and partitions of land.<sup>3</sup>

The 1960s brought land use planning issues in Oregon to a head. Citizen worries about

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<sup>1</sup> A special acknowledgment to the Oregon Department of Land Conservation and Development for providing the backbone of the material provided in this chapter. This chapter cites heavily to the following publications: (1) OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AN INTRODUCTORY GUIDE TO LAND USE PLANNING FOR SMALL CITIES AND COUNTIES IN OREGON (2007) [hereinafter referred to as INTRODUCTORY GUIDE]; available at:

[https://www.oregon.gov/lcd/Publications/Intro\\_Guide\\_LandUsePlanning\\_SmallCitiesCounties\\_2007.pdf](https://www.oregon.gov/lcd/Publications/Intro_Guide_LandUsePlanning_SmallCitiesCounties_2007.pdf) (last accessed June 10, 2024); and (2) Oregon Department of Land Conservation and Development, *Understanding Oregon's Land Use Planning Program, Training for Local Officials and the Public*, available at:

<https://www.oregonlandusetraining.info/index.html> (last accessed June 5, 2024) [hereinafter referred to as *Training for Local Officials*]. Another excellent resource is 1 *Land Use* (OSB Legal Pubs 2010), available at:

<https://www.osbar.org/docs/legalpubs/brochures/10/LandUse.pdf> (last accessed July 15, 2024).

<sup>2</sup> Oregon Laws 1919, c. 300; *Kroner v. City of Portland*, 116 Or 141 (1925); *Village of Euclid v. Ambler Realty Co.*, 272 US 398 (1926). See also John Ame, *History of Land Use Planning in Oregon* (2008), available at

<https://oregonexplorer.info/content/history-land-use-planning?topic=4123&ptopic=62> (last accessed June 4, 2024) [hereinafter referred to as *History of Land Use*].

<sup>3</sup> *History of Land Use*, supra note 1.

losing access to the Pacific coast led to the 1967 Beach Bill, which decreed that all land within 16 vertical feet of the average low tide mark belongs to the people of Oregon and guarantees the public free and uninterrupted use of Oregon's 363 miles of coastal beaches.<sup>4</sup>

Passed in 1969, Senate Bill 10 established a basic program for statewide planning, requiring local governments to draw up comprehensive plans and established ten goals to guide cities and counties in their planning.<sup>5</sup> The bill's basic concern was, "[t]o conserve prime farm lands for the production of crops and provide for an orderly and efficient transition from rural to urban land use."<sup>6</sup>

The 1973 Oregon Legislature passed the Land Conservation and Development Act, which regulated land use far more extensively than Senate Bill 10.<sup>7</sup> That bill provided the following:

- Created a state agency board, the Land Conservation and Development Commission (LCDC), and directed it to establish new statewide planning goals and guidelines after wide public input.<sup>8</sup>
- Required all Oregon cities and counties prepare a comprehensive plan and implement regulations in accordance with the new state goals.<sup>9</sup>
- Functioned as a property tax relief bill that awarded tax reductions to owners of farm and forest lands.<sup>10</sup> This, in effect, indirectly compensated farmers and owners of timber lands for land use restrictions and lowered their annual fixed operating costs.<sup>11</sup>

A fundamental premise of Oregon's land use program is that it does not necessarily offer solutions to land use conflicts but, instead, a process through which land use conflicts can be resolved.

After passage of the Land Conservation and Development Act, the LCDC established the following statewide planning goals after soliciting public comments, holding nearly 100 workshops and meeting with numerous economic and political groups:

### **Process Goals**

- Goal 1 Citizen Involvement<sup>12</sup>

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<sup>4</sup> *History of Land Use*, supra note 1; House Bill 1601 (1967).

<sup>5</sup> *History of Land Use*, supra note 1; Senate Bill 10 (1969).

<sup>6</sup> *Id.*

<sup>7</sup> Senate Bill 100 (1973).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Senate Bill 101 (1973).

<sup>11</sup> *Id.*

<sup>12</sup> OAR 660-015-0000(1); Oregon Department of Land Conservation and Development, *Goal 1: Citizen Involvement*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-1.aspx> (last accessed June 5, 2024).

- Goal 2 Land Use Planning<sup>13</sup>

### Resource Goals

- Goal 3 Agricultural Lands<sup>14</sup>
- Goal 4 Forest Lands<sup>15</sup>
- Goal 5 Natural Resources, Scenic and Historic Areas, and Open Spaces<sup>16</sup>

### Hazard Goals

- Goal 6 Air, Water and Land Resources Quality<sup>17</sup>
- Goal 7 Areas Subject to Natural Hazards<sup>18</sup>

### Urban Area Goals

- Goal 8 Recreational Needs<sup>19</sup>
- Goal 9 Economic Development<sup>20</sup>
- Goal 10 Housing<sup>21</sup>
- Goal 11 Public Facilities and Services<sup>22</sup>
- Goal 12 Transportation<sup>23</sup>
- Goal 13 Energy Conservation<sup>24</sup>
- Goal 14 Urbanization<sup>25</sup>

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<sup>13</sup> OAR 660-015-0000(2); Oregon Department of Land Conservation and Development, *Goal 2: Land Use Planning*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-2.aspx> (last accessed June 5, 2024).

<sup>14</sup> OAR 660-015-0000(3); Oregon Department of Land Conservation and Development, *Goal 3: Agricultural Lands*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-3.aspx> (last accessed June 5, 2024).

<sup>15</sup> OAR 660-015-0000(4); Oregon Department of Land Conservation and Development, *Goal 4: Forest Lands*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-4.aspx> (last accessed June 5, 2024).

<sup>16</sup> OAR 660-015-0000(5); Oregon Department of Land Conservation and Development, *Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-5.aspx> (last accessed June 5, 2024).

<sup>17</sup> OAR 660-015-0000(6); Oregon Department of Land Conservation and Development, *Goal 6: Air, Water, and Land Resources Quality*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-6.aspx> (last accessed June 5, 2024).

<sup>18</sup> OAR 660-015-0000(7); Oregon Department of Land Conservation and Development, *Goal 7: Areas Subject to Natural Hazards*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-7.aspx> (last accessed June 5, 2024).

<sup>19</sup> OAR 660-015-0000(8); Oregon Department of Land Conservation and Development, *Goal 8: Recreational Needs*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-8.aspx> (last accessed June 5, 2024).

<sup>20</sup> OAR 660-015-0000(9); Oregon Department of Land Conservation and Development, *Goal 9: Economic Development*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-9.aspx> (last accessed June 5, 2024).

<sup>21</sup> OAR 660-015-0000(10); Oregon Department of Land Conservation and Development, *Goal 10: Housing*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-10.aspx> (last accessed June 5, 2024).

<sup>22</sup> OAR 660-015-0000(11); Oregon Department of Land Conservation and Development, *Goal 11: Public Facilities and Services*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-11.aspx> (last accessed June 5, 2024).

<sup>23</sup> OAR 660-015-0000(12); Oregon Department of Land Conservation and Development, *Goal 12: Transportation*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-12.aspx> (last accessed June 5, 2024).

<sup>24</sup> OAR 660-015-0000(13); Oregon Department of Land Conservation and Development, *Goal 13: Energy Conservation*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-13.aspx> (last accessed June 5, 2024).

<sup>25</sup> OAR 660-015-0000(14); Oregon Department of Land Conservation and Development, *Goal 14: Urbanization*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-14.aspx> (last accessed June 5, 2024).

## Willamette Valley Goals

- Goal 15 Willamette River Greenway<sup>26</sup>

## Coastal Goals

- Goal 16 Estuarine Resources<sup>27</sup>
- Goal 17 Coastal Shorelands<sup>28</sup>
- Goal 18 Beaches and Dunes<sup>29</sup>
- Goal 19 Ocean Resources<sup>30</sup>

Most of the goals are accompanied by “guidelines,” which are suggestions about how a goal may be applied.<sup>31</sup> As noted in Goal 2, guidelines are not mandatory.<sup>32</sup> The goals and guidelines are, however, adopted as Oregon administrative rules.<sup>33</sup>

Since the Land Conservation and Development Act was enacted, voters have challenged Oregon's land use program. Of note, in 2000, Oregon voters passed Ballot Measure 7, requiring the government to reimburse land owners when regulations reduced the value of their property.<sup>34</sup> However, the Oregon Supreme Court declared Ballot Measure 7 unconstitutional.<sup>35</sup> In 2004, Oregon voters initially passed Ballot Measure 37, a largely similar measure, but avoided the constitutional issues of Ballot Measure 7.<sup>36</sup> Ballot Measure 37 was later modified by the Oregon Legislature and approved by the voters in 2007 as Ballot Measure 49.<sup>37</sup>

Statutes relating to city land use planning and development are the following:

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<sup>26</sup> OAR 660-015-0005; Oregon Department of Land Conservation and Development, *Goal 15: Willamette River Greenway*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-15.aspx> (last accessed June 5, 2024).

<sup>27</sup> OAR 660-015-0010(1); Oregon Department of Land Conservation and Development, *Goal 16: Estuarine Resources*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-16.aspx> (last accessed June 5, 2024).

<sup>28</sup> OAR 660-015-0010(2); Oregon Department of Land Conservation and Development, *Goal 17: Coastal Shorelands*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-17.aspx> (last accessed June 5, 2024).

<sup>29</sup> OAR 660-015-0010(3); Oregon Department of Land Conservation and Development, *Goal 18: Beaches and Dunes*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-18.aspx> (last accessed June 5, 2024).

<sup>30</sup> OAR 660-015-0010(4); Oregon Department of Land Conservation and Development, *Goal 19: Ocean Resources*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-19.aspx> (last accessed June 5, 2024).

<sup>31</sup> Oregon Department of Land Conservation and Development, *Statewide Planning Goals and Guidelines* (July 2019), available at: [https://www.oregon.gov/lcd/Publications/compilation\\_of\\_statewide\\_planning\\_goals\\_July2019.pdf](https://www.oregon.gov/lcd/Publications/compilation_of_statewide_planning_goals_July2019.pdf) (last accessed June 5, 2024).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; OAR 660-015-0000 to OAR 660-015-0010.

<sup>34</sup> *League of Oregon Cities v. State*, 334 Or 645 (2002).

<sup>35</sup> *Id.*

<sup>36</sup> Ballot Measure 7 (2004).

<sup>37</sup> ORS 195.300 to 195.336; ORS 197.353. *See also* Oregon Department of Land Conservation and Development, *Measure 49*, available at: <https://www.oregon.gov/lcd/measure49/pages/index.aspx> (last accessed June 5, 2024).

### **ORS Chapter 197**

- Establishes the LCDC and the Department of Land Conservation and Development (DLCD)<sup>38</sup>
- Defines a “land use decision”<sup>39</sup>
- Assigns comprehensive planning responsibilities<sup>40</sup>
- Requires city compliance with the statewide planning goals<sup>41</sup>
- LCDC order city compliance with goals and plans<sup>42</sup>
- Addresses needed housing and urban growth boundary (UGB)<sup>43</sup>
- Establishes local procedural requirements<sup>44</sup>
- Contains post acknowledgement procedures<sup>45</sup>
- Establishes the jurisdiction of the Land Use Board of Appeals (LUBA)<sup>46</sup>

### **ORS Chapter 227**

- Establishes city planning commission<sup>47</sup>
- Requires city approvals of certain plats or renaming of streets<sup>48</sup>
- Requires certain hearing procedures for review<sup>49</sup>
- Authorizes cities to regulate development of land<sup>50</sup>

### **ORS Chapter 195**

- Sets forth local government coordination agreement requirements<sup>51</sup>
- Sets forth urban service agreements requirements<sup>52</sup>
- Just compensation for land use regulations<sup>53</sup>

### **ORS Chapter 268**

- Governs the planning and other authority of Metro Service District, the Portland area regional government

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<sup>38</sup> ORS 197.030 to 197.070; ORS 197.075 to 197.095.

<sup>39</sup> ORS 197.015(10).

<sup>40</sup> ORS 197.175.

<sup>41</sup> ORS 197.251.

<sup>42</sup> ORS 197.319 to 197.350.

<sup>43</sup> ORS 197.746 to 197.761.

<sup>44</sup> ORS 197.796 to 197.797.

<sup>45</sup> ORS 197.610 to 197.651.

<sup>46</sup> ORS 197.805 to 197.860.

<sup>47</sup> ORS 227.010 to 227.090.

<sup>48</sup> ORS 227.095 to 227.120.

<sup>49</sup> ORS 227.160 to 227.188.

<sup>50</sup> ORS 227.215 to 227.320.

<sup>51</sup> ORS 195.020 to 195.040.

<sup>52</sup> ORS 195.060 to 195.085.

<sup>53</sup> ORS 195.300 to 195.336.



### ORS Chapter 222

- Governs annexations and boundary changes

### ORS Chapter 92

- Governs partition and subdivision of land

## II. LOCAL LAND USE

As discussed above, cities were required to adopt a comprehensive plan and implementing regulations in accordance with these stateside planning goals.<sup>54</sup>

### A. Comprehensive Plan

A comprehensive plan is a generalized, coordinated land use map and policy statement of the governing body of a city.<sup>55</sup> It relates to all man-made and natural systems as well as activities relating to the use of lands.<sup>56</sup> It establishes the community's vision and identifies the type, location and intensity of future development.<sup>57</sup> It must address local conditions and priorities consistent with the applicable requirements of the Statewide Planning Goals.<sup>58</sup> The plan is implemented through local ordinances, codes, or regulations.

A comprehensive plan generally includes the following three elements:

- *An inventory of existing land uses*, housing stock, developable lands, and public facilities such as water, sewer, and storm drainage, natural resources, natural hazards, recreational facilities, transportation facilities, and economics.<sup>59</sup> Background documents may also discuss the adequacy of community services such as education and law enforcement.<sup>60</sup>

The inventories, while significant, do not play a major role in the day-to-day administration of the planning program of a city or county.<sup>61</sup> The inventories are most important when developing the goals and policies. The inventories are normally updated during major plan updates, and the updated inventories may lead to changes in policies within the plan.<sup>62</sup> For example, if a policy was adopted in 1988 to provide

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<sup>54</sup> ORS 197.251.

<sup>55</sup> *Training for Local Officials*, *supra* note 1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* See also ORS 197.251.

<sup>59</sup> *E.g.*, OAR 660-009-0000 to 660-009-0030; see also Oregon Department of Land Conservation and Development, *Plan Amendments*, available at: <https://www.oregon.gov/lcd/CPU/Pages/Plan-Amendments.aspx> (last accessed June 5, 2024); INTRODUCTORY GUIDE, *supra* note 1, at 3.

<sup>60</sup> *Id.*

<sup>61</sup> INTRODUCTORY GUIDE, *supra* note 1, at 4.

<sup>62</sup> *Id.*



additional tourist-related housing to further an economic development goal, and by 2005 the city found it had an overabundance of tourist-related housing that had been constructed in the intervening years, it would probably be prudent to consider revising that particular policy.<sup>63</sup>

- *Goal and policy statements*, which indicate, in a general way, the objectives of the jurisdiction over a specific planning period and guidance on how to achieve those objectives.<sup>64</sup> The goals and policies are generally designed to provide guidance to elected and appointed officials over the use of land.<sup>65</sup> They are important when reviewing proposed zone changes, comprehensive plan amendments, and sometimes, conditional use permits.<sup>66</sup>
- *A comprehensive plan map*, which depicts, in a site-specific nature (*i.e.*, to individual property lines), the desired arrangement of uses for the entire jurisdiction.<sup>67</sup> The zoning map must be subordinate to the comprehensive plan map.<sup>68</sup> That is, the zoning map cannot allow a more intensive land use than is shown on the comprehensive plan map for the same area.<sup>69</sup> To take that a step further, if a plan designates a certain area as residential, the zoning map cannot designate the same area as commercial — a more intensive land use.<sup>70</sup>

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*A comprehensive plan policy can only be used as an approval criterion for a zone change or a permit if the words require it such as shall or must.*

*Policy terms such as “should,” “encourage,” or “consider,” are not used as a basis for making a land use decision.*

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Once the LCDC determined that a local government’s local plan and regulations were in compliance with the statewide planning goals, it issued an order “acknowledging” that plan.<sup>71</sup> By the mid-1980s, almost all local governments achieved LCDC acknowledgment.<sup>72</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> INTRODUCTORY GUIDE, *supra* note 1, at 3.

<sup>65</sup> INTRODUCTORY GUIDE, *supra* note 1, at 4.

<sup>66</sup> *Id.*

<sup>67</sup> INTRODUCTORY GUIDE, *supra* note 1, at 3-4.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION (Carl Abbott et al. eds., 1994).

<sup>72</sup> *Id.*

After acknowledgment, the local plan becomes the sole land use regulation for the jurisdiction in most instances.<sup>73</sup> The statewide goals no longer directly apply to land use decisions of a local government but continue to apply to legislative amendments to the acknowledged plan and regulations.<sup>74</sup>

The comprehensive plan map is the controlling document for local land use decisions and even zoning maps are subordinate.<sup>75</sup> That means that a zoning map cannot allow a more intensive land use than is shown on the comprehensive plan map.<sup>76</sup>

A library of the acknowledged plans throughout Oregon is available online by the University of Oregon, Scholars' Bank Local and Regional Documents Archive, available at: <https://scholarsbank.uoregon.edu/xmlui/handle/1794/7549> (last accessed June 6, 2024).

## **B. Development Code**

The development code is the implementation of the comprehensive plan. The development code may be named many different things depending on the local government, such as *community development ordinance*, *land development code*. The development code intended to implement the broad comprehensive plan and is a critical component of DLCD acknowledgment of compliance with the statewide planning goals.<sup>77</sup> The code is a compilation of the ordinances of general applicability relating to land use and is the most important tool in the day-to-day planning effort.<sup>78</sup>

The code will typically be split into: (1) zoning, including permitted, conditional and prohibited uses within each zone; (2) procedures for land use approval, and (3) criteria or standards for approval.

### **i. Zoning**

The purpose of zoning is to delineate the city into areas known as *zones* where certain types of uses and what land uses may occur in each zone.<sup>79</sup> Within each zone, uses will be listed as *permitted* (often referred to as an *outright permitted use*) which means that the use is not subject to approval criteria.<sup>80</sup> Other uses will be listed as *conditional uses*, which means these uses are subject to a land use decision based on the criteria for conditional uses.<sup>81</sup>

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<sup>73</sup> *Byrd v. Stringer*, 295 Or 311 (1983).

<sup>74</sup> *Id.*

<sup>75</sup> See Oregon Department of Land Conservation and Development, *Plan Amendments (PAPA)*, available at: <https://www.oregon.gov/lcd/CPU/Pages/Plan-Amendments.aspx> (last accessed June 15, 2024).

<sup>76</sup> *Id.*

<sup>77</sup> INTRODUCTORY GUIDE, *supra* note 1, at 3-4.

<sup>78</sup> INTRODUCTORY GUIDE, *supra* note 1, at 4.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

Zoning can be split into base zones and overlay zones.<sup>82</sup> Base zone designations in cities are typically residential, commercial, industrial, and public.<sup>83</sup> Within the base zone categories, cities often include several more specific zones.<sup>84</sup> For example, sub-categories of residential zoning may include single-family, multi-family, medium-density, and high-density.<sup>85</sup>

An overlay zone is, as the name implies, a zone that adds requirements or considerations regarding the use of affected land and do not replace the underlying zone.<sup>86</sup> Overlay zones are commonly employed to implement requirements of the floodplain or other hazard ordinance, to protect flight paths around airports, and protect significant wildlife habitat.<sup>87</sup> Overlay zones may make an otherwise permitted use into a conditional use, alter setback or height requirements, or add other types of approval criteria, depending on the purpose of the zone.<sup>88</sup>

The zoning map is a visual tool that shows the location and boundaries of the zones covering all geographical areas of the city.<sup>89</sup> Many cities have zoning maps available online.<sup>90</sup>

While zoning categories are similar statewide, each community creates its own, based on the desired development pattern and policy framework contained in the comprehensive plan.<sup>91</sup> The zoning map and any changes to zoning designations over time must be consistent with policies and designations in the comprehensive plan.<sup>92</sup> The comprehensive plan map and zoning map may be very similar but not necessarily identical.<sup>93</sup>

## ii. Land Use Approval Procedures

The development code will set forth the procedures for land use action including land divisions, building permits, zone changes, and legislative action. Depending on the type of decision, the typical development code breaks the land use approval process into different categories, based upon the level of review:

**Ministerial.**<sup>94</sup> Ministerial decisions are typically made without any notice or opportunity to comment or appeal. This procedure is frequently used because there are clear and objective approval criteria and applying city standards or criteria requires little or no

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<sup>82</sup> INTRODUCTORY GUIDE, *supra* note 1, at 18.

<sup>83</sup> *Training for Local Officials*, *supra* note 1.

<sup>84</sup> *Training for Local Officials*, *supra* note 1.

<sup>85</sup> *Training for Local Officials*, *supra* note 1.

<sup>86</sup> INTRODUCTORY GUIDE, *supra* note 1, at 4.

<sup>87</sup> INTRODUCTORY GUIDE, *supra* note 1, at 18.

<sup>88</sup> *Id.*

<sup>89</sup> *Training for Local Officials*, *supra* note 1.

<sup>90</sup> For example, the City of Beaverton has its zones and many more visual tools in its geographic information system (GIS), available at: <https://beaverton.maps.arcgis.com/home/index.html> (last accessed June 6, 2024).

<sup>91</sup> *Training for Local Officials*, *supra* note 1.

<sup>92</sup> *Training for Local Officials*, *supra* note 1.

<sup>93</sup> *Training for Local Officials*, *supra* note 1.

<sup>94</sup> INTRODUCTORY GUIDE, *supra* note 1, at 26; *Training for Local Officials*, *supra* note 1.

discretion. Examples include building permits for a use permitted by code or a determination that a proposed structure meets setback or height requirements.

***Administrative Decisions.***<sup>95</sup> Administrative decisions are decisions made without a hearing if a notice of decision provided to neighbors with an opportunity to appeal the decision to a quasi-judicial hearing where testimony would be taken. An administrative process is used when the type of land use decision has objective standards with a lower level of discretion, for uses permitted outright or permitted with standards. An appeal of an administrative decision provides an opportunity for a hearing before a planning commission, using the quasi-judicial hearing procedures as discussed below. An example of an administrative decision would be a design review.

***Quasi-Judicial Decisions.***<sup>96</sup> Quasi-judicial decisions are land use actions that generally have discretionary approval criteria. Quasi-judicial decisions automatically go to a hearings officer or hearing body for approval with a right of appeal to the governing body. Where the decision requires an ordinance for decisions like a re-zone, the planning commission makes a recommendation to the governing body and if the governing body agrees, it enacts an ordinance. Additional examples of quasi-judicial decisions are conditional use permits, variances, partitions, subdivisions, annexations and road and street vacations.

***Legislative Decisions.***<sup>97</sup> Legislative decisions are those that require a greater level of discretion or a legislative change. Legislative decisions go directly to the planning commission for a recommendation to the governing body. The governing body considers the issue and if approved, the governing body takes action with an ordinance. The examples for a legislative decision include the following: code text amendments, comprehensive plan text amendments, and comprehensive plan map amendments.

### **iii. Development Standards**

Development of lots must meet not only the zone requirements in the development code such as minimum lot sizes (if any); minimum density (if any); and siting requirements, such as height limits, lot coverage, setbacks, and floor area ratios, but also the development standards.<sup>98</sup> Development standards typically contain the basic infrastructure requirements, e.g., street and sidewalk, sewer and water connections, required landscaping, and similar requirements.<sup>99</sup>

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<sup>95</sup> INTRODUCTORY GUIDE, *supra* note 1, at 25; *Training for Local Officials*, *supra* note 1.

<sup>96</sup> INTRODUCTORY GUIDE, *supra* note 1, at 27; *Training for Local Officials*, *supra* note 1.

<sup>97</sup> INTRODUCTORY GUIDE, *supra* note 1, at 26; *Training for Local Officials*, *supra* note 1.

<sup>98</sup> INTRODUCTORY GUIDE, *supra* note 1, at 4.

<sup>99</sup> *Id.*

## III. TYPICAL LAND USE ACTIONS

### A. Building Permits

The simplest land use action is the issuance of a building permit. The building permit applicant must include with the permit application a site plan showing the tentative location of the proposed structure.<sup>100</sup> The building permit application will also include structural plans, which will be reviewed by the local building official.<sup>101</sup> Building regulations are discussed in Chapter 24 of the League of Oregon Cities Oregon Municipal Handbook.

To issue a building permit, the land use planner would consider the following:

- What is the zoning of the property?
- In that zone, is the proposed use allowed outright within that zone? Or is the proposed use a conditional use that must meet additional criteria for land use approval?
- Does the proposed site plan comply with all of the development regulations such as setback, height limit, and parking?
- Does the proposed building require any special review such as site plan review, floodplain review, hillside review, or historic review?<sup>102</sup>

Using the site plan, the planner would determine whether development code requirements such as setbacks from the exterior property lines are adequate.<sup>103</sup>

### B. Land Divisions

Under Oregon law, there are two categories of land divisions: partitions and subdivisions. A partition divides a unit of land into two or three parcels.<sup>104</sup> A subdivision divides a unit of land into four or more lots.<sup>105</sup>

Partitions and subdivisions undergo two stages of review and approval.<sup>106</sup> A tentative or preliminary plan is a proposal that is reviewed by the land use planner to ensure conformance with code or ordinance requirements and identify planning issues or problems.<sup>107</sup> Approval of the preliminary plat frequently includes conditions of approval that must be satisfied before final plat approval.<sup>108</sup> A common condition is that the applicant must construct the necessary public

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<sup>100</sup> INTRODUCTORY GUIDE, *supra* note 1, at 6.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> ORS 92.010(9); ORS chapter 92.

<sup>105</sup> ORS 92.010(16).

<sup>106</sup> ORS 92.044; ORS 92.046; *see Bienz v. Dayton*, 29 Or App 761, 767–768 (1977) (explaining two-step process).

<sup>107</sup> *Id.*

<sup>108</sup> ORS 92.090(3)(d).

improvements prior to final plat approval.<sup>109</sup>

Final land division approval is simply a check to see that the preliminary approval process has been followed and all of the conditions have been met.<sup>110</sup> After it is approved, the tentative or preliminary plan becomes a final plat with accurate survey lines and dimensions of lots, streets, utilities, and other physical features.<sup>111</sup> It is commonly handled by staff as an administrative matter.<sup>112</sup> This final plat is officially recorded with the county.<sup>113</sup>

A city's development code will provide the following city-specific requirements: (1) standards for improvements to public infrastructure, such as streets (including sidewalks), water, sewer, and drainage system; (2) procedures for processing applications; and (3) criteria for reviewing applications.<sup>114</sup>

Some development codes have a different procedure for major and minor partitions, but currently there is no distinction in state law.<sup>115</sup> Similarly, some jurisdictions may still require that partitions and subdivisions go before a public hearing.<sup>116</sup> The statutes now allow administrative approval of partitions and subdivisions by staff.<sup>117</sup>

### C. Zone Change

A zone change, also known as a zoning map amendment, is a process by which the applicant seeks to amend the zoning map to change the designation on a specific tract.<sup>118</sup> A comprehensive plan map amendment often accompanies a zone change.<sup>119</sup>

A property owner/applicant submits a completed application.<sup>120</sup> Once city staff determines the application is complete, a hearing is scheduled before the planning commission and the city council.<sup>121</sup> A zone change is normally a two-hearing process, the first before the planning commission and the second

### Dos and Don'ts of Zone Changes

1. Don't rezone a portion of a piece of property without rezoning the whole parcel.
2. Do ensure that the proposed zone will conform to the comprehensive plan map.
3. Don't rezone lands to create islands of a special designation in the middle of a different zone, i.e. spot zoning.

INTRODUCTORY GUIDE, *supra* note 1, at 13.

<sup>109</sup> INTRODUCTORY GUIDE, *supra* note 1, at 16.

<sup>110</sup> ORS chapter 92; INTRODUCTORY GUIDE, *supra* note 1, at 16.

<sup>111</sup> ORS chapter 92; INTRODUCTORY GUIDE, *supra* note 1, at 15-16.

<sup>112</sup> INTRODUCTORY GUIDE, *supra* note 1, at 16.

<sup>113</sup> ORS 92.120.

<sup>114</sup> INTRODUCTORY GUIDE, *supra* note 1, at 15.

<sup>115</sup> ORS chapter 92; INTRODUCTORY GUIDE, *supra* note 1, at 15.

<sup>116</sup> *Id.*

<sup>117</sup> ORS 197.195 (allowing a limited land use decision).

<sup>118</sup> See Oregon City, *Zone Changes & Comprehensive Plan Amendments*, available at:

<https://www.orcity.org/794/Zone-Changes-Comprehensive-Plan-Amendmen> (last accessed June 12, 2024).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> INTRODUCTORY GUIDE, *supra* note 1, at 12.

hearing before the governing body.<sup>122</sup> It requires that post-acknowledgement plan amendment rules be applied, including notifying the DLCD at least 35 days before the first public hearing on the application.<sup>123</sup>

Typical criteria for approval include: (1) demonstration that the proposed zone will be compatible with surrounding property uses; (2) public services are adequate to serve the proposed use; and (3) the change will comply with the goals and policies of the comprehensive plan.<sup>124</sup> For the last criterion listed, different sections of the plan may seem to conflict with each other, requiring the city to balance the policies with the unique circumstances of the request in question.<sup>125</sup>

## D. Conditional Use Permits

A conditional use permit is a process by which a city reviews a proposed land use that is listed in the development code as a conditional use.<sup>126</sup> As discussed above, a city’s development code delineates the city into areas known as *zones* where conditional uses may be allowed, provided that the proposed use meets the criteria.

Conditional use provisions generally apply to uses or activities that have potential adverse impacts or compatibility issues and therefore require review.<sup>127</sup> In many cases, adverse impacts and compatibility issues can be resolved or minimized by the application of conditions or limitations.<sup>128</sup>

Through the review process, the decision-maker can assess neighborhood comments as well as comments from other parties of record, who are those who respond to the notice or

## Tips for Conditional Use

Always require a site plan for any structure and attach the plan to the findings of fact.

For commercial enterprises such as a home occupation or public or semi-public uses, ask for an applicant’s written statement detailing how the proposed use will be conducted “Statement of Operations” to set the parameters of the use.

INTRODUCTORY GUIDE, *supra* note 1, at 10.

<sup>122</sup> *Id.*

<sup>123</sup> ORS 197.610; OAR 660-018-0020.

<sup>124</sup> INTRODUCTORY GUIDE, *supra* note 1, at 12. *E.g.*, the City of Salem, *Change the Zoning of Your Property*, available at: <https://www.cityofsalem.net/business/land-use-zoning/development-application-help/change-the-zoning-of-your-property> (last accessed June 12, 2024).

<sup>125</sup> *Id.*

<sup>126</sup> See *Anderson v. Peden*, 284 Or 313, 317–320 (1978).

<sup>127</sup> See City of Portland, *Conditional Use Reviews*, available at: <https://www.portland.gov/bds/zoning-land-use/land-use-review-fees-and-types/conditional-use-reviews> (last accessed June 12, 2024).

<sup>128</sup> INTRODUCTORY GUIDE, *supra* note 1, at 10-11.



participate in a public hearing.<sup>129</sup> The decision-maker can approve the request, deny it, or approve it with conditions, based on criteria in the zoning ordinance.<sup>130</sup>

Typically, a conditional use permit will require the following criteria:

- The proposal be consistent with the comprehensive plan and the objectives of the zoning ordinance and other applicable policies;
- The proposal has a minimal adverse impact on abutting properties and the surrounding area compared to the impact of development that is permitted outright;
- The size, design, and operation characteristics of the proposed use;
- The proposal preserves assets of particular interest to the community; and
- The applicant has a bona fide intent and capability to develop, use the land as proposed and has some appropriate purpose for submitting the proposal.<sup>131</sup>

Typical conditional use permits in a city are for multi-family dwellings and public and semi-public structures, including churches.<sup>132</sup> Conditional use permit requests can be decided by staff, planning commission, or elected officials.<sup>133</sup> Conditions of approval may be specified by the zone or imposed by a decision-maker based on the results of a public review and hearing, although the decision-maker will need to justify special conditions by citing an overarching policy or requirement.<sup>134</sup>

## E. Variance

A variance is a process to allow an exception from development standards in the development code — normally setbacks, building height, or other physical dimensions.<sup>135</sup> For example, a variance may be requested to allow a reduced setback for a home built on an unusually shaped lot.<sup>136</sup> Variances are subject to specific and rigorous approval standards outlined in the development code.<sup>137</sup> Decisions require evidence and findings demonstrating the standards are met.<sup>138</sup>

A variance request generally requires a site plan showing the proposed development including the exterior boundaries of the structures, distance from the property lines, access, and

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<sup>129</sup> *Id.* See City of Sherwood, *Conditional Use Permit*, available at: <https://www.sherwoodoregon.gov/planning/page/conditional-use-permit> (last accessed June 12, 2024).

<sup>130</sup> *Id.*

<sup>131</sup> INTRODUCTORY GUIDE, *supra* note 1, at 10-11.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8.

<sup>136</sup> *Training for Local Officials*, *supra* note 1.

<sup>137</sup> *Id.* E.g., *Reagan v. City of Oregon City*, 39 Or LUBA 672, 682–683 (2001).

<sup>138</sup> *Training for Local Officials*, *supra* note 1. See *Friends of Bryant Woods Park v. City of Lake Oswego*, 126 Or App 205, 208 (1994).

other information necessary to support the request.<sup>139</sup> The applicant must describe the nature of the variance sought and explain how it satisfies the approval criteria in the development code.<sup>140</sup>

A request for a variance will be evaluated against the criteria established in the development code.<sup>141</sup> A variance that does not satisfy all of the criteria should not be approved. There are generally four criteria for approval of a variance:

- Exceptional or extraordinary circumstances that apply to the property but do not apply generally to other properties in the same zone or vicinity. These circumstances result from lot size or shape, topography, or other conditions that the property owners cannot control;<sup>142</sup>
- The variance is necessary so that the applicant can enjoy a property right, the nature of which owners of properties in the same zone or vicinity possess;<sup>143</sup>
- The granting of the variance will not be detrimental to public safety, health, or welfare, or injurious to other property;<sup>144</sup> and
- The hardship is not self-imposed, and the variance is the minimum that will alleviate the hardship.<sup>145</sup>

As these criteria imply, a variance should only be approved for unusual circumstances.

## IV. NATURE OF LAND USE DECISIONS

Land use decisions are subject to notice and an opportunity for a hearing.<sup>146</sup> A *land use decision* is: (1) a decision that applies the local land use regulations; or (2) significantly impacts use of land, involves some discretion and is in some written form.<sup>147</sup> The question of whether a local government action is a land use decision can be a difficult issue. There is a body of law on what actions are considered a *land use decision*.

In processing land use actions in Oregon, there are two types of public hearing procedures: legislative and quasi-judicial.<sup>148</sup> The two-hearing processes differ significantly in the procedural and public notice requirements.

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<sup>139</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8.

<sup>140</sup> *Id.*

<sup>141</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8. See *Thomas v. City of Rockaway Beach*, 24 Or LUBA 532, 534 (1993).

<sup>142</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8. See *Lovell v. Planning Com. of Independence*, 37 Or App 3, 6, 586 P2d 99 (1978).

<sup>143</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8. See *Foster v. City of Astoria*, 16 Or LUBA 879, 888 (1988).

<sup>144</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8. See *Cope v. City of Cannon Beach*, 15 Or LUBA 546, 551–552 (1987).

<sup>145</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8. See *Elder v. Douglas County*, 33 Or LUBA 276, 280 (1997).

<sup>146</sup> ORS 197.797.

<sup>147</sup> ORS 197.015(10); *Billington v. Polk County*, 299 Or 471, 478–479 (1985); *Petersen v. Klamath Falls*, 279 Or 249, 254 (1977).

<sup>148</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

Legislative decisions are where a governing body enacts policies or standards which are generally applicable to all persons or property or large classes of persons or property.<sup>149</sup> A legislative hearing is a public hearing in which the planning commission, city council, board of commissioners, or county court is acting as a legislator, making new law.

Quasi-judicial decisions are decisions where a governing body is applying adopted policies or standards to *specific property*.<sup>150</sup> A quasi-judicial hearing is a type of land use proceeding in which the decision maker is acting in the capacity of a judge.<sup>151</sup>

When deciding whether a particular matter is legislative or quasi-judicial, ask three questions:

- (1) Is the process bound to result in a decision?
- (2) Is the decision bound to apply preexisting criteria to concrete facts?
- (3) Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?<sup>152</sup>

If the answers to these questions are yes, then use quasi-judicial procedures.<sup>153</sup> If the answers to all the questions are no, it is a legislative matter. The nature and procedure of the administrative and legislative decisions are discussed below.

## A. Legislative Decisions

Legislative decisions typically affect large areas and are not focused on small, localized segments of property or the community.<sup>154</sup> When a governing body makes a legislative decision, it is sitting in its role as the policy-making body for the local government.<sup>155</sup> The Oregon Land Use Board of Appeals (LUBA) shall affirm a local government's interpretation of its comprehensive plan and land use regulations unless the interpretation is inconsistent with the comprehensive plan, regulation or state law.<sup>156</sup>

Legislative hearings typically occur when considering amendments to the goals and policies in the comprehensive plan, to major map amendments, and to changes to the zoning ordinance.<sup>157</sup>

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<sup>149</sup> INTRODUCTORY GUIDE, *supra* note 1, at 8. See *South of Sunnyside Neighborhood League v. Board of Comm'rs*, 280 Or 3, 10–12 (1977).

<sup>150</sup> INTRODUCTORY GUIDE, *supra* note 1, at 27.

<sup>151</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

<sup>152</sup> *Strawberry Hill 4 Wheelers v. Board of Comm'rs*, 287 Or 591, 602–603 (1979).

<sup>153</sup> *Id.*

<sup>154</sup> INTRODUCTORY GUIDE, *supra* note 1, at 26.

<sup>155</sup> *Id.*

<sup>156</sup> ORS 197.829.

<sup>157</sup> *Training for Local Officials*, *supra* note 1.

## **i. Public Notices**

To consider legislative changes, cities must follow the procedures set forth in the city's development code for sending notice of legislative hearings.<sup>158</sup> Local procedures generally include providing notice of the hearing in a newspaper of general circulation at least 10 days before the hearing.<sup>159</sup>

The strict notice and process requirements for quasi-judicial decisions do not apply to legislative land use decisions. However, Ballot Measure 56, approved by the voters in 1998, requires that if the proposed legislative change limits or prohibits previously allowed land uses, Oregon law requires notice to property owners not less than 20 and not more than 40 days in advance of the first hearing.<sup>160</sup>

Unless the city determines that the statewide planning goals do not apply, legislative land use hearing notice must be mailed to the DLCDD at least 35 days in advance of the first evidentiary hearing on adoption.<sup>161</sup> In the unlikely event that the statewide planning goals do not apply, the city must mail the notice of adoption to the DLCDD not later than five working days following adoption.<sup>162</sup> Failure to provide the proper notice requires the city to redo the hearing after the required notice.<sup>163</sup>

## **ii. Citizen Involvement**

Statewide Land Use Planning Goal 1 requires every local government to adopt and implement a citizen involvement program.<sup>164</sup> Local governments have typically complied by establishing neighborhood associations, to which notice of pending legislative decisions are sent so that the associations may participate and submit comments.<sup>165</sup>

## **iii. Hearing Procedure**

Because legislative decisions do not involve specific persons or property, the procedural requirements for making legislative decisions are less complex than those for quasi-judicial decisions.<sup>166</sup> In most local governments, proposed legislative amendments are first referred to a planning commission for public hearing and recommendation before coming to the governing body for public hearing and adoption.<sup>167</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

<sup>160</sup> ORS 227.186 (Ballot Measure 56).

<sup>161</sup> ORS 197.610; OAR 660-018-0020.

<sup>162</sup> ORS 197.615.

<sup>163</sup> ORS 197.610; *N.E. Medford Neighborhood Coalition v. City of Medford*, 214 Or App 46 (2007).

<sup>164</sup> OAR 660-015-0000(1); Oregon Department of Land Conservation and Development, *Goal 1: Citizen Involvement*, available at: <https://www.oregon.gov/lcd/OP/Pages/Goal-1.aspx> (last accessed June 5, 2024).

<sup>165</sup> ORS 197.797.

<sup>166</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

<sup>167</sup> INTRODUCTORY GUIDE, *supra* note 1, at 14.

For legislative matters, there are no concerns about contact between citizens and the decision-makers because the decision makers are seeking broad input to make a reasonable decision on the proposed amendments.<sup>168</sup>

During the hearing, the presiding officer should explain the nature of the hearing and ask for a staff report.<sup>169</sup> The presiding officer can ask people to testify in the order they signed up rather than split testimony into opponents, proponents and those from a neutral position.<sup>170</sup> After the close of testimony, the decision makers decide whether to adopt the proposed legislative amendment in compliance with the adoption procedures of the local government charter or code.<sup>171</sup> All legislative land use decisions must be enacted by ordinance.<sup>172</sup>

#### **iv. Comprehensive Plan Amendments**

As discussed below, comprehensive plans may be amended through post-acknowledgment plan amendments or periodic review. Comprehensive plan amendments are made as community needs, goals and resources change.<sup>173</sup> Depending on the type of comprehensive plan amendment, cities have additional considerations for procedure and notice.

##### *Post-Acknowledgment Plan Amendment*

*Post-acknowledgment plan amendment (PAPA)* is a term to describe unscheduled adjustments to a comprehensive plan.<sup>174</sup> PAPAs generally deal with a discrete issue in the comprehensive plan and have specific procedural requirements regarding notice and appeals.<sup>175</sup>

A city's comprehensive plan may contain approval criteria or a review process for PAPAs. If it does, the city must meet the approval criteria to amend the comprehensive plan. A post-acknowledgment amendment to a comprehensive plan or implementing regulation must be in compliance with any applicable statewide planning goal.<sup>176</sup>

State law requires local governments to notify the public when a comprehensive plan is under review or when changes are proposed or adopted.<sup>177</sup> After a city submits its PAPA notice to the DLCDC, state law requires the DLCDC to provide public notice of all proposals and adoptions received on a weekly basis.<sup>178</sup> The DLCDC then reviews all proposed and adopted

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<sup>168</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> OAR 661-010-0010(3).

<sup>173</sup> *Training for Local Officials*, *supra* note 1.

<sup>174</sup> ORS 197.610 to 197.615.

<sup>175</sup> *Id.*

<sup>176</sup> ORS 197.610 to 197.615.

<sup>177</sup> ORS 197.610.

<sup>178</sup> OAR 660-018-0025.

comprehensive plan amendments for compliance with statewide planning goals.<sup>179</sup>

### *Periodic Review*

*Periodic review* is a term used in Oregon law to describe the periodic evaluation and revision of a local comprehensive plan.<sup>180</sup> State law requires cities to review their comprehensive plans according to a periodic schedule established by the LCDC.<sup>181</sup> Cities with a population of 2,500 or more in a metropolitan planning organization or a metropolitan service district shall conduct period review every seven years.<sup>182</sup> Cities with a population greater than 10,000 are required to go through periodic review every 10 years.<sup>183</sup>

The purpose of periodic review is to ensure that comprehensive plans are:

- Updated to respond to changes in local, regional and state conditions
- Coordinated with other comprehensive plans and investments
- In compliance with the statewide planning goals, statutes and rules<sup>184</sup>

Once a periodic review is initiated, local governments prepare a work program to the DLCD for review and approval.<sup>185</sup> Citizens must be provided the opportunity to propose work tasks.<sup>186</sup> Once the work program is complete and approved, the local government embarks on completing the tasks in the work program.

Generally, periodic review is only a review of the fundamental building blocks of local planning such as economic development, needed housing, transportation, public facilities and services, and urban growth.<sup>187</sup> Certain statutes and rules are implemented through periodic review.<sup>188</sup> For example, the Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) administrative rule (OAR 660, Division 23) states that a local government must, with some exceptions, address the requirements of the rule at its next periodic review.<sup>189</sup>

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<sup>179</sup> ORS 197.627.

<sup>180</sup> ORS 197.627 to 197.636.

<sup>181</sup> *Id*

<sup>182</sup> ORS 197.629(1)(a).

<sup>183</sup> ORS 197.629(1)(b).

<sup>184</sup> See OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, THE COMPLETE PLANNER'S GUIDE TO PERIODIC REVIEW: A GUIDE (2012), available at:

[https://www.oregon.gov/lcd/Publications/Periodic\\_Review\\_Guide\\_2nd\\_ed\\_2012.pdf](https://www.oregon.gov/lcd/Publications/Periodic_Review_Guide_2nd_ed_2012.pdf) (last accessed June 6, 2024).

<sup>185</sup> OAR 660-025-0100(1).

<sup>186</sup> OAR 660-025-0080(2)(a).

<sup>187</sup> See OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, THE COMPLETE PLANNER'S GUIDE TO PERIODIC REVIEW: A GUIDE (2012), available at:

[https://www.oregon.gov/lcd/Publications/Periodic\\_Review\\_Guide\\_2nd\\_ed\\_2012.pdf](https://www.oregon.gov/lcd/Publications/Periodic_Review_Guide_2nd_ed_2012.pdf) (last accessed June 6, 2024).

<sup>188</sup> *Id*.

<sup>189</sup> *Id*.

Plan amendments may require amendments to the implementing measures such as the zoning and development code.<sup>190</sup> Like the PAPAs, the DLCDC reviews the plans, and any revisions or updates to the plans, to make sure they align with the goals.<sup>191</sup> Citizens who participated at the local level may submit an objection to the DLCDC about the local government's tasks.<sup>192</sup> After the DLCDC makes a decision to approve or remand a task, the decision may be appealed to the LCDC.<sup>193</sup>

## **B. Quasi-Judicial Decisions**

A quasi-judicial hearing is a type of land use proceeding in which the decision maker addresses a narrow land use issue, normally related to one or a limited number of parcels and apply existing criteria.<sup>194</sup> State law requires the quasi-judicial process to include items such as proper notice, a staff report, consideration of certain evidence, the right of rebuttal, the concept of raise it or waive it, and the participants have the right to appeal the final decision.<sup>195</sup>

The quasi-judicial decision-making process is controlled by both state law and local code and can differ substantially among local governments.<sup>196</sup> The general rule is that parties to a quasi-judicial decision are entitled to be treated as if they were parties to a court action --they are entitled to present and rebut evidence and testimony, to be judged by an impartial decision-maker, and to a written decision.<sup>197</sup>

### **i. Notice**

For quasi-judicial decisions, specific parties must be notified at least 20 days prior to the public hearing to include the following: the applicant; property owners within 100 feet of the property if within a UGB, within 250 feet if located outside a UGB and within 500 feet if located within a farm or forest zone; and any neighborhood or community organizations whose boundaries include the site. Some local governments also require that notice be posted on the property.<sup>198</sup> The notice must explain the nature of the application, list the applicable criteria, and describe the procedures to be used at the hearing.<sup>199</sup> A violation of the notice requirements can result in a remand if it prejudices a "substantial right."<sup>200</sup>

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<sup>190</sup> *Id.*

<sup>191</sup> OAR 660-025-0130.

<sup>192</sup> OAR 660-025-0140.

<sup>193</sup> OAR 660-025-0150 to 660-025-0160.

<sup>194</sup> ORS 197.797.

<sup>195</sup> ORS 197.797.

<sup>196</sup> See ORS 197.195; ORS 197.797; ORS 215.416; ORS 227.160 to 227.185.

<sup>197</sup> ORS 197.797; ORS 215.416; ORS 227.175; *Fasano v. Washington County*, 264 Or 574 (1973) *overruled in part*, 288 Or 585, 590 (1980).

<sup>198</sup> ORS 197.797.

<sup>199</sup> *Id.*

<sup>200</sup> ORS 197.828.



## ii. Hearings Body

As discussed above, a quasi-judicial hearing is a type of land use proceeding in which the decision maker is acting in the capacity of a judge.<sup>201</sup> As such, the parties to such a quasi-judicial decision are entitled to a fair, equal, and unbiased consideration and decision from the hearings body.<sup>202</sup>

Prior to hearing any evidence, members of a hearings body should be given the opportunity to declare *ex parte* contacts, bias, and conflicts of interests.<sup>203</sup> After any such declarations, it is a best practice to ask the audience if anyone has any objections to the hearings body hearing the case.

### *Ex Parte Contacts*

An *ex parte* contact occurs when a decision-maker receives information, discusses the land use application or visits the site in question outside the formal public hearing.<sup>204</sup> This does not include discussions with and information received from staff.<sup>205</sup> Failure to disclose such contact may result in reversal or remand of the decision.<sup>206</sup> If *ex parte* contact does occur, the decision-maker must disclose it on the record at the hearing, describe the circumstances under which it occurred and present any new evidence introduced through that contact.<sup>207</sup> The presiding officer must give parties the opportunity to rebut the substance of the *ex parte* contact.

### *Conflicts of Interest*

Prior to participating in any discussion, a member of the planning commission or governing body must declare any potential or actual conflicts of interest.<sup>208</sup>

A “potential conflict of interest” exists if the land use decision *could* result in a personal financial gain or loss to the decision maker, any member of their household, or any business with which they or a household member is associated.<sup>209</sup> A decision maker must publicly declare the potential conflict of interest and explain the nature of the conflict prior to participating in the discussion but may continue to participate in the discussion and decision.<sup>210</sup>

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<sup>201</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

<sup>202</sup> ORS 197.835 (12).

<sup>203</sup> *Id.*

<sup>204</sup> See *McNamara v. Union County*, 28 Or LUBA 396, 398, fn. 1 (1994); *Angel v. City of Portland*, 21 Or LUBA 1, 8-9 (1991); *Training for Local Officials*.

<sup>205</sup> *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541-542 (1996); *Training for Local Officials*

<sup>206</sup> *Training for Local Officials*.

<sup>207</sup> ORS 227.180; *Training for Local Officials*.

<sup>208</sup> ORS Chapter 244 (Government Standards and Practices); *Training for Local Officials*, *supra* note 1.

<sup>209</sup> ORS 244.020(13).

<sup>210</sup> ORS 244.120(2).

An “actual conflict of interest” exists if the land use decision *would* result in a personal financial gain or loss to the decision maker, any member of their household, or any business with which they or a household member is associated.<sup>211</sup> A decision maker with an actual conflict of interest must declare the conflict in the same manner as for a potential conflict but may not participate in the discussion or decision.<sup>212</sup> If the participation of the decision maker is necessary to meet a requirement of a minimum number of votes to take official action, the decision maker may vote, but may not participate in the discussion.<sup>213</sup>

### *Bias*

“Actual bias” means prejudice or prejudgment of the facts to such a degree that they are incapable of rendering an objective decision on the merits of the case.<sup>214</sup> A member of a governing body should not participate in a decision if he or she has an actual bias regarding the application.<sup>215</sup> It is not bias for a governing body to decide a city’s own applications.<sup>216</sup>

Even though bias is often subjective, not all personal views or positions are actual bias in the eyes of the law.<sup>217</sup> While it is not unusual for decision-makers to have a perspective or background, the threshold test is if this will influence their decision.<sup>218</sup> Decision-makers should carefully consider any issues related to their personal bias and be prepared to step aside if necessary.<sup>219</sup>

Although a court will not overturn a city council decision based upon a mere appearance of bias, perception of bias can create problems during the local hearing process, undermine acceptance of the city's decision, and lead to appeals.<sup>220</sup> For the reasons stated above, it is probably better to err on the side of participation.<sup>221</sup> It is useful, however, for the council to have a discussion about bias issues to determine some ground rules for participation.<sup>222</sup> This can also be a good idea to prevent the opposite problem from happening – a perception that a particular councilor has stepped down for bias to avoid having to make a controversial decision.<sup>223</sup>

### **iii. Criteria**

When making a quasi-judicial decision, the governing body must apply the adopted criteria for approval contained in the local government's comprehensive plan and development

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<sup>211</sup> ORS 244.020(1).

<sup>212</sup> ORS 244.120(2).

<sup>213</sup> ORS 244.120(2)(b)(B).

<sup>214</sup> *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

<sup>215</sup> *Fasano v. Board of County Comm'rs*, 264 Or 574, 588 (1973), *overruled on other grounds*, 288 Or 585 (1980).

<sup>216</sup> *Pend-Air Citizen's Committee v. City of Pendleton*, 29 Or LUBA 362 (1995).

<sup>217</sup> *Training for Local Officials*, *supra* note 1.

<sup>218</sup> *Fasano v. Board of County Comm'rs*, 264 Or 574, 588 (1973), *overruled on other grounds*, 288 Or 585 (1980).

<sup>219</sup> *Training for Local Officials*, *supra* note 1.

<sup>220</sup> *Fasano v. Board of County Comm'rs*, 264 Or 574, 588 (1973), *overruled on other grounds*, 288 Or 585 (1980).

<sup>221</sup> *Training for Local Officials*, *supra* note 1.

<sup>222</sup> *Training for Local Officials*, *supra* note 1.

<sup>223</sup> *Training for Local Officials*, *supra* note 1.

regulations.<sup>224</sup> An application is judged by the criteria in effect at the time the application is filed.<sup>225</sup> In other words, the governing body cannot delay a decision on an application to rush through a legislative amendment to the criteria and then retroactively apply the new criteria to the pending application.<sup>226</sup>

If an applicant demonstrates compliance with these criteria, the application must be approved even if the governing body disagrees with the criteria or believes that additional unadopted criteria should be applied.<sup>227</sup> Conversely, if the applicant fails to demonstrate compliance with the applicable criteria, the governing body must deny the application even if the governing body believes that the applicable criteria are unreasonable.<sup>228</sup>

Criteria must not be arbitrary or so vague that it does not provide an applicant with a reasonable idea of what the applicant needs to do to obtain an approval.<sup>229</sup>

#### iv. Hearing Procedure

Quasi-judicial hearings can occur either as the initial fact-finding hearing or as an appeal of a decision. Initial hearings, such as zone changes, allow any participant to submit evidence and testimony to the decision-maker. Most development codes provide for at least one hearing before a lower body such as a planning commission or a hearings officer before the decision may be appealed to the governing body.<sup>230</sup>

#### *Appeal Hearings – Judicial Review*

Depending on the development code, the appeal hearing will be either a *de novo* or *on the record*. *De novo* is a Latin term that means “anew” and if a hearings body hears an appeal *de novo*, it makes a decision as if it had not been

<sup>224</sup> ORS 227.173.

<sup>225</sup> ORS 227.178(3).

<sup>226</sup> *Id.*

<sup>227</sup> *Buel-McIntire v. City of Yachats*, 63 Or LUBA 452 (2011).

<sup>228</sup> *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

<sup>229</sup> *Spiering v. Yamhill County*, 25 Or LUBA 695, 715 (1993).

<sup>230</sup> INTRODUCTORY GUIDE, *supra* note 1, at 14.

## Tips on Hearings

- Introduce the body (planning commission, council, board, or court) and staff at the outset of the hearing.
- Body declares conflicts and *ex parte* contacts.
- Ask for objections to members hearing case.
- Use a script to ensure all required procedures are followed.
- Set a time limit for each speaker, if necessary. Try to keep speakers focused on relevant criteria.
- Train hearings body members on the importance of due process
- Use a sign-up sheet that requires names and addresses to keep track of proponents and opponents who wish to speak or receive notice of the decision or both.
- Keep control of the hearing. There are several short courses available for planning commissioners. New planning commissioners and other elected officials are encouraged to attend.
- Record names and mailing addresses of all hearing participants. These people qualify as “parties” to the hearing and must be notified of the decision.

INTRODUCTORY GUIDE, *supra* note 1, at 21.

heard previously.<sup>231</sup> A *de novo* hearing means that any person may submit new evidence and testimony before the governing body.<sup>232</sup> Some local governments limit the arguments in a *de novo* hearing to those stated in the notice of appeal.<sup>233</sup>

*On the record* hearings means that the governing body's review on appeal is limited to argument based upon the issues raised and the evidence presented at the lower hearing.<sup>234</sup> Evidence is considered to be *on the record* if it has been submitted to the decision-maker as part of the application, staff report, or written or oral public testimony during the proceedings on the application.<sup>235</sup> The purpose of limiting evidence and testimony is to encourage issues to be fully presented and resolved at the lower level. Even if a governing body is aware of some outside information that might be relevant to the decision, it may not consider that information unless it was presented by staff or one of the parties during proceedings.<sup>236</sup>

### *Hearing Procedure*

At the hearing, the presiding officer summarizes the procedures and planning staff describes the case, including the applicable criteria in the comprehensive plan or zoning code, and its recommendation.<sup>237</sup>

The presiding officer (or city representative) must state that evidence and testimony must be directed to the applicable criteria or criteria that the person believes should be applied and must raise issues "accompanied by statements or evidence sufficient to afford" the parties an opportunity to respond.<sup>238</sup> The presiding officer (or city representative) must also state, "failure of the applicant to raise constitutional or other issues relating to the proposed conditions of approval with sufficient specificity to allow the local government or its designee to respond to the issue precludes an action for damages in circuit court."<sup>239</sup>

Generally, applicants then present their case for approval and others may support them.<sup>240</sup> Opponents then have the opportunity to challenge the applicant's case.<sup>241</sup> All parties have the right to present and rebut evidence directed toward the applicable criteria.<sup>242</sup>

Failure to raise an issue orally or in writing in advance of or during the hearing precludes appeal to LUBA on that issue.<sup>243</sup> This is commonly referred to as the "raise it or waive it"

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<sup>231</sup> *Murphy v. City of Ashland*, 19 Or LUBA 182, 190 & n 7, *aff'd without opinion*, 103 Or App 238 (1990).

<sup>232</sup> ORS 197.797.

<sup>233</sup> *Jensen Properties v. Washington County*, 61 Or LUBA 155 (2010).

<sup>234</sup> See *City of Bend*, Development Code § 4.1.115.

<sup>235</sup> *Id.*

<sup>236</sup> *Wicks v. City of Reedsport*, 29 Or LUBA 8, 16–17 (1995).

<sup>237</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

<sup>238</sup> ORS 197.797(5)

<sup>239</sup> ORS 197.796(3)(b).

<sup>240</sup> INTRODUCTORY GUIDE, *supra* note 1, at 19.

<sup>241</sup> *Id.*

<sup>242</sup> ORS 197.797.

<sup>243</sup> *Id.*

requirement because it provides that LUBA may not consider an issue on appeal unless a party raised it at the local level with “sufficient specificity to enable the local government to respond.”<sup>244</sup>

Unless waived by the applicant, the applicant is entitled to submit final written arguments after the record is closed to all other parties.<sup>245</sup> This extension is exempt from the 120-Day Rule described below.<sup>246</sup>

### *Substantial Evidence*

A decision to approve or deny must be based on “substantial evidence in the whole record.”<sup>247</sup> If a local decision is supported by substantial evidence, LUBA will not overturn the ruling even if it might reach a different conclusion on the same evidence.<sup>248</sup> Substantial evidence is evidence a reasonable person would rely on in reaching a decision.<sup>249</sup>

If LUBA concludes that a reasonable person could have reached the same conclusion as the local government in view of all the evidence in the record, it will defer to the local government's choice between conflicting evidence.<sup>250</sup> In order to determine whether evidence is “substantial” it must be considered in the context of conflicting evidence in the record.<sup>251</sup> The local hearings body is empowered to make the choice between different reasonable conclusions to be drawn from the evidence in the whole record.<sup>252</sup>

The Oregon Supreme Court stated that Land Use Board of Appeals (LUBA) is required to defer to a local government's interpretation of its code, so long as the interpretation is not “clearly contrary to the enacted language,” or “inconsistent with express language of the ordinance or its apparent purpose or policy.”<sup>253</sup> The 1993 Oregon Legislature incorporated this court holding standard into Oregon law.<sup>254</sup>

However, the Oregon Court of Appeals adopted a more deferential review of the local governing body's interpretation when it applied the *PGE* rules of construction to review the text and context of the local provisions, overturning only if the local decision is “clearly wrong.”<sup>255</sup> More recently, the Court of Appeals has indicated that the courts should defer to a city's

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<sup>244</sup> ORS 197.835.

<sup>245</sup> ORS 197.797(6)(e).

<sup>246</sup> *Id.*

<sup>247</sup> ORS 197.835.

<sup>248</sup> *Id.*

<sup>249</sup> *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119 (1984).

<sup>250</sup> *Younger v. City of Portland*, 305 Or 346, 360 (1988).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Clark v. Jackson County*, 313 Or 508 (1992).

<sup>254</sup> ORS 197.829.

<sup>255</sup> *Church v. Grant County*, 187 Or App 518 (2003) (holding that the *Clark* test and the statute 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)).

interpretation of its own code if that interpretation is “plausible.”<sup>256</sup>

### *Continuances*

Any party can request either a continuance or an open record, and the choice of which process will be used is up to the hearings body.<sup>257</sup> After the initial continuance or open record period, the parties must be permitted at least seven days to respond to the new evidence submitted, and the extensions are not exempt from the 120-Day Rule, unless the continuance is agreed to by the applicant.<sup>258</sup>

### *Findings/Orders*

The governing body's final decision must be expressed in writing.<sup>259</sup> This decision, typically referred to as the “*Findings of Fact, Conclusions of Law and Order*” sets forth the relevant criteria, state the evidence on which the governing body relies, and explains the justification for the decision based on the criteria and the facts. Typically, a governing body will make a preliminary oral decision at the conclusion of the public hearing, which is followed up by adoption of the written decision at a later meeting.

Often, the winning side will request an opportunity to draft the findings. This does not violate any state law and may save staff resources.<sup>260</sup> However, the findings are official statements from the city and should be carefully reviewed to ensure they accurately reflect the facts of the case and the governing body’s judgment.

Once the final decision has been made, a written notice of the decision must be mailed to the applicant, all parties at the public hearing, and those who requested it.<sup>261</sup> In the case of a comprehensive plan text or map amendment or a zoning change, where the 45-day notice was sent to the DLCDC, a notice of the decision must be given to the DLCDC within five working days of the final decision.<sup>262</sup>

### *120-Day Rule*

Cities must make a final decision on a land use application, including resolution of all local appeals, within 120 days of the filing of a complete application.<sup>263</sup> If the local government fails to do so, then the applicant can file a *writ of mandamus* in circuit court to compel the local government to approve the application.<sup>264</sup> If the applicant prevails on the writ, the court can

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<sup>256</sup> *Siporen v. City of Medford*, 231 Or App 585, 598-99 (2009).

<sup>257</sup> ORS 197.797(6).

<sup>258</sup> *Id.*

<sup>259</sup> OAR 661-010-0010(3).

<sup>260</sup> *Dimone v. City of Hillsboro*, 41 Or LUBA 167 (2001).

<sup>261</sup> ORS 227.175.

<sup>262</sup> ORS 197.615.

<sup>263</sup> ORS 227.178.

<sup>264</sup> ORS 227.179.

make the local government pay the applicant's attorney fees.<sup>265</sup>

## V. APPEALS

In the local development code, it will outline a local appeal process. Generally, an appeal of the planning commission decision will go to the elected officials, but some jurisdictions use a hearings officer.<sup>266</sup>

A final local land use decision can be appealed to LUBA within 21 days of the final local decision.<sup>267</sup> LUBA has exclusive jurisdiction to review “land use decisions” and “limited land use decisions.”<sup>268</sup>

Quasi-judicial decisions that are not land use decisions may be appealed to a circuit court as a writ of review.<sup>269</sup> As discussed above, there is a body of law on what actions are considered a land use decision. Once appealed, the city is responsible for compiling the record.<sup>270</sup>

### A. Administrative Review (LUBA)

LUBA is a three-member administrative hearings body appointed by the governor.<sup>271</sup> Although the members of LUBA are not judges (but they must be attorneys), they serve as the initial appeal body for almost all land use cases in Oregon.<sup>272</sup> LUBA's procedure is very similar to filing a brief and arguing a case before the Court of Appeals or Supreme Court.<sup>273</sup>

LUBA publishes case notes that describe important LUBA holdings that are organized by subject matter. The notes are available at: <https://www.oregon.gov/luba/Pages/Headnotes.aspx> (last accessed June 12, 2024).

LUBA can affirm, reverse, or remand the governing body's decision.<sup>274</sup> LUBA will typically remand the decision when it determines that the local government's decision is not supported by substantial evidence or the local government failed to apply or correctly apply an applicable criterion.<sup>275</sup> LUBA is required to make a final decision within 77 days of the filing of the record.<sup>276</sup>

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<sup>265</sup> *Id.*

<sup>266</sup> INTRODUCTORY GUIDE, *supra* note 1, at 22.

<sup>267</sup> ORS 197.830.

<sup>268</sup> ORS 197.015(10); 197.015(12); 197.825(1).

<sup>269</sup> ORS 34.020.

<sup>270</sup> OAR 661-010-0025.

<sup>271</sup> ORS 197.810.

<sup>272</sup> *Id.*

<sup>273</sup> OAR 661-010-0000 to 661-010-0075.

<sup>274</sup> ORS 197.835.

<sup>275</sup> *Id.*

<sup>276</sup> ORS 197.830(14).



LUBA can award attorney fees if the losing party fails to present a position that is well founded in law or factually supported.<sup>277</sup> LUBA can also award attorney fees to a prevailing party on a takings claim.<sup>278</sup> However, award of attorney fees by LUBA rarely occurs.

When LUBA remands a case, the governing body must reconsider its decision based on LUBA's order.<sup>279</sup> Local governments must respond to a LUBA remand within 90 days of a request from the applicant for a decision.<sup>280</sup>

## **B. Judicial Review**

LUBA's decision may be appealed within 21 days to the Oregon Court of Appeals.<sup>281</sup> Review at the Court of Appeals is also expedited; except in limited circumstances, the court must hold oral argument within 49 days of the transmittal of the record and to make a decision no later than 91 days after oral argument.<sup>282</sup>

# **VI. OTHER ISSUES**

In addition to the issues discussed above that are addressed in a city's development code, cities have encountered other issues such as urban growth boundary amendments, takings issues under the U.S. Constitution's Fifth Amendment, nonconforming uses, and land use compatibility statements.

## **A. Urban Growth Boundary Amendments**

One of the most fundamental aspects to Oregon's land planning is the creation of urban growth boundaries (UGBs) to place limits on urban development. Statewide Goal 14 requires every city, in coordination with the affected county, to establish an urban growth boundary around the city limits containing a 20- year supply of buildable land for residential uses.<sup>283</sup> The intent of Goal 14 is to manage urban development to a well-defined, contiguous area, it is believed that growth can be accommodated without urban sprawl.<sup>284</sup>

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<sup>277</sup> ORS 197.830(15)(b).

<sup>278</sup> ORS 197.796(5).

<sup>279</sup> ORS 227.181

<sup>280</sup> *Id.*

<sup>281</sup> ORS 197.850.

<sup>282</sup> ORS 197.850(7); ORS 197.850(10).

<sup>283</sup> OAR 660-015-0000(14).

<sup>284</sup> *Id.* See also Oregon Department of Land Conservation and Development, *Goal 14: Urbanization*, available at: <https://www.oregon.gov/lcd/op/pages/goal-14.aspx> (last accessed June 14, 2024).

Metro establishes the Metro UGB for cities within its jurisdiction.<sup>285</sup> Within the Metro UGB, each city then establishes an urban services boundary within which the particular city commits to annex and serve the territory.<sup>286</sup>

In order to protect land adjacent to the UGB from being developed incompatibly with future urban land needs, a local jurisdiction may designate urban reserve territory.<sup>287</sup> The urban reserve area reflects a 30-to-50-year land need beyond the current UGB.<sup>288</sup> Once designated, an urban reserve becomes the first priority territory for expansion of the UGB when such need is determined.<sup>289</sup>

Oregon law requires a review of the 20-year land supply and require either adjustments to the UGB or to land use regulations to accommodate need.<sup>290</sup> Once a need is identified, the factors of Goal 14 are applied to determine the appropriate area for expansion.<sup>291</sup> Generally, non-resource land is preferred over resource land such as farm or forest.<sup>292</sup> Urban growth boundary amendments of more than 100 acres in the Metro area or more than 50 acres in cities with a population of 2,500 or more must be submitted to the Land Conservation and Development Commission (LCDC) under the period review process.<sup>293</sup> Appeal of the LCDC's decision goes to the Oregon Court of Appeals.<sup>294</sup>

To give local governments better access to the process of updating a comprehensive plan, in 2016 the LCDC adopted a simplified UGB process.<sup>295</sup> The simplified process reduces much of the complexity while encouraging cities to increase their development capacity and maintain a supply of land that is ready for development. Unlike the traditional UGB expansion process, which plans for a 20-year period, the simplified UGB process plans for a 14-year period.<sup>296</sup>

## **B. Takings**

The United States Constitution and the Oregon Constitution prohibit the taking of private property for public use without due process and just compensation.<sup>297</sup> In land use planning, there are two primary ways that courts have found that local governments can violate the takings clause without due process or just compensation:

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<sup>285</sup> OAR 660-007-0000 to OAR 660-007-0060; Metro Code Chapter 3.07; Metro, *Urban Growth Management Functional Plan*, available at: <https://www.oregonmetro.gov/library/urban-growth-boundary/lookup> (last accessed June 14, 2024).

<sup>286</sup> *Id.*

<sup>287</sup> ORS 197A.230 to 197A.250; OAR 660-027-0005 to OAR 660-027-0080.

<sup>288</sup> *Id.*

<sup>289</sup> ORS 197A.285; ORS 197A.355.

<sup>290</sup> ORS 197A.015 to 197A.314; OAR 660-015-0000(14).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> ORS 197.626.

<sup>294</sup> *Id.*

<sup>295</sup> ORS 197A.310 to ORS 197A.325.

<sup>296</sup> *Id.*

<sup>297</sup> U.S. Const., amend. V; Or Const, Art. I, § 18.

- *Inverse Condemnation*. If a zoning regulation goes “too far” and effectively appropriates private property for a public use, a court can invalidate the regulation and/or require just compensation, including for compensation for a “temporary taking.”<sup>298</sup>

Such a “regulatory taking” is very difficult to prove – basically the regulation must eliminate all reasonable economic use from a property and a plaintiff must “ripen” the claim by applying for any other use or form of relief allowed by the local ordinance (less valuable use, variances, zone changes).<sup>299</sup>

- *Exactions*. An exaction is a requirement that an owner give up a property right, such as extra right-of-way, as a condition of approval of a land use application.<sup>300</sup> An exaction is constitutional if the local government demonstrates that it complies with the following:
  - The exaction must advance a legitimate state interest;
  - The exaction must have an “essential nexus” to that state interest (i.e., directly help to achieve that interest); and
  - The exaction must “roughly proportional” (i.e., related in nature and degree) to the impacts of the development.<sup>301</sup>

Oregon law provides a method of challenging conditions of approval that may be unconstitutional exactions.<sup>302</sup> An applicant for a land use decision must bring a case within 180 days after the final decision either at LUBA or a circuit court.<sup>303</sup> The applicant must have raised the issue at the local level and exhausted all local appeals.<sup>304</sup> As discussed above, the city must: (1) state at the beginning of a hearing that failure to raise an issue with regard to a condition of approval precludes appeal; and (2) provide the condition of approval with sufficient specificity to enable the applicant to contest the decision before the final local hearing is closed.<sup>305</sup>

Recently, the U.S. Supreme Court held that development fees and exactions imposed on a broad class of property owners through legislative action are subject to the same nexus and proportionality analysis as those applied on an ad hoc basis.<sup>306</sup> As a result, system development charges following the careful analysis required by Oregon law will likely be sufficient. However, high fees that are not closely related to the nexus and proportionality of the proposed development are not constitutional.

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<sup>298</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

<sup>299</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302 (2002)

<sup>300</sup> *Dolan v. City of Tigard*, 512 US 374 (1994); *Sheetz v. El Dorado County*, 601 US \_ (2024).

<sup>301</sup> *Id.*

<sup>302</sup> ORS 197.796.

<sup>303</sup> ORS 197.796.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Sheetz v. El Dorado County*, 601 US \_ (2024)

## C. Nonconforming Uses

A *nonconforming use* is a use or structure that was legally established but is no longer permitted because zoning regulations have been applied or changed since the use or structure was established.<sup>307</sup> A common example is a residence in a commercial zone. Nonconforming uses may be created because the local government made a conscious decision to plan for a structure or an area to eventually convert to a different use, such as houses in the downtown.<sup>308</sup> Changes in state regulations regarding farm and forest lands can create nonconforming uses in rural areas, such as a school near a city in a farm zone.<sup>309</sup>

Most development codes allow continuation of nonconforming uses.<sup>310</sup> Maintenance and repair of nonconforming structures are usually allowed, but expansion and replacement are often limited or prohibited.<sup>311</sup> Different codes treat replacement in the event of a natural hazard or disaster in different ways.<sup>312</sup> There is generally a provision for replacement of a building that has been destroyed by fire or other disaster, often within one year, but not all codes permit it.<sup>313</sup>

State law guides alteration, restoration, and replacement of nonconforming uses in counties.<sup>314</sup> There is no such statute that applies to cities. If your code has provisions for altering or expanding a nonconforming use, it will likely include approval criteria.<sup>315</sup>

## D. Land Use Compatibility Statements

State agency actions must be completed in a manner that is consistent with the local comprehensive plan.<sup>316</sup> The vehicle through which a city confirms that a proposal is consistent with the plan is a land use compatibility statement, or *LUCS*.<sup>317</sup> Common LUCS requests include new or amended water rights, on-site sewage disposal approval, and wetland fill or removal.<sup>318</sup>

For example, the Oregon Department of Environmental Quality (DEQ) activities affecting land use and the requirement for a LUCS may be found in Oregon Administrative Rules (OAR) Chapter 340, Division 18. A LUCS is required for nearly all DEQ permits and certain approvals of plans or related activities that affect land use prior to issuance of a DEQ

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<sup>307</sup> INTRODUCTORY GUIDE, *supra* note 1, at 17.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> ORS 215.130.

<sup>315</sup> INTRODUCTORY GUIDE, *supra* note 1, at 17.

<sup>316</sup> ORS 197.180(1)(b); OAR 660-030-0070; OAR 660-015-0000(2).

<sup>317</sup> *Flowers v. Klamath County*, 17 Or LUBA 1078, 1083 (1989).

<sup>318</sup> INTRODUCTORY GUIDE, *supra* note 1, at 18.

permit or approval.<sup>319</sup>

The DEQ and other state agencies with permitting or approval activities that affect land use are required by Oregon law to be consistent with local comprehensive plans and have a process for determining consistency.<sup>320</sup> Signing a LUCS is generally not a land use decision that requires public notice and opportunity for appeal.<sup>321</sup> In certain unusual circumstances, deciding whether the proposed use is permitted may require discretion requiring notice of the decision and opportunity for appeal.<sup>322</sup>

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<sup>319</sup> OAR 340-018-0000 to OAR 340-018-0200.

<sup>320</sup> *Id.*

<sup>321</sup> INTRODUCTORY GUIDE, *supra* note 1, at 18.

<sup>322</sup> *Id.*