

**PROPOSED AMENDMENTS TO
A-ENGROSSED SENATE BILL 77**

1 On page 1 of the printed A-engrossed bill, line 2, delete “197.830” and in-
2 sert “196.115, 197.830 and 197.835”.

3 On page 4, delete lines 32 through 45 and delete page 5 and insert:

4 **“SECTION 2.** ORS 197.835 is amended to read:

5 “197.835. (1) The Land Use Board of Appeals shall review the land use
6 decision or limited land use decision and prepare a final order affirming,
7 reversing or remanding, **in whole or in part**, the land use decision or lim-
8 ited land use decision. The board shall adopt rules defining the circum-
9 stances in which it will reverse rather than remand a land use decision or
10 limited land use decision that is not affirmed.

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

13 “(b) In the case of disputed allegations of standing, unconstitutionality
14 of the decision, ex parte contacts, actions described in subsection
15 [(10)(a)(B)] **(12)(a)(B)** of this section or other procedural irregularities not
16 shown in the record that, if proved, would warrant reversal or remand, the
17 board may take evidence and make findings of fact on those allegations. The
18 board shall be bound by any finding of fact of the local government, special
19 district or state agency for which there is substantial evidence in the whole
20 record.

21 “(3) Issues shall be limited to those raised by any participant before the
22 local hearings body as provided by ORS 197.195 or 197.763, whichever is ap-

1 plicable.

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

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

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

13 **“(5) The board shall refuse to review an issue related to a land use
14 decision or limited land use decision that:**

15 **“(a) Was raised and for which the board made a final decision un-
16 less the issue is successfully appealed and remanded to the board for
17 further review; or**

18 **“(b) Could have been raised before the board but was not raised.**

19 **“(6) The board shall refuse to review an issue related to compre-
20 hensive plan or land use regulation amendments processed pursuant
21 to ORS 197.610 to 197.625 that:**

22 **“(a) Were raised and for which the board issued a final decision
23 unless the issue is successfully appealed and remanded to the board
24 for further review; or**

25 **“(b) Could have been raised before the board but was not raised.**

26 **“[(5)] (7) The board shall reverse or remand a land use decision not sub-
27 ject to an acknowledged comprehensive plan and land use regulations if the
28 decision does not comply with the goals. The board shall reverse or remand
29 a land use decision or limited land use decision subject to an acknowledged
30 comprehensive plan or land use regulation if the decision does not comply**

1 with the goals and the Land Conservation and Development Commission has
2 issued an order under ORS 197.320 or adopted a new or amended goal under
3 ORS 197.245 requiring the local government to apply the goals to the type
4 of decision being challenged.

5 “[6] **(8)** The board shall reverse or remand an amendment to a compre-
6 hensive plan if the amendment is not in compliance with the goals.

7 “[7] **(9)** The board shall reverse or remand an amendment to a land use
8 regulation or the adoption of a new land use regulation if:

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

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

13 “[8] **(10)** The board shall reverse or remand a decision involving the
14 application of a plan or land use regulation provision if the decision is not
15 in compliance with applicable provisions of the comprehensive plan or land
16 use regulations.

17 “[9] **(11)** In addition to the review under subsections (1) to [(8)] **(10)** of
18 this section, the board shall reverse or remand the land use decision under
19 review if the board finds:

20 “(a) The local government or special district:

21 “(A) Exceeded its jurisdiction;

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

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

26 “(D) Improperly construed the applicable law; or

27 “(E) Made an unconstitutional decision; or

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

29 “[10(a)] **(12)(a)** The board shall reverse a local government decision and
30 order the local government to grant approval of an application for develop-

1 ment denied by the local government if the board finds:

2 “(A) Based on the evidence in the record, that the local government de-
3 cision is outside the range of discretion allowed the local government under
4 its comprehensive plan and implementing ordinances; or

5 “(B) That the local government’s action was for the purpose of avoiding
6 the requirements of ORS 215.427 or 227.178.

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

10 “[~~(11)(a)~~] **(13)(a)** Whenever the findings, order and record are sufficient
11 to allow review, and to the extent possible consistent with the time re-
12 quirements of ORS 197.830 (14), the board shall decide all issues presented
13 to it [*when reversing or remanding*] **when reviewing** a land use decision
14 described in subsections (2) to [~~(9)~~] **(11)** of this section or limited land use
15 decision described in ORS 197.828 and 197.195 **and shall affirm, reverse or**
16 **remand the decision, in whole or in part.**

17 “(b) Whenever the findings are defective because of failure to recite ade-
18 quate facts or legal conclusions or failure to adequately identify the stan-
19 dards or their relation to the facts, but the parties identify relevant evidence
20 in the record which clearly supports the decision or a part of the decision,
21 the board shall affirm the decision or the part of the decision supported by
22 the record and remand the remainder to the local government, with direction
23 indicating appropriate remedial action.

24 “[~~(12)~~] **(14)** The board may reverse or remand a land use decision under
25 review due to ex parte contacts or bias resulting from ex parte contacts with
26 a member of the decision-making body, only if the member of the decision-
27 making body did not comply with ORS 215.422 (3) or 227.180 (3), whichever
28 is applicable.

29 “[~~(13)~~] **(15)** Subsection [~~(12)~~] **(14)** of this section does not apply to reverse
30 or remand of a land use decision due to ex parte contact or bias resulting

1 from ex parte contact with a hearings officer.

2 “[~~(14)~~] **(16)** The board shall reverse or remand a land use decision or
3 limited land use decision which violates a commission order issued under
4 ORS 197.328.

5 “[~~(15)~~] **(17)** In cases in which a local government provides a quasi-judicial
6 land use hearing on a limited land use decision, the requirements of sub-
7 sections [~~(12) and (13)~~] **(14) and (15)** of this section apply.

8 “[~~(16)~~] **(18)** The board may decide cases before it by means of memorandum
9 decisions and shall prepare full opinions only in such cases as it deems
10 proper.

11 **“SECTION 3.** ORS 196.115 is amended to read:

12 “196.115. (1) For purposes of judicial review, decisions of the Columbia
13 River Gorge Commission shall be subject to review solely as provided in this
14 section, except as otherwise provided by the Columbia River Gorge National
15 Scenic Area Act, P.L. 99-663.

16 “(2)(a) A final action or order by the commission in a review or appeal
17 of any action of the commission pursuant to section 10(c) or 15(b)(4) of the
18 Columbia River Gorge National Scenic Area Act, or a final action or order
19 by the commission in a review or appeal of any action of a county pursuant
20 to section 15(a)(2) or 15(b)(4) of the Columbia River Gorge National Scenic
21 Area Act, shall be reviewed by the Court of Appeals on a petition for judicial
22 review filed and served as provided in subsections (3) and (4) of this section
23 and ORS 183.482.

24 “(b) On a petition for judicial review under paragraph (a) of this sub-
25 section the Court of Appeals also shall review the action of the county that
26 is the subject of the commission’s order, if requested in the petition.

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

29 “(d) In lieu of judicial review under paragraphs (a) and (b) of this sub-
30 section, a county action may be appealed to the Land Use Board of Appeals

1 under ORS 197.805 to 197.855. A notice of intent to appeal the county’s action
2 shall be filed not later than 21 days after the commission’s order on the
3 county action becomes final.

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

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

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

23 “(b) Notwithstanding any provision of ORS 183.482:

24 “(A) The commission shall transmit the original record or the certified
25 copy of the entire record within 21 days after service of a petition for judi-
26 cial review is served on the commission; and

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

29 “(c) The court may affirm, reverse or remand the order. If the court finds
30 that the agency has erroneously interpreted a provision of law and that a

1 correct interpretation compels a particular action, the court shall:

2 “(A) Set aside or modify the order; or

3 “(B) Remand the case to the agency for further action under a correct
4 interpretation of the provision of law.

5 “(d) The court shall remand the order to the agency if the court finds the
6 agency’s exercise of discretion to be:

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

8 “(B) Inconsistent with an agency rule, an officially stated agency position
9 or a prior agency practice, unless the inconsistency is explained by the
10 agency; or

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

12 “(e) The court shall set aside or remand the order if the court finds that
13 the order is not supported by substantial evidence in the whole record.

14 “(f) Notwithstanding any other provision of this section, in any case
15 where review of a county action as well as a commission order is sought
16 pursuant to subsection (2)(a) and (b) of this section, the court shall accept
17 any findings of fact by the commission which the court finds to be supported
18 by substantial evidence in the whole record, and such findings by the com-
19 mission shall prevail over any findings by the county concerning the same
20 or substantially the same facts.

21 “(4)(a) Except as otherwise provided by this section or the Columbia River
22 Gorge National Scenic Area Act, P.L. 99-663, if review of a county action is
23 sought pursuant to subsection (2)(b) of this section, the procedures to be
24 followed by the parties, the county and the court, and the court’s review,
25 shall be in accordance with those provisions governing review of county land
26 use decisions by the Land Use Board of Appeals set forth in ORS 197.830 (2)
27 to (8), (10), (15) and (16) and 197.835 [(2) to (10), (12) and (13)] **(2) to (12), (14)**
28 **and (15)**. As used in this section, ‘board’ as used in the enumerated pro-
29 visions shall mean ‘court’ and the term ‘notice of intent to appeal’ in ORS
30 197.830 (10) shall refer to the petition described in subsection (2) of this

1 section.

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

5 “(c) In accordance with subsection (3)(b)(B) of this section, a party to a
6 review of both a commission order and a county action shall file only one
7 brief with the court, which shall address both the commission order and the
8 county action.

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

15 “(5) Approval of county land use ordinances by the commission pursuant
16 to section 7 of the Columbia River Gorge National Scenic Area Act, P.L.
17 99-663, may be reviewed by the Court of Appeals as provided in ORS 183.482.

18 “(6) Notwithstanding ORS 183.484, any proceeding filed in circuit court
19 by or against the commission shall be filed with the circuit court for the
20 county in which the commission has a principal business office or in which
21 the land involved in the proceeding is located.

22 **“SECTION 4. The amendments to ORS 196.115, 197.830 and 197.835**
23 **by sections 1, 2 and 3 of this 2013 Act apply to the review of land use**
24 **decisions and limited land use decisions for which a notice of intent**
25 **to appeal is filed on or after the effective date of this 2013 Act.**

26 **“SECTION 5. This 2013 Act being necessary for the immediate**
27 **preservation of the public peace, health and safety, an emergency is**
28 **declared to exist, and this 2013 Act takes effect on its passage.”.**

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