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Thank you to

- Jeffrey Condit, Partner, Miller Nash, LLP
- William Kabeiseman, Of Counsel, Garvey Schubert Barer

for updating this chapter in the Fall of 2010.

Names listed in alphabetical order.

CHAPTER 12 – LAND USE AND DEVELOPMENT PROGRAMS

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A. THE OREGON LAND USE SYSTEM

In 1973, the Oregon Legislature adopted SB 100, Oregon's pioneering, statewide land use planning program. That bill, now codified in ORS Chapter 197, created the Land Conservation and Development Commission ("LCDC"), which was directed to adopt the Statewide Planning Goals. Local governments were then required to adopt comprehensive land use plans and implementing regulations in compliance with the Goals. Once LCDC determined that a local plan and regulations were in compliance, it issued an order "acknowledging" that plan. Almost all local governments achieved LCDC acknowledgment by the mid-eighties. After acknowledgment, the local plan becomes the sole land use regulation for the jurisdiction in most instances. The 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. The chief applicable statutory and regulatory authorities are found at:

ORS AND OAR

LCD Website
LUBA Website
Oregon Statewide Planning Goals
ORS 197
ORS 227
ORS 195
ORS 268
ORS 222
ORS 092
OAR 660
OAR 661

- **ORS CHAPTER 197** Establishes LCDC and the Department of Land Conservation and Development ("DLCD"), assigns comprehensive planning responsibilities, requires compliance with the goals, addresses needed housing and urban growth boundary ("UGB") expansion, establishes local procedural requirements, contains post-acknowledgement procedures, and establishes the jurisdiction of the Land Use Board of Appeals ("LUBA").
- **ORS CHAPTER 227** Governs city planning requirements, many of which have analogs in the county statute.
- **ORS CHAPTER 195** Sets forth local government coordination and urban reserve requirements.
- **ORS CHAPTER 268** Governs the planning and other authority of Metro, the Portland area regional government.
- **ORS CHAPTER 222** Governs annexations and boundary changes.
- **ORS CHAPTER 92** Governs partition and subdivision of land.
- **OAR CHAPTER 660** LCDC's Administrative Rules.
- **OAR CHAPTER 661** LUBA's Rules of Procedure.

B. LOCAL LAND USE REGULATORY SYSTEM

Local land use regulations are typically contained in two documents:

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THE COMPREHENSIVE PLAN

The Comprehensive Plan is a local government's chief land use document. Comprehensive Plans establish the policy framework for the local land use program. Comprehensive Plan policies are typically not directly applicable to individual applications, but this can vary from jurisdiction to jurisdiction. LUBA has held, however, that a local government may only apply its Comprehensive Plan as a regulatory document if such intent is clearly expressed by the language of the Plan.

THE ZONING/DEVELOPMENT CODE

The typical local development code contains more specific regulations designed to implement the broad Comprehensive Plan policies. Such codes are the "nuts and bolts" document: They set forth the criteria or standards that each application must meet in order to be approved. These codes are required by law to comply with the Comprehensive Plan. ORS 197.175. The components of a typical code include:

- **ZONING:** The zoning portion of the development code (in some jurisdictions, the Zoning Code is a separate document) sets forth the zoning districts of the local jurisdiction (e.g., residential, commercial, industrial, etc.) The zoning districts typically list the allowed uses in the zone, the minimum lot sizes (if any), minimum density (if any), and siting requirements, such as height limits, lot coverage, setbacks, and floor area ratios. Uses are typically divided into "permitted uses" and "conditional uses." Permitted uses are generally allowed outright subject to no or limited review procedures, while "conditional uses" are uses that may be approved, denied, or approved with conditions because of their potential negative impacts on the permitted uses in the zone. In 2011, solar photovoltaic and solar thermal energy systems were exempted from land use restrictions and fees, with some limitations. ORS 227.505.

- **PERMITTING PROCEDURES:** The typical code breaks the permitting process into three or four categories, based upon the level of review: "Ministerial" (Type I) decisions, "minor" (Type II) decisions, "major" (type III decisions), and "legislative/rezone" (Type IV) decisions. Type I decisions are typically made without any notice or opportunity to comment or appeal. These types of decisions are (or are supposed to be) limited to nondiscretionary permits subject to objective criteria. The next level up, Type II, are generally staff decisions, but are subject to notice and the opportunity to appeal to a hearing. Type III decisions automatically go to a hearings officer or hearing body for approval. Type IV decisions are those that require a legislative or

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quasi-judicial change to the zoning requirements or standards befor the permit is approved.

Note: The question of whether a local government action is a "land use decision" subject to notice and at least the opportunity for a hearing is a perennially recurring and difficult issue. Deserving of an entire chapter itself, the question is tough to boil down to a rule, but basically a "land use decision" is:

- A decision that applies the local land use regulations; or
- Significantly impacts use of land; and'
- Involves at least an iota of discretion; and
- Is in some written form.

Many property owners will want to rush through a seemingly simple land use question without providing basic notice. This can come back to haunt them later, because the appeal period in some cases is never tolled.

- **DEVELOPMENT STANDARDS:** The development standards typically contain the basic infrastructure requirements, e.g., street and sidewalk, sewer and water connections, required landscaping, and similar requirements. Due to changes in law effective June 1, 2012, cities must also adopt standards for clustered mailbox that conform to the standards established by the Oregon Structural Specialty Code, to ensure compliance with the Americans with Disabilities Act requirements. ORS 227.455.

C. TYPES OF LAND USE DECISIONS

- **"LEGISLATIVE" DECISIONS** Are decisions where a governing body enacts policies or standards which are generally applicable to all persons or property or large classes of persons or property. Amendments to the policies of the Comprehensive Plan or the standards and criteria of the Zoning Code are typically legislative decisions. When a governing body makes a legislative decision, it is sitting in its role as the policy-making body for the local government.
- **"QUASI-JUDICIAL" DECISIONS** Are decisions where a governing body is applying adopted policies or standards to specific persons or property. Approvals or denials of specific land use permits are typically quasi-judicial decisions. As the name implies, when a governing body makes a quasi-judicial decision, it is sitting in the role of a judge and is adjudicating individual rights.

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D. LEGISLATIVE LAND USE DECISIONS

NATURE AND SCOPE OF LEGISLATIVE DECISION

When a governing body makes a legislative land use decision, it is deciding whether or not a proposed amendment to the Comprehensive Plan or Zoning Code is in the best interest of the local government as a matter of public policy. Legislative decisions typically affect large areas and are not focused on small, localized segments of property or the community. Because a governing body is the elected policy-making body of the local government, the governing body's policy judgment is given great deference by the courts.

A governing body's legislative discretion is, however, constrained by state and local laws, such as:

- **THE GOALS:** A post acknowledgment amendment to a Comprehensive Plan or implementing regulation must be in compliance with any applicable Statewide Planning Goal.
- **STATE LAW:** ORS 227.173(1) requires all land use decisions to be based on legislatively adopted standards and criteria. While such criteria may be discretionary, LUBA and the courts have reversed criteria that are arbitrary or so vague that they do not provide an applicant with a reasonable idea of what the applicant needs to do to obtain an approval.
- **THE COMPREHENSIVE PLAN:** Many Comprehensive Plans contain approval criteria or a review process for amendments to the Plan. Amendments to zoning regulations must comply with Comprehensive Plan policies.
- **LOCAL CHARTER AND CODE REQUIREMENTS:** 1998 Ballot Measure 56 amended ORS 227.186(2) to require all legislative land use decisions to be enacted by ordinance. Legislative land use decisions must therefore be made pursuant to each city's local enactment process.

PROCEDURAL REQUIREMENTS FOR LEGISLATIVE DECISIONS

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. In most local governments, proposed legislative amendments are first referred to a planning commission

for public hearing and recommendation before coming to the governing bo for public hearing and adoption.

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- **NOTICE** Notice of a legislative hearing is typically provided by publication in a newspaper of general circulation in the community. Local codes may contain additional requirements.
- **BALLOT MEASURE 56** (ORS 215.503/227.186) requires notice to property owners not less than 20 and not more than 40 days in advance of the first hearing on a legislative change that limits or prohibits previously allowed land uses.
- ORS 197.610 requires notice of a legislative decision to be mailed to DLCD at least 45 days in advance of the first evidentiary hearing on adoption, unless the local government determines that the Goals do not apply (which will almost never be the case). In either event, notice of adoption must be mailed to DLCD not later than five working days following adoption. Failure to do so is jurisdictional, which means the decision comes back to the local government to re-do with the appropriate notice.
- **CITIZEN INVOLVEMENT** Statewide Land Use Planning Goal 1 requires every local government to adopt and implement a citizen involvement program. 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.
- **HEARING PROCEDURE** There is no state-prescribed procedure for legislative hearings. Most codes provide for general testimony; others call first for testimony in favor, followed by testimony in opposition. After the close of testimony, the legislative amendment is adopted, adopted with amendments, or rejected pursuant to the ordinance or resolution adoption procedures of the local government charter or code.

E. QUASI-JUDICIAL LAND USE DECISIONS

NATURE AND SCOPE OF QUASI-JUDICIAL DECISIONS

When a governing body makes a quasi-judicial decision, it is deciding whether the evidence and testimony in the record proves or fails to prove that the application complies with the applicable criteria for approval. The scope of a quasi-judicial decision is much more limited, and a governing body's discretion is more constrained, both procedurally and substantively. Typically, quasi-judicial decisions affect only a single or limited number of

properties. Quasi-judicial decisions apply, rather than create, policy. In thes circumstances, the Council is acting as a judge rather than setting policy fo the city.

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THE APPLICABLE STANDARDS AND 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 regulations. ORS 215.416 and 227.173. 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. 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. These criteria, however, can be and are frequently very subjective.

- **WHICH CRITERIA?** ORS 227.178(3) and 215.427(3) require that an application be judged by the criteria in effect at the time the application is filed. In other words, the governing body cannot delay a decision on an application in order to rush through a legislative amendment to the criteria and then retroactively apply the new criteria to the pending application.

- **INTERPRETATION OF CRITERIA:** In Clark v. Jackson County, 313 Or 508 (1992), the Oregon Supreme Court stated that 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." The 1993 Legislature incorporated the Clark standard into the LUBA review statute. ORS 197.829.

- In *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003), however, the Court of Appeals appeared to limit its line of cases that concluded that *Clark* and the *Clark* codification statute (ORS 197.829) required affirmance of a local governing body's interpretation if not "clearly wrong." Instead, the court of appeals concluded 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)" (the "*PGE* test"). 187 Or App at 524. Under the *PGE* Test, courts look first to the text and context of the provision. If the text and context is ambiguous, the courts next look to legislative history.

- More recently, the Court of Appeals has indicated that LUBA and the courts should defer to a city's interpretation of its own code if that interpretation is "plausible." *Siporen v. City of Medford*, 231 Or App

585, 598-99, 220 P3d 427 (2009). This issue seems to be in flux a may be developing further

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THE EVIDENCE IN THE RECORD

The decision as to whether an application complies with the applicable criteria has to be based on the evidence and testimony "in the record." Evidence is considered to be "in 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. 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.

- **BURDEN OF PROOF:** The applicant has the burden of proof to demonstrate compliance with the applicable criteria. The "burden of proof" is the obligation to establish compliance by evidence to a particular degree. The typical evidentiary burdens are "beyond a reasonable doubt," "clear and convincing," and proof by a "preponderance of the evidence." The latter is the burden in most codes. In other words, if the city council believes that the evidence is 50-50 with regard to compliance with a particular criterion, then it must deny the application because the applicant has failed to carry the burden of proving his or her case to the council.

- **SUBSTANTIAL EVIDENCE:** A decision to approve or deny must be based on "substantial evidence in the whole record." 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. "Substantial" evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984). 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. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988). "In order to determine whether evidence is 'substantial' it must be considered in the context of conflicting evidence in the record." The local hearings body is empowered to make the choice between different reasonable conclusions to be drawn from the evidence in the whole record.

PROCEDURAL REQUIREMENTS

ORS 197
ORS 195
ORS 763
ORS 215
ORS 416
ORS 227

The quasi-judicial decision-making process is controlled by both state law and local code and can differ substantially among local governments. See

ORS 197.195, 197.763, 215.416, and 227.160 to 227.185. The general ru is, however, that parties to a quasi-judicial decision are entitled to be trea 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 make and to a written decision. *Fasano v.* Washington *County*, 264 Or 574 (1973), ORS 227.173(2).

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- **THE RIGHT TO PRESENT AND REBUT EVIDENCE** The standard practice in most local governments is for the applicant to begin the public testimony, followed by testimony in support of the application. Testimony in opposition is then taken, enabling opponents to respond to the evidence in support and to present additional evidence. The applicant is then given the opportunity for rebuttal, which is limited to responding to the evidence and testimony in opposition.

- **LOCAL HEARINGS** Most local government codes provide for at least one hearing before a lower body (generally the planning commission or a hearings officer) before the application may be appealed to the governing body. Depending on the local government, an appeal to the governing body may be heard:

- **DE NOVO** A "de novo" hearing generally means that the parties may submit new evidence and testimony before the governing body, although some local governments limit the arguments to those stated in the notice of appeal.

- **ON THE RECORD** An "on the record" hearing 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. No new issues or evidence may be presented at the governing body hearing. The purpose of limiting evidence and testimony is to encourage issues to be fully presented and resolved at the lower level.

- **IMPARTIAL TRIBUNAL** The requirement for the governing body to be impartial is one of the most important distinctions between legislative and quasi-judicial decisions. A legislative decision is essentially a political decision and people are entitled and should be encouraged to call, send letters, or otherwise attempt to influence a governing body's decision. Further, a governing body is expected and entitled to exercise its political judgment in making such decisions. In contrast, a quasi-judicial decision is a legal judgment on a specific case which affects individual rights. The parties to such a case are entitled to a fair, equal, and unbiased consideration and decision.

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- **EX PARTE CONTACT** An "ex parte" contact is contact with a governing body regarding a land use application outside of the pub hearing process. Ex parte contacts are discouraged in quasi-judicia decisions because they can result in undue influence and because all parties do not have the opportunity to hear and respond to such comments. If a member of a governing body has an ex parte contact (and sometimes they cannot be avoided), then the member must disclose and describe the content of that contact prior to opening the public hearing so that all parties may respond. ORS 227.180. Failure to disclose an ex parte contact taints the fairness of the hearing and can result in reversal or remand of the governing body's decision.

- Communication with local government staff regarding an application outside the hearing process is not an ex parte contact. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540, 541-542 (1996). This is true even if the City is the applicant.

- A site visit by the governing body is not technically an ex-parte contact, but will be treated like one if not disclosed because a decision based on a site visit is otherwise impermissibly based on evidence outside of the record. 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).

- Contacts that occur prior to the filing of an application are not ex parte contacts. *Richards-Kreitzberg*, 31 Or LUBA at 541.

- **BIAS** A member of a governing body should not participate in a decision if he or she has an actual bias regarding the application. "Actual bias" means prejudice or prejudgment of the facts to such a degree that he or she is incapable of rendering an objective decision on the merits of the case. *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76, 742 P2d 39 (1987).

- The courts have been very reluctant to overturn a local government decision based upon an allegation of bias. The reasons are essentially two: First, elected officials are not judges and are expected to exercise some political judgment – within the bounds of the law. Second, while you can easily replace a judge, disqualifying city councilors or county commissioners can create quorum and minimum vote problems, making it difficult for the governing body to even make a decision. *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 754, 588 P2d 640 (1978).

- It is not bias for a city council to decide the city's own applications. *Pend-Air Citizen's Committee v. City of Pendleton*, 29 Or LUBA 362 (1995).

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- 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. For the reasons stated above, it is probably better to err on the side of participation. It is useful, however, for the council to have a discussion about bias issues to determine some ground rules for participation. 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.

- **CONFLICTS OF INTEREST** Prior to participating in any decision, a member of the planning commission or governing body must declare any potential or actual conflicts of interest pursuant to ORS Chapter 244 (Government Standards and Practices).

- A "potential conflict of interest" exists if the land use decision could result in a personal financial gain or loss to the councilor, any member of his or her household, or any business with which they or a household member is associated. A potential conflict does not include financial impacts arising out of membership in an occupation or class which is a prerequisite to holding office, or an action which would affect to the same degree a class such as an industry, occupation, or other group to which the councilor belongs. A councilor 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. ORS 244.120(2). If the land use decision is discussed over the course of several meetings, the councilor must declare the conflict each time the matter comes up.

- An "actual conflict of interest" exists if the land use decision would result in a personal financial gain or loss to the councilor, any member of his or her household, or any business with which they or a household member is associated. A councilor 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. Exception: If the participation of the councilor is necessary to meet a requirement of a minimum number of votes to take official action, the councilor may vote, but may not participate in the discussion. ORS 244.120(2)(b)(B).

- Failure to comply with ORS Chapter 244 can result in an investigation and hearing by the Oregon Ethics Commission ("OEC"). If it finds a violation, the OEC can levy a fine of up to $5000. It also can affect the validity of the land use decision.

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- Note: The statutory requirement to declare conflicts applies to both legislative and quasi-judicial decisions.

- To the extent a member of a governing body has questions regarc conflicts of interest, the OEC can provide advice. You should consult with your city attorney if you have any concerns about conflicts of interest.

- **ORS 197.763 (THE "RAISE IT OR WAIVE IT" LAW)** Since 1989, the State Legislature has regulated local quasi-judicial land use hearing procedures pursuant to ORS 197.763. This statute is referred to as the "raise it or waive it" law 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." In return for this protection, the legislature adopted a number of procedural requirements designed to ensure that parties have an adequate opportunity to raise issues at the local level.

- ORS 197.763 may or may not apply to a hearing before the governing body. If the hearing is "de novo" before the governing body, ORS 197.763 applies. If the hearing is "on the record," however, ORS 197.763 may not apply. See *Murphey Citizens Advisory Committee v. Josephine County*, 25 Or LUBA 312 (1993). ORS 197.763 issues that are likely to come up at a hearing include:

- **NOTICE** ORS 197.763(3) requires that written notice be sent 20 days in advance of the hearing. The notice must explain the nature of the application, list the applicable criteria, and describe the procedures to be used at the hearing. A violation of the notice requirements can result in a remand if it prejudices a "substantial right."

- **LUBA/TAKINGS WARNING** At the beginning of each quasi-judicial hearing, the chair 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.

- ORS 197.796 requires an applicant alleging that a condition of approval unconstitutionally "takes" their property to raise that argument at the local level. ORS 197.796(3)(b) now requires a statement that "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."

- **CONTINUANCE/OPEN RECORD** Under ORS 197.763(6), 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. 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.

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- **FINAL REBUTTAL** Unless waived by the applicant, the applicant is entitled to submit final written arguments after the record is closed to all other parties. ORS 197.763(6)(e). This extension is exempt from the 120/150-Day Rules.

- **WRITTEN DECISION** The governing body's final decision must be expressed in writing. This decision, typically referred to as the "Findings of Fact, Conclusions of Law and Order" must set forth the relevant criteria, state the evidence on which the governing body relies, and explain 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. It is important to remember that the decision does not become final until the written order is adopted; during the interim between preliminary decision and adoption of the final order, you should continue to avoid ex parte contacts.

- Often, the winning side will request an opportunity to draft the findings. LUBA has concluded that this does not violate any state law and may save staff resources. 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.

120/150-DAY RULES

ORS 215.427, 215.429, 227.178, and 227.129 require local governments to make a final decision on a land use application, including resolution of all local appeals, within 120 days (cities/counties for territory within an urban growth boundary) or 150 days (counties outside of an urban growth boundary) of the filing of a complete application. 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. If the applicant prevails on the writ, the court can make the local government pay the applicant's attorney fees.

Note: An applicant is entitled to a compelled approval unless the local government can demonstrate that approval would violate a

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substantive provision of the local Comprehensive Plan and zoning regulations. Many applicants mistakenly assume that if the local government violates the rule that they are entitled to automatic approval.

F. APPEAL OF GOVERNING BODY DECISIONS

PROCEDURE AND PROCESS

With several limited exceptions, a legislative or quasi-judicial decision of the governing body, where proper notice was given, may be appealed by filing a Notice of Intent to Appeal ("NITA") with LUBA within 21 days of the date of the decision. ORS 197.805 to 197.895. LUBA is a three-member administrative hearings body appointed by the governor. ORS 197.810. 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. LUBA's procedure is very similar to filing a brief and arguing a case before the Court of Appeals or Supreme Court.

LUBA is statutorily required to make a final decision within 77 days of the filing of the record. ORS 197.830(14). (The local government has 21 days from the filing of the NITA to file the record).

EFFECT OF LUBA'S DECISION

LUBA can affirm, reverse, or remand the governing body's decision. 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. When LUBA remands a case, the governing body must reconsider its decision based on LUBA's order.

- **REMAND DEADLINE:** ORS 227.181 requires a city to respond to a LUBA remand within 90 days of a request from the applicant for a decision.
- **ATTORNEY FEES:** Attorney fees are difficult to obtain at LUBA, but can be awarded if the losing party fails to present a position that is well founded in law or factually supported. ORS 197.830(15)(b). LUBA can also award attorney fees to a prevailing party on a takings claim. ORS 197.796(5). This rarely occurs.

JUDICIAL REVIEW

LUBA's decision may be appealed within 21 days to the Court of Appeals, and the Court of Appeals decision can be appealed to the Supreme Court.

ORS 197.850. Review at the Court of Appeals is also expedited: Except in limited circumstances, the Court must hold oral argument within 49 days o the transmittal of the record. ORS 197.850(7). ORS 197.850(10) requires the court to make a decision "with the greatest possible expediency" and r later than 91 days from the date after oral argument. ORS 197.855(1). ORAP 4.60 to 4.74, which govern appeals from LUBA, require the record to be transmitted within seven days of filing of the appeal, require the petition for review to be filed within 21 days of filing, and require the response to be filed within 21 days after the filing of the opening brief. As with a standard civil case arising from circuit, the Supreme Court has discretion as to whether to grant review of a Court of Appeals land use decision. Historically, the Supreme Court has granted review in only a handful of cases. A decision by the Supreme Court is final, unless the decision involves an issue of federal law (such as a due process or 5th Amendment takings claim), in which case a party could file a petition for review in the United States Supreme Court. This is a very rare occurrence.

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G. MISCELLANEOUS CONCEPTS AND ISSUES

URBAN GROWTH BOUNDARIES

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

- **AMENDING THE UGB** ORS 197.295 to 197.314, 197.475 to 197.490, and Goal 14 apply to amendments to the UGB. Generally, the statutes require a review of the 20-year land supply, and require either adjustments to the UGB or to land use regulations to accommodate the need. Once a need is identified, the factors of Goal 14 and ORS 197.298 are applied to determine the appropriate area for expansion. Generally, non-resource land is preferred over resource (forest or farm) land. Urban Growth Boundary amendments over 100 acres (Metro) or 50 acres (cities over 2,500 in population) must be submitted to LCDC under the period review process. Appeal of LCDC's decision goes to the Court of Appeals.

- **URBAN RESERVES** 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. ORS 195.145. The urban reserve area reflects a 30- to 50-year land need beyond the current UGB. Rules for identification and designation of urban reserves are very similar to those for the UGB. Once designated, an

urban reserve becomes the first priority territory for expansion of the UGB when such need is determined. ORS 197.298(1)(a).

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"TAKINGS"

The 5th amendment to the U.S. Constitution and Article I Section 18 of the Oregon Constitution prohibit the taking of private property for public use without due process and just compensation. While grossly oversimplifying a complex area of the law, there are basically four kinds of takings:

- **EMINENT DOMAIN** A government may take private land for public use by filing a condemnation action. A governing body's determination of "public use" is given great deference in this context. Generally, the chief argument at trial, if it gets that far, is the amount of compensation.

- **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." 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).

- **PHYSICAL INVASIONS** A regulation is a "physical invasion" – and thus an unconstitutional "taking" regardless of how it impacts the value of the property – if it requires the owner to permit a third party to occupy his or her premises.

- **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. Related to a physical invasion, an exaction is constitutional if the local government demonstrates that it complies with the test established in *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994):

    - 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.

  The 1999 Legislature enacted ORS 197.796 to provide for a method of challenging conditions of approval that may be unconstitutional exactions. An applicant for a land use decision must bring a case

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within 180 days after the final decision either at LUBA or circuit cour In order to do so, the applicant must have raised the issue at the local level and exhausted all local appeals. The local government has the obligation to state at the beginning of a hearing that failure to raise an issue with regard to a condition precludes appeal, and must state the condition with sufficient specificity to enable the applicant to contest the decision before the final local hearing is closed.

H. CONCLUSION

This chapter is a necessarily cursory overview of a complex area of the law. Please consult your city attorney if you have further questions.