Current Advanced Topics in Real Estate and Land Use

Cosponsored by the Real Estate & Land Use Section

Friday, April 19, 2019
9 a.m.–4:15 p.m.

5.75 General CLE credits
Current Advanced Topics in Real Estate and Land Use

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7. **Strategies to Promote Affordable Housing Through Density Increases** .............. 7–i
   — Scott Hilgenberg, *Attorney at Law, Portland, Oregon*
8:00  Registration

9:00  Commercial Landlord Tenant Disputes—Gaining (or Keeping) Possession—Case Studies
  ✦ Debunking the “Rocket Docket” myth in commercial FEDs
  ✦ Waiving nonwaiver clauses
  ✦ How to use self-help effectively
  ✦ Pitfalls with commercial evictions
  William Miner, Davis Wright Tremaine LLP, Portland

10:00  PACE Project Lending—What Is It, and How Does It Work in Oregon?
  ✦ History of PACE programs: ORS 223.680 and ORS 223.685
  ✦ Multnomah County/Prosper Portland PropertyFit program
  ✦ Closing example—first lending priority, seller financing, and refinancing
  Sam Baraso, Senior Policy Analyst, Office of Sustainability, Multnomah County, Portland
  Raphael “Rafi” Golberstein, PACE Loan Group, Minneapolis
  Dustin Klinger, Thede Culpepper Moore Munro & Silliman LLP, Portland

11:00  Break

11:15  Water Law in Real Estate Transactions
  ✦ Water rights law overview
  ✦ Due diligence in farmland, vineyard acquisitions, or other settings in which water supply drives value
  ✦ Practical considerations performing diligence and correcting identified water rights problems
  Richard Glick, Davis Wright Tremaine LLP, Portland
  Adam Sussman, GSI Water Solutions Inc., Corvallis

12:00  Lunch

1:00   Water Law Related to Land Use
  ✦ Water rights in the entitlements process
  ✦ Land use information forms and land use compatibility statements
  ✦ Extraterritorial extensions of water service
  David Filippi, Stoel Rives LLP, Portland

1:45   Update on Land Use Procedural and Substantive Issues Under “Needed Housing,” ORS 197.303 and 197.307
  ✦ Oregon Land Use Board of Appeals and Oregon Court of Appeals decisions
  ✦ Update on LUBA
  ✦ Recent decisions on needed housing
  ✦ Proposed legislations affecting housing
  Michael Robinson, Schwabe Williamson & Wyatt PC, Portland

2:30   Break
2:45  An Evolving Landscape: Marijuana’s Continued Impact on Oregon Land Use Planning
    ♦ Marijuana and hemp integration into Oregon’s land use system
    ♦ Potential new legislation relating to marijuana
    ♦ Updates on local regulation of marijuana-related uses
Corinne Celko, Emerge Law Group, Portland
Ross Williamson, Speer Hoyt LLC, Eugene

3:30  Strategies to Promote Affordable Housing Through Density Increases
    ♦ Summary of Senate Bill 1051 (2017)
    ♦ Accessory dwelling unity mandate litigation in Eugene
    ♦ Local and state legislation promoting density
Scott Hilgenberg, Attorney at Law, Portland

4:15  Adjourn
FACULTY

Sam Baraso, Senior Policy Analyst, Office of Sustainability, Multnomah County, Portland.

Corinne Celko, Emerge Law Group, Portland. Ms. Celko focuses her practice on land use and development law, obtaining permit and entitlement approvals for a wide variety for development projects. She has experience advocating at local government hearings, moving through the local land use application process, and handling cases before the Oregon Land Use Board of Appeals. She has worked with various cities and counties throughout Oregon to adopt regulations specific to cannabis-related uses. Ms. Celko is a member of the National Cannabis Bar Association and is a frequent presenter at cannabis-related conferences.

Raphael “Rafi” Golberstein, PACE Loan Group, Minneapolis. Mr. Golberstein is a commercial real estate finance veteran with experience in structured finance, loan origination, and equity investments. Prior to founding Pace Loan Group, Mr. Golberstein spent his career on Wall Street, most recently as a managing director of a publicly traded real estate investment trust focused on commercial mortgage-backed securities origination, balance sheet and mezzanine loans, and equity investments. Throughout his career, Mr. Golberstein has originated and closed over $2.5 billion of commercial real estate loans throughout the country.

David Filippi, Stoel Rives LLP, Portland. Mr. Filippi practices in the areas of natural resources, environmental, and land use law, and he concentrates his practice on water rights and water quality, fish and wildlife law, hydropower relicensing, and project facility siting and permitting. He has been closely involved in the development and implementation of numerous Endangered Species Act compliance strategies on behalf of both public and private clients. His water law practice encompasses regional water supply planning, water management and conservation planning, and compliance with water basin programs. He works regularly with clients to inventory and secure existing water rights, obtain new water rights, and transfer existing water rights to new uses. He also advises clients as to permitting and compliance under the Clean Water Act, National Environmental Policy Act, and federal reclamation laws including the Reclamation Reform Act. He is a member of the Northwest Energy Association, the Northwest Hydroelectric Association, the Rocky Mountain Mineral Law Foundation, and the Oregon State Bar Environmental and Natural Resources Section and Real Estate and Land Use Section, and the American Bar Association Environment, Energy, and Resources Section. Mr. Filippi is the 2001 recipient of the Burton Award for Legal Achievement.

Richard Glick, Davis Wright Tremaine LLP, Portland. Mr. Glick focuses on environmental, water, and energy law, representing businesses and local governments in a wide range of environmental matters. He counsels clients on regulatory compliance, permitting for major infrastructure projects, energy facility siting and permitting, water rights, water quality permitting and certifications, wetlands, endangered species, and environmental impact review; assists in assessing and managing environmental risk associated with business or real estate transactions; evaluates water rights in agricultural transactions; and represents clients before the state and federal agencies in Superfund, environmental cleanup, permitting, and enforcement actions. Mr. Glick is former staff counsel to the California State Water Resources Control Board, and a former deputy city attorney for the City of Portland. Among other professional activities, Mr. Glick is a member of the Low Impact Hydropower Institute Board of Directors, cochair of the Oregon Business & Industries Economic Development Committee, cofounder and first president of the American College of Environmental Lawyers, and cofounder of the National Water Resources Law Forum. Mr. Glick is admitted to practice in Oregon and California.

Scott Hilgenberg, Attorney at Law, Portland.
Dustin Klinger, *Thede Culpepper Moore Munro & Silliman LLP, Portland*. Mr. Klinger focuses his practice on business organization and transactions. He has extensive experience in cooperative mergers and real estate–related acquisitions, sales, property management, leasing, and secured financing. He is active in structuring, negotiating, and closing transactions for co-op, family, and closely held companies. He has specific experience representing retail landlords, lenders, real estate developers, colleges and universities, service-providers, as well as agricultural cooperative businesses, and has also worked with charitable and nonprofit organizations. Dustin is admitted to practice in Oregon and Washington. Mr. Klinger is past chair and the 2020 elected treasurer of the Oregon State Bar Real Estate & Land Use Section Executive Committee. He is also on the *Oregon Real Estate Deskbook* (OSB Legal Pubs 2015) Editorial Committee and authored the chapter on “Commercial Real Estate Finance.” He is a frequent CLE and CPE presenter. Mr. Klinger holds an LL.M. in Asian and Comparative Law from the University of Washington School of Law.

William Miner, *Davis Wright Tremaine LLP, Portland*. Mr. Miner works with his clients to resolve their legal problems through pre-litigation counseling, litigation, and mediation. He tries cases in state and federal courts and through private arbitration. His experience includes defending and prosecuting business torts, breach-of-contract claims, disputes between and among members of limited liability companies, residential and commercial real estate matters, including landlord-tenant, title, lien, and timber trespass disputes, and probate and trust cases. Mr. Miner is also the partner in charge of Davis Wright Tremaine’s Portland office, where he leads 85 attorneys and a staff of 90.

Michael Robinson, *Schwabe Williamson & Wyatt PC, Portland*. Mr. Robinson represents home builders, hospitals, office developers, and municipalities with zoning, permitting, entitlement, and approval of single-family homes, schools, manufacturing facilities, shopping centers, and infrastructure improvements. He also works closely with Schwabe’s real estate finance and transactions, natural resources, and business and corporate attorneys. He is a member of the Oregon State Bar Real Estate and Land Use Section, the American Institute of Certified Planners, and the American Planning Association.

Adam Sussman, *GSI Water Solutions Inc., Corvallis*. Mr. Sussman is the firm’s Principal Water Resources Consultant and manages its Water Rights and Resources practice. He helps water users and providers throughout Oregon develop strategies for managing water resources. For 14 years, he worked for the Oregon Water Resources Department, where he developed and implemented statewide water policies and programs. He is an expert in Oregon water rights and the administrative rules and processes governing water rights transactions.

Ross Williamson, *Speer Hoyt LLC, Eugene*. Mr. Williamson’s practice emphasizes the subject areas of land use and public contracting, but he also has experience in most aspects of local government law. He works with the Local Government Law Group, a member of Speer Hoyt LLC. LGLG limits its practice to providing legal services to local government entities throughout Oregon and serves as legal counsel for 20+ cities and 80+ special districts. Mr. Williamson is the designated city attorney for the cities of Brownsville, Creswell, Falls City, Florence, Halsey, and Yachats. He has also served as a land use hearings official for the City of Eugene. Mr. Williamson is admitted to practice in Oregon and Washington.
Chapter 1

Presentation Slides: The “Rocket Docket” Practice in Commercial Landlord Tenant Disputes (and Other Issues)

WILLIAM MINER
Davis Wright Tremaine LLP
Portland, Oregon
## Forcible Entry and Detainer Review

- **ORS 105.105 – 105.168**

  The purpose of a forcible-entry-and-detainer (FED) proceeding is to give the landlord a quick and speedy method to obtain recovery of property from a tenant.

- Most FEDs occur in the residential context. Practitioners and courts are most familiar with the process as it relates to residential FEDs.

- For residential FEDs, the process is truly a “rocket docket.”
Forcible Entry and Detainer Review (Cont.)

- Action is filed.
- Depending on the County, a “First Appearance” is scheduled within 10 days of the action being filed (Multnomah County is about a week and a day).
- At the First Appearance, Four possible outcomes:
  - 1. Landlord appears, Tenant does not. Landlord applies for a default.
  - 2. Tenant appears, Landlord does not. Action is dismissed.
  - 3. Both parties appear, they enter into a stipulated agreement (see ORS 105.145-105.148), or otherwise agree to a dismissal.
  - 4. Both parties appear and are unable to reach an agreement. Tenant requests a trial.

Forcible Entry and Detainer Review (Cont.)

- If a trial is requested, “the court shall set the matter for trial as soon as practicable, unless the court is advised by the parties that the matter has been settled. The trial shall be scheduled no later than 15 days from the date of such appearance.” ORS 105.137
- Courts require a defendant to file an Answer in short order.
  - Multnomah County, : 5 p.m. the same judicial day. Multnomah County SLR 18.045(1).
  - Clackamas County: 5 p.m. the same judicial day. Clackamas County SLR 18.005(1)(c).
  - Washington County: 5 p.m. the same judicial day. SLR 18.010
“Rocket Docket” in Commercial Evictions

Fact Pattern: Commercial landlord sends a notice of termination. Upon the expiration of the notice, landlord files an FED action against the tenant. A first appearance is scheduled. Landlord and Tenant appear and are unable to work out their differences. The court sets a trial within 15 days and requires the commercial tenant to file an Answer within 24 hours.

What the Oregon CLE Deskbook Says (and what many practitioners practice and advise commercial landlords):

- § 35.3 FORCIBLE-ENTRY-AND-DETAINER ACTIONS
- § 35.3-5 Summons
- § 35.3-5(b) First Appearance

First appearances in forcible-entry-and-detainer (FED) actions are governed by ORS 105.137. Although ORS 105.137 expressly deals with residential FEDs, the process for commercial FEDs is essentially the same. If the plaintiff-lessee appears, but the defendant-lessee does not, a default judgment for possession of the premises and costs and disbursements must be entered in favor of the plaintiff. ORS 105.137(1). If the defendant-lessee appears, but the plaintiff-lessee does not, a default judgment dismissing the complaint and awarding costs and disbursements must be entered in favor of the defendant-lessee. ORS 105.137(2). If both parties appear, the court must set the matter for trial as soon as practicable, but no later than 15 days from the date of first appearance. ORS 105.137(6).
No Rocket Docket for Commercial Evictions

- ORS 105.130 How action conducted; fees. (1) Except as provided in this section and ORS 105.135, 105.137 and 105.140 to 105.161, an action pursuant to ORS 105.110 shall be conducted in all respects as other actions in courts of this state.

- None of the exceptions shortens a defendant’s deadline to file an answer in a commercial FED action, or limits the scope or timing of discovery in a commercial FED action. Rather, the only limitations in those statutes apply to residential FED actions under ORS Chapter 90.

- ORS 105.137, which provides that if both parties appear on the first appearance date, that a trial shall be set “as soon as practicable” but “no later than 15 days from the date of such appearance,” and provides, in the case of an unrepresented party, that the answer shall be served “upon the plaintiff on the same day as first appearance,” is expressly limited to “the case of a dwelling unit to which ORS chapter 90 applies.” ORS 105.137. It has no bearing whatsoever on a commercial eviction to which ORS chapter 90 does not apply.

No Rocket Docket for Commercial Evictions (cont.)

- The process is bolstered contextually by ORS 105.113, which provides the form of summons to FEDs “[n]otwithstanding ORCP 7 C, for premises to which ORS chapter 90 or ORS 91.120 [eviction of an employee] applies.” ORS 105.113.

- That provision expressly states that the time to answer is “on the same day” as the first appearance. However, for premises to which ORS chapter 90 or ORS 91.120 do not apply, there is no provision in the ORS shortening the time for a defendant’s first appearance “notwithstanding ORCP 7 C.”

- Where ORS chapter 90 and ORS 91.120 do not apply, ORCP 7 C governs defendant’s first appearance, and defendant is provided 30 days to appear. ORCP 7 C(2). A commercial FED must be “conducted in all respects as other actions in courts of this state,” as required by ORS 105.130(1).
What it Means:

- FED actions in Oregon proceed in three general stages:
  1. service/process;
  2. answer and trial; and
  3. judgment after trial.

Statutes and case law provide that the service/process and post-trial stages are summary proceedings to which expedited timeframes apply in both commercial and residential FED proceedings. ORS Chapter 105; Lexton-Ancira, Inc. v. Kay, 269 Or 1, 6, 522 P2d 875 (1974).

These same authorities, however, conspicuously decline to apply the summary proceeding rules to commercial FED actions during the answer and trial stage, instead drawing distinctions between commercial and residential actions at this phase. ORS 105.130(2); 105.137; 105.113.

No Oregon authority exists imposing expedited procedures on the answer and trial phase of commercial FED action.

After the service/process phase, commercial tenants are entitled under ORS 105.130(1) to have their case “conducted in all respects as other actions in courts of this state[.]”

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What’s a Commercial Tenant To Do?

1. Be ready at the first appearance to file a motion explaining to the Court that ORS 105.130 must be followed.

2. You may also consider having an Answer ready to file as well (and preserve your objections to the process).

3. Continue tendering rent through the process. Note: if this is a non-payment of rent situation, think about entering into an agreement pursuant to ORS 105.145-148).

4. Now that the landlord is faced with a more traditional process (that is time consuming and costly), re-open negotiations with the landlord for a resolution of the dispute.
What’s a Landlord To Do?

- Consider self-help.
- If there are no undisputed facts (i.e. rent has not been paid), consider a straightforward motion for summary judgment on the issue of whether landlord has a right to possession. ORCP 47 allows an MSJ to be filed 20 days from the commencement of an action. There is no requirement that an Answer be filed.
- If the concern is continuing bad conduct, consider a temporary restraining order or preliminary injunction.
- At the first appearance, do what you can to utilize the provisions of ORS 105.145-148.

Questions/Disagreements?

- Different Practices?
- Other practices outside of the tri-county area?
- Does this need to be addressed by the Legislature?
- Can you draft around it?
- Can you agree that the process outlined in ORS 105.137 will be the process followed?
- Pros and Cons?
- Volunteers to revise that portion of the Deskbook?
A Quick Reminder Regarding Employees Who Reside on Commercial Property (especially now)

- ORS 90.110 Exclusions from application of this chapter. Unless created to avoid the application of this chapter, the following arrangements are not governed by this chapter:
  - * * *
  - (7) Occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises. However, the occupancy by an employee as described in this subsection may be terminated only pursuant to ORS 91.120.

SB 608

- Effective 2/28/19
- With limited exceptions, prohibits “no cause” evictions.
- Also prohibits a landlord from raising rent in the first 12 months of the tenancy, and by no more than 7% (plus CPI) annually thereafter.
- Still more restrictive rent control laws (e.g. City of Portland)
Effective Self-help and Alternatives for Landlords

- Is the provision for Self Help Included in the Lease? If the language of the lease permits the lessor to reenter and retake the premises upon a default by the lessee, the lessor may do so in a “peaceable manner and without force.” ORS 105.105; see Jordan v. Wilhelm, 95 Or App 528, 770 P2d 74 (1989), rev den, 308 Or 79 (1989) (affirming judgment for the defendant-lesser in a conversion action who locked out the plaintiff-lessee from the premises to enforce lien rights).
- Understand what “breach of the peace” means.
- Be confident that the lease has been properly terminated. Double and triple check that the notice provisions have been followed – ultimately it will depend on whether the lease is followed.
- Evaluate the risks (quiet enjoyment, unlawful eviction, conversion, trespass) – it depends on the tenant.
- Consider Injunctive relief.

Protecting Against Self-help (from the tenant perspective)

- Use law enforcement (having a copy of the lease on hand).
- Understand what “breach of peace” means.
- Utilize security systems, hired guards, sleeping bags.
- Think about using a declaratory action together with injunctive relief (especially defending against an aggressive landlord).
Non-Waiver Clauses

- To establish waiver, the lessee must show that the lessor intentionally relinquished its right to collect rent or demand performance of some nonmonetary obligation under the lease. See *Kahl v. Pool*, 47 Or App 43, 48–49, 613 P2d 1078 (1980).


- Waiver may be express or by conduct. *Watson*, 164 Or App at 314.

- If the lessor knows of a breach of lease by the lessee and continues to accept performance, the lessor elects to continue the lease agreement and is bound to perform the contract despite the breach. See, e.g., *Watson*, 164 Or App at 315; *Smith v. Hickey*, 45 Or App 139, 607 P2d 787 (1980).

Non-Waiver Clauses (Cont.)

- If the lessor does not intend to waive the breach of lease, and continues to demand performance, however, the lessor has not waived the condition. *Title & Trust Co. v. Durkheimer Inv. Co.*, 155 Or 427, 443–44, 63 P2d 909 (1936).

- You can “waive the non-waiver clause.”

- Even when the lessor has waived the terms of a lease, the lessor may reinstate strict compliance with the terms of the lease after providing the lessee notice of reinstatement of the lease. See generally, *Laster v. Hiebert*, 284 Or 493, 587 P2d 461 (1978) (lease); *Spiess v. White*, 172 Or App 36, 17 P3d 568 (2001) (trust deed).

- The notice of reinstatement should be in writing and must provide a reasonable time under the circumstances to cure the default. See *Spiess*, 172 Or App at 41–42.
Protect the Landlord Client from Waiver

- Analyze the situation with waiver in mind.
- How long has the conduct been occurring and has the client been accepting rent?
- Did they have knowledge? Imputed?
- To be safe, send a reinstatement letter *before* the default letter without admitting waiver. It will take time, but in most cases, will be worth it.

Common Traps for Landlords

- Failure to follow the notice/default provision of the lease.
- Failure to recognize that there may be an ambiguity in the lease provision that is attempting to be enforced.
- Failure to recognize waiver.
- Failure to confirm whether a default has been cured.
- Acceptance of rent after a notice of default expires.
Common Traps for Tenants

- Consenting to a landlord to use the “rocket docket”.
- Not taking notice of defaults seriously.
- Not paying attention to rent when there is a dispute pending (especially if there is no default language).
- Failing to recognize the scope and extent of landlord liens.
- Entering into a stipulated agreement pursuant to ORS 105.145 that cannot be performed.
Chapter 2

Presentation Slides: PACE Project Lending

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Advanced Topics in RELU: PACE Project Lending

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What is PACE?

Property Assessed Clean Energy (PACE) is a financing mechanism that provides real estate owners low-cost, long-term funding for energy efficient, renewable energy and in Oregon, seismic resiliency projects.

- PACE covers 100% of eligible improvements and self amortizes over the loan term (usually 20-30 years).
- PACE is secured and repaid by a special assessment attached to the property.
- PACE is very low leverage, generally no more than 20% to 30% of the property’s value.
- PACE is legislated on a state-by-state basis. Currently, 35 states and the District of Columbia have passed PACE legislation.

PACE Eligible Improvements:

- High efficiency lighting
- Seismic retrofit
- HVAC upgrades
- Water conservation
- Roof replacement
- Building envelope
- Boilers, chillers, furnaces
- Automated building controls
- Renewable energy

History of PACE in Oregon

ORS 223.680

2009 Passed and authorized:
- The creation of property assessed financing programs for commercial building in Oregon;
- The use of property assessment to secure financing, and;
- Local governments to issue bonds to fund individual transactions

2014 Amended:
- Authorized the use of private capital to finance individual transactions

2017 Amended:
- Expanded eligible improvements to include water conservation, energy storage and electric vehicle charging

ORS 223.685

2015 Passed:
- Established separate authority to create property assessed financing programs for seismic resiliency property improvements
**PACE Statute in Action**

Multnomah County exercised its statutory authority to create a program in 2015. Multnomah County contracted with ProsperPortland via an intragovernmental agreement to administer the program on its behalf.

**Key Program Requirements**
- Other lien holders must be provided notice of the pending PACE financing and consent to the recording of the benefit assessment lien
- Financing secured by a benefit assessment lien which has the same priority as a Limited Improvement District (LID) assessment
- County assigns the payment stream from the benefit assessment lien to the PropertyFit capital provider

**Role of Administrator**
- To review all CPACE transactions to ensure they meet statutory requirements of the program.
- To record the benefit assessment lien against the subject property to secure the PACE financing
- At capital provider’s request, to manage the process of certifying delinquent assessments to the tax assessor for collection

**PACE: Default & Collection**

**Default and Collection**
- If an assessment is delinquent as of May 1st any year it may be “certified” to the tax roll for collection
- Benefit assessment liens cannot be accelerated

**Once in Default and Certified**
- Treated in the same manner as a LID
- By certifying the assessment to the county assessor for collection in the same manner as local property taxes
- Benefit assessment lien may be outstanding at foreclosure (5 year minimum) but could be expunged at the time of a County sale
- Capital provider and mortgage lender are incentivized to cure
- Hybrid collection process of securing the financing as a benefit assessment lien but collecting as a delinquent assessment through the property tax system.
CLIMATE ACTION PLAN
Reduce carbon emissions by 80% from 1990 levels by 2050

24% of carbon emissions in Multnomah County come from commercial buildings

Multnomah County

Program Administrator and Occasional Capital Provider
Legal authority
Collection agency (default)
Building assessment and evaluation

Prosper Portland: Program

Property
• Commercial
• Multi-family (5+)
• Industrial

Borrower
Legal owner of eligible property

Measures
• Energy Efficiency
• Water Conservation
• Renewables
• Seismic
• Electric Vehicles

Costs
• Audits
• Measures
• Support Measures
• Commissioning
• Fees
Prosper Portland: Eligibility

- Existing Buildings
- Major Renovation / New Construction
- Seismic Retrofit

Building a Capital Stack with PACE

Before PACE:
- 65% Senior Debt
- 25% Equity
- 10% Mezzanine Debt

After PACE:
- 65% Senior Debt
- 15% Equity
- 15% Mezzanine Debt

PACE Loans are tax assessments.
The Case for **PACE: Senior Lenders**

**No Acceleration Clause**
In the event of default / non-payment of taxes no acceleration takes place. PACE rights and remedies mirror those of property taxes.

**PACE Runs with the Property**
PACE assessments are assumable and are not due upon sale or refinance of a Property.

**Cash Flow Positive / Increases Property Value**
Reduced utilities and operating expenses often outweigh the increased property tax increasing NOI and thus increasing value.

**Infuses Capital into Properties**
PACE incentivizes owners to make high quality and highly efficient investments into their properties which is accretive to the health of the asset.

**Fully Funded at Close**
Like equity, PACE assessments are fully funded into title upon closing and may only be drawn upon via standard draw procedures.

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**PLG Portfolio: ** **KEX Hostel**

- **Location:** Portland, OR
- **Project Type:** Gut Rehab and Seismic Retrofit
- **PACE Loan:** $3.50 million
- **Total Project Cost:** $12.32 million
- **Project Description:** Gut rehab and seismic retrofit of historic building in Portland.
- **PACE Improvements:** Energy STAR Windows, HVAC, HE Water Heaters, LED Lighting, Complete Seismic Retrofit.
**KEX Objectives & Eligibility**

- Complete renovation of historic building; total project cost $12.3 million
- Capitalize for alternative/non-traditional use
- Capitalized with PACE, seller financing and CrowdStreet
- First Republic Bank refinanced/upsized seller financing post closing

**PACE Eligible**

- ENERGY STAR Windows
- High Efficiency Ductless Mini-Split Heat Pumps
- High Efficiency Ducted Heat Pump Systems
- Ventilation Controlled Make-Up Air Units
- High Efficiency Commercial Water Heaters
- LED Lighting
- High Efficiency Showers
- High Efficiency Toilets (HETs)
- Seismic Retrofitting

**Non-PACE Eligible**

- Building Demolition
- Concrete Work
- Tuckpointing
- Bar / Lobby Renovations (FF&E, cosmetics)
- Beds, Chairs, Personal Property
- Flooring
- Painting

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**KEX: PACE Impact**

**Sizing Analysis**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Project Costs</td>
<td>$12,300,000</td>
</tr>
<tr>
<td>Total Eligible per PropertyFit</td>
<td>$8,070,520</td>
</tr>
<tr>
<td>ECM Savings vs Code (ASHRAE Level 2)</td>
<td>33.47%</td>
</tr>
<tr>
<td>ECM PACE Eligible (25% of cost)</td>
<td>$2,017,630</td>
</tr>
</tbody>
</table>

**Summary of PACE Eligible Expenses**

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seismic Retrofit</td>
<td>$2,876,671</td>
</tr>
<tr>
<td>Efficiency/Conservation Measures (ECM)</td>
<td>$2,017,630</td>
</tr>
<tr>
<td>Closing Costs</td>
<td>$136,250</td>
</tr>
<tr>
<td>Capitalized Interest</td>
<td>$308,286</td>
</tr>
<tr>
<td>Total PACE Eligible Expenses</td>
<td>$5,338,837</td>
</tr>
<tr>
<td>PACE Financing Amount</td>
<td>$3,500,000</td>
</tr>
</tbody>
</table>
PLG Portfolio: Treasure Island Center

Location: Saint Paul, MN
Project Type: Adaptive Reuse
PACE Loan: $6.8 million
Total Project Cost: $71 million

Project Description:
Adaptive reuse of vacant Macy’s converted to mixed use facility including new MN Wild (NHL) practice facility.

PACE Improvements:
HVAC, LED lighting, building insulation, high efficiency windows, low flow toilets, and an insulated roof.

PLG Portfolio: New Prague Senior Living

Location: New Prague, MN
Project Type: New Construction
PACE Loan: $1.58 million
Total Project Cost: $21 million

Project Description:
Construction of a 91-unit senior living facility including a memory care unit, independent living and assisted living.

PACE Improvements:
High efficiency HVAC, LED lighting, high efficiency windows, roof insulation, high efficiency fixtures, and high efficiency elevators.
PLG Portfolio: International Market Square

- **Location:** Minneapolis, MN
- **Project Type:** Renovation and energy efficient upgrades
- **PACE Loan:** $3.79 million
- **Project Description:** Fund part of a $12.5 million renovation of a stabilized, 315,000 square foot mixed-use office/retail/showroom property.
- **PACE Improvements:** High efficiency HVAC, LED lighting, high efficiency windows, heat regulating window film, and roof replacement.

Advanced Topics in RELU: PACE

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Chapter 3
Presentation Slides: Water Rights Auditing: Protecting Value in Transactions

Richard Glick
Davis Wright Tremaine LLP
Portland, Oregon

Adam Sussman
GSI Water Solutions Inc.
Corvallis, Oregon
Water Rights Auditing: Protecting Value in Transactions

Rick Glick, Davis Wright Tremaine LLP
Adam Sussman, GSI Water Solutions, Inc.
Oregon State Bar: Current Advanced Topics in Real Estate and Land Use
April 19, 2019

Water Rights Auditing Overview

- Validity of water rights drives value for
  - Agricultural properties
  - Vineyards/wineries
  - Aquaculture facilities
  - Resort properties

- Audits examine paper rights, government records, owner records and sometimes includes on-the-ground investigations
Water Rights 101

- Water rights east of the Rockies governed by English riparian rights principles
  - Adequate rainfall means no need to irrigate
  - All owners of streamside property share
  - Reasonable use
Water Rights 101

- Wild West: Prior Appropriation Doctrine
  - Arid conditions + Manifest Destiny = new concept
  - Mining and irrigated agriculture
  - Principles:
    - First in time, first in right
    - Physical removal from stream and evidence of claim
    - Prompt and constant use

States adopted water codes to regulate use
- Oregon 1909 (ORS Chapter 537)
- Washington 1917 (RCW Chapter 90.03)
- California 1914 (Cal. Water Code Div. 2)
- Pre-water code rights determined in adjudication
### Water Rights 101

- **2-step approval process**
  - Application for permit sets priority date
  - Permit allows development and use—*inchoate*
  - Certificate (“license” in CA) is *vested* right

- Permit needed for surface and ground water use
- Water use must be consistent with permit or certificate conditions—often isn’t!
- Non-use can result in loss of rights, in whole or in part
  - ORS 540.610: rebuttable presumption of forfeiture
  - RCW 90.14.160: relinquishment unless good cause
  - CWC 1627, 1675: revocation if not used
Water Rights 101

- California is special in so many ways!
  - No permit system for groundwater (unless underground channel)
    - Correlative rights
    - Rights determined in decades long adjudications
    - SGMA establishes planning process (AB 1739, SB 1168, and SB 1319 (2015))
  - Riparian rights still valid
  - Subject to Public Trust Doctrine

Water Rights Audit

- Water rights audit defined
- Common information for audit
- Practice tips
- A case for proactive water rights audits
Water Rights Audit

- Topics of water right/water use review:
  - In good standing or subject to cancellation?
  - Use in accordance with terms and conditions?
  - Conditions that may limit water use?
  - Sufficient quantity of water?
  - Is authorized source sufficient?
  - Who “owns” the water right?
  - Are there water right-related agreements?
  - Adequate infrastructure?
  - Access to sources of supply?
- If supply is inadequate, are other options available?

Sources of Information

- The Oregon Water Resources Department:
  www.oregon.gov/OWRD. Online resources include water rights and maps, GIS mapping, well logs, water use reporting, scanned file contents (sometimes)
- Official file review – don’t overlook!
Water Rights Audit

Sources of Information

- Interviews with OWRD enforcement and field staff
- Records held by seller – use, agreements, correspondence with OWRD
- Site visit – confirm use, condition compliance, infrastructure capacity, measuring devices

Water Rights Audit

Typical Issues

1. Water use but no water rights
2. Water use but not authorized location, source, POD, well, or use
3. Water rights but no use
4. Water right conditions unmet
5. Permit development timelines lapsed
Water Rights Audit
Typical Issues

6. “Paper water rights” exceed supply
7. Insufficient infrastructure
8. Pending transactions
9. Water right ownership
10. Supplemental vs. primary

Case Studies

- Farmland acquisition in Eastern Oregon
  - 10,000 acres, high value
  - Several farms, some owned, some leased
  - Complicated water rights and irrigation operations
    - Multiple rights with different priorities
    - Water rights moved throughout season per temporary transfers
Case Studies

- Oregon vineyard in Eastern Oregon
  - $9,000,000 value, 404 acres
Case Studies

- Vineyard (cont.)
  - Serious Water Management Problem Area
    - Critical Groundwater Area?
    - Junior water rights, could lead to curtailment
    - Can’t support claim of separate aquifer
  - Alternatives:
    - Artificial recharge/aquifer storage & recovery
    - Acquire senior water rights
Case Studies

- Citrus farm in Central Valley, California
  - $31,000,000 value, 900 acres
  - Multiple farms
  - Multiple water sources, but none available during drought!
  - Relied on spot market

Water Rights Audit
Practice Tips

- **Time** – provide enough time before closing, – often complex with lots of information

- **Location, location, location** – Make sure everyone is on the same page. Are the subject properties clearly identified?
Water Rights Audit
Practice Tips

- **Pending transactions** – focus on loose ends – expired “c” dates, pending extensions, COBUs and transfers

- **Understand and evaluate conditions**, especially groundwater level conditions

Water Rights Audit
Practice Tips

- **Ownership and agreements** – OWRD views permits as personal property and appurtenancy is not the end of the story

- **Look forward** – CGWA, Willamette Basin Bi-Op, stored water contracts
Water Rights Audit
Practice Tips

- **Compile information** into an easy-to-understand format

- **Develop a detailed “to-do” list** prior to closing – assignments, ownership updates, agreement modifications, completion of pending transactions, etc.

Proactive Water Rights Audit
Water Rights Audit Questions?

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Chapter 4
Water Law Related to Land Use

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Stoel Rives LLP
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No Materials Were Submitted for This Presentation
Chapter 5

Update on Land Use Procedural and Substantive Issues Under “Needed Housing,” ORS 197.303 and 197.307

Michael Robinson
Schwabe Williamson & Wyatt PC
Portland, Oregon

Contents

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I. UPDATE ON LAND USE BOARD OF APPEALS (“LUBA”).

1. NEW ADMINISTRATIVE RULES EFFECTIVE JANUARY 1, 2019

   A. OAR 661-010-0030(2)(b) and (c).

   Petition for Review and Response Brief length reduced to 11,000 words or 38 pages unless the Board grants permission for a longer brief.
B. OAR 661-010-0039.

Reply brief is now allowed without a motion.

C. OAR 661-010-040(3)(a).

Oral Argument is now limited to 15 minutes per side unless the Board grants permission for a longer argument.
2. DISPOSITION OF NOTICES OF INTENT TO APPEAL.
ORS 197.830(19) requires LUBA to track and report certain statistics on a quarterly and annual basis.

Fourth Quarter 2018:
- Appeals filed: 45
- Decision affirmed: 13 (29%)
- Decision remanded: 14 (31%)
- Decision reversed: 1 (2%)
- Transferred: 2 (4%)
- Appeal dismissed: 15 (34%)

2018:
- Appeals filed: 177
- Decision affirmed: 45 (25%)
- Decision remanded: 40 (23%)
- Decision reversed: 5 (3%)
- Transferred: 2 (1%)
- Appeal dismissed: 85 (48%)

Where a Petition for Review was filed:
- Decision affirmed: 43 (49%)
- Decision remanded: 36 (40%)
- Decision reversed: 5 (5%)
- Transferred: 1 (1%)
- Appeal dismissed: 5 (5%)

II. HB 3272.

- Affects timing of Petition for Review after record objection denied, timing of motion to take evidence not in the record and award of attorney fees.
- Amends ORS 197.830910) to provide that if a petitioner’s record objection is denied, the Board may establish a new deadline for the Petition for Review.
- Amends ORS 197.830(15)(a) to allow award of reasonable attorney fees and expenses to prevailing party against any party that Board finds presented a position or file any motion without probable cause to believe position or motion was well-founded.
- Amends ORS 197.835(2)(b) to provide that petitioner or cross-petitioner must file a motion to take evidence not in the record no later than the date the record is settled for filing an objection to the record.
III. NEEDED HOUSING LAWS.

1. ORS 197.303(1)
   - Defines Needed Housing as almost every type of housing within Urban Growth Boundaries ("UGB") on land zoned for residential use or mixed residential and commercial use.
   - Excludes cities with a population under 2,500 and counties with a population under 15,000.
   - Cities and counties may take an exception under ORS 197.732 to the definition of Needed Housing.

2. ORS 197.307
   - ORS 197.307(4), except as provided in ORS 197.307(6), provides that standards, conditions and procedures must be clear and objective (no discretion).
   - ORS 197.307(4)(a) may include provisions regulating density and height.
   - ORS 197.307(4)(b) cannot discourage or increase housing cost through unreasonable cost or delay.
   - ORS 197.307(5) does not apply to central cities or regional centers in cities with more than 50,000 residents.
   - ORS 197.307(6) allows a subjective approval path if a clear and objective path exists. Group B, LLC v. City of Corvallis, 72 Or LUBA 74 (2015).
   - ORS 197.307(7) provides that cities and counties can allow housing types outright, impose special conditions and establish procedures subject to ORS 197.307(4).
   - ORS 227.173(2) (Cities) and 215.416(8)(b) (Counties) require that if approval standards must be clear and objective, must be clear and objective on the face of the ordinance.
IV. ANALYSIS TO DETERMINE IF NEEDED HOUSING APPLIES.

- Is the application within a UGB?
- Is the application on land zoned for residential or mixed residential and commercial uses?
- Is the application a permit, limited land use decision or expedited land use decision? Variance and zoning map amendments are excluded.
- Does the city or county have the required population?
- Has the city or county taken an exception to the definition of Needed Housing?
- Are the standards, conditions and procedures clear and objective?
- Do the standards, conditions and procedures, either individually or cumulatively, discourage Needed Housing through unreasonable cost or delay?
  - Is the application in a formally adopted central city plan, or a Metro-defined regional center, in a city with more than 50,000 residents? If so, not applicable.
  - Is there a separate subjective path for entitlements that regulates appearance or aesthetics? May be used if the applicant has the option of proceeding under ORS 197.307(4) and the approval criteria authorize a density at least as high as the density authorized under ORS 197.307(4).
  - A city of county subject to ORS 197.307(4) may allow certain housing types permitted outright, impose special conditions or establish approval procedures.

V. WARREN V. WASHINGTON COUNTY

Warren v. Washington County concerns a six-lot subdivision on a 2.54-acre parcel zoned R-5 in unincorporated Washington County’s Metzger area. The property contains Ash Creek and a portion of the property is mapped under Goal 5 as “Significant Natural Resources.” However, the County had not completed a Goal 5 program for the property.

Washington County Community Development Code (“CDC”) 422-3.1 requires the applicant to identify the location of natural resources, describe how they would be altered, if at all, and then apply design elements of the applicable Washington County Community Plan. CDC 422-3.6 provides that for any use in a Significant Natural Resource area, the County shall make a finding that the proposed use “will not seriously interfere” with the preservation of fish and wildlife areas and habitat, or show how that interference can be mitigated.

The applicant argued the CDC 422-3.6 was not clear and objective (the phrase “seriously interfere” is subjective) and because the property was subject to the “Needed Housing” laws, the County could not apply subjective standards under ORS 197.307(4). At the time of Warren I, ORS 197.303(1) required that Needed Housing be on “buildable land” as defined in ORS 197.295(1).

In Warren I, LUBA recited the history of the Needed Housing laws and how the various Needed Housing provisions related to one another. The issue before LUBA was whether the subdivision property was situated on “buildable lands” because it was located on Metro’s 2014 Buildable Lands Inventory. However, the Buildable Lands Inventory was not in the local government record but LUBA took official notice of both the Buildable Lands Inventory and Metro’s Buildable Lands Ordinance. LUBA ultimately decided that some of the property met the definition of buildable lands but it was uncertain how much and where it was located. Because the Hearings Officer did not have the buildable lands evidence before him, he did not decide which part of the subdivision property contained buildable lands. LUBA remanded the decision to the County to determine what part of the property was buildable lands.
V. WARREN V. WASHINGTON COUNTY (CONT'D)

Subsequent to LUBA’s decision in Warren I, the Oregon legislature enacted Senate Bill (“SB”) 1051 which amended the definition of ORS 197.307(4) to exclude buildable lands and amended ORS 197.303(1) to provide that the Needed Housing statutes applied to the development of all housing, including Needed Housing. The applicant in Warren I, rather than seek a decision on remand from the County, chose to submit a new application taking advantage of amended ORS 197.303(1) and 197.307(4) under the “Goal Post Rule” in ORS 215.427(3).

The County Hearings Officer again approved the subdivision application and determined that CDC 422-3.6 was not clear and objective and therefore, it could not be applied to the application. The petitioners appealed to LUBA.

The petitioners argued, in Warren II, that other provisions required an analysis of buildable land continued to applied. The petitioner argued that ORS 197.296(2)-(7) (referring to buildable lands) continued to apply and required the Hearings Officer to find that the subdivision was located on buildable lands. The petitioner also argued that Statewide Planning Goal 10, “Housing”, and the administrative rule implementing Goal 10 at OAR 660-008-0015 continued to include the phrase “buildable land”, therefore, required buildable lands to be analyzed. LUBA rejected these arguments because it said the express removal of the phrase “on buildable land” from ORS 197.307(4) “disconnected” any previous link that may have existed between the property’s inclusion on the Buildable Lands Inventory pursuant to ORS 197.295(1) from the requirement to apply only clear and objective standards under ORS 197.307(4). LUBA affirmed the County’s decision in Warren II.

The petitioners appealed to the Oregon Court of Appeals, which affirmed LUBA’s decision. The Court of Appeals determined the legislative history of the amendments to ORS 197.307(4) confirmed LUBA’s view of the statutory changes. The Court of Appeals rejected the petitioner’s argument that other laws continue to require the determination the buildable lands existed.


- LUBA remands County’s approval of six-lot subdivision because of lack of information on how much of the property consisted of buildable lands.

- LUBA affirms the County’s approval of a new subdivision application relying on amendment to ORS 197.307(4) which removed the buildable lands requirement.


- Court of Appeals affirms LUBA’s decision in *Warren II* finding that other references to buildable lands are disconnected from the clear and objective requirement in ORS 197.307(4).
OAR UPDATE EXCERPTS

OAR 661-010-0030(2)(b) and (c)

“Petition for Review

“(2) Specifications of Petition: The petition for review shall:

“(a) Begin with a table of contents and authorities;
“(b) Not exceed 11,000 words, unless permission for a longer petition is given by the Board. Headings, footnotes and quoted material count toward the word-count limitations. The front cover, table of contents, table of authorities, appendices, certificate of service, any other certificates, and the signature block do not count toward the word-count limitation.”

OAR 661-010-0035(2)

“(2) Specifications of Briefs: Respondent’s brief shall conform to the specifications of the petition for review at OAR 661-010-0030(2), except that the brief shall have red front and back covers. If there is more than one respondent, the front cover shall specify which respondent is filing the brief. Respondent’s brief shall be subject to OAR 661-010-0030(3).”

OAR UPDATE EXCERPTS (CONT’D)

OAR 661-010-0039

“Reply Brief

“A reply brief shall be permitted. A reply brief shall be filed together with four copies within seven days of the date the respondent’s brief is filed. A reply brief shall be confined to responses to arguments in the respondent’s brief, state agency brief or amicus brief, but shall not include new assignments of error or advance new bases for reversal or remand. A reply brief shall not exceed 1,000 words, exclusive of appendices, unless permission for a longer reply brief is given by the Board. If a party does not have access to a word-processing system that provides a word count, a reply brief is acceptable if it does not exceed four pages. A reply brief must include the certificate of compliance required by OAR 661-01-0030(2)(k). A reply brief shall have gray front and back covers.”
OAR UPDATE EXCERPTS (CONT'D)

OAR 661-010-0040(3)(a)

“Oral Argument

* * *

“(3)(a) Unless the Board otherwise orders, petitioner(s) shall be allowed 15 minutes for oral argument. Petitioner(s) may reserve up to five minutes for rebuttal following respondents’ oral argument, to respond to arguments made during respondents’ oral argument. Multiple petitioners shall share the 15 minutes. Requests for an overlength oral argument shall be submitted to the Board in writing at any time after the record is received but in no event later than seven days after the petition for review is filed, shall state whether all parties join in the request, and shall state the reasons why an overlength oral argument will assist the Board in resolving the appeal.”

OregonLive.com Bill Tracker

2019 Session

House Bill 3272

Limits extension that Land Use Board of Appeals may provide petitioner whose objection to record is denied to 14 days from later of original deadline or date of denial

2017 ORS 197.303¹

“Needed housing” defined

(1) As used in ORS 197.307 (Effect of need for certain housing in urban growth areas), “needed housing” means all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a. “Needed housing” includes the following housing types:

(a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;

(b) Government assisted housing;

(c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 (Policy) to 197.490 (Restriction on establishment of park);

(d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and

(e) Housing for farmworkers.

(2) Subsection (1)(a) and (d) of this section does not apply to:

(a) A city with a population of less than 2,500.

(b) A county with a population of less than 15,000.

(3) A local government may take an exception under ORS 197.732 (Goal exceptions) to the definition of “needed housing” in subsection (1) of this section in the same manner that an exception may be taken under the goals. [1981 c.884 §6; 1983 c.795 §2; 1989 c.380 §1; 2011 c.354 §2; 2017 c.745 §4]

A-Bill-for-an-act

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 197.830 is amended to read:

197.830. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to
197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Ap-
peals.

(2) Except as provided in ORS 197.620, a person may petition the board for review of a land use
decision or limited land use decision if the person:

(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section;

and

(b) Appeared before the local government, special district or state agency orally or in writing.

(3) If a local government makes a land use decision without providing a hearing, except as
provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision
that is different from the proposal described in the notice of hearing to such a degree that the notice
of the proposed action did not reasonably describe the local government’s final actions, a person
adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no
notice is required.

(4) If a local government makes a land use decision without a hearing pursuant to ORS 215.416
(11) or 227.175 (10):

(a) A person who was not provided notice of the decision as required under ORS 215.416 (11)(c)
or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving
actual notice of the decision.

NOTE: Matter in boldfaced type in an amended section is new; matter in italic and bracketed is existing law to be omitted.
New sections are in boldfaced type.
A-Eng. HB 3272

(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).

(c) A person who receives notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the notice of the decision did not reasonably describe the nature of the decision.

(d) Except as provided in paragraph (c) of this subsection, a person who receives notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may not appeal the decision to the board under this section.

(5) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government’s final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(6) The appeal periods described in subsections (3), (4) and (5) of this section:

(a) May not exceed three years after the date of the decision, except as provided in paragraph (b) of this subsection.

(b) May not exceed 10 years after the date of the decision if notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763 is required but has not been provided.

(7)(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person described in paragraph (b) of this subsection may intervene in and be made a party to the review proceeding by filing a motion to intervene and by paying a filing fee of $100.

(b) Persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

(A) The applicant who initiated the action before the local government, special district or state agency; or

(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

(c) Failure to comply with the deadline or to pay the filing fee set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene.

(8) If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent’s brief is due and shall be accompanied by a filing fee of $100.

(9) A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a statement identifying when, how and to whom notice was provided under ORS 197.615 does not render the notice defective. Copies of the notice of intent to appeal shall be served upon the local
government, special district or state agency and the applicant of record, if any, in the local govern-
ment, special district or state agency proceeding. The notice shall be served and filed in the form
and manner prescribed by rule of the board and shall be accompanied by a filing fee of $200 and a
deposit for costs to be established by the board. If a petition for review is not filed with the board
as required in subsections (10) and (11) of this section, the filing fee and deposit shall be awarded
to the local government, special district or state agency as cost of preparation of the record.

(10)(a) Within 21 days after service of the notice of intent to appeal, the local government, spe-
cial district or state agency shall transmit to the board the original or a certified copy of the entire
record of the proceeding under review. By stipulation of all parties to the review proceeding the
record may be shortened. The board may require or permit subsequent corrections to the record;
however, the board shall issue an order on a motion objecting to the record within 60 days of re-
ceiving the motion. If the board denies a petitioner’s objection to the record, the board may
establish a new deadline for the petition for review to be filed that may not be less than 14
days from the later of the original deadline for the brief or the date of denial of the
petitioner’s record objection.

(b) Within 10 days after service of a notice of intent to appeal, the board shall provide notice
to the petitioner and the respondent of their option to enter into mediation pursuant to ORS 197.860.
Any person moving to intervene shall be provided such notice within seven days after a motion to
intervene is filed. The notice required by this paragraph shall be accompanied by a statement that
mediation information or assistance may be obtained from the Department of Land Conservation and
Development.

(11) A petition for review of the land use decision or limited land use decision and supporting
brief shall be filed with the board as required by the board under subsection (13) of this section.

(12) The petition shall include a copy of the decision sought to be reviewed and shall state:
(a) The facts that establish that the petitioner has standing.
(b) The date of the decision.
(c) The issues the petitioner seeks to have reviewed.

(13)(a) The board shall adopt rules establishing deadlines for filing petitions and briefs and for
oral argument.

(b) At any time subsequent to the filing of a notice of intent and prior to the date set for filing
the record, or, on appeal of a decision under ORS 197.610 to 197.625, prior to the filing of the
respondent’s brief, the local government or state agency may withdraw its decision for purposes of
reconsideration. If a local government or state agency withdraws an order for purposes of recon-
sideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision.
If the petitioner is dissatisfied with the local government or agency action after withdrawal for
purposes of reconsideration, the petitioner may refile the notice of intent and the review shall pro-
ceed upon the revised order. An amended notice of intent shall not be required if the local govern-
ment or state agency, on reconsideration, affirms the order or modifies the order with only minor
changes.

(14) The board shall issue a final order within 77 days after the date of transmittal of the record.
If the order is not issued within 77 days the applicant may apply in Marion County or the circuit
court of the county where the application was filed for a writ of mandamus to compel the board to
issue a final order.

(15)(a) Upon entry of its final order the board may, in its discretion, award costs to the pre-
vailing party including the cost of preparation of the record if the prevailing party is the local
government, special district or state agency whose decision is under review. The board shall apply
the deposit required by subsection (9) of this section to any costs charged against the petitioner.

(b) The board shall also award reasonable attorney fees and expenses to the prevailing party
against any other party who the board finds presented a position or filed any motion without
probable cause to believe the position or motion was well-founded in law or on factually supported
information.

(16) Orders issued under this section may be enforced in appropriate judicial proceedings.

(17)(a) The board shall provide for the publication of its orders that are of general public in-
terest in the form it deems best adapted for public convenience. The publications shall constitute
the official reports of the board.

(b) Any moneys collected or received from sales by the board shall be paid into the Board
Publications Account established by ORS 197.832.

(18) Except for any sums collected for publication of board opinions, all fees collected by the
board under this section that are not awarded as costs shall be paid over to the State Treasurer to
be credited to the General Fund.

(19) The board shall track and report on its website:

(a) The number of reviews commenced, as described in subsection (1) of this section, the number
of reviews commenced for which a petition is filed under subsection (2) of this section and, in re-
lation to each of those numbers, the rate at which the reviews result in a decision of the board to
uphold, reverse or remand the land use decision or limited land use decision. The board shall track
and report reviews under this paragraph in categories established by the board.

(b) A list of petitioners, the number of reviews commenced and the rate at which the petitioner’s
reviews have resulted in decisions of the board to uphold, reverse or remand the land use decision
or limited land use decision.

(c) A list of respondents, the number of reviews involving each respondent and the rate at which
reviews involving the respondent have resulted in decisions of the board to uphold, reverse or re-
mand the land use decision or limited land use decision. Additionally, when a respondent is the local
government that made the land use decision or limited land use decision, the board shall track
whether the local government appears before the board.

(d) A list of reviews, and a brief summary of the circumstances in each review, under which the
board exercises its discretion to require a losing party to pay the attorney fees of the prevailing
party.

SECTION 2. ORS 197.835 is amended to read:

197.835. (1) The Land Use Board of Appeals shall review the land use decision or limited land
use decision and prepare a final order affirming, reversing or remanding the land use decision or
limited land use decision. The board shall adopt rules defining the circumstances in which it will
reverse rather than remand a land use decision or limited land use decision that is not affirmed.

(2)(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.

(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte
contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities
not shown in the record that, if proved, would warrant reversal or remand, the board may take ev-
idence and make findings of fact on those allegations. A motion by the petitioner or cross-
petitioner to take evidence must be made no later than the date the record is settled for
filing an objection to the record. The board [shall be] is bound by any finding of fact of the local
government, special district or state agency for which there is substantial evidence in the whole
A-Eng. HB 3272

(3) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.

(4) A petitioner may raise new issues to the board if:

(a) The local government failed to list the applicable criteria for a decision under ORS 197.195 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable criteria that were omitted from the notice. However, the board may refuse to allow new issues to be raised if it finds that the issue could have been raised before the local government; or

(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government’s final action.

(5) The board shall reverse or remand a land use decision not subject to an acknowledged comprehensive plan and land use regulations if the decision does not comply with the goals. The board shall reverse or remand a land use decision or limited land use decision subject to an acknowledged comprehensive plan or land use regulation if the decision does not comply with the goals and the Land Conservation and Development Commission has issued an order under ORS 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to apply the goals to the type of decision being challenged.

(6) The board shall reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals.

(7) The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

(a) The regulation is not in compliance with the comprehensive plan; or

(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.

(8) The board shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations.

(9) In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:

(a) The local government or special district:

(A) Exceeded its jurisdiction;

(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

(C) Made a decision not supported by substantial evidence in the whole record;

(D) Improperly construed the applicable law; or

(E) Made an unconstitutional decision; or

(b) The state agency made a decision that violated the goals.

(10)(a) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; or

(B) That the local government’s action was for the purpose of avoiding the requirements of ORS
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1. 215.427 or 227.178.
2. (b) If the board does reverse the decision and orders the local government to grant approval of
the application, the board shall award attorney fees to the applicant and against the local govern-
ment.
3. (11)(a) Whenever the findings, order and record are sufficient to allow review, and to the extent
possible consistent with the time requirements of ORS 197.830 (14), the board shall decide all issues
presented to it when reversing or remanding a land use decision described in subsections (2) to (9)
of this section or limited land use decision described in ORS 197.828 and 197.195.
4. (b) Whenever the findings are defective because of failure to recite adequate facts or legal
conclusions or failure to adequately identify the standards or their relation to the facts, but the
parties identify relevant evidence in the record which clearly supports the decision or a part of the
decision, the board shall affirm the decision or the part of the decision supported by the record and
remand the remainder to the local government, with direction indicating appropriate remedial
action.
5. (12) The board may reverse or remand a land use decision under review due to ex parte contacts
or bias resulting from ex parte contacts with a member of the decision-making body, only if the
member of the decision-making body did not comply with ORS 215.422 (3) or 227.180 (3), whichever
is applicable.
6. (13) Subsection (12) of this section does not apply to reverse or remand of a land use decision
due to ex parte contact or bias resulting from ex parte contact with a hearings officer.
7. (14) The board shall reverse or remand a land use decision or limited land use decision which
violates a commission order issued under ORS 197.328.
8. (15) In cases in which a local government provides a quasi-judicial land use hearing on a limited
land use decision, the requirements of subsections (12) and (13) of this section apply.
9. (16) The board may decide cases before it by means of memorandum decisions and shall prepare
full opinions only in such cases as it deems proper.
HB 3272-2
(LC 3812)
4/8/19  (RLM/ps)

Requested by Representative MEEK

PROPOSED AMENDMENTS TO
HOUSE BILL 3272

On page 3 of the printed bill, delete lines 10 and 11 and insert “establish a new deadline for the petition for review to be filed that may not be less than 14 days from the later of the original deadline for the brief or the date of denial of the petitioner’s record objection.”.

On page 4, line 2, delete the boldfaced material.

In line 38, delete the boldfaced material.

In line 39, delete “later than the deadline for filing an objection to the record” and after the period insert “A motion by the petitioner or cross-petitioner to take evidence must be made no later than the date the record is settled for filing an objection to the record.”.

__________
2017 ORS 197.307¹
Effect of need for certain housing in urban growth areas

• approval standards for residential development
• placement standards for approval of manufactured dwellings

(1) The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern.

(2) Many persons of lower, middle and fixed income depend on government assisted housing as a source of affordable, decent, safe and sanitary housing.

(3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

   (a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

   (b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

(5) The provisions of subsection (4) of this section do not apply to:

   (a) An application or permit for residential development in an area identified in a formally adopted central city plan, or a regional center as defined by Metro, in a city with a population of 500,000 or more.

   (b) An application or permit for residential development in historic areas designated for protection under a land use planning goal protecting historic areas.
(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;

(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.

(7) Subject to subsection (4) of this section, this section does not infringe on a local government’s prerogative to:

(a) Set approval standards under which a particular housing type is permitted outright;

(b) Impose special conditions upon approval of a specific development proposal; or

(c) Establish approval procedures.

(8) In accordance with subsection (4) of this section and ORS 197.314 (Required siting of manufactured homes), a jurisdiction may adopt any or all of the following placement standards, or any less restrictive standard, for the approval of manufactured homes located outside mobile home parks:

(a) The manufactured home shall be multisectional and enclose a space of not less than 1,000 square feet.

(b) The manufactured home shall be placed on an excavated and back-filled foundation and enclosed at the perimeter such that the manufactured home is located not more than 12 inches above grade.

(c) The manufactured home shall have a pitched roof, except that no standard shall require a slope of greater than a nominal three feet in height for each 12 feet in width.

(d) The manufactured home shall have exterior siding and roofing which in color, material and appearance is similar to the exterior siding and roofing material commonly used on residential dwellings within the community or which is comparable to the predominant materials used on surrounding dwellings as determined by the local permit approval authority.
(e) The manufactured home shall be certified by the manufacturer to have an exterior thermal envelope meeting performance standards which reduce levels equivalent to the performance standards required of single-family dwellings constructed under the state building code as defined in ORS 455.010 (Definitions for ORS chapter 455).

(f) The manufactured home shall have a garage or carport constructed of like materials. A jurisdiction may require an attached or detached garage in lieu of a carport where such is consistent with the predominant construction of immediately surrounding dwellings.

(g) In addition to the provisions in paragraphs (a) to (f) of this subsection, a city or county may subject a manufactured home and the lot upon which it is sited to any development standard, architectural requirement and minimum size requirement to which a conventional single-family residential dwelling on the same lot would be subject. [1981 c.884 §5; 1983 c.795 §3; 1989 c.380 §2; 1989 c.964 §6; 1993 c.184 §3; 1997 c.733 §2; 1999 c.357 §1; 2001 c.613 §2; 2011 c.354 §3; 2017 c.745 §5]

Respondent Venture Properties applied for approval of a six-lot subdivision on land located in Washington County. A county hearings officer approved the application and petitioner Warren appealed that opinion to the Land Use Board of Appeals (LUBA). LUBA rejected each of petitioner’s challenges to the order and petitioner now seeks judicial review. Neither Venture Properties nor respondent Washington County has filed a brief in this court. For the reasons set out below, we affirm.

The pertinent facts are set out in LUBA’s order. Venture Properties applied for approval of a six-lot subdivision on a 2.8-acre parcel of land. A stream called Ash Creek runs through the parcel and approximately half of the parcel is included on a map of Significant Natural Resources (SNR) that is part of the county’s program for meeting Statewide Planning Goal 5.1 The subdivision application proposed setting aside 58 percent of the property from development, including “the Ash Creek floodplain and...
associated wetlands and vegetated corridors.” The application proposed “enhancement plantings” in a corridor adjacent to Ash Creek as required by regulations of Clean Water Services (CWS), the regional sewerage agency in that area. A county hearings officer approved the application with conditions, and LUBA affirmed the county’s decision.

Petitioner’s challenges to the LUBA order all relate to whether Washington County could apply certain provisions of its community development code (CDC) to prevent or restrict the proposed subdivision. To provide context for petitioner’s arguments and LUBA’s rationale for rejecting them, we set out the pertinent statutory provisions—in particular, ORS 197.307(4)—before discussing petitioner’s arguments in detail. However, we note at the outset that at least some of petitioner’s arguments are premised on an assumption that part of the 2.8-acre property at issue may not qualify as “buildable land” as that term is defined in ORS 197.295(1). That is a fact that LUBA also appears to have assumed for purposes of resolving petitioner’s challenges to the subdivision approval and, accordingly, we do so, too.²

The extent to which the county’s CDC provisions could apply to the subdivision application is controlled in part by ORS 197.307, which is sometimes referred to as one of Oregon’s “needed housing statutes.” See, e.g., Warren v. Washington County, ___ Or LUBA ___, ___ (LUBA No. 2018-089, Nov 14, 2018) (slip op at 6) (“The statutes that are set out at ORS 197.295 to 197.314 are commonly referred to as the Needed Housing Statutes.”). The statute addresses, as “a matter of statewide concern,” the “availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers.” In various ways, the provisions of ORS 197.307 govern the circumstances under which local governments may apply standards, conditions, and procedures that have the effect of regulating or restricting the development of housing. The legislature amended several of the needed housing statutes in 2017. See Or Laws 2017, ch 745.

Petitioner’s arguments focus on the requirements of ORS 197.307(4). Before it was amended in 2017, ORS 197.307(4) provided that local governments generally could restrict development of “needed housing” on “buildable land” only through application of regulations and procedures that were “clear and objective”:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of needed housing on buildable land described in subsection (3) of this section. The standards, conditions and procedures may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”
ORS 197.307(4) (2015). By its terms, the “clear and objective” standard imposed by ORS 197.307(4) then applied only to development of needed housing on buildable land. The statute did not prevent local governments from applying standards, conditions, and procedures that were not clear and objective to regulate housing development on other types of land.3

As amended in 2017, ORS 197.307(4) now provides:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

“(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

“(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.”

Thus, ORS 197.307(4) no longer refers to “buildable land,” and, by its terms, provides that local government can regulate the development of housing only through clear and objective standards, conditions, and procedures.

That 2017 version of ORS 197.307(4) applies to Venture Properties’ subdivision application. In rejecting petitioner’s arguments that certain CDC provisions should prevent the subdivision from going forward, LUBA ruled, as pertinent here: (1) ORS 197.307(4) prohibits Washington County “from applying any standards, conditions and procedures that are not clear and objective to [Venture Properties’] application to develop a six-lot residential subdivision,

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without regard to whether [Venture Properties’] property is ‘buildable land’”; (2) aspects of CDC 422-3.3, which generally prohibits new or expanded alteration of vegetation in a riparian corridor, except in specified circumstances, and CDC 422-3.4, which relates to enhancements of degraded riparian corridors, are not “clear and objective”; and (3) substantial evidence supports the county hearing officer’s determination that a part of the property near Ash Creek is “degraded” for purposes of those CDC provisions. On judicial review, petitioner challenges each of those aspects of LUBA’s decision.

We begin our analysis by addressing petitioner’s overarching challenge to the LUBA decision, which is premised on petitioner’s contention that the 2017 amendments to ORS 197.307(4) did not have the effect of extending the “clear and objective” requirement to housing development on land that is not buildable land. Rather, according to petitioner, the “clear and objective” requirement in ORS 197.307(4) “still only appl[ies] to ‘buildable land.’”
To assess petitioner’s statutory construction argument, we examine the text and context of ORS 197.307(4) as amended in 2017 and, to the extent it appears useful, the legislative history. TriMet v. Amalgamated Transit Union Local 757, 362 Or 484, 493, 412 P3d 162 (2018). We begin with the statute’s text, which “is the most persuasive evidence of the legislature’s intent.” Id. Again, the pertinent part of the amended statute provides:

“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. ***”

ORS 197.307(4).

Nothing in the wording of that provision suggests that the requirement that local governments regulate housing development only through “clear and objective” standards applies only to housing development on “buildable land.” To the contrary, ORS 197.307(4) plainly states that the “clear and objective” requirement applies broadly to local governments’ application of standards, conditions, and procedures “regulating the development of housing” generally, including “needed housing.” Reading that provision to apply only to housing that is developed on buildable land would impermissibly insert a limitation on the provision’s scope, in violation of ORS 174.010 (in construing a statute, a court should “ascertain and declare what is *** contained therein” and should not “insert what has been omitted”).

Consideration of context, including the previous version of ORS 197.307(4), does not change our view of the provision’s meaning. See State v. Spainhower, 251 Or App 25, 28, 283 P3d 361 (2012) (context “includes prior versions of the statute”). The 2017 legislature expressly deleted the reference to “buildable land” from ORS 197.307(4), supporting our view that subsection (4) no longer relates only to development that occurs on that category of land. Or Laws 2017, ch 745, § 5. Moreover, other aspects of the 2017 legislation also reflect an intention to promote certain housing development. For example, the legislation includes provisions that, under specified circumstances, impose relatively short timelines for processing applications for development of affordable multifamily housing, prohibit counties from reducing the density associated with certain proposed housing developments, redefine “needed housing” to expressly address “affordable[ility] to households within the county with a variety of incomes,” require certain municipalities to allow accessory dwelling units, and permit places of worship to use their real property to provide affordable housing. Or Laws 2017, ch 745, §§ 1, 2, 3, 4, 6, 7, 8. Each of those provisions may be viewed as promoting housing development—a goal that is consistent with making the “clear and objective” standard in ORS 197.307(4) applicable to housing development generally, not only to development of housing on “buildable land.”
Nonetheless, in arguing that context supports her interpretation of ORS 197.307(4), petitioner points to other statutory provisions that retain references to “buildable land,” particularly ORS 197.307(3), which states (as it did before the 2017 legislation):

“When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.”

Petitioner posits that, because subsection (3) of ORS 197.307 already references “buildable land,” the legislature likely deleted that reference from subsection (4) simply “to avoid repetitious language.” We disagree. As LUBA explained, ORS 197.307(3) relates to “estimating housing demand and land supply” and it “imposes a planning mandate on local governments” requiring them to allow needed housing in the particular areas identified in that subsection of the statute. ORS 197.307(4) addresses a different concern, limiting the standards that local governments may apply when considering an application to develop housing. For at least that reason, the reference to “buildable land” in subsection (3) does not suggest that the legislature silently intended subsection (4) to apply only to applications for housing on buildable land.

Petitioner’s additional statutory construction arguments rely on the wording of an administrative rule that apparently has not yet been updated to reflect the 2017 amendment to ORS 197.307(4), the absence of a discussion of the previous “buildable land” limitation in the legislative history of that amendment, and petitioner’s view that interpreting the provision according to its plain terms would lead to an absurd result. We have considered each of those arguments and conclude that they lack merit. We conclude, as did LUBA, that the “clear and objective” requirement in ORS 197.307(4) applies, as it states, to “standards, conditions and procedures regulating the development of housing, including needed housing,” without regard to whether the development will occur on “buildable land.”

We turn to petitioner’s other challenges to the LUBA order, which focus on LUBA’s determination that pertinent aspects of CDC 422-3.3 and CDC 422-3.4 are not “clear and objective” and that, consequently, the county could not apply those code provisions to the proposed development. CDC 422 includes the county standards that are designed “to permit limited and safe development in areas with significant natural resources, while providing for the identification, protection, enhancement and perpetuation” of those resources. CDC 422-1. CDC 422-3.3 sets out the standards for development in a riparian corridor. As pertinent here, that CDC provision states:
“A. No new or expanded alteration of the vegetation or terrain of the Riparian Corridor shall be allowed except for the following:

“

“(7) Where it can be demonstrated, with concurrence of the Clackamas County biologist or other applicable district biologist of the Oregon Department of Fish and Wildlife, that a riparian corridor has been degraded, an enhancement of [that] area which conforms to the definition and criteria listed in Section 422-3.4 may be permitted. Enhancement or alteration of a non-degraded portion of these areas is permitted when it is in conjunction with and it is needed to support the enhancement of the degraded area.”

CDC 422-3.3. In turn, CDC 422-3.4 provides that “[e]nhancement of a degraded riparian corridor” that is permitted under CDC 422-3.3 A. (7) “shall meet the following” requirements, including:

“A. For the purposes of Section 422-3.3 A. (7) an enhancement is a modification, as a result of which no later than five (5) years after completion of the project, the quality and/or quantity of the natural habitats is measurably improved in terms of animal and plant species numbers, number of habitat types, and/or amount of area devoted to natural habitat.”

CDC 422-3.4 (emphasis added).

As noted, LUBA determined that CDC 422-3.3 and CDC 422-3.4 could not be applied to prevent the enhancement plantings along Ash Creek because the term “measurably improved” is not “clear and objective,” as ORS 197.307(4) requires. On judicial review, petitioner does not challenge that determination directly; that is, petitioner does not assert that the term “measurably improved” is clear and objective. Rather, petitioner argues that LUBA should not have applied the “clear and objective” test at all, because the term “enhancement” is merely a definition, and not a “standard[].

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condition[] [or] procedure[]” for purposes of ORS 197.307(4). We disagree. Application of CDC 422-3.3 and CDC 422-3.4 to either allow or disallow alteration of a riparian corridor through enhancement plantings in conjunction with a proposed subdivision amounts to “regulat[ion of] the development of housing, including needed housing.” Further, whether such enhancement is permissible under those CDC provisions depends in part on whether the natural habitat will be “measurably improved” as a result. CDC 422-3.4. Thus, measurable improvement of natural habitat is a “condition” to allowing enhancement of a degraded riparian corridor.

Petitioner also argues on judicial review that LUBA should not have reached the question whether the term “measurably improved” is clear and objective because the
current prohibition against “new or expanded alteration of the vegetation or terrain of the Riparian Corridor” in CDC 422-3.4 itself is clear and objective. Because that general prohibition is clear and objective, petitioner argues, it does not matter whether any of the exceptions to the prohibition—including the enhancement exception—also meets that requirement. Petitioner relies on the presence of a severability clause in the CDC and contends that application of that clause means that, “even if the definition of ‘enhancement’ in the list of exceptions is found to be unenforceable, then the otherwise clear and objective general prohibition against ‘new or expanded alteration of vegetation’ in the riparian SNR would still be enforceable.” That is not an argument that petitioner meaningfully developed before LUBA and it is, therefore, not properly preserved for our review. See Willamette Oaks, LLC v. City of Eugene, 295 Or App 757, 765-66, ___ P3d ___ (2019) (discussing preservation principles as they apply in judicial review of LUBA proceedings).

We reject petitioner’s remaining arguments on judicial review without discussion.

Affirmed.

1. As noted in OAR 660-015-0000(5), Statewide Planning Goal 5 relates to “Natural Resources, Scenic and Historic Areas, and Open Spaces.” The administrative rules in OAR chapter 660, division 23, “establish[] procedures and criteria for inventorying and evaluating Goal 5 resources and for developing land use programs to conserve and protect significant Goal 5 resources.” OAR 660-023-0000.

2. ORS 197.295(1) defines “buildable lands” as “lands in urban and urbanizable areas that are suitable, available and necessary for residential uses.” The term includes “both vacant land and developed land likely to be redeveloped.” Id.

LUBA found that the property at issue in this case is included in Metro’s Buildable Lands Inventory (BLI). Petitioner does not contest that finding. LUBA also ruled that inclusion of the property in the BLI means that Metro has determined that at least some portion of the property is “buildable land” as defined in ORS 197.295(1). Petitioner does not contest that ruling. However, LUBA has not determined that the entire property is “buildable land.” Rather, it held that petitioner’s arguments lacked merit “without regard to whether [the] property is ‘buildable land.’”

3. Laws other than ORS 197.307(4) may or may not have then restricted local governments’ ability to apply standards or regulations that were not “clear and objective” to lands other than buildable lands. This opinion concerns only the “clear and objective” requirement imposed by ORS 197.307(4), before and after the 2017 legislation at issue, and this opinion should not be read to express any view on the effect of other statutes on the development of housing in this state.

4. Accordingly, we express no view on whether the term “measurably improved” meets the “clear and objective” standard.
5. The clause on which petitioner relies is CDC 105-1, which states:

“If any portion of this Code is for any reason held invalid or unconstitutional by a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Code.”
Chapter 6

Presentation Slides: An Evolving Landscape: Marijuana’s Continued Impact on Oregon Land Use Planning

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An Evolving Landscape:

Marijuana’s Continued Impacts on Oregon Land Use Planning

Corinne Celko, Emerge Law Group
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OSB Current Advanced Topics in Real Estate and Land Use
April 19, 2019

Terminology

1. Cannabis
   - Cannabis Sativa L. species

2. Marijuana
   - THC & CBD products
   - Psychoactive effects
   - Medicinal & recreational uses

3. Hemp
   - Non-psychoactive
   - Industrial uses
   - CBD products
US History of Marijuana

- **1611 to 1800s** – US Cultivation
- **1850** – Added to U.S. Pharmacopeia
- **1911** – First state to ban marijuana
- **1937** – Marijuana Tax Act
- **1970** – Controlled Substances Act (affecting other federal laws)
- **1980s** – Mandatory Sentencing

- **1990s** – State Medical Marijuana Laws
- **2012** – CO & WA Legalize
- **2014** – AK & OR Legalize
- **2016** – CA, NV, MA, ME Legalize
- **2017** – VT Legalizes (legislature)
- **2018**
  - Sessions Memo
  - 2018 Farm Bill
- **2019** …

Marijuana remains federally illegal
Maturing of the Marijuana System: A Local Government Perspective (AKA: 3-stages of Government Grief)

Initial knee-jerk reaction (AKA: denial)
- State preemption
- State directives
- Measure 91 voter results within each jurisdiction
- Federal law
Taking on the task (AKA: negotiating)

- A whole new use ... or not
  - Growing marijuana vs. Growing pumpkins
  - Marijuana shop vs. Liquor store
- Reasonable time/place/manner regulations
  - Dark sky; odor; noise; hours; set-backs; buffers

I smell smoke, but where’s the fire? (AKA: acceptance)

- Tax revenue
- Just another store front
- T/P/M seem to be working
- But still:
  - Criminal elements (BHO; excess supply)
  - Nuisance (smell; public view)
  - Compliance issues (OLCC resources)
Case studies

- Independence Airpark v. City of Independence
- T/P/M in action
- City of Eugene
- Okay, maybe it is a new use...

QUESTIONS?

Thank you!

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Chapter 7

Strategies to Promote Affordable Housing Through Density Increases

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I. Senate Bill 1051

In 2017, Speaker of the House Tina Kotek provided testimony to the Oregon House Committee on Human Services and Housing that addressed Oregon’s housing crisis. She noted that the crisis is complex and has many root causes. She asserted:

"To make necessary progress, I believe that the state must pursue policy solutions that address three key goals: provide protection for tenants, preserve the affordable housing that we have, and increase the supply of both market rate and affordable housing."

Speaker Kotek explained that Oregon had already passed bills to address the housing crisis, including House Bill 2004, which strengthened tenant protections, and House Bill 2002, which helped preserve subsidized housing that is at risk of conversion to market rate housing.

That same year, the legislature enacted and the Governor signed Senate Bill 1051 (SB 1051). See attachment 1. The law made a number of changes to ORS Chapter 197 including:

- Redefined "needed housing" as housing for a variety of incomes including low, very low, and extremely low incomes, and housing on land zoned residential, mixed or commercial;

- Expedited permits for affordable housing;

- Strengthened requirements for clear and objective standards relating to the development of housing;

- Provided a right for religious institutions to use their property to develop affordable housing; and

- Required allowances of accessory dwelling units ("ADUs") in certain areas

The law amended ORS 197.312 to increase the supply of affordable housing units and motivate infill development through the allowance of accessory dwelling units, or smaller dwellings that can be attached or detached to a primary single-family home. ORS 197.312 is titled "Limitations on city and county authority to prohibit certain kinds of housing" and prior to SB 1051’s passage, the statute regulated farmworker housing and real estate sales offices. A new subsection was added to ORS 197.312 that now provides:

"A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas **within the urban growth**
Chapter 7—Strategies to Promote Affordable Housing Through Density Increases

The amendment was to become operative on July 1, 2018, effectively giving jurisdictions one year to update their code. SB 1051 § 12. The law explicitly stated that the amendment was to be applied to permit applications for accessory dwelling units submitted for review on or after July 1, 2018. *Id.* § 13(3). The entire act was to be effective immediately upon its passage. *Id.* § 14.

The limitation on a local government's ability to regulate accessory dwelling units ("ADUs") is one tool that the legislature thought would help solve the housing shortage, as ADUs are frequently available at below market rental rates, and are often times the only affordable rental choice in low-density residential zones.

After the passage of SB 1051, DLCD issued non-binding guidance to help local jurisdictions implement the ADU requirement. The guidance offered reasonable interpretations of the mandate, recommending against minimum lot size and owner-occupancy requirements. See attachment 2.

II. *Homebuilders Association of Lane County, Housing Land Advocates et al. v. City of Eugene, LUBA Nos. 2018-063 and 2018-064 (November 29, 2018) (Attachment 3)*

After the passage of SB 1051, some local jurisdictions and community members were reluctant to! accept the statutory mandate to allow ADUs in all areas zoned for detached single-family dwellings. One of those cities was the City of Eugene.

According to the National Association of Realtors, the Eugene area is the second-most constrained housing market in the nation and nearly half of the community is cost burdened by the price of housing. Clearly something needed to change.

The city made minimal effort to draft ordinances to address the new legislation. The city received numerous comments in favor of strong protections for ADUs,

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1 ORS 197.312(5)(a) was amended in 2018 to remedy a scrivener's error and clarified that the new requirement that local governments allow ADUs applies only within the urban growth boundary. Or Laws 2018, ch 15 § 7.

2 The author of these materials was counsel for Housing Land Advocates in the LUBA proceeding and is acting secretary for the non-profit organization.
but other bullish individuals and existing neighborhood groups opposed any change to how low-density residential land is used in Eugene. The planning commission and the city council adopted two amendments to the local municipal code. The code already had a reference to "secondary dwelling" in portions of the code, and the first ordinance replaced that term with "Accessory dwelling" to align with the terms in SB 1051.

The other ordinance amended the code's general residential use allowances to authorize ADUs as permitted uses in a number of its zones that allowed single family zoning. That same ordinance also created or imported from previously existing code sections a number of special development standards applicable to ADUs, many which petitioners asserted did not constitute allowable regulations because they did not relate to siting or design, or were not reasonable.

a. No immediate obligation to revise local code; statute applied directly

The first issue was whether the City was required to amend its land use regulations by July 1, 2018, the operative date of SB 1051. LUBA determined that the law did not require any code amendment action by the City because the law did not provide a timeline for amendments, but under section 13 of the law, the new state statute would apply directly to any code amendment made by the city. Slip op at 8-9. LUBA noted that ORS 197.646 provides the general requirements for local government implementation of new statutory requirements, but LCDC had not established by a rule a timeline within which a local government was required to adopt new code to implement SB 1051.3

3 ORS 197.646 is titled "Implementation of New Requirement in Goal, Rule or Statute; Rules," and provides:

"(1) A local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.

"(2)(a) The Department of Land Conservation and Development shall notify local governments when a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals requires changes to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan.

"(b) The Land Conservation and Development Commission shall establish, by rule, the time period within which an acknowledged comprehensive plan, an acknowledged regional framework plan and land use regulations implementing either plan must be in compliance with:
found that because the city engaged in code amendments that attempted to implement SB 1051, the code amendments that newly allowed ADUs had to comply with the applicable law, \textit{i.e}, SB 1051. \textit{Id.} at 10.

\textbf{b. Reasonable Regulations Relating to Siting and Design}

1. ADUs already allowed in the City

One neighborhood in Eugene already allowed second dwellings on a residential lot, but existing provisions were restrictive, and arguably not within the scope of reasonable siting and design regulations. LUBA declined to review whether the existing code provisions that governed already-allowed ADUs complied with SB 1051 because the requirements were on the books prior to the law's passage, and were therefore not open to review. \textit{Slip op at 15-16}.

2. ADUs allowed in new zones

LUBA determined that existing code standards regulating ADUs in zones where ADUs were newly-allowed (referred to as "carried-forward provisions") were subject to review for compliance with ORS 197.312(5). \textit{Slip op at 12}. Petitioners argued that many of the carried-forward provisions were either unreasonable or not related to siting and design. Some of the challenged provisions included restrictions that effectively precluded siting ADUs on lots that allowed single-family dwellings, such as provisions that:

- Prohibited ADUs on alley-access lots
- Prohibited attached ADUs on flag lots
- Prohibited ADUs on lots under a certain size or with certain dimensions

\begin{flushright}
(A) A new requirement in a land use statute, if the legislation does not specify a time period for compliance; and

(B) A new requirement in a land use planning goal or rule adopted by the commission.

(3) When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government’s land use decisions. The failure to adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335."
\end{flushright}
• Prohibited ADUs on lots that could not accommodate a certain open space

• Limitation of an ADU’s maximum occupancy based on the number of rooms in a primary dwelling

• Prohibited ADUs where the owner is not an occupant of one of the structures

• Prohibited ADU development if parking requirements could not be met

The nature of the City’s decision was clear, and the offending code language was before LUBA for it to review whether the regulations were consistent with ORS 197.312(5).

c. Disposition

As noted above, LUBA determined that by applying existing code standards in new zones to allow ADUs in a highly-restrictive manner, the decision was subject to ORS 197.312(5). But because the City claimed it did not need to comply with new law because it was merely applying its existing code in new zones, LUBA noted the difficulty in evaluating the code’s compliance with the new law because the city’s decision did not address, and included no findings on, whether the existing standards carried forward are reasonable local regulations relating to siting or design within the meaning of ORS 197.312(5). Slip op at 13. LUBA then addressed whether it was appropriate to evaluate the carried-forward provisions and their consistency with state law (slip op at 14), which LUBA should have done because LUBA is obligated to perform such an evaluation under LUBA’s rules and applicable statute.4 LUBA asserted that although the interpretation of "reasonable local regulations relating to siting and design" is a question of statutory interpretation, the legislative allowance for cities provides some measure of local regulatory authority over accessory dwellings. Slip op at 13-14. LUBA then punted on analyzing any of the offending code provisions, and determined remand was appropriate.

LUBA’s remand rendered the City’s attempt to restrict newly-allowed ADUs ineffective. The remand directed the city to consider in the first instance whether the carried-forward provisions applied in the new zones constitute reasonable local regulations relating to siting and design. Slip op at 14. LUBA specifically

4 OAR 661-010-0071(1)(c) requires LUBA to reverse a land use decision when it violates a provision of applicable law and is prohibited as a matter of law.

ORS 197.835(11)(a) requires that”[w]henever the findings, order and record are sufficient to allow review, and to the extent possible under the time constraints of ORS 197.830(14), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (9) of this section or limited land use decision described in ORS 197.828 and 197.185."
encouraged the city to consider adopting findings on minimum lot size requirements and alley access lot prohibitions. *Id.* at 8. LUBA also remanded on a separate assignment of error relating to comprehensive plan policies, requiring the city to consider its own policies that govern the city's review and consideration of local zoning and development regulations. *Id.* at 20.


In a companion case to the *Homebuilders* case summarized above, *Kamp-Hughes* involved a zone verification decision sought by petitioner. The request asked whether an 800-square-foot ADU was permitted on an alley access lot. The city planner issued a decision that concluded the use was not permitted under the local code because ADUs on alley access lots were prohibited. Slip op at 1.

On appeal, the city claimed that the decision was correct and not subject to ORS 197.312(5) because under section 13 of SB 1051, ORS 197.312(5) only applied to "permits" as defined at ORS 227.160(2), *i.e.*, discretionary permits.5 Slip op at 6. LUBA rejected the argument, noting that ORS 197.312(5) does not cross reference the ORS 227 definition of permit, and that Section 5 of SB 1051 operated independently from Section 13, in that it placed limitations on a local jurisdiction’s ability to restrict allowances of ADUs regardless of permit issuances. *Id.*

Like *Homebuilders*, LUBA remanded the decision to allow for the city to consider for the first instance whether its code provision that prohibited ADU development on alley access lots constituted a reasonable local regulation relating to siting and design under ORS 197.312(5).

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5 ORS 227.160(2) provides:

"'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:

"(a) A limited land use decision as defined in ORS 197.015;

"(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary;

"(c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations; or

"(d) An expedited land division, as described in ORS 197.360."
Aftermath

After the issuance of the LUBA decision, the property owner filed a separate new zone verification request relating to the development of an ADU on the same property. The City issued a verification decision, stating that the applicant had failed to demonstrate that the proposal constituted an "accessory" dwelling unit. That decision is now on appeal before LUBA.

IV. Emerging local and state legislation promoting density

Jurisdictions across the United States continue to promote increased densities in established communities to ensure the provision of adequate and affordable housing supplies.

a. Examples of City Approaches

- In December 2018, the City of Minneapolis passed a comprehensive plan amendment to permit triplex homes in the city's residential neighborhoods, abolished parking minimums for new construction, and allowed high-density buildings along transit corridors.

- In 2017 and 2019, the City of Seattle upzoned select residential neighborhoods to allow for taller buildings and denser construction, while requiring developers to help create affordable housing. Developers are now required to devote 5 to 11 percent of their projects to low income apartments or pay $5 to $32.75 per square foot in fees depending on where they build and how much heights increase. In tandem with the upzone legislation, the city passed a resolution committing the city to consider adopting policies to monitor and combat displacement of marginalized communities, and to protect historic buildings and trees.

- And over the past few years, the City of Portland has been contemplating its Residential Infill Project, which has been lauded and decried by many, although no final decision has been made. The proposal is to upzone roughly 96% of Portland's residential neighborhoods to allow four-plexes. The proposal also allowed houses to have up to two ADUs. On March 12, 2019, the City's Planning and Sustainability Commission voted 5-4 in support of the proposal. The commission's revised draft proposal will be published later this spring, with city council hearings tentatively scheduled for September. See attachment 5.

b. Proposed State Legislation (as of March 22, 2019)

The 2019 legislative session, like recent years, includes many land use bills, including bills addressing housing. The most notable bill relating to density is House Bill 2001, which would require cities with populations greater than 10,000 and counties with populations to allow middle housing on lands zoned for single-family dwellings. As currently proposed, cities would be required to allow at least
one of the following: duplexes, triplexes, quadplexes, or cottage clusters. The bill also incorporates the requirement to only subject those middle missing homes to reasonable local regulations relating to siting and design. The bill clarifies what that phrase means, identifying owner-occupancy and off-street parking requirements to be prohibited. See attachment 6.

c. **Takeway considerations when discussing density changes**

   o Existing public facilities and services
   o Remedying racist zoning history
   o Unintended demolition, gentrification, and displacement
   o Community outreach and local control
   o Federal Fair Housing Act and Americans With Disabilities Act
79th OREGON LEGISLATIVE ASSEMBLY--2017 Regular Session

Chapter 7—Strategies to Promote Affordable Housing Through Density Increases

Enrolled

Senate Bill 1051

Sponsored by COMMITTEE ON BUSINESS AND TRANSPORTATION

CHAPTER ..................................................

AN ACT


Be It Enacted by the People of the State of Oregon:

SECTION 1. (1) As used in this section:
(a) “Affordable housing” means housing that is affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the development is built or for the state, whichever is greater.
(b) “Multifamily residential building” means a building in which three or more residential units each have space for eating, living and sleeping and permanent provisions for cooking and sanitation.
(2) Notwithstanding ORS 215.427 (1) or ORS 227.178 (1), a city with a population greater than 5,000 or a county with a population greater than 25,000 shall take final action on an application qualifying under subsection (3) of this section, including resolution of all local appeals under ORS 215.422 or 227.180, within 100 days after the application is deemed complete.
(3) An application qualifies for final action within the timeline described in subsection (2) of this section if:
(a) The application is submitted to the city or the county under ORS 215.416 or 227.175;
(b) The application is for development of a multifamily residential building containing five or more residential units within the urban growth boundary;
(c) At least 50 percent of the residential units included in the development will be sold or rented as affordable housing; and
(d) The development is subject to a covenant appurtenant that restricts the owner and each successive owner of the development or a residential unit within the development from selling or renting any residential unit described in paragraph (c) of this subsection as housing that is not affordable housing for a period of 60 years from the date of the certificate of occupancy.
(4) A city or a county shall take final action within the time allowed under ORS 215.427 or 227.178 on any application for a permit, limited land use decision or zone change that does not qualify for review and decision under subsection (3) of this section, including resolution of all appeals under ORS 215.422 or 227.180, as provided by ORS 215.427 and 215.435 or by ORS 227.178 and 227.181.

SECTION 2. ORS 215.416 is amended to read:

Enrolled Senate Bill 1051 (SB 1051-A)
215.416. (1) When required or authorized by the ordinances, rules and regulations of a county, an owner of land may apply in writing to such persons as the governing body designates, for a permit, in the manner prescribed by the governing body. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service.

(2) The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 215.427. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.

(3) Except as provided in subsection (11) of this section, the hearings officer shall hold at least one public hearing on the application.

(4)(a) [The application shall not be approved] A county may not approve an application if the proposed use of land is found to be in conflict with the comprehensive plan of the county and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by statute or county legislation.

(b)(A) A county may not deny an application for a housing development located within the urban growth boundary if the development complies with clear and objective standards, including but not limited to clear and objective design standards contained in the county comprehensive plan or land use regulations.

(B) This paragraph does not apply to:

(i) Applications or permits for residential development in areas described in ORS 197.307 (5); or

(ii) Applications or permits reviewed under an alternative approval process adopted under ORS 197.307 (6).

(c) A county may not reduce the density of an application for a housing development if:

(A) The density applied for is at or below the authorized density level under the local land use regulations; and

(B) At least 75 percent of the floor area applied for is reserved for housing.

(d) A county may not reduce the height of an application for a housing development if:

(A) The height applied for is at or below the authorized height level under the local land use regulations;

(B) At least 75 percent of the floor area applied for is reserved for housing; and

(C) Reducing the height has the effect of reducing the authorized density level under local land use regulations.

(e) Notwithstanding paragraphs (c) and (d) of this subsection, a county may reduce the density or height of an application for a housing development if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal.

(f) As used in this subsection:

(A) “Authorized density level” means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations.

(B) “Authorized height level” means the maximum height of a structure that is permitted under local land use regulations.

(C) “Habitability” means being in compliance with the applicable provisions of the state building code under ORS chapter 455 and the rules adopted thereunder.

(5) Hearings under this section shall be held only after notice to the applicant and also notice to other persons as otherwise provided by law and shall otherwise be conducted in conformance with the provisions of ORS 197.763.

(6) Notice of a public hearing on an application submitted under this section shall be provided to the owner of an airport defined by the Oregon Department of Aviation as a “public use airport” if:
(a) The name and address of the airport owner has been provided by the Oregon Department of Aviation to the county planning authority; and

(b) The property subject to the land use hearing is:

(A) Within 5,000 feet of the side or end of a runway of an airport determined by the Oregon Department of Aviation to be a “visual airport”; or

(B) Within 10,000 feet of the side or end of the runway of an airport determined by the Oregon Department of Aviation to be an “instrument airport.”

(7) Notwithstanding the provisions of subsection (6) of this section, notice of a land use hearing need not be provided as set forth in subsection (6) of this section if the zoning permit would only allow a structure less than 35 feet in height and the property is located outside the runway “approach surface” as defined by the Oregon Department of Aviation.

(8)(a) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.

(b) When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.

(9) Approval or denial of a permit or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.

(10) Written notice of the approval or denial shall be given to all parties to the proceeding.

(11)(a)(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.

(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.

(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and

(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing.

(b) If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site.

(c)(A) Notice of a decision under paragraph (a) of this subsection shall be provided to the applicant and to the owners of record of property on the most recent property tax assessment roll where such property is located:

(i) Within 100 feet of the property that is the subject of the notice when the subject property is wholly or in part within an urban growth boundary;

(ii) Within 250 feet of the property that is the subject of the notice when the subject property is outside an urban growth boundary and not within a farm or forest zone; or

(iii) Within 750 feet of the property that is the subject of the notice when the subject property is within a farm or forest zone.

(B) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(C) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.

(12) A decision described in ORS 215.402 (4)(b) shall:

(a) Be entered in a registry available to the public setting forth:

(A) The street address or other easily understood geographic reference to the subject property;

(B) The date of the decision; and

(C) A description of the decision made.

(b) Be subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.

(c) Be subject to the appeal period described in ORS 197.830 (5)(b).

(13) At the option of the applicant, the local government shall provide notice of the decision described in ORS 215.402 (4)(b) in the manner required by ORS 197.763 (2), in which case an appeal to the board shall be filed within 21 days of the decision. The notice shall include an explanation of appeal rights.

(14) Notwithstanding the requirements of this section, a limited land use decision shall be subject to the requirements set forth in ORS 197.195 and 197.828.

SECTION 3. ORS 227.175 is amended to read:

227.175. (1) When required or authorized by a city, an owner of land may apply in writing to the hearings officer, or such other person as the city council designates, for a permit or zone change, upon such forms and in such a manner as the city council prescribes. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service.

(2) The governing body of the city shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 227.178. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations.

(3) Except as provided in subsection (10) of this section, the hearings officer shall hold at least one public hearing on the application.
(4)(a) [The application shall not be approved] A city may not approve an application unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation.

(b)(A) A city may not deny an application for a housing development located within the urban growth boundary if the development complies with clear and objective standards, including but not limited to clear and objective design standards contained in the city comprehensive plan or land use regulations.

(b)(B) This paragraph does not apply to:

(i) Applications or permits for residential development in areas described in ORS 197.307 (5); or

(ii) Applications or permits reviewed under an alternative approval process adopted under ORS 197.307 (6).

(c) A city may not reduce the density of an application for a housing development if:

(A) The density applied for is at or below the authorized density level under the local land use regulations; and

(B) At least 75 percent of the floor area applied for is reserved for housing.

(d) A city may not reduce the height of an application for a housing development if:

(A) The height applied for is at or below the authorized height level under the local land use regulations;

(B) At least 75 percent of the floor area applied for is reserved for housing; and

(C) Reducing the height has the effect of reducing the authorized density level under local land use regulations.

(e) Notwithstanding paragraphs (c) and (d) of this subsection, a city may reduce the density or height of an application for a housing development if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal.

(f) As used in this subsection:

(A) “Authorized density level” means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations.

(B) “Authorized height level” means the maximum height of a structure that is permitted under local land use regulations.

(C) “Habitability” means being in compliance with the applicable provisions of the state building code under ORS chapter 455 and the rules adopted thereunder.

(5) Hearings under this section may be held only after notice to the applicant and other interested persons and shall otherwise be conducted in conformance with the provisions of ORS 197.763.

(6) Notice of a public hearing on a zone use application shall be provided to the owner of an airport, defined by the Oregon Department of Aviation as a “public use airport” if:

(a) The name and address of the airport owner has been provided by the Oregon Department of Aviation to the city planning authority; and

(b) The property subject to the zone use hearing is:

(A) Within 5,000 feet of the side or end of a runway of an airport determined by the Oregon Department of Aviation to be a “visual airport”; or

(B) Within 10,000 feet of the side or end of the runway of an airport determined by the Oregon Department of Aviation to be an “instrument airport.”

(7) Notwithstanding the provisions of subsection (6) of this section, notice of a zone use hearing need only be provided as set forth in subsection (6) of this section if the permit or zone change would only allow a structure less than 35 feet in height and the property is located outside of the runway “approach surface” as defined by the Oregon Department of Aviation.

(8) If an application would change the zone of property that includes all or part of a mobile home or manufactured dwelling park as defined in ORS 446.003, the governing body shall give written notice by first class mail to each existing mailing address for tenants of the mobile home park.
or manufactured dwelling park at least 20 days but not more than 40 days before the date of the first hearing on the application. The governing body may require an applicant for such a zone change to pay the costs of such notice.

(9) The failure of a tenant or an airport owner to receive a notice which was mailed shall not invalidate any zone change.

(10)(a)(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.

(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.

(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the city’s land use regulations. A city may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to the Land Use Board of Appeals under ORS 197.830.

(D) An appeal from a hearings officer’s decision made without hearing under this subsection shall be to the planning commission or governing body of the city. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a de novo hearing.

(E) The de novo hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to the Land Use Board of Appeals. At the de novo hearing:

(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;

(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and

(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing.

(b) If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. The fee allowed in this paragraph shall not apply to appeals made by neighborhood or community organizations recognized by the governing body and whose boundaries include the site.

(c)(A) Notice of a decision under paragraph (a) of this subsection shall be provided to the applicant and to the owners of record of property on the most recent property tax assessment roll where such property is located:

(i) Within 100 feet of the property that is the subject of the notice when the subject property is wholly or in part within an urban growth boundary;

(ii) Within 250 feet of the property that is the subject of the notice when the subject property is outside an urban growth boundary and not within a farm or forest zone; or

(iii) Within 750 feet of the property that is the subject of the notice when the subject property is within a farm or forest zone.
(B) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(C) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.

(11) A decision described in ORS 227.160 (2)(b) shall:
   (a) Be entered in a registry available to the public setting forth:
   (A) The street address or other easily understood geographic reference to the subject property;
   (B) The date of the decision; and
   (C) A description of the decision made.

   (b) Be subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.

   (c) Be subject to the appeal period described in ORS 197.830 (5)(b).

   (12) At the option of the applicant, the local government shall provide notice of the decision described in ORS 227.160 (2)(b) in the manner required by ORS 197.763 (2), in which case an appeal to the board shall be filed within 21 days of the decision. The notice shall include an explanation of appeal rights.

   (13) Notwithstanding other requirements of this section, limited land use decisions shall be subject to the requirements set forth in ORS 197.195 and 197.828.

SECTION 4. ORS 197.303 is amended to read:

197.303. (1) As used in ORS 197.307, “needed housing” means all housing [types] on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at [particular] price ranges and rent levels, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a. “Needed housing” includes at least the following housing types:

   (a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
   (b) Government assisted housing;
   (c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
   (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
   (e) Housing for farmworkers.

   (2) Subsection (1)(a) and (d) of this section [shall] does not apply to:

   (a) A city with a population of less than 2,500.
   (b) A county with a population of less than 15,000.

   (3) A local government may take an exception under ORS 197.732 to the definition of “needed housing” in subsection (1) of this section in the same manner that an exception may be taken under the goals.

SECTION 5. ORS 197.307 is amended to read:

197.307. (1) The availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle and fixed income, including housing for farmworkers, is a matter of statewide concern.

   (2) Many persons of lower, middle and fixed income depend on government assisted housing as a source of affordable, decent, safe and sanitary housing.

   (3) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

   (4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of hous-
ing, including needed housing [on buildable land described in subsection (3) of this section]. The standards, conditions and procedures:

(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

(5) The provisions of subsection (4) of this section do not apply to:

(a) An application or permit for residential development in an area identified in a formally adopted central city plan, or a regional center as defined by Metro, in a city with a population of 500,000 or more.

(b) An application or permit for residential development in historic areas designated for protection under a land use planning goal protecting historic areas.

(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;

(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.

(7) Subject to subsection (4) of this section, this section does not infringe on a local government’s prerogative to:

(a) Set approval standards under which a particular housing type is permitted outright;

(b) Impose special conditions upon approval of a specific development proposal; or

(c) Establish approval procedures.

(8) In accordance with subsection (4) of this section and ORS 197.314, a jurisdiction may adopt any or all of the following placement standards, or any less restrictive standard, for the approval of manufactured homes located outside mobile home parks:

(a) The manufactured home shall be multisectional and enclose a space of not less than 1,000 square feet.

(b) The manufactured home shall be placed on an excavated and back-filled foundation and enclosed at the perimeter such that the manufactured home is located not more than 12 inches above grade.

(c) The manufactured home shall have a pitched roof, except that no standard shall require a slope of greater than a nominal three feet in height for each 12 feet in width.

(d) The manufactured home shall have exterior siding and roofing which in color, material and appearance is similar to the exterior siding and roofing material commonly used on residential dwellings within the community or which is comparable to the predominant materials used on surrounding dwellings as determined by the local permit approval authority.

(e) The manufactured home shall be certified by the manufacturer to have an exterior thermal envelope meeting performance standards which reduce levels equivalent to the performance standards required of single-family dwellings constructed under the state building code as defined in ORS 455.010.

(f) The manufactured home shall have a garage or carport constructed of like materials. A jurisdiction may require an attached or detached garage in lieu of a carport where such is consistent with the predominant construction of immediately surrounding dwellings.

(g) In addition to the provisions in paragraphs (a) to (f) of this subsection, a city or county may subject a manufactured home and the lot upon which it is sited to any development standard, ar-
chitectural requirement and minimum size requirement to which a conventional single-family residential dwelling on the same lot would be subject.

**SECTION 6.** ORS 197.312 is amended to read:

197.312. (1) A city or county may not by charter prohibit from all residential zones attached or detached single-family housing, multifamily housing for both owner and renter occupancy or manufactured homes. A city or county may not by charter prohibit government assisted housing or impose additional approval standards on government assisted housing that are not applied to similar but unassisted housing.

(2)(a) A single-family dwelling for a farmworker and the farmworker’s immediate family is a permitted use in any residential or commercial zone that allows single-family dwellings as a permitted use.

(b) A city or county may not impose a zoning requirement on the establishment and maintenance of a single-family dwelling for a farmworker and the farmworker’s immediate family in a residential or commercial zone described in paragraph (a) of this subsection that is more restrictive than a zoning requirement imposed on other single-family dwellings in the same zone.

(3)(a) Multifamily housing for farmworkers and farmworkers’ immediate families is a permitted use in any residential or commercial zone that allows multifamily housing generally as a permitted use.

(b) A city or county may not impose a zoning requirement on the establishment and maintenance of multifamily housing for farmworkers and farmworkers’ immediate families in a residential or commercial zone described in paragraph (a) of this subsection that is more restrictive than a zoning requirement imposed on other multifamily housing in the same zone.

(4) A city or county may not prohibit a property owner or developer from maintaining a real estate sales office in a subdivision or planned community containing more than 50 lots or dwelling units for the sale of lots or dwelling units that remain available for sale to the public.

(5)(a) A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.

(b) As used in this subsection, “accessory dwelling unit” means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling.

**SECTION 7.** ORS 215.441 is amended to read:

215.441. (1) If a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship is allowed on real property under state law and rules and local zoning ordinances and regulations, a county shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity, including [worship services, religion classes, weddings, funerals, child care and meal programs, but not including private or parochial school education for prekindergarten through grade 12 or higher education.]:

(a) Worship services.

(b) Religion classes.

(c) Weddings.

(d) Funerals.

(e) Meal programs.

(f) Child care, but not including private or parochial school education for prekindergarten through grade 12 or higher education.

(g) Providing housing or space for housing in a building that is detached from the place of worship, provided:

(A) At least 50 percent of the residential units provided under this paragraph are affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the real property is located;
(B) The real property is in an area zoned for residential use that is located within the urban growth boundary; and

(C) The housing or space for housing complies with applicable land use regulations and meets the standards and criteria for residential development for the underlying zone.

(2) A county may:

(a) Subject real property described in subsection (1) of this section to reasonable regulations, including site review or design review, concerning the physical characteristics of the uses authorized under subsection (1) of this section; or

(b) Prohibit or restrict the use of real property by a place of worship described in subsection (1) of this section if the county finds that the level of service of public facilities, including transportation, water supply, sewer and storm drain systems is not adequate to serve the place of worship described in subsection (1) of this section.

(3) Notwithstanding any other provision of this section, a county may allow a private or parochial school for prekindergarten through grade 12 or higher education to be sited under applicable state law and rules and local zoning ordinances and regulations.

(4) Housing and space for housing provided under subsection (1)(g) of this section must be subject to a covenant appurtenant that restricts the owner and each successive owner of the building or any residential unit contained in the building from selling or renting any residential unit described in subsection (1)(g)(A) of this section as housing that is not affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the real property is located for a period of 60 years from the date of the certificate of occupancy.

SECTION 8. ORS 227.500 is amended to read:

227.500. (1) If a church, synagogue, temple, mosque, chapel, meeting house or other nonresidential place of worship is allowed on real property under state law and rules and local zoning ordinances and regulations, a city shall allow the reasonable use of the real property for activities customarily associated with the practices of the religious activity, including [worship services, religion classes, weddings, funerals, child care and meal programs, but not including private or parochial school education for prekindergarten through grade 12 or higher education.]:

(a) Worship services.

(b) Religion classes.

(c) Weddings.

(d) Funerals.

(e) Meal programs.

(f) Child care, but not including private or parochial school education for prekindergarten through grade 12 or higher education.

(g) Providing housing or space for housing in a building that is detached from the place of worship, provided:

(A) At least 50 percent of the residential units provided under this paragraph are affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the real property is located;

(B) The real property is in an area zoned for residential use that is located within the urban growth boundary; and

(C) The housing or space for housing complies with applicable land use regulations and meets the standards and criteria for residential development for the underlying zone.

(2) A city may:

(a) Subject real property described in subsection (1) of this section to reasonable regulations, including site review and design review, concerning the physical characteristics of the uses authorized under subsection (1) of this section; or

(b) Prohibit or regulate the use of real property by a place of worship described in subsection (1) of this section if the city finds that the level of service of public facilities, including transporta-
tion, water supply, sewer and storm drain systems is not adequate to serve the place of worship described in subsection (1) of this section.

(3) Notwithstanding any other provision of this section, a city may allow a private or parochial school for prekindergarten through grade 12 or higher education to be sited under applicable state law and rules and local zoning ordinances and regulations.

(4) Housing and space for housing provided under subsection (1)(g) of this section must be subject to a covenant appurtenant that restricts the owner and each successive owner of the building or any residential unit contained in the building from selling or renting any residential unit described in subsection (1)(g)(A) of this section as housing that is not affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the real property is located for a period of 60 years from the date of the certificate of occupancy.

SECTION 9. ORS 197.178 is amended to read:
197.178. (1) Local governments with comprehensive plans or functional plans that are identified in ORS 197.296 (1) shall compile and report annually to the Department of Land Conservation and Development the following information for all applications received under ORS 227.175 for residential permits and residential zone changes:
(a) The total number of complete applications received for residential development, [including the net residential density proposed in the application and the maximum allowed net residential density for the subject zone] and the number of applications approved;
[(b) The number of applications approved, including the approved net density; and]
[(c) The date each application was received and the date it was approved or denied.]

(b) The total number of complete applications received for development of housing containing one or more housing units that are sold or rented below market rate as part of a local, state or federal housing assistance program, and the number of applications approved; and

(c) For each complete application received:
(A) The date the application was received;
(B) The date the application was approved or denied;
(C) The net residential density proposed in the application;
(D) The maximum allowed net residential density for the subject zone; and
(E) If approved, the approved net residential density.

(2) The report required by this section may be submitted electronically.

SECTION 10. ORS 215.427 is amended to read:
215.427. (1) Except as provided in subsections (3), (5) and (10) of this section, for land within an urban growth boundary and applications for mineral aggregate extraction, the governing body of a county or its designee shall take final action on an application for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 120 days after the application is deemed complete. The governing body of a county or its designee shall take final action on all other applications for a permit, limited land use decision or zone change, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete, except as provided in subsections (3), (5) and (10) of this section.

(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section and section 1 of this 2017 Act upon receipt by the governing body or its designee of:
(a) All of the missing information;
(b) Some of the missing information and written notice from the applicant that no other information will be provided; or
(c) Written notice from the applicant that none of the missing information will be provided.
(3)(a) If the application was complete when first submitted or the applicant submits additional information, as described in subsection (2) of this section, within 180 days of the date the application was first submitted and the county has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application must be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.

(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:
   (a) All of the missing information;
   (b) Some of the missing information and written notice that no other information will be provided; or
   (c) Written notice that none of the missing information will be provided.

(5) The period set in subsection (1) of this section or the 100-day period set in section 1 of this 2017 Act may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (10) of this section for mediation, may not exceed 215 days.

(6) The period set in subsection (1) of this section applies:
   (a) Only to decisions wholly within the authority and control of the governing body of the county; and
   (b) Unless the parties have agreed to mediation as described in subsection (10) of this section or ORS 197.319 (2)(b).

(7) Notwithstanding subsection (6) of this section, the period set in subsection (1) of this section and the 100-day period set in section 1 of this 2017 Act do [does] not apply to a decision of the county making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610.

(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the county or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days or 150 days, as applicable, after the application is deemed complete, the county shall refund to the applicant either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

(9) A county may not compel an applicant to waive the period set in subsection (1) of this section or to waive the provisions of subsection (8) of this section or ORS 215.429 or section 1 of this 2017 Act as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

(10) The periods set forth in [subsection (1)] subsections (1) and (5) of this section and section 1 of this 2017 Act [and the period set forth in subsection (5) of this section] may be extended by up to 90 additional days, if the applicant and the county agree that a dispute concerning the application will be mediated.

SECTION 11. ORS 227.178 is amended to read:

227.178. (1) Except as provided in subsections (3), (5) and (11) of this section, the governing body of a city or its designee shall take final action on an application for a permit, limited land use de-
decision or zone change, including resolution of all appeals under ORS 227.180, within 120 days after the application is deemed complete.

(2) If an application for a permit, limited land use decision or zone change is incomplete, the governing body or its designee shall notify the applicant in writing of exactly what information is missing within 30 days of receipt of the application and allow the applicant to submit the missing information. The application shall be deemed complete for the purpose of subsection (1) of this section or section 1 of this 2017 Act upon receipt by the governing body or its designee of:

(a) All of the missing information;
(b) Some of the missing information and written notice from the applicant that no other information will be provided; or
(c) Written notice from the applicant that none of the missing information will be provided.

(3)(a) If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

(b) If the application is for industrial or traded sector development of a site identified under section 12, chapter 800, Oregon Laws 2003, and proposes an amendment to the comprehensive plan, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted, provided the application complies with paragraph (a) of this subsection.

(4) On the 181st day after first being submitted, the application is void if the applicant has been notified of the missing information as required under subsection (2) of this section and has not submitted:

(a) All of the missing information;
(b) Some of the missing information and written notice that no other information will be provided; or
(c) Written notice that none of the missing information will be provided.

(5) The 120-day period set in subsection (1) of this section or the 100-day period set in section 1 of this 2017 Act may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (11) of this section for mediation, may not exceed 245 days.

(6) The 120-day period set in subsection (1) of this section applies:

(a) Only to decisions wholly within the authority and control of the governing body of the city; and
(b) Unless the parties have agreed to mediation as described in subsection (11) of this section or ORS 197.319 (2)(b).

(7) Notwithstanding subsection (6) of this section, the 120-day period set in subsection (1) of this section and the 100-day period set in section 1 of this 2017 Act do not apply to a decision of the city making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610.

(8) Except when an applicant requests an extension under subsection (5) of this section, if the governing body of the city or its designee does not take final action on an application for a permit, limited land use decision or zone change within 120 days after the application is deemed complete, the city shall refund to the applicant, subject to the provisions of subsection (9) of this section, either the unexpended portion of any application fees or deposits previously paid or 50 percent of the total amount of such fees or deposits, whichever is greater. The applicant is not liable for additional governmental fees incurred subsequent to the payment of such fees or deposits. However, the applicant is responsible for the costs of providing sufficient additional information to address relevant issues identified in the consideration of the application.

(9)(a) To obtain a refund under subsection (8) of this section, the applicant may either:
(A) Submit a written request for payment, either by mail or in person, to the city or its designee; or

(B) Include the amount claimed in a mandamus petition filed under ORS 227.179. The court shall award an amount owed under this section in its final order on the petition.

(b) Within seven calendar days of receiving a request for a refund, the city or its designee shall determine the amount of any refund owed. Payment, or notice that no payment is due, shall be made to the applicant within 30 calendar days of receiving the request. Any amount due and not paid within 30 calendar days of receipt of the request shall be subject to interest charges at the rate of one percent per month, or a portion thereof.

(c) If payment due under paragraph (b) of this subsection is not paid within 120 days after the city or its designee receives the refund request, the applicant may file an action for recovery of the unpaid refund. In an action brought by a person under this paragraph, the court shall award to a prevailing applicant, in addition to the relief provided in this section, reasonable attorney fees and costs at trial and on appeal. If the city or its designee prevails, the court shall award reasonable attorney fees and costs at trial and on appeal if the court finds the petition to be frivolous.

(10) A city may not compel an applicant to waive the 120-day period set in subsection (1) of this section or to waive the provisions of subsection (8) of this section or ORS 227.179 or section 1 of this 2017 Act as a condition for taking any action on an application for a permit, limited land use decision or zone change except when such applications are filed concurrently and considered jointly with a plan amendment.

(11) The periods set forth in subsection (1) and (5) of this section and section 1 of this 2017 Act may be extended by up to 90 additional days, if the applicant and the city agree that a dispute concerning the application will be mediated.

SECTION 12. The amendments to ORS 197.312, 215.416 and 227.175 by sections 2, 3 and 6 of this 2017 Act become operative on July 1, 2018.

SECTION 13. (1) Section 1 of this 2017 Act and the amendments to ORS 197.178, 197.303, 197.307, 215.427, 215.441, 227.178 and 227.500 by sections 4, 5 and 7 to 11 of this 2017 Act apply to permit applications submitted for review on or after the effective date of this 2017 Act.

(2) The amendments to ORS 215.416 and 227.175 by sections 2 and 3 of this 2017 Act apply to applications for housing development submitted for review on or after July 1, 2018.

(3) The amendments to ORS 197.312 by section 6 of this 2017 Act apply to permit applications for accessory dwelling units submitted for review on or after July 1, 2018.

SECTION 14. This 2017 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2017 Act takes effect on its passage.
GUIDANCE ON IMPLEMENTING
THE ACCESSORY DWELLING UNITS (ADU) REQUIREMENT
UNDER OREGON SENATE BILL 1051

M. Klepinger’s backyard detached ADU, Richmond neighborhood, Portland, OR. (Photo courtesy of Ellen Bassett and accessorydwellings.org.)

OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

MARCH 2018
Introduction
As housing prices in Oregon go up, outpacing employment and wage growth, the availability of affordable housing is decreasing in cities throughout the state. While Oregon’s population continues to expand, the supply of housing, already impacted by less building during the recession, has not kept up. To address the lack of housing supply, House Speaker Tina Kotek introduced House Bill 2007 during the 2017 legislative session to, as she stated, “remove barriers to development.” Through the legislative process, legislators placed much of the content of House Bill 2007 into Senate Bill 1051, which then passed, and was signed into law by Governor Brown on August 15, 2017. In addition, a scrivener’s error¹ was corrected through the passage of HB 4031 in 2018.

Among the provisions of SB 1051 and HB 4031 is the requirement that cities and counties of a certain population allow accessory dwelling units (ADUs) as described below:

a) A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas within the urban growth boundary that are zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.

b) As used in this subsection, “accessory dwelling unit” means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling.

This new requirement becomes effective on July 1, 2018 and subject cities and counties must accept applications for ADUs inside urban growth boundaries (UGBs) starting July 1, 2018. Many local governments in Oregon already have ADU regulations that meet the requirements of SB 1051, however, some do not. Still others have regulations that, given the overall legislative direction to encourage the construction of ADUs to meet the housing needs of Oregon’s cities, are not “reasonable.” The Oregon Department of Land Conservation and Development (DLCD) is issuing this guidance and model code language to help local governments comply with the legislation. The model code language is included on its own page at the end of this document.

¹ The scrivener’s error in SB 1051 removed the words “within the urban growth boundary.” HB 4031 added the words into statute and thus limited the siting of ADUs to within UGBs.
## Guidance by Topic

The purpose of the following guidance is to help cities and counties implement the ADU requirement in a manner that meets the letter and spirit of the law: to create more housing in Oregon by removing barriers to development.

### Number of Units

The law requires subject cities and counties to allow “at least one accessory dwelling unit for each detached single-family dwelling.” While local governments must allow one ADU where required, DLCD encourages them to consider allowing two units. For example, a city or county could allow one detached ADU and allow another as an attached or interior unit (such as a basement conversion). Because ADUs blend in well with single-family neighborhoods, allowing two units can help increase housing supply while not having a significant visual impact. Vancouver, BC is a successful example of such an approach.

### Siting Standards

In order to simplify standards and not create barriers to development of ADUs, DLCD recommends applying the same or less restrictive development standards to ADUs as those for other accessory buildings. Typically that would mean that an ADU could be developed on any legal lot or parcel as long as it met the required setbacks and lot coverage limits; local governments should not mandate a minimum lot size for ADUs. So that lot coverage requirements do not preclude ADUs from being built on smaller lots, local governments should review their lot coverage standards to make sure they don’t create a barrier to development. To address storm water concerns, consider limits to impermeable surfaces rather than simply coverage by structures.

In addition, any legal nonconforming structure (such as a house or outbuilding that doesn’t meet current setback requirements) should be allowed to contain, or be converted to, an ADU as long as the development does not increase the nonconformity.

### Design Standards

Any design standards required of ADUs must be clear and objective (ORS 197.307[4]). Clear and objective standards do not contain words like “compatible” or “character.” With the exception of ADUs that are in historic districts and must follow the historic district regulations, DLCD does not recommend any special design standards for ADUs. Requirements that ADUs match the materials, roof pitch, windows, etc. of the primary dwelling can create additional barriers to development and sometimes backfire if the design and materials of the proposed
ADU would have been of superior quality to those of the primary dwelling, had they been allowed.

**Parking**

Requiring off-street parking is one of the biggest barriers to developing ADUs and it is recommended that jurisdictions not include an off-street parking requirement in their ADU standards. Adding off-street parking on many properties, especially in older centrally-located areas where more housing should be encouraged, is often either very expensive or physically impossible. In addition, when adding an additional off-street parking space requires a new or widened curb cut, it removes existing on-street parking, resulting in no net gain of parking supply. As an alternative to requiring off-street parking for ADUs, local governments can implement a residential parking district if there is an on-street parking supply shortage. For more help on parking issues, visit www.oregon.gov/lcd/tgm/pages/parking.aspx or contact DLCD.

**Owner Occupancy**

Owner-occupancy requirements, in which the property owner is required to live on the property in either the primary or accessory dwelling unit, are difficult to enforce and not recommended. They may be a barrier to property owners constructing ADUs, but will more likely simply be ignored and constitute an on-going enforcement headache for local governments.

**Public Utilities**

Development codes that require ADUs to have separate sewer and water connections create barriers to building ADUs. In some cases, a property owner may want to provide separate connections, but in other cases doing so may be prohibitively expensive.

**System Development Charges (SDCs)**

While SDCs are not part of the development code and SB 1051 does not require them to be updated, local governments should consider revising their SDCs to match the true impact of ADUs in order to remove barriers to their development. ADUs are generally able to house fewer people than average single-family dwellings, so their fiscal impact would be expected to be less than a single-family dwelling. Accordingly, it makes sense that they should be charged lower SDCs than primary detached single-family dwellings.
Accessory Dwellings (model code)

**Note:** ORS 197.312 requires that at least one accessory dwelling be allowed per detached single-family dwelling in every zone within an urban growth boundary that allows detached single-family dwellings. Accessory dwellings are an economical way to provide additional housing choices, particularly in communities with high land prices or a lack of investment in affordable housing. They provide an opportunity to increase housing supply in developed neighborhoods and can blend in well with single-family detached dwellings. Accessory dwelling regulations can be difficult to enforce when local codes specify who can own or occupy the homes. Requirements that accessory dwellings have separate connections to and pay system development charges for water and sewer services can pose barriers to development. Concerns about neighborhood compatibility, parking, and other factors should be considered and balanced against the need to address Oregon’s housing shortage by removing barriers to development.

The model development code language below provides recommended language for accessory dwellings. The italicized sections in brackets indicate options to be selected or suggested numerical standards that communities can adjust to meet their needs. Local housing providers should be consulted when drafting standards for accessory dwellings, and the following standards should be tailored to fit the needs of your community.

Accessory dwellings, where allowed, are subject to review and approval through a Type I procedure[, pursuant to Section __________,] and shall conform to all of the following standards:

[A. **One Unit.** A maximum of one Accessory Dwelling is allowed per legal single-family dwelling. The unit may be a detached building, in a portion of a detached accessory building (e.g., above a garage or workshop), or a unit attached or interior to the primary dwelling (e.g., an addition or the conversion of an existing floor).

[B. **Floor Area.**

1. A detached Accessory Dwelling shall not exceed [800-900] square feet of floor area, or [75] percent of the primary dwelling’s floor area, whichever is smaller.

2. An attached or interior Accessory Dwelling shall not exceed [800-900] square feet of floor area, or [75] percent of the primary dwelling’s floor area, whichever is smaller. However, Accessory Dwellings that result from the conversion of a level or floor (e.g., basement, attic, or second story) of the primary dwelling may occupy the entire level or floor, even if the floor area of the Accessory Dwelling would be more than [800-900] square feet.

C. **Other Development Standards.** Accessory Dwellings shall meet all other development standards (e.g., height, setbacks, lot coverage, etc.) for buildings in the zoning district, except that:

1. Conversion of an existing legal non-conforming structure to an Accessory Dwelling is allowed, provided that the conversion does not increase the non-conformity; and...
2. No off-street parking is required for an Accessory Dwelling.

**Definition** (This should be included in the “definitions” section of the zoning ordinance. It matches the definition for Accessory Dwelling found in ORS 197.312)

**Accessory Dwelling** – An interior, attached, or detached residential structure that is used in connection with, or that is accessory to, a single-family dwelling.
HOME BUILDERS ASSOCIATION OF LANE COUNTY, Petitioner, and
1000 FRIENDS OF OREGON, HOUSING LAND ADVOCATES,
EUGENE AREA CHAMBER OF COMMERCE,
WALKABLE EUGENE CITIZENS ADVISORY NETWORK, and AARP OREGON, Intervenors-Petitioners,
v.
CITY OF EUGENE, Respondent.

LUBA No. 2018-063
LUBA No. 2018-064

LAND USE BOARD OF APPEALS OF THE STATE OF OREGON

November 29, 2018

FINAL OPINION AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos PC.

Mary Kyle McCurdy, Portland, filed a petition for review and argued on behalf of intervenor-petitioner 1000 Friends of Oregon.

Scott N. Hilgenberg, Portland, filed a petition for review and argued on behalf of intervenor-petitioner Housing Land Advocates. With him on the brief were Jennifer M. Bragar and Tomasi Salyer Martin.

Micheal M. Reeder, Eugene, filed a petition for review on behalf of intervenors-petitioners Eugene Area Chamber of Commerce, Walkable Eugene Citizens Advisory Network, and AARP Oregon.

RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.
Chapter 7—Strategies to Promote Affordable Housing Through Density Increases

NATURE OF THE DECISION

Petitioner appeals two ordinances, Ordinances 20594 and 20595, that amend the Eugene Code in order to implement amendments to an existing statute.

MOTION TO DISMISS INTERVENORS-PETITIONERS

Neither intervenor-petitioner Chris Wig (Wig) nor intervenor-petitioner John Hoops (Hoops) filed a petition for review. The city moves to dismiss Wig and Hoops from the appeal. Wig and Hoops do not object to the motion. The city’s motion is granted. Intervenors-petitioners Wig and Hoops are dismissed as intervenors-petitioners.

REPLY BRIEF

Petitioner Homebuilders Association of Lane County (HBA) and intervenor-petitioner Housing Land Advocates (HLA) each move for permission to file a reply brief to respond to alleged new matters raised in the city’s response brief. The city does not object to the reply briefs. The reply briefs are allowed.

MOTION TO STRIKE

HBA moves to strike page 5 line 17 from the city’s brief, which HBA argues is not supported by the record. The city does not object to the motion. Page 5 line 17 is stricken from the city’s response brief and LUBA will not consider the information contained in that part of the brief.

Page 4

BACKGROUND

We briefly set out the legal and factual background that led to the city’s adoption of the challenged ordinances.

In 2017, the Oregon legislature enacted Senate Bill 1051 (SB 1051), at Oregon Laws 2017, Chapter 745, sections 1-14. As relevant here, SB 1051, section 6 amended ORS 197.312 to add subsection (5), which now provides:

“(a) A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.

“(b) As used in this subsection, ‘accessory dwelling unit’ means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling.”

SB 1051, section 12 provides for a delayed operative date for the amendments to ORS 197.312(5), until July 1, 2018. SB 1051, section 13(3) provides that the provisions of ORS
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197.312(5) “apply to permit applications for accessory dwelling units submitted for review on or after July 1, 2018.”

In January, 2018, the city began a process to amend the Eugene Code (EC) to implement the changes to ORS 197.312(5), and held hearings on the proposed changes to the EC between February and June 2018. In June 2018, the city adopted two ordinances, Ordinance 20595 and Ordinance 20594 (the Ordinances). We briefly summarize only the changes to the EC effectuated by

the Ordinances that are relevant to these appeals, before we turn to the parties’ assignments of error.

Section 1 of Ordinance 20595 amended the phrase “secondary dwelling” in the EC to change it to “Dwelling, Accessory” and adopt a definition for the new phrase. Section 1 of Ordinance 20594 then replaced the term “secondary dwelling” where it was previously used in the EC with the term “accessory dwelling.”

Section 5 of Ordinance 20594 amended EC Table 9.2740, “Residential Zone Land Uses and Permit Requirements,” to authorize accessory dwellings as permitted uses in the areas zoned for detached single family dwellings in which they had not been previously permitted: the Agricultural (AG), Medium Density Residential (R-2), Limited High-Density Residential (R-3), High Density Residential (R-4), Elmira Road Special Area Zone (S-E), Blair Boulevard Historic Commercial Area (S-HB), Jefferson Westside Special Area (S-JW Zone), and Chambers Special Area (S-C) (R-2 Subarea) zones. Record 28. We refer to these zones collectively as the New Zones.

Ordinance 20594, section 6 amended the Special Use Limitations for Table 9.2740 that are found in EC 9.2741 to (1) provide that accessory dwellings are subject to the standards in EC Table 9.2750, “Residential Zone Development Standards,” and EC 9.2751, “Special Development Standards for Table 9.2750,” and (2) prohibit new accessory dwellings on alley access lots. Section 7 amended the standards in EC Table 9.2750 to subject accessory dwellings to the existing provisions in EC 9.2751(17), the special development standards for EC Table 9.2750.

Section 15 of Ordinance 20594 amended EC 9.3615(2) to allow in the S-JW Zone “[a]n additional (interior, attached or detached) residential structure that is used in connection with or that is accessory to a single family dwelling” as an “additional ‘One-Family Dwelling’ and not as an “Accessory Dwelling.””

With each of the Ordinances, the city council adopted findings that address the Statewide Planning Goals, various provisions of the Eugene Springfield Metro Plan, and applicable refinement plans. See n 11.
These appeals followed.

HBA’s FIRST, SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR/HLA’S FIRST ASSIGNMENT OF ERROR/1000 FRIENDS’ FIRST AND SECOND ASSIGNMENTS OF ERROR

The central theme in these assignments of error is that the city’s implementation of SB 1051 is not consistent with ORS 197.312(5). That is so, we understand Petitioners to argue, because while the Ordinances nominally allow accessory dwellings in all areas of the city where they are required to be allowed, some of the standards that apply to accessory dwellings effectively nullify that first city action, because the standards prohibit accessory dwellings on certain types of lots, are not limited to “regulations relating to siting and design,” and/or are not “reasonable,” within the meaning of ORS 197.312(5)(a).

As we explained above, the Ordinances (1) amended the EC to allow accessory dwellings in zones in which accessory dwellings were not previously allowed, and (2) incorporated for accessory dwellings in the New Zones the existing standards that applied to accessory dwellings in the zones in which they were previously allowed.

A. The Ordinances Amended the EC to Allow Accessory Dwellings

In its first, second and third arguments under the first assignment of error, HBA argues that SB 1051, section 12 required the city, before July 1, 2018, to evaluate the existing EC standards that previously applied to all accessory dwellings in all zones in the city and eliminate existing standards for accessory dwellings that are not “reasonable local regulations relating to siting and design,” as that phrase is used in ORS 197.312(5)(a). HBA asks LUBA to remand the Ordinances in order for the city to “complete its homework assignment from the legislature.” HBA Petition for Review 2.

We understand the city to respond that nothing in SB 1051, section 12 required the city to evaluate all existing provisions of the EC and potentially amend, or eliminate, existing standards applicable to accessory dwellings that are not “reasonable local regulations relating to siting and design.” That is so, the city argues, because SB 1051, section 13 specifies the remedy for when a city

fails to implement the provisions of ORS 197.312(5): the provisions of ORS 197.312(5) apply directly to applications for a permit.

The city also argues that ORS 197.646(3) provides recourse in the situation when a city does not amend its land use regulations to implement a new land use statute: “the new requirements apply directly to the local government’s land use applications.” As the city explains it, the city council did not intend in adopting the Ordinances to “fully” implement SB 1051. Stated differently, the city council did not intend to comprehensively and legislatively
evaluate the standards that apply to all accessory dwellings in all zones in the city to determine whether those standards are “reasonable local regulations relating to siting and design” of accessory dwellings within the meaning of ORS 197.312(5). Instead, we understand the city to argue, it intends to evaluate whether specific standards comply with SB 1051 on a case-by-case basis, in the context of individual applications for accessory dwellings, and also to undertake a comprehensive legislative evaluation in the future.

To the extent that HBA argues that SB 1051, section 12 required the city to amend its land use regulations to implement SB 1051 by July 1, 2018, we disagree with that argument. SB 1051 itself is silent regarding any requirement, much less a deadline, for a city to amend its land use regulations to comply with its provisions.\(^3\) SB 1051, section 12 provides for a delayed “operative date” of July 1, 2018. That delayed operative date provides a grace period before which the provisions of SB 1051 did not apply, and after which, the statute applies directly and cities are required to “allow” accessory dwellings in areas required by the statute. But SB 1051 does not direct cities as to the mechanism by which to allow accessory dwellings.

Similarly, while ORS 197.646(1) requires the city to amend its land use regulations to implement SB 1051, ORS 197.646(2)(b) requires LCDC to establish by rule the time period within which a local government must amend its code to implement a new land use statute “if the legislation does not specify a time period for compliance[.]” LCDC has not adopted any rules specifying a time period for implementation of SB 1051. Accordingly, to the extent HBA argues that the city improperly construed SB 1051 in failing to evaluate and adopt amendments to the EC that implement all of the provisions of SB 1051 by July 1, 2018, we disagree with that argument.

However, even if neither SB 1051 nor ORS 197.646(2)(b) compelled the city to adopt legislation to implement SB 1051 by any particular date, the city in fact amended its land use code to at least partially implement SB 1051, and those amendments like any other are subject to review for consistency with applicable law. We therefore turn to Petitioners’ arguments that the challenged amendments are inconsistent with applicable law, including SB 1051.

**B. Reasonable Regulations Relating to Siting and Design - Existing EC Standards**

In various assignments of error, Petitioners argue that several existing EC standards are inconsistent with the ORS 197.312(5) requirement to “allow” accessory dwellings, because those existing standards prohibit accessory dwellings on certain types of lots.\(^4\) In Petitioners’ view, ORS 197.312(5) creates an unrestricted entitlement to an accessory dwelling on any lot that is zoned for a detached single-family dwelling. In the city’s view, that ORS 197.312(5) allows cities to “subject” accessory dwellings “to” siting regulations means that not every lot that is zoned for a detached single-family dwelling is entitled to site an accessory dwelling on that lot.
Petitioners also argue that some EC standards that apply to accessory dwellings are not “regulations relating to siting and design.” Finally, Petitioners further argue that some EC standards that apply to accessory dwellings and which are “regulations relating to siting and design” are not “reasonable.” See n 7.

The city responds, initially, that Petitioners are precluded from challenging existing EC standards that the city applied to the New Zones because the Ordinances do not amend those existing standards. According to the city, because the city did not intend to fully implement SB 1051 with the adoption of the Ordinances, but only intended to amend the EC to “allow” accessory dwellings in compliance with ORS 197.312(5), the existing standards in the EC are not subject to challenge at or review by LUBA for a determination of whether those existing standards are “reasonable local regulations relating to siting and design.” In support of its argument, the city cites Volny v. City of Bend, 37 Or LUBA 493, aff’d 168 Or App 516, 4 P3d 768 (2000). In Volny, LUBA concluded that when the city amended the transportation element of the city’s comprehensive plan, the city was not required to also adopt a transportation systems plan in order to comply with the newly adopted Transportation Planning Rule at OAR 660-012-0000 et seq, where that comprehensive plan amendment was not intended to implement the Transportation Planning Rule.

Citing Homebuilders Assoc. v. City of Eugene, 41 Or LUBA 370, 388 (2002), HBA and HLA respond that in endeavoring to comply with SB 1051, the city applied existing standards to a new use — accessory dwellings in the New Zones — for the first time, and therefore those existing standards are subject to review for compliance with ORS 197.312(5). In Home Builders, LUBA agreed with the petitioners that the city’s “carried-forward” provisions were subject to review for compliance with the needed housing statutes that the legislation intended to implement, even though the carried-forward provisions were either unamended or slightly amended when they were carried forward. Id. That was so because the city’s action was intended to comply with new statutory requirements. Id.

We agree with Petitioners that the existing EC standards that now apply to accessory dwellings in the New Zones (which we refer to here as the carried-forward provisions) are subject to review for compliance with ORS 197.312(5). The city apparently intended to only partially implement SB 1051 and perhaps thus limit review of the Ordinances to only the changes made, consistent with Volny. That partial implementation approach might have had the effect of limiting review over the carried-forward provisions had the city not also chosen to apply the existing standards in the New Zones. However, having chosen to implement ORS 197.312(5) and apply (carry forward) existing EC standards to accessory dwellings in the New Zones for the first time, the city’s action more closely, although not completely, resembles the situation that occurred in Home Builders. Had the city chosen to amend the EC to allow accessory dwellings in the New Zones, but without
importing existing standards applicable to accessory dwellings, that action would have more closely resembled the situation in *Volny*. But by applying existing EC standards for the first time in the New Zones, the city in effect adopted those standards for the first time in the New Zones, and accordingly we agree with HBA that they are subject to review for compliance with ORS 197.312(5) as to the New Zones.

The problem that arises from our disposition of that issue, however, is that the city’s decision simply does not address, and the city adopted no findings, evaluating whether the existing EC standards that the city carried forward are “reasonable local regulations relating to siting and design” within the meaning of ORS 197.312(5)(a). In other words, there is nothing in the Ordinances or in the findings supporting the Ordinances for LUBA to review. While the meaning of the phrase “reasonable local regulations relating to siting and design” is a question of statutory interpretation, the legislative allowance for cities to “subject” accessory dwellings “to” those regulations leaves with cities some measure of local regulatory authority over accessory dwellings. In other words, the reach of the regulatory allowance accorded cities under ORS 197.312(5) is mostly, but not purely, a matter of state law, because it leaves cities to decide in the first instance which of their “local regulations” are “reasonable” “siting and design” standards that the cities can apply to accessory dwellings. Given that SB 1051 was recently enacted, there is scant legislative history for SB 1051 that assists in resolving the questions presented in these assignments of error, and there are no existing administrative rules that define or interpret its operative terms, we think the better course at this point is to remand the Ordinances to the city for the city to consider in the first instance whether the existing EC standards that the city applied for the first time in the New Zones are “reasonable local regulations relating to siting and design.”

Therefore, except for the arguments that we address below regarding the S-JW Zone, we do not consider Petitioners’ arguments regarding specific EC provisions that Petitioners argue are not “reasonable local regulations relating to siting and design” because they are either not “regulations relating to siting and design” or are not “reasonable.” On remand, the city should at a minimum address Petitioners’ arguments and determine whether the existing EC standards that the city applied to the New Zones fall within the statute’s allowance for local regulation of accessory dwellings.

C. The S-JW Zone Allows “An Additional One Family Dwelling”

HBA’s and 1000 Friends’ petitions for review challenge the provisions of Ordinance 20594, section 15. That section amended EC 9.3615 to add section (2), which allows in the S-JW Zone “an additional (interior, attached or detached) residential structure that is used in connection with or that is accessory to a single family dwelling” as an “additional ‘One-Family Dwelling’ and not as an ‘Accessory Dwelling.’” According to HBA and 1000 Friends, EC 9.3615(2) “bans” accessory dwellings in the S-JW Zone. HBA and 1000 Friends argue that the
S-JW Zone does not allow accessory dwellings, presumably focusing on the language quoted above “and not as an ‘Accessory Dwelling.’”

The city responds, and we agree, that accessory dwellings are allowed in the S-JW Zone because EC 9.3615(2) now allows the exact type of dwellings that SB 1051 defines as an “accessory dwelling.” As the city puts it, “[w]hether it is called an [accessory dwelling unit] ADU or an additional one-family dwelling is irrelevant.” Response Brief 32. Nothing in SB 1051 or elsewhere cited to our attention requires the city use the term “accessory dwelling unit” instead of a synonymous term.

1000 Friends also challenges the EC Table 9.3625 standards that prohibit more than one dwelling on a lot that is less than 4,500 square feet, and argues that that provision in EC Table 9.3625 is not a “reasonable local regulation relating to siting and design.” However, EC 9.3625 is not one of the “carried-forward provisions,” but one that applied in the S-JW zone prior to the adoption of Ordinance 20594. Ordinance 20594 did not amend EC Table 9.3625 at all. Accordingly, we agree with the city that because EC 9.3625 applied in the S-JW zone prior to the adoption of Ordinance 20594, and was not amended by Ordinance 20594, EC 9.3625 may not be challenged in this appeal of Ordinance 20594.

D. Conclusion

HBA’s first assignment of error and HLA’s first assignment of error are sustained, in part. We do not reach HBA’s second and third assignments of error, portions of HLA’s first assignment of error, or 1000 Friends’ second assignment of error.

HBA’s fourth assignment of error and 1000 Friends’ first assignment of error are denied.

HLA’S SECOND ASSIGNMENT OF ERROR

In its second assignment of error, HLA argues that the city’s findings are inadequate to explain why the Ordinances are consistent with a number of Metro Plan policies (the regional comprehensive plan for the cities of Eugene and Springfield) and a number of policies of Envision Eugene, the city’s comprehensive plan. Generally, legislative decisions such as the challenged decision are not required to be supported by the detailed findings that are typically required for quasi-judicial land use decisions. For legislative land use decisions, the city may rely on findings as well as arguments in its brief and accessible material in the record to establish that applicable legal standards are satisfied. Citizens Against Irresponsible Growth v. Metro, 179 Or App 12, 16 n 6, 38 P3d 956 (2002).
A. Metro Plan Policies A.13, A.17 and A.18

HLA first argues that the city’s findings regarding Metro Plan Residential Land Use and Housing Element (Housing Element) Policies A.13, A.17, and A. 18 are “incorrect” because in three city zones the Ordinances applied standards to the New Zones that prohibit accessory dwellings on lots that do not meet minimum lots size or dimensional standards. HLA Petition for Review 35.

Accordingly, HLA argues, the city’s finding that the Ordinances “[i]ncrease overall density * * * by creating more opportunities for effectively designed in-fill” and “[p]rovide opportunities for a full range of choice in housing type, density, size, cost, and location” in the city is not accurate. Housing Element Policies A.17, A.19.

The city responds, and we agree, that Ordinances that allow accessory dwellings for the first time in seven of the city’s zones create infill development and provide for more choice in housing, consistent with the applicable Housing Element Policies. The city reasonably found that the Ordinances create more opportunity for infill and provide opportunities for a full range of housing.


HLA next argues that the city failed to adopt findings addressing Housing Element Policies A.2, A.10, A.14, A.28, A.30, A.31, A.32, A.33, and A.34.

The city responds that Policy A.2 does not apply to the city’s decision to adopt the Ordinances because the Ordinances do not amend the zoning of any property within the city’s UGB. We agree with the city.

The city also responds that Policy A.10 is phrased in aspirational terms and does not apply, and in the alternative, that the Ordinances are consistent with Policy A.10 because the Ordinances “[p]romote higher residential density.” Again, we agree with the city. Amendments to the EC that allow accessory dwellings in the New Zones in which they were not previously allowed “[p]romote higher residential density.”

The city’s response brief provides reasons why the city was not required to consider any of the remaining Housing Element Policies in its decision to adopt the Ordinances. We have reviewed HLA’s arguments and the city’s responses,

and the cited Housing Element Policies can be grouped into two categories. The first category includes policies that do not contain language that references the city’s zoning and development regulations. These are policies A.28, A.30, A.32, and A.34. We agree with the city that the city was not required, in adopting the Ordinances that amend the EC, to consider these policies.
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Policies A.14, A.31, and A.33, on the other hand, all contain language referring to the city’s review or consideration of local zoning and development regulations. We conclude that, where the Ordinances amend the local zoning and development regulations even for the limited purpose of implementing SB 1051, it is not apparent why the city is not required to consider these policies in amending the EC. The city cites nothing in the record indicating that the city council considered whether the Ordinances are consistent with these policies.

C. Envision Eugene Comprehensive Plan

HLA also argues that the city’s findings fail to address language in the introduction section to the Envision Eugene Comprehensive Plan that describes several values that guide the city’s planning efforts: “2. Provide Housing Affordable to all income levels; * * * 4. Promote compact urban development and efficient transportation options.” See n 11. HLA also argues that the city’s findings fail to address Envision Eugene Comprehensive Plan Economic Development Chapter Policy 3.3, which states in part that one economic development policy is to “[e]xpand[ ] Eugene’s assets. Recognize and enhance special areas of strength and local assets that attract sectors such as tourism, hospitality, and retirement living.” Finally, HLA argues that the city erred in failing to comply with Envision Eugene Comprehensive Plan, Administration and Implementation Chapter, Policy 10.8 and 10.9 by evaluating data from the city’s growth monitoring program in adopting the Ordinances.

The city responds that the city has not adopted a housing chapter for the Envision Eugene plan, so there are no Envision Eugene plan policies that apply to the city’s decision. The city also responds that the city was not required to consider the provisions from the introduction section to the Envision Eugene plan cited by HLA because the introduction section explains the role of introductory text, goals, and policies, and states that introductory text “is provided for general explanatory purposes only.” Response Brief 50. Finally, the city responds that the city was not required to consider data collected from the city’s newly established growth monitoring program, even if that data existed, because “[l]ocal data about growth could not override a directive from the Oregon legislature” to allow accessory dwellings. Response Brief 53. We agree with the city on all points.

HLA’s second assignment of error is sustained, in part.

HLA’S THIRD ASSIGNMENT OF ERROR

In its third assignment of error, HLA argues that the Ordinances are inconsistent with the Fair Housing Act (FHA), 42 USC sections 3601-3619, and the Americans with Disabilities Act (ADA), 42 USC sections 12101-12213. HLA argues that the Ordinances will result in disparate
impacts on access to housing for individuals who possess protected characteristics (race, color, religion, sex, disability, familial status, or national origin) under the FHA, and will result in discrimination against disabled persons protected from discrimination under the ADA, and therefore the Ordinances violate both federal laws.

The present appeal involves a facial challenge to a legislative decision. In such a context, HLA must demonstrate that the Ordinances are facially inconsistent with applicable law and are incapable of being applied consistently with controlling law. See Benson v. City of Portland, 119 Or App 406, 410, 850 P2d 416, rev den 318 Or 24 (1993) (in considering a facial challenge to legislation as inconsistent with applicable law the question is whether the legislation is capable of any permissible applications that are consistent with law); Children’s Alliance v. City of Bellevue, 950 F Supp 1491, 1496 (WD Wash 1997) (explaining the test for demonstrating a prima facie disparate treatment violation of the FHA is whether an ordinance on its face expressly treats members of a protected class differently than others who are similarly situated).

In support of its argument, HLA points to EC 9.2751(17)(c)(8), which limits occupancy of an accessory dwelling in some cases to two persons, and EC 9.2751(17)(c)(4), which restricts the amount of space on a lot that may be used for vehicle storage, and argues that such standards will disparately impact protected classes. HLA also argues that the prohibitions in EC 9.2741(2) on accessory dwellings on alley access lots, and in EC 9.2751(17)(c)(1) on accessory dwellings on lots smaller than 7,500 square feet in some zoning districts, will disparately impact protected classes.

The city responds, again, that HLA may not challenge unamended standards that the Ordinances applied for the first time to the New Zones, and we reject that response for the same reasons described above. As to the New Zones, in which the accessory dwelling standards were applied for the first time, HLA may challenge those standards in those New Zones.

However, HLA has not satisfied its burden to demonstrate that the standards that the Ordinances applied for the first time in the New Zones are incapable of being applied consistently with the FHA or the ADA under any circumstances where they may be applied. HLA does not point to any evidence in the record to support its claims, and its arguments do not establish that the cited standards are incapable in all circumstances of being applied consistently with the FHA or the ADA.

HLA’s third assignment of error is denied.

The city’s decision is remanded.

Footnotes:

1. We sometimes refer to HBA, HLA and 1000 Friends of Oregon (1000 Friends) collectively in this opinion as Petitioners.
Chapter 7—Strategies to Promote Affordable Housing Through Density Increases

2. The city also points out that ORS 197.646(3) provides that a remedy for a city’s failure to timely amend its land use regulations to implement a new land use statute is to petition the Land Conservation and Development Commission (LCDC) for enforcement pursuant to ORS 197.319 to 197.335.

3. Because other legislation relating to land use has included direction to a local government to amend its land use regulations and deadlines for implementations of the amendments, the legislature clearly knows how to impose that requirement. See, e.g., Oregon Laws 2018, Chapter 15, section 5 (“A county shall amend its land use regulations to conform to the requirements of sections 2, 3 and 4 of this 2018 Act”); Oregon Laws 2010, Chapter 84, section 5 (“A county shall amend its land use regulations to conform to the requirements of sections 2, 3 and 4 of this 2010 Act”); Oregon Laws 2009, Chapter 850, section 16 (“On or before December 31, 2010, a county shall amend its land use regulations to conform to the amendments to ORS 215.213 by section 1 of this 2009 Act or ORS 215.283 by section 2 of this 2009 Act, whichever is applicable”).

4. These arguments are included in HBA’s fourth, fifth, sixth, seventh, eighth and ninth arguments in its first assignment of error and HBA’s fourth assignment of error; HLA’s first assignment of error at HLA Petition for Review 19-23; and 1000 Friends’ first and second assignments of error.

5. These arguments are included in HBA’s second assignment of error; HLA’s first assignment of error at Petition for Review 25-26; and 1000 Friends’ second assignment of error.

6. These arguments are included in HBA’s third assignment of error; HLA’s first assignment of error at Petition for Review 27-32; and 1000 Friends’ second assignment of error.

7. Petitioners challenge EC 9.2741(2), which prohibits accessory dwellings on alley access lots; EC 9.2751(17)(a) and EC 9.2775(4), which prohibits attached accessory dwellings on flag lots, and on lots under a certain size and with certain dimensions; EC 9.2775(4)(c), which prohibits accessory dwellings on flag lots that were created before August 29, 2014; and EC 9.2751(17)(c)(1)-(2), which provides that in some neighborhoods in the city, accessory dwellings are prohibited on lots smaller than 7,500 square feet and that lack certain dimensions that provide for open space on the lot.

8. The city council should also consider adopting findings addressing Petitioners’ argument that minimum lot size requirements for accessory dwellings and alley access lot prohibitions on accessory dwellings are not “reasonable local regulations related to siting and design.”

9. On remand, the city should also consider whether ORS 197.831 applies to the Ordinances, and if so, whether the Ordinances are “capable of being imposed only in a clear and objective manner.”

10. HBA’s fourth assignment of error; 1000 Friends’ first assignment of error.

11. Until recently, the cities of Eugene and Springfield shared an urban growth boundary (UGB) and a single regional comprehensive plan, the Metro Plan. Since creating separate UGBs,
Eugene has adopted its own comprehensive plan, Envision Eugene, but the city has not yet adopted an Envision Eugene chapter that addresses Statewide Planning Goal 10 (Housing). According to the city, the Metro Plan’s Housing apply in the city. Response Brief 39-40. Petitioners do not dispute this contention.

12. The city adopted findings that the Ordinances are consistent with Housing Element Policies A.13, A.17, and A.18, which provide:

“A.13 Increase overall residential density in the metropolitan area by creating more opportunities for effectively designed in-fill, redevelopment, and mixed use while considering impacts of increased residential density on historic, existing and future neighborhoods.

“* * * * *

“A.17 Provide opportunities for a full range of choice in housing type, density, size, cost, and location.

“A.18 Encourage a mix of structure types and densities within residential designations by reviewing and, if necessary, amending local zoning and development regulations.”

13. Housing Element Policy A.2 is “Residentially designated land within the UGB should be zoned consistent with the Metro Plan and applicable plans and policies; however, existing agricultural zoning may be continued within the area between the city limits and the UGB until rezoned for urban uses.” (Emphasis in original.)

14. Housing Element Policy A.10 is “Promote higher residential density inside the UGB that utilizes existing infrastructure, improves the efficiency of public services and facilities, and conserves rural resource lands outside the UGB.”

15. These policies are:

“A.28 Seek to maintain and increase the supply of rental housing and increase home ownership options for low- and very low-income households by providing economic and other incentives, such as density bonuses, to developers that agree to provide needed below market and service-enhanced housing in the community.

“A.30 Balance the need to provide a sufficient amount of land to accommodate affordable housing with the community’s goals to maintain a compact urban form.

“A.32 Encourage the development of affordable housing for special needs populations that may include service delivery enhancements on-site.

“A.34 Protect all persons from housing discrimination.”
These policies are:

“A.14 Review local zoning and development regulations periodically to remove barriers to higher density housing and to make provision for a full range of housing options.

“A.31 Consider the unique housing problems experienced by special needs populations, including the homeless, through review of local zoning and development regulations, other codes and public safety regulations to accommodate these special needs.

“A.33 Consider local zoning and development regulations impact on the cost of housing.”

Policy 10.8 is to develop and maintain monitoring efforts to track “quality of life indicators” including creating walkable, compatible and affordable neighborhoods.” Policy 10.9 is to develop and maintain a growth monitoring program to track official population forecasts, housing trends, economic development trends, and the rate of development of residential lands in the city.
NICHOLAS KAMPS-HUGHES, Petitioner,  
v.  
CITY OF EUGENE, Respondent.  

LUBA No. 2018-091  
LAND USE BOARD OF APPEALS OF THE STATE OF OREGON  

November 29, 2018  

FINAL OPINION AND ORDER  

Appeal from City of Eugene.  

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was the Law Office of Bill Kloos PC.  

Lauren A. Sommers, Assistant City Attorney, Eugene, filed the response brief and argued on behalf of respondent.  

RYAN, Board Chair; BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.  

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.  

Page 2  
Opinion by Ryan.  

NATURE OF THE DECISION  

Petitioner appeals a zone verification decision issued to petitioner by a city planner.  

FACTS  

Petitioner owns property that is zoned R-1 and is accessed only by an alley. In July 2018, petitioner submitted a zone verification request to the city, requesting a determination whether an 800 square-foot detached accessory dwelling is a permitted use on his property. A city planner issued a zone verification decision that concluded that a detached accessory dwelling is not a permitted use on petitioner’s property because Eugene Code (EC) 9.2741(2) prohibits an accessory dwelling on alley access lots. This appeal followed.  

ASSIGNMENT OF ERROR  

In his assignment of error, petitioner argues that the city’s decision improperly failed to consider ORS 197.312(5) in evaluating his zoning verification request, and that ORS 197.312(5) requires the city to allow a detached accessory dwelling on petitioner’s property, notwithstanding the prohibition in EC 9.2741(2) on accessory dwellings on alley access lots.1 We
briefly summarize ORS 197.312(5) and related legislation before we turn to the assignment of error.

In 2017, the Oregon legislature enacted Senate Bill 1051 (SB 1051), at Oregon Laws 2017 Chapter 745, sections 1-14. As relevant here, SB 1051, Section 6 amended ORS 197.312 to add subsection (5), which now provides, in part:

“(a) A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design[.]”

SB 1051, Section 12 provided for a delayed operative date for the amendments to ORS 197.312(5): July 1, 2018. SB 1051, Section 13(3) provided that the provisions of ORS 197.312(5) apply to “permit applications for accessory dwelling units submitted for review on or after July 1, 2018.” As noted, petitioner submitted his zone verification request after the operative date of SB 1051.

The crux of petitioner’s assignment of error is that the city was required to consider ORS 197.312(5) in evaluating his zone verification request, and pursuant to ORS 197.312(5), the city may not prohibit an accessory dwelling on petitioner’s property because ORS 197.312(5)(a) provides that the city “shall allow” accessory dwellings in all zones in the city in which a detached single family dwelling is allowed. Accordingly, we understand petitioner to argue, while the city’s conclusion that EC 9.2741(2) prohibits an accessory dwelling on petitioner’s alley access lot is correct under the EC, that conclusion is not correct when considering ORS 197.312(5)(a).

A. Waiver

The city responds initially that petitioner is precluded from raising the issues regarding ORS 197.312(5) because the issue was not raised during the proceedings before the city. ORS 197.835(3) provides in relevant part that “[i]ssues [raised at LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195[.]” The city cites ORS 227.175(11)(b), which provides that zone verification decisions such as the challenged decision shall “[b]e subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision,” and argues that pursuant to ORS 197.835(3), LUBA’s review of limited land use decisions is limited to issues raised before the city.

ORS 197.195(3)(c)(A) provides that the notice and procedures used by a local government must state that issues which may provide the basis for an appeal to LUBA must be
raised in writing prior to the expiration of the 14-day comment period prior to a decision. In *ONRC v. City of Oregon City*, 28 Or LUBA 263, 267 (1994), we held that our review of limited land use decisions is limited to issues raised below, unless the local government did not satisfy the procedural requirements of ORS 197.195. Here, the city did not follow or satisfy the procedural requirements of ORS 197.195 and the city does not take the position that it did. Accordingly, our review of the challenged decision is not limited to the issues raised below.

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**B. ORS 197.312(5) Is Not Limited to Only Applications for a Statutory Permit**

The city next responds that SB 1051, Section 13(3) limits application of ORS 197.312(5) only to applications for a “permit,” as defined in ORS 227.160(2).4 SB 1051, Section 13 provides that “the amendments to ORS 197.312 by Section 6 of this 2017 Act apply to permit applications for accessory dwelling units submitted for review on or after July 1, 2018.” According to the city, because a zone verification decision is, by definition in ORS 227.160(2)(b), not a statutory permit, ORS 197.312(5) does not apply, and the city planner correctly concluded that EC 9.2741(2) prohibits an accessory dwelling on petitioner’s property.

We disagree with the city. First, SB 1051, Section 13(3) does not cross reference or otherwise cite the definition of “permit” in ORS Chapter 227.160(2), and similarly the definition of “permit” in ORS 227.160(2) limits its use “[a]s

Page 7

used in ORS 227.160 to 227.186.” Absent any reference to the definition at ORS 227.160(2), or other definition included in SB 1051, it is not clear that the legislature intended the word “permit” or the phrase “permit application” to be limited to statutory permits.

Second, we understand SB 1051, Section 13(3) to have provided for a grace period for application of the new law, before which the provisions of ORS 197.312(5) did not apply, and after which the provisions applied.5 We do not understand SB 1051, Section 13(3) to have limited the application of ORS 197.312(5) only to statutory permits.

Third, as petitioner points out in his reply brief, ORS 197.312(5)(a) is a separate provision of SB 1051 from Section 13(3), and it requires the city to “allow” accessory dwellings in all zones in the city in which a detached single family dwelling is allowed, including the R-1 zone. The city may limit accessory dwellings in those zones only pursuant to “reasonable local regulations relating to siting and design.”

**C. “Reasonable * * * Regulations Relating to Siting and Design”**

Petitioner next argues that EC 9.2741(2) is not a “reasonable local regulation relating to siting and design,” and explains why petitioner believes his interpretation is the correct interpretation of the phrase as used in ORS
197.312(5). The city responds that EC 9.2741(2) is a “reasonable local regulation relating to siting and design,” and explains why that is so.

Petitioner asks LUBA to “order[] [the City] to reissue the decision and confirm the validity of the development proposal as requested.” Petition for Review 12. The city requests that if LUBA concludes that the city should have considered ORS 197.312(5) in evaluating petitioner’s zone verification request, that LUBA remand the decision to the city in order for the city to evaluate whether EC 9.2741(2) is a “reasonable local regulation relating to siting and design” in the first instance.

We agree with the city that the proper remedy is to remand the decision to the city in order for the city to consider in the first instance whether EC 9.2741(2) is a “reasonable local regulation relating to siting and design” within the meaning of ORS 197.312(5). OAR 661-010-0073(2)(d).

The assignment of error is sustained.

The city’s decision is remanded.

Footnotes:

1. EC 9.1080 provides:

“Zone Verification. Zone verification is used by the city to evaluate whether a proposed building or land use activity would be a permitted use or be subject to land use application approval or special standards applicable to the category of use and the zone of the subject property. The city may use zone verification as part of the review for a land use application or development permit, or where required by this land use code. As part of the zone verification, the planning and development director shall determine whether uses not specifically identified on the allowed use list for that zone are permitted, permitted subject to an approved conditional use permit or other land use permit, or prohibited, or whether a land use review is required due to the characteristics of the development site or the proposed site. This determination shall be based on the requirements applicable to the zone, applicable standards, and on the operating characteristics of the proposed use, building bulk and size, parking demand, and traffic generation. Requests for zone verification shall be submitted on a form approved by the city manager and be accompanied by a fee pursuant to EC Chapter 2.”

2. In January 2018, the city began a process to amend the EC to implement SB 1051. In June 2018, the city adopted two ordinances, Ordinance 20595 and Ordinance 20594 (the Ordinances) to implement in part SB 1051. In an opinion issued this date, we remanded the Ordinances. Home Builders Ass’n of Lane County v. City of Eugene, ___ Or LUBA ___ (LUBA Nos. 2018-063/064, November 29, 2018).
ORS 197.646(1) requires local governments to amend their land use regulations to implement “new requirement[s]” in a goal, statute or administrative rule, and unless and until a local government does so, the new requirement applies directly to the local government’s land use decisions, pursuant to ORS 197.646(3).

ORS 227.160 provides:

“(2) ‘Permit’ means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. ‘Permit’ does not include:

“(a) A limited land use decision as defined in ORS 197.015;

“(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]”

We note that SB 1051, Section 13(3) is not included in the codified version of ORS 197.312(5).
Chapter 7—Strategies to Promote Affordable Housing Through Density Increases

Residential Infill Project Summary

REVISED PROPOSED DRAFT

Shaping the future of our neighborhoods together

Portland’s neighborhoods have always been places of change. So it’s important to work together as a community to make sure that change is for the better and benefits all of us.

By 2035, Portland will grow by more than 100,000 households. The city’s popularity, changes in housing demand and other factors have resulted in a housing shortage that has driven up housing costs. Also, housing market changes have made it more attractive to construct large, expensive new houses in older residential neighborhoods — even as the number of people per household is getting smaller.

To address these issues around growth and change, the City of Portland is taking a look at the rules that determine the types of housing allowed in our neighborhoods.

This proposal would allow more housing units to be built in residential neighborhoods, but only if they follow new limits on the size of new buildings.

How this project is organized

This project addresses these concerns through the following topics:

As Portlanders, we have an opportunity to update the rules that shape our residential neighborhoods so that more people can live in them, while limiting the construction of very large new houses.

The proposals in this document would add more housing options for people’s changing needs.

Take a look inside and see how they have evolved based on public testimony and Planning and Sustainability Commission direction.

February 2019

www.portlandoregon.gov/bps/infill

Current Advanced Topics in Real Estate and Land Use 7–53
HOUSING OPTIONS AND SCALE

1. Allow for more housing types (R7, R5 and R2.5 zones).
   a. Allow for duplexes, triplexes and fourplexes.
   b. Allow a house to have two accessory dwelling units (ADUs) or a duplex to have one ADU.
   c. Limit lots with the following constraints to a house plus one ADU or a corner lot duplex:
      - 100-year floodplain
      - Areas identified in the natural resource inventory (NRI)
      - Landslide hazard areas
      - Unpaved streets
   d. Set a minimum lot size for lots with 1 or 2 units and a larger lot size for lots with 3 or 4 units.

2. Limit the overall size of buildings (R7, R5 and R2.5 zones).
   a. Set a total maximum building size, measured by floor-to-area ratio (FAR), that is less than what is achievable today.
   b. Scale the FAR to increase as the number of units increases on the site.
   c. Exclude attics and basements from FAR.
   d. Allow a bonus increase in FAR on the site if:
      - At least one of the units is affordable (80% median family income); or
      - Units are added to a site with an existing house and the street-facing facade of the house remains substantially unaltered.

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<th>Min. lot size</th>
<th>FAR Base</th>
<th>FAR With bonus</th>
<th>Min. lot size</th>
<th>FAR Base</th>
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<td>3</td>
<td>Triplex or duplex + ADU</td>
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<td>Fourplex</td>
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<td>1.35 FAR</td>
<td>1.75 FAR</td>
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</table>

Current allowed FAR (based on setbacks, height, building coverage)
**3.** For 3 or 4 units, at least 1 unit must be visitable (R7, R5 and R2.5 zones). The visitable unit must have a no step entry, wider doorways, with a bathroom and living area on the ground floor.

**4.** Require at least 2 dwelling units when developing a vacant double-sized lot (R7, R5 and R2.5 zones).

**5.** Rezone half of the historically narrow lots from R5 to R2.5. Allow the remainder of the historically narrow lots in the R5 zone to be built with pairs of attached houses.

**6.** Allow small flag lots through property line adjustments (R5 and R2.5 zones).
   a. Require that the existing house be retained and exempt from FAR limits at the time of the property line adjustment review.
   b. In the R5 zone, limit the height of the house on the flag lot to 20 feet, limit its size to 1,000 square feet and require additional exterior design elements.

**7.** Continue to allow different building forms and site arrangements through a planned development review (R7, R5, and R2.5 zones). Align density allowances and review procedure thresholds between planned developments and land divisions.
The Residential Infill Project

Legend

- Proposed ‘z’ Constrained Sites
  - Overlay Zone.
    - (Additional housing types not allowed)
  - R7, R5, R2.5 Base Zones
    - (Additional housing types allowed)
  - RF, R20, R10 Base Zones
    - (Additional housing types not allowed)
Lots with the proposed ‘z’ overlay are constrained by natural hazard or natural resources and are not eligible for the additional housing types shown in Proposal #1. The ‘z’ overlay does not reflect lots that do not meet minimum lot size requirements. Searchable parcel-specific information is available through the interactive Map App, [www.portlandoregon.gov/bps/infill/mapapp](http://www.portlandoregon.gov/bps/infill/mapapp).
Chapter 7—Strategies to Promote Affordable Housing Through Density Increases

**BUILDING DESIGN**

8. **Revise how height is measured (all zones).**
   a. Measure height from the lowest point near the house, not the highest point.
   b. Exclude small dormers from the height measurement calculation.
   c. Continue to allow 2-½ story houses (30 feet high) on standard lots.

9. **Address building features and articulation.**
   a. Limit how high the front door can be above the ground (exempt lots in floodplains).
   b. Allow eaves to project up to 2 feet into setbacks.
   c. Allow the front door of each corner lot duplex unit to face the same street.

10. **Provide greater flexibility for Accessory Dwelling Unit (ADU) design.**
    a. Maintain current ADU size allowances.
    b. Allow basement ADU conversions to exceed the 800 square feet/75%-size cap in an existing house.
    c. Allow the front door of an internal ADU to face the street.

11. **Modify parking rules.**
    a. Eliminate minimum parking requirements for residential uses in single-dwelling zones.
    b. If a lot abuts an alley, require parking access from the alley when parking is provided.
    c. For narrow lots, duplexes, triplexes and fourplexes, prohibit driveways and parking between the building and the street unless the driveway accesses a garage or parking space behind the front of the building. Limit garages to 50% of the building façade.

12. **Improve building design on lots less than 32 feet wide.**
    a. Limit the height of a detached house to 1-½ times its width.
    b. Require attached houses on lots 25 feet wide and narrower.

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**Example of a pair of attached houses on 25-foot-wide lots**
Proposed Base Zone Map Changes (R5 to R2.5)

Small, shorter detached houses allowed on 26- to 32-foot-wide lots.
Chapter 7—Strategies to Promote Affordable Housing Through Density Increases

Residential Infill Project  |  LEARN MORE

Phase I: Concept Development
The concepts for these proposals were developed in Phase I, which took place in 2015 and 2016. In addition to the engagement of the 26-member Stakeholder Advisory Committee, more than 7,000 people participated in an online questionnaire during Phase I. After hearing public testimony, City Council unanimously accepted the Residential Infill Project Concept Report with amendments in 2016.

Phase II: Code and Map Amendments
Staff received more than 3,700 comments on the Discussion Draft, which helped refine the Proposed Draft. The Proposed Draft includes the Zoning Code and Zoning Map amendments to implement the concepts from Phase I.

A Revised Proposal
During two public hearings in May 2018, the Planning and Sustainability Commission heard from more than 130 people. The PSC also received more than 1,200 written pieces of testimony. In response to this public testimony, the Commission held eight work sessions with staff between June and September, resulting in several key changes from the original Proposed Draft. This required substantial changes to the Zoning Code and Zoning Map amendments to implement these proposals, which are summarized in this document and on the project website.

Learn more
Visit our project website and the interactive Map App on any computer, tablet or smart phone.

1. Project website: www.portlandoregon.gov/bps/infill
   Get the latest news, view documents and more.

   Learn how the proposals may affect individual properties across Portland. Type in the property address to see proposed changes that may affect your property.

3. Ask staff a question. Call 503-823-0195 or email us at residential.infill@portlandoregon.gov.

Next steps
Staff will return to the Planning and Sustainability Commission with the complete Revised Proposed Draft. The Commission will review the revised draft to ensure the changes are consistent with their direction and then make a final vote. The next draft of the proposal – the Recommended Draft – will incorporate any final changes the PSC makes to the Revised Proposed Draft. The Recommended Draft will be forwarded to City Council for additional public testimony and hearings, deliberations, possible amendments and a vote.

The Recommended Draft is tentatively scheduled to be heard by City Council in Summer 2019.
House Bill 2001

Sponsored by Representative KOTEK (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Requires cities with population greater than 10,000 and counties with population greater than 15,000 to allow middle housing in lands zoned for single-family dwellings within urban growth boundary. Requires Land Conservation and Development Commission to draft model code. Requires cities and counties to amend their comprehensive plan and land use regulations to conform with requirement by December 31, 2020, or to directly apply model code developed by commission. Requires Department of Consumer and Business Services to amend Low-Rise Residential Dwelling Code to apply to low-rise middle housing and to amend State of Oregon Structural Specialty Code to not apply to low-rise middle housing.

Allows attorney fees, beginning January 1, 2021, for prevailing applicant whose proposal to develop middle housing is denied.

Prohibits conditioning approval of accessory dwelling unit within urban growth boundary on off-street parking availability or owner occupancy.

Prohibits local governments from requiring system development charges to be paid by developer of middle housing before occupancy permit is issued.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2019 Act is added to and made a part of ORS chapter 197.

SECTION 2. (1) As used in this section:

(a) “Cottage clusters” means groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard.

(b) “Middle housing” means:

(A) Duplexes;
(B) Triplexes;
(C) Quadplexes; and
(D) Cottage clusters.

(2) Each city with a population greater than 10,000 and each county with a population greater than 15,000 shall allow, within its urban growth boundary in areas zoned for detached single-family dwellings, the development of at least one middle housing type on each lot, subject to reasonable local regulations related to siting and design.

SECTION 3. No later than December 31, 2020:

(1) Notwithstanding ORS 197.646, each local government subject to section 2 of this 2019 Act shall update its comprehensive plan and land use regulations to implement section 2 of this 2019 Act.

(2) The Land Conservation and Development Commission, with the assistance of the Building Codes Division of the Department of Consumer and Business Services, shall develop a model middle housing code.

(3) A local government that has not adopted its own comprehensive plan and land use

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

LC 2887
regulations under subsection (1) of this section shall directly apply the model code developed
by the commission under subsection (2) of this section under ORS 197.646 (3).

SECTION 4. (1) It is the policy of the State of Oregon to reduce to the extent practicable
administrative and permitting costs and barriers to the construction of middle housing, as
defined in section 2 of this 2019 Act, while maintaining safety, public health and the general
welfare with respect to construction and occupancy.

(2) Notwithstanding ORS 455.035, on or before January 1, 2021, the Department of Con-
sumer and Business Services shall adopt changes to:

(a) The Low-Rise Residential Dwelling Code to apply the code to all middle housing types;
and

(b) The State of Oregon Structural Specialty Code to exempt all middle housing that is
three stories or less above grade from requirements of the code.

SECTION 5. Section 6 of this 2019 Act is added to and made a part of ORS 223.297 to
223.314.

SECTION 6. A local government may not require that a system development charge for
middle housing, as defined in section 2 of this 2019 Act, be paid prior to the issuance of an
occupancy permit for the dwelling. The local government may enforce the system develop-
ment charge by an encumbrance against the property, but may not charge any interest on
the system development charge prior to the issuance of the occupancy permit.

SECTION 7. ORS 197.312, as amended by section 7, chapter 15, Oregon Laws 2018, is amended
to read:

197.312. (1) A city or county may not by charter prohibit from all residential zones attached or
detached single-family housing, multifamily housing for both owner and renter occupancy or manu-
factured homes. A city or county may not by charter prohibit government assisted housing or impose
additional approval standards on government assisted housing that are not applied to similar but
unassisted housing.

(2)(a) A single-family dwelling for a farmworker and the farmworker's immediate family is a
permitted use in any residential or commercial zone that allows single-family dwellings as a per-
mitted use.

(b) A city or county may not impose a zoning requirement on the establishment and maintenance
of a single-family dwelling for a farmworker and the farmworker's immediate family in a residential
or commercial zone described in paragraph (a) of this subsection that is more restrictive than a
zoning requirement imposed on other single-family dwellings in the same zone.

(3)(a) Multifamily housing for farmworkers and farmworkers’ immediate families is a permitted
use in any residential or commercial zone that allows multifamily housing generally as a permitted
use.

(b) A city or county may not impose a zoning requirement on the establishment and maintenance
of multifamily housing for farmworkers and farmworkers’ immediate families in a residential or
commercial zone described in paragraph (a) of this subsection that is more restrictive than a zoning
requirement imposed on other multifamily housing in the same zone.

(4) A city or county may not prohibit a property owner or developer from maintaining a real
estate sales office in a subdivision or planned community containing more than 50 lots or dwelling
units for the sale of lots or dwelling units that remain available for sale to the public.

(5)(a) A city with a population greater than 2,500 or a county with a population greater than
15,000 shall allow in areas within the urban growth boundary that are zoned for detached single-
family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design.

(b) As used in this subsection,:

(A) “Accessory dwelling unit” means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling.

(B) “Reasonable local regulations relating to siting and design” does not include owner-occupancy requirements of either the primary or accessory structure or requirements to construct additional off-street parking.

(6) Subsection (5) of this section does not prohibit local governments from regulating vacation occupancies, as defined in ORS 90.100, to require owner-occupancy or off-street parking.

SECTION 8. Section 2 of this 2019 Act is amended to read:

Sec. 2.

(1) As used in this section:

(a) “Cottage clusters” means groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard.

(b) “Middle housing” means:

(A) Duplexes;

(B) Triplexes;

(C) Quadplexes; and

(D) Cottage clusters.

(2) Each city with a population greater than 10,000 and each county with a population greater than 15,000 shall allow, within its urban growth boundary in areas zoned for detached single-family dwellings, the development of at least one middle housing type on each lot, subject to reasonable local regulations related to siting and design.

(3) An applicant whose proposal to develop middle housing under this section is denied is entitled to attorney fees if the applicant is the prevailing party on an appeal to the Land Use Board of Appeals.

SECTION 9. (1) Sections 2, 3, 4 and 6 of this 2019 Act and the amendments to ORS 197.312 by section 7 of this 2019 Act become operative on January 1, 2020.

(2) The amendments to section 2 of this 2019 Act by section 8 of this 2019 Act become operative on January 1, 2021.

(3) The Land Conservation and Development Commission, the Department of Consumer and Business Services and the Residential and Manufactured Structures Board may take any actions before the operative date specified in subsection (1) of this section necessary to enable the commission to exercise, on or after the operative date specified in subsection (1) of this section, the duties required under section 3 of this 2019 Act.

SECTION 10. In addition to and not in lieu of any other appropriation, there is appropriated to the Land Conservation and Development Commission, for the biennium beginning July 1, 2019, out of the General Fund:

(1) The amount of $ for the purpose of enforcing section 3 (1) of this 2019 Act through enforcement actions as provided in ORS 197.319 to 197.335; and

(2) The amount of $ for the activities of the commission under section 3 (2) and (3) of this 2019 Act.

SECTION 11. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect
on its passage.
Strategies to Promote Affordable Housing Through Density Increases

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Presentation Outline

- Prior State legislation
  - Senate Bill 1051 (2017)

- Litigation
  - Homebuilders Association of Lane County and Housing Land Advocates et al. v. City of Eugene
  - Kamp-Hughes v. City of Eugene

- Emerging Local and State Legislation to Promote Density
  - Municipal Approaches
  - New State legislation
  - Policy considerations
Senate Bill 1051 (2017)

- Amended ORS Chapter 197
  - Redefined "needed housing" as housing for a variety of incomes including low, very low, and extremely low incomes, and housing on land zoned residential, mixed or commercial;
  - Expedited permits for affordable housing;
  - Strengthened requirements for clear and objective standards relating to the development of housing;
  - Provided a right for religious institutions to use their property to develop affordable housing; and
  - Required allowances of accessory dwelling units ("ADUs") in certain urban areas.

Senate Bill 1051

- Amended ORS 197.312, which now provides:
  - "A city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas [within the urban growth boundary that are] zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design."

- As used in this subsection, 'accessory dwelling unit' means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling." SB 1051 § 6 (emphasis added).
Senate Bill 1051

- The amendments to ORS 197.312 became operative on July 1, 2018, effectively giving jurisdictions one year to adjust to the new requirements. SB 1051 § 12.

- The law provided that the revised permit requirements were to be applied to permit applications for ADUs submitted for review on or after July 1, 2018. Id. § 13(3).

- The law was to be effective immediately upon its passage. Id. § 14.

Homebuilders Association of Lane County, Housing Land Advocates et al. v. City of Eugene

- The Eugene area is the second-most constrained housing market in the nation and nearly half of the community is cost burdened by the price of housing.

- The planning commission and the city council adopted two amendments to the local municipal code.
  - The code already had a reference to "secondary dwelling" in portions of the code, and the first ordinance replaced that term with "Accessory dwelling" to align with the terms in SB 1051.
  - The other ordinance amended the code's general residential use allowances to authorize ADUs as permitted uses in zones that allowed single family zoning. The ordinance imported from previously existing code sections development standards applicable to ADUs, many which petitioners asserted did not constitute allowable regulations.
Homebuilders Association of Lane County, Housing Land Advocates et al. v. City of Eugene

- Appeal Issue #1
- Municipal obligations to amend code language in line with new state statute
  - SB 1051 did not provide specific timeline
  - ORS 197.646 provides the general requirements for local government implementation of new statutory requirements
  - LCDC had not set timeline for jurisdictions to amend codes, therefore no obligation to immediately amend, but the state law applied directly.

ORS 197.646

ORS 197.646 is titled "Implementation of New Requirement in Goal, Rule or Statute; Rules," and provides:

"(1) A local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 to comply with a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals.

"(2)(a) The Department of Land Conservation and Development shall notify local governments when a new requirement in land use statutes, statewide land use planning goals or rules implementing the statutes or the goals requires changes to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan.

"(b) The Land Conservation and Development Commission shall establish, by rule, the time period within which an acknowledged comprehensive plan, an acknowledged regional framework plan and land use regulations implementing either plan must be in compliance with:
ORS 197.646 (cont.)

"(A) A new requirement in a land use statute, if the legislation does not specify a time period for compliance; and

"(B) A new requirement in a land use planning goal or rule adopted by the commission.

"(3) When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government’s land use decisions. The failure to adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335."

Homebuilders Association of Lane County, Housing Land Advocates et al. v. City of Eugene

- Appeal Issue #2: Reasonable Regulations Relating to Siting and Design
  - LUBA’s scope of review did not include ADU allowances that were already on the books, where the term “secondary dwellings” was merely replaced by “ADU”
  - LUBA determined that existing code standards regulating ADUs in zones where ADUs were newly-allowed (referred to as "carried-forward provisions") were subject to compliance with ORS 197.312(5).
Homebuilders Association of Lane County, Housing Land Advocates et al. v. City of Eugene

- Carried-forward provisions that arguably were either not reasonable or not related to siting and design:
  - Prohibited ADUs on alley-access lots
  - Prohibited attached ADUs on flag lots
  - Prohibited ADUs on lots under a certain size or with certain dimensions
  - Prohibited ADUs on lots that could not accommodate a certain open space
  - Limitation of an ADU’s maximum occupancy based on the number of rooms in a primary dwelling
  - Prohibited ADUs where the owner is not an occupant of one of the structures
  - Prohibited ADU development if parking requirements could not be met

LUBA considered "reasonable local regulations relating to siting and design" to be a question of statutory interpretation, with the legislative allowance for cities providing some measure of local regulatory authority over accessory dwellings.

LUBA then punt and failed to analyze any code provision, determining remand was appropriate because the city had not considered whether any of its provisions complied with the new law.
Homebuilders Association of Lane County, Housing Land Advocates et al. v. City of Eugene

- LUBA's statutory review obligations:
  - ORS 197.835(11)(a) requires that "[w]henever the findings, order and record are sufficient to allow review, and to the extent possible under the time constraints of ORS 197.830(14), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (9) of this section or limited land use decision described in ORS 197.828 and 197.185."

Kamp-Hughes v. City of Eugene

- Appeal of decision on a zoning verification request that asked whether an 800-square-foot ADU was permitted on an alley access lot.
- The city planner concluded the use was not permitted under the local code because ADUs on alley access lots were prohibited.
- On appeal, the city claimed that the decision was correct and not subject to ORS 197.312(5) because under section 13 of SB 1051, ORS 197.312(5) only applied to "permits" as defined at ORS 227.160(2), i.e., discretionary permits.
Kamp-Hughes v. City of Eugene

- LUBA rejected the argument, noting that ORS 197.312(5) does not cross reference the ORS 227 definition of permit, and that Section 5 of SB 1051 operated independently from Section 13, in that it placed limitations on a local jurisdiction’s ability to restrict allowances of ADUs regardless of permit issuances.

- LUBA remanded to allow for the city to consider in the first instance whether a site-specific prohibition of ADU development on an alley access lot constituted a reasonable local regulation relating to siting and design under ORS 197.312(5).

- Unclear how LUBA’s remand complies with ORS 197.835(11).

Emerging Legislation that Promotes Density

- City of Minneapolis (2018) allowance of triplexes in residential zones, abolish parking minimums and allow high-density buildings along transit corridors

- City of Seattle (2017 and 2019) upzoned select residential neighborhoods for taller and more dense construction, require developers to devote percentage of project to low income apartments or pay fee.

- City of Portland (ongoing) working on its Residential Infill Project to effectively upzone 95% of residential land
Emerging Legislation that Promotes Density

- HB 2001
  - Requires cities with population greater than 10,000 and counties with population greater than 15,000 to allow middle housing in lands zoned for single-family dwellings within urban growth boundary.
  - Requires Land Conservation and Development Commission to draft model code. Requires cities and counties to amend their comprehensive plan and land use regulations to conform with requirement by December 31, 2020, or to directly apply model code developed by commission.
- Ongoing amendments

Considerations Relating to Density Changes

- Existing public facilities and services; carry capacity
- Remedying racist zoning history
- Unintended demolition, gentrification, and displacement
- Community outreach and local control
- Variety of available housing structures
- Impacts to density allowance due to private contracting
- Federal Fair Housing Act and Americans With Disabilities Act