

# House Bill 2658

Sponsored by Representative GARRARD (Pre-session 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**.

Establishes different filing fees for participation in quasi-judicial review of local government decisions affecting land use for persons that are adversely affected by decisions and other persons that are eligible to intervene or petition for review.

## A BILL FOR AN ACT

1  
2 Relating to quasi-judicial review of local decisions affecting land use; creating new provisions; and  
3 amending ORS 196.115, 197.796, 197.830, 197.832, 197.835, 197.840 and 197.850.

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

5 **SECTION 1.** ORS 197.830 is amended to read:

6 197.830. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to  
7 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Ap-  
8 peals.

9 (2) Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review  
10 of a land use decision or limited land use decision if the person:

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

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

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

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

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

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

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

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

31 (c) A person who receives mailed notice of a decision made without a hearing under ORS 215.416

**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.

1 (11) or 227.175 (10) may appeal the decision to the board under this section within 21 days of re-  
 2 ceiving actual notice of the nature of the decision, if the mailed notice of the decision did not rea-  
 3 sonably describe the nature of the decision.

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

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

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

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

14 (6)(a) Except as provided in paragraph (b) of this subsection, the appeal periods described in  
 15 subsections (3), (4) and (5) of this section shall not exceed three years after the date of the decision.

16 (b) If notice of a hearing or an administrative decision made pursuant to ORS 197.195 or 197.763  
 17 is required but has not been provided, the provisions of paragraph (a) of this subsection do not ap-  
 18 ply.

19 (7)(a) Within 21 days after a notice of intent to appeal has been filed with the board under  
 20 subsection (1) of this section, any person described in paragraph (b) of this subsection may intervene  
 21 in and be made a party to the review proceeding by filing a motion to intervene and by paying a  
 22 filing fee [*of \$100*] **described in subsection (10) of this section.**

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

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

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

29 (c) Failure to comply with the deadline or to pay the filing fee set forth in [*paragraph (a) of*  
 30 *this*] **subsection (10) of this section** shall result in denial of a motion to intervene.

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

34 (9) A notice of intent to appeal a land use decision or limited land use decision shall be filed  
 35 not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of  
 36 intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to  
 37 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is  
 38 mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a  
 39 certificate of mailing with the notice mailed under ORS 197.615 shall not render the notice defective.  
 40 Copies of the notice of intent to appeal shall be served upon the local government, special district  
 41 or state agency and the applicant of record, if any, in the local government, special district or state  
 42 agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule  
 43 of the board and shall be accompanied by a filing fee [*of \$200*] **described in subsection (10) of this**  
 44 **section** and a deposit for costs to be established by the board. If a petition for review is not filed  
 45 with the board as required in subsections [*(10) and*] (11) **and (12)** of this section, the filing fee and

1 deposit shall be awarded to the local government, special district or state agency as cost of prepa-  
 2 ration of the record.

3 **(10)(a) A person that petitions for review under subsection (2) of this section and that is:**

4 **(A) Rebuttably presumed to be adversely affected by the decision as described by para-**  
 5 **graph (d) of this subsection must submit a filing fee of \$200.**

6 **(B) Not rebuttably presumed to be adversely affected by the decision as described by this**  
 7 **subsection must submit a filing fee of \_\_\_\_\_.**

8 **(b) A person that intervenes under subsection (7) of this section and that is:**

9 **(A) Rebuttably presumed to be adversely affected by the decision as described by this**  
 10 **subsection must submit a filing fee of \$100.**

11 **(B) Not rebuttably presumed to be adversely affected by the decision as described by this**  
 12 **subsection must submit a filing fee of \_\_\_\_\_.**

13 **(c) Notwithstanding the description of “adversely affected” applicable to this subsection,**  
 14 **a person that is required to submit a filing fee under paragraph (a)(B) or (b)(B) of this sub-**  
 15 **section may petition the board for a determination that the person is adversely affected by**  
 16 **the decision being reviewed, as that term is generally construed for purposes of this section.**  
 17 **If the board determines that the person is adversely affected, as that term is generally con-**  
 18 **strued for purposes of this section, the board shall refund to the person the difference be-**  
 19 **tween the filing fee paid and the amount of the filing fee under paragraph (a)(A) or (b)(A)**  
 20 **of this subsection, whichever is appropriate.**

21 **(d) For purposes of this subsection only, unless the context requires otherwise, a person**  
 22 **is rebuttably presumed to be adversely affected when the person has a legal or equitable in-**  
 23 **terest of record in real property that is within \_\_\_\_\_ of any property that is the subject**  
 24 **of or is affected by the decision being reviewed.**

25 *[(10)(a)]* **(11)(a)** Within 21 days after service of the notice of intent to appeal, the local govern-  
 26 ment, special district or state agency shall transmit to the board the original or a certified copy of  
 27 the entire record of the proceeding under review. By stipulation of all parties to the review pro-  
 28 ceeding the record may be shortened. The board may require or permit subsequent corrections to  
 29 the record; however, the board shall issue an order on a motion objecting to the record within 60  
 30 days of receiving the motion.

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

37 *[(11)]* **(12)** A petition for review of the land use decision or limited land use decision and sup-  
 38 porting brief shall be filed with the board as required by the board under subsection *[(13)]* **(14)** of  
 39 this section.

40 *[(12)]* **(13)** The petition shall include a copy of the decision sought to be reviewed and shall state:

41 **(a)** The facts that establish that the petitioner has standing.

42 **(b)** The date of the decision.

43 **(c)** The issues the petitioner seeks to have reviewed.

44 *[(13)(a)]* **(14)(a)** The board shall adopt rules establishing deadlines for filing petitions and briefs  
 45 and for oral argument.

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

11 [(14)] (15) The board shall issue a final order within 77 days after the date of transmittal of the  
 12 record. If the order is not issued within 77 days the applicant may apply in Marion County or the  
 13 circuit court of the county where the application was filed for a writ of mandamus to compel the  
 14 board to issue a final order.

15 [(15)(a)] (16)(a) Upon entry of its final order the board may, in its discretion, award costs to the  
 16 prevailing party including the cost of preparation of the record if the prevailing party is the local  
 17 government, special district or state agency whose decision is under review. The deposit required  
 18 by subsection (9) of this section shall be applied to any costs charged against the petitioner.

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

22 [(16)] (17) Orders issued under this section may be enforced in appropriate judicial proceedings.

23 [(17)(a)] (18)(a) The board shall provide for the publication of its orders that are of general  
 24 public interest in the form it deems best adapted for public convenience. The publications shall  
 25 constitute the official reports of the board.

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

28 [(18)] (19) Except for any sums collected for publication of board opinions, all fees collected by  
 29 the board under this section that are not awarded as costs shall be paid over to the State Treasurer  
 30 to be credited to the General Fund.

31 **SECTION 2.** ORS 196.115 is amended to read:

32 196.115. (1) For purposes of judicial review, decisions of the Columbia River Gorge Commission  
 33 shall be subject to review solely as provided in this section, except as otherwise provided by the  
 34 Columbia River Gorge National Scenic Area Act, P.L. 99-663.

35 (2)(a) A final action or order by the commission in a review or appeal of any action of the  
 36 commission pursuant to section 10(c) or 15(b)(4) of the Columbia River Gorge National Scenic Area  
 37 Act, or a final action or order by the commission in a review or appeal of any action of a county  
 38 pursuant to section 15(a)(2) or 15(b)(4) of the Columbia River Gorge National Scenic Area Act, shall  
 39 be reviewed by the Court of Appeals on a petition for judicial review filed and served as provided  
 40 in subsections (3) and (4) of this section and ORS 183.482.

41 (b) On a petition for judicial review under paragraph (a) of this subsection the Court of Appeals  
 42 also shall review the action of the county that is the subject of the commission's order, if requested  
 43 in the petition.

44 (c) The Court of Appeals shall issue a final order on review under this subsection within the  
 45 time limits provided by ORS 197.855.

1 (d) In lieu of judicial review under paragraphs (a) and (b) of this subsection, a county action  
2 may be appealed to the Land Use Board of Appeals under ORS 197.805 to 197.855. A notice of intent  
3 to appeal the county's action shall be filed not later than 21 days after the commission's order on  
4 the county action becomes final.

5 (e) Notwithstanding ORS 197.835, the scope of review in an appeal pursuant to paragraph (d)  
6 of this subsection shall not include any issue relating to interpretation or implementation of the  
7 Columbia River Gorge National Scenic Area Act, P.L. 99-663, and any issue related to such inter-  
8 pretation or implementation shall be waived by the filing of an appeal under paragraph (d) of this  
9 subsection.

10 (f) After county land use ordinances are approved pursuant to sections 7(b) and 8(h) to (k) of the  
11 Columbia River Gorge National Scenic Area Act, P.L. 99-663, the Land Use Board of Appeals shall  
12 not review land use decisions within the general management area or special management area for  
13 compliance with the statewide planning goals. The limitation of this paragraph shall not apply if the  
14 Land Conservation and Development Commission decertifies the management plan pursuant to ORS  
15 196.107.

16 (3)(a) If a petition for judicial review of a commission order is filed pursuant to subsection (2)(a)  
17 of this section, the procedures to be followed by the parties, the commission and the court, and the  
18 court's review, shall be in accordance with ORS 183.480, 183.482 (1) to (7), 183.485, 183.486, 183.490  
19 and 183.497, except as this section or the Columbia River Gorge National Scenic Area Act, P.L.  
20 99-663, otherwise provides.

21 (b) Notwithstanding any provision of ORS 183.482:

22 (A) The commission shall transmit the original record or the certified copy of the entire record  
23 within 21 days after service of a petition for judicial review is served on the commission; and

24 (B) The parties shall file briefs with the court within the times allowed by rules of the court.

25 (c) The court may affirm, reverse or remand the order. If the court finds that the agency has  
26 erroneously interpreted a provision of law and that a correct interpretation compels a particular  
27 action, the court shall:

28 (A) Set aside or modify the order; or

29 (B) Remand the case to the agency for further action under a correct interpretation of the pro-  
30 vision of law.

31 (d) The court shall remand the order to the agency if the court finds the agency's exercise of  
32 discretion to be:

33 (A) Outside the range of discretion delegated to the agency by law;

34 (B) Inconsistent with an agency rule, an officially stated agency position or a prior agency  
35 practice, unless the inconsistency is explained by the agency; or

36 (C) Otherwise in violation of a constitutional or statutory provision.

37 (e) The court shall set aside or remand the order if the court finds that the order is not sup-  
38 ported by substantial evidence in the whole record.

39 (f) Notwithstanding any other provision of this section, in any case where review of a county  
40 action as well as a commission order is sought pursuant to subsection (2)(a) and (b) of this section,  
41 the court shall accept any findings of fact by the commission which the court finds to be supported  
42 by substantial evidence in the whole record, and such findings by the commission shall prevail over  
43 any findings by the county concerning the same or substantially the same facts.

44 (4)(a) Except as otherwise provided by this section or the Columbia River Gorge National Scenic  
45 Area Act, P.L. 99-663, if review of a county action is sought pursuant to subsection (2)(b) of this

1 section, the procedures to be followed by the parties, the county and the court, and the court's re-  
 2 view, shall be in accordance with those provisions governing review of county land use decisions  
 3 by the Land Use Board of Appeals set forth in ORS 197.830 (2) to (8), (10), [(15) and (16)] (11), (16)  
 4 **and (17)** and 197.835 (2) to (10), (12) and (13). As used in this section, "board" as used in the enu-  
 5 merated provisions shall mean "court" and the term "notice of intent to appeal" in ORS 197.830  
 6 [(10)] (11) shall refer to the petition described in subsection (2) of this section.

7 (b) In addition to the other requirements of service under this section, the petitioner shall serve  
 8 the petition upon the persons and bodies described in ORS 197.830 (9), as a prerequisite to judicial  
 9 review of the county action.

10 (c) In accordance with subsection (3)(b)(B) of this section, a party to a review of both a com-  
 11 mission order and a county action shall file only one brief with the court, which shall address both  
 12 the commission order and the county action.

13 (d) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record. Subject  
 14 to subsection (3)(f) of this section, the court shall be bound by any finding of fact of the county for  
 15 which there is substantial evidence in the whole record. The court may appoint a master and follow  
 16 the procedures of ORS 183.482 (7) in connection with matters that the board may take evidence for  
 17 under ORS 197.835 (2).

18 (5) Approval of county land use ordinances by the commission pursuant to section 7 of the  
 19 Columbia River Gorge National Scenic Area Act, P.L. 99-663, may be reviewed by the Court of Ap-  
 20 peals as provided in ORS 183.482.

21 (6) Notwithstanding ORS 183.484, any proceeding filed in circuit court by or against the com-  
 22 mission shall be filed with the circuit court for the county in which the commission has a principal  
 23 business office or in which the land involved in the proceeding is located.

24 **SECTION 3.** ORS 197.796 is amended to read:

25 197.796. (1) An applicant for a land use decision, limited land use decision or expedited land di-  
 26 vision or for a permit under ORS 215.427 or 227.178 may accept a condition of approval imposed  
 27 under ORS 215.416 or 227.175 and file a challenge to the condition under this section. Acceptance  
 28 by an applicant for a land use decision, limited land use decision, expedited land division or permit  
 29 under ORS 215.427 or 227.178 of a condition of approval imposed under ORS 215.416 or 227.175 does  
 30 not constitute a waiver of the right to challenge the condition of approval. Acceptance of a condi-  
 31 tion may include but is not limited to paying a fee, performing an act or providing satisfactory evi-  
 32 dence of arrangements to pay the fee or to ensure compliance with the condition.

33 (2) Any action for damages under this section shall be filed in the circuit court of the county  
 34 in which the application was submitted within 180 days of the date of the decision.

35 (3)(a) A challenge filed pursuant to this section may not be dismissed on the basis that the ap-  
 36 plicant did not request a variance to the condition of approval or any other available form of re-  
 37 consideration of the challenged condition. However, an applicant shall comply with ORS 197.763 (1)  
 38 prior to appealing to the Land Use Board of Appeals or bringing an action for damages in circuit  
 39 court and must exhaust all local appeals provided in the local comprehensive plan and land use  
 40 regulations before proceeding under this section.

41 (b) In addition to the requirements of ORS 197.763 (5), at the commencement of the initial public  
 42 hearing, a statement shall be made to the applicant that the failure of the applicant to raise con-  
 43 stitutional or other issues relating to proposed conditions of approval with sufficient specificity to  
 44 allow the local government or its designee to respond to the issue precludes an action for damages  
 45 in circuit court.

1 (c) An applicant is not required to raise an issue under this subsection unless the condition of  
 2 approval is stated with sufficient specificity to enable the applicant to respond to the condition prior  
 3 to the close of the final local hearing.

4 (4) In any challenge to a condition of approval that is subject to the Takings Clause of the Fifth  
 5 Amendment to the United States Constitution, the local government shall have the burden of dem-  
 6 onstrating compliance with the constitutional requirements for imposing the condition.

7 (5) In a proceeding in circuit court under this section, the court shall award costs and reason-  
 8 able attorney fees to a prevailing party. Notwithstanding ORS 197.830 [(15)] (16), in a proceeding  
 9 before the Land Use Board of Appeals under this section, the board shall award costs and reason-  
 10 able attorney fees to a prevailing party.

11 (6) This section applies to appeals by the applicant of a condition of approval and claims filed  
 12 in state court seeking damages for the unlawful imposition of conditions of approval in a land use  
 13 decision, limited land use decision, expedited land division or permit under ORS 215.427 or 227.178.

14 **SECTION 4.** ORS 197.832 is amended to read:

15 197.832. The Board Publications Account is established in the General Fund. All moneys in the  
 16 account are appropriated continuously to the Land Use Board of Appeals to be used for paying ex-  
 17 penses incurred by the board under ORS 197.830 [(17)] (18). Disbursements of moneys from the ac-  
 18 count shall be approved by a member of the board.

19 **SECTION 5.** ORS 197.835 is amended to read:

20 197.835. (1) The Land Use Board of Appeals shall review the land use decision or limited land  
 21 use decision and prepare a final order affirming, reversing or remanding the land use decision or  
 22 limited land use decision. The board shall adopt rules defining the circumstances in which it will  
 23 reverse rather than remand a land use decision or limited land use decision that is not affirmed.

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

25 (b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte  
 26 contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities  
 27 not shown in the record that, if proved, would warrant reversal or remand, the board may take ev-  
 28 idence and make findings of fact on those allegations. The board shall be bound by any finding of  
 29 fact of the local government, special district or state agency for which there is substantial evidence  
 30 in the whole record.

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

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

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

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

41 (5) The board shall reverse or remand a land use decision not subject to an acknowledged  
 42 comprehensive plan and land use regulations if the decision does not comply with the goals. The  
 43 board shall reverse or remand a land use decision or limited land use decision subject to an ac-  
 44 knowledged comprehensive plan or land use regulation if the decision does not comply with the  
 45 goals and the Land Conservation and Development Commission has issued an order under ORS

1 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to  
 2 apply the goals to the type of decision being challenged.

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

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

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

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

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

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

16 (a) The local government or special district:

17 (A) Exceeded its jurisdiction;

18 (B) Failed to follow the procedures applicable to the matter before it in a manner that preju-  
 19 diced the substantial rights of the petitioner;

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

21 (D) Improperly construed the applicable law; or

22 (E) Made an unconstitutional decision; or

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

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

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

29 (B) That the local government's action was for the purpose of avoiding the requirements of ORS  
 30 215.427 or 227.178.

31 (b) If the board does reverse the decision and orders the local government to grant approval of  
 32 the application, the board shall award attorney fees to the applicant and against the local govern-  
 33 ment.

34 (11)(a) Whenever the findings, order and record are sufficient to allow review, and to the extent  
 35 possible consistent with the time requirements of ORS 197.830 [(14)] (15), the board shall decide all  
 36 issues presented to it when reversing or remanding a land use decision described in subsections (2)  
 37 to (9) of this section or limited land use decision described in ORS 197.828 and 197.195.

38 (b) Whenever the findings are defective because of failure to recite adequate facts or legal  
 39 conclusions or failure to adequately identify the standards or their relation to the facts, but the  
 40 parties identify relevant evidence in the record which clearly supports the decision or a part of the  
 41 decision, the board shall affirm the decision or the part of the decision supported by the record and  
 42 remand the remainder to the local government, with direction indicating appropriate remedial  
 43 action.

44 (12) The board may reverse or remand a land use decision under review due to ex parte contacts  
 45 or bias resulting from ex parte contacts with a member of the decision-making body, only if the



1 member of the decision-making body did not comply with ORS 215.422 (3) or 227.180 (3), whichever  
2 is applicable.

3 (13) Subsection (12) of this section does not apply to reverse or remand of a land use decision  
4 due to ex parte contact or bias resulting from ex parte contact with a hearings officer.

5 (14) The board shall reverse or remand a land use decision or limited land use decision which  
6 violates a commission order issued under ORS 197.328.

7 (15) In cases in which a local government provides a quasi-judicial land use hearing on a limited  
8 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  
10 full opinions only in such cases as it deems proper.

11 **SECTION 6.** ORS 197.840 is amended to read:

12 197.840. (1) The following periods of delay shall be excluded from the 77-day period within which  
13 the board must make a final decision on a petition under ORS 197.830 [(14)] (15):

14 (a) Any period of delay up to 120 days resulting from the board's deferring all or part of its  
15 consideration of a petition for review of a land use decision or limited land use decision that  
16 allegedly violates the goals if the decision has been:

17 (A) Submitted for acknowledgment under ORS 197.251; or

18 (B) Submitted to the Department of Land Conservation and Development as part of a periodic  
19 review work program task pursuant to ORS 197.628 to 197.650 and not yet acknowledged.

20 (b) Any period of delay resulting from a motion, including but not limited to, a motion disputing  
21 the constitutionality of the decision, standing, ex parte contacts or other procedural irregularities  
22 not shown in the record.

23 (c) Any reasonable period of delay resulting from a request for a stay under ORS 197.845.

24 (d) Any reasonable period of delay resulting from a continuance granted by a member of the  
25 board on the member's own motion or at the request of one of the parties, if the member granted  
26 the continuance on the basis of findings that the ends of justice served by granting the continuance  
27 outweigh the best interest of the public and the parties in having a decision within 77 days.

28 (2) No period of delay resulting from a continuance granted by the board under subsection (1)(d)  
29 of this section shall be excludable under this section unless the board sets forth in the record, either  
30 orally or in writing, its reasons for finding that the ends of justice served by granting the contin-  
31 uance outweigh the best interests of the public and the other parties in a decision within the 77  
32 days. The factors the board shall consider in determining whether to grant a continuance under  
33 subsection (1)(d) of this section in any case are as follows:

34 (a) Whether the failure to grant a continuance in the proceeding would be likely to make a  
35 continuation of the proceeding impossible or result in a miscarriage of justice; or

36 (b) Whether the case is so unusual or so complex, due to the number of parties or the existence  
37 of novel questions of fact or law, that it is unreasonable to expect adequate consideration of the  
38 issues within the 77-day time limit.

39 (3) No continuance under subsection (1)(d) of this section shall be granted because of general  
40 congestion of the board calendar or lack of diligent preparation or attention to the case by any  
41 member of the board or any party.

42 (4) The board may defer all or part of its consideration of a land use decision or limited land  
43 use decision described in subsection (1)(a) of this section until the Land Conservation and Develop-  
44 ment Commission has disposed of the acknowledgment proceeding described in subsection (1)(a) of  
45 this section. If the board deferred all or part of its consideration of a decision under this subsection,

1 the board may grant a stay of the comprehensive plan provision, land use regulation, limited land  
 2 use decision or land use decision under ORS 197.845.

3 **SECTION 7.** ORS 197.850 is amended to read:

4 197.850. (1) Any party to a proceeding before the Land Use Board of Appeals under ORS 197.830  
 5 to 197.845 may seek judicial review of a final order issued in those proceedings.

6 (2) Notwithstanding the provisions of ORS 183.480 to 183.540, judicial review of orders issued  
 7 under ORS 197.830 to 197.845 is solely as provided in this section.

8 (3)(a) Jurisdiction for judicial review of proceedings under ORS 197.830 to 197.845 is conferred  
 9 upon the Court of Appeals. Proceedings for judicial review are instituted by filing a petition in the  
 10 Court of Appeals. The petition must be filed within 21 days following the date the board delivered  
 11 or mailed the order upon which the petition is based.

12 (b) Filing of the petition, as set forth in paragraph (a) of this subsection, and service of a peti-  
 13 tion on all persons identified in the petition as adverse parties of record in the board proceeding is  
 14 jurisdictional and may not be waived or extended.

15 (4) The petition must state the nature of the order the petitioner desires reviewed. Copies of the  
 16 petition must be served by first class, registered or certified mail on the board and all other parties  
 17 of record in the board proceeding.

18 (5) Within seven days after service of the petition, the board shall transmit to the court the  
 19 original or a certified copy of the entire record of the proceeding under review, but, by stipulation  
 20 of all parties to the review proceeding, the record may be shortened. The court may tax a party that  
 21 unreasonably refuses to stipulate to limit the record for the additional costs. The court may require  
 22 or permit subsequent corrections or additions to the record when deemed desirable. Except as spe-  
 23 cifically provided in this subsection, the court may not tax the cost of the record to the petitioner  
 24 or any intervening party. However, the court may tax such costs and the cost of transcription of  
 25 record to a party filing a frivolous petition for judicial review.

26 (6) Petitions and briefs must be filed within time periods and in a manner established by the  
 27 Court of Appeals by rule.

28 (7)(a) The court shall hear oral argument within 49 days of the date of transmittal of the record.

29 (b) The court may hear oral argument more than 49 days from the date of transmittal of the  
 30 record provided the court determines that the ends of justice served by holding oral argument on  
 31 a later day outweigh the best interests of the public and the parties. The court shall not hold oral  
 32 argument more than 49 days from the date of transmittal of the record because of general congestion  
 33 of the court calendar or lack of diligent preparation or attention to the case by any member of the  
 34 court or any party.

35 (c) The court shall set forth in writing a determination to hear oral argument more than 49 days  
 36 from the date the record is transmitted, together with the reasons for its determination, and shall  
 37 provide a copy to the parties. The court shall schedule oral argument as soon as practicable there-  
 38 after.

39 (d) In making a determination under paragraph (b) of this subsection, the court shall consider:

40 (A) Whether the case is so unusual or complex, due to the number of parties or the existence  
 41 of novel questions of law, that 49 days is an unreasonable amount of time for the parties to brief  
 42 the case and for the court to prepare for oral argument; and

43 (B) Whether the failure to hold oral argument at a later date likely would result in a miscar-  
 44 riage of justice.

45 (8) Judicial review of an order issued under ORS 197.830 to 197.845 shall be confined to the re-

1 cord. The court shall not substitute its judgment for that of the board as to any issue of fact.

2 (9) The court may affirm, reverse or remand the order. The court shall reverse or remand the  
3 order only if it finds:

4 (a) The order to be unlawful in substance or procedure, but error in procedure is not cause for  
5 reversal or remand unless the court finds that substantial rights of the petitioner were prejudiced  
6 thereby;

7 (b) The order to be unconstitutional; or

8 (c) The order is not supported by substantial evidence in the whole record as to facts found by  
9 the board under ORS 197.835 (2).

10 (10) The Court of Appeals shall issue a final order on the petition for judicial review with the  
11 greatest possible expediency.

12 (11) If the order of the board is remanded by the Court of Appeals or the Supreme Court, the  
13 board shall respond to the court's appellate judgment within 30 days.

14 (12) A party must file with the board an undertaking with one or more sureties insuring that  
15 the party will pay all costs, disbursements and attorney fees awarded against the party by the Court  
16 of Appeals if:

17 (a) The party appealed a decision of the board to the Court of Appeals; and

18 (b) In making the decision being appealed to the Court of Appeals, the board awarded attorney  
19 fees and expenses against that party under ORS 197.830 [(15)(b)] **(16)(b)**.

20 (13) Upon entry of its final order, the court shall award attorney fees and expenses to a party  
21 who prevails on a claim that an approval condition imposed by a local government on an application  
22 for a permit pursuant to ORS 215.416 or 227.175 is unconstitutional under section 18, Article I,  
23 Oregon Constitution, or the Fifth Amendment to the United States Constitution.

24 (14) The undertaking required in subsection (12) of this section must be filed with the board and  
25 served on the opposing parties within 10 days after the date the petition was filed with the Court  
26 of Appeals.

27 **SECTION 8. The amendments to ORS 196.115, 197.796, 197.830, 197.832, 197.835, 197.840 and**  
28 **197.850 by sections 1 to 7 of this 2011 Act apply to reviews commenced by the filing of a no-**  
29 **tice of intent to appeal with the Land Use Board of Appeals on or after the effective date**  
30 **of this 2011 Act.**

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