

House Bill 3458

Sponsored by Representative MCLAIN (at the request of City of Portland)

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**.

Limits issues that may be basis for appeal of land use decisions where local government amends comprehensive plan or land use regulations.

Requires Land Use Board of Appeals to approve land use regulations not in strict conformance with comprehensive plan if they further plan.

Takes effect on 91st day following adjournment sine die.

A BILL FOR AN ACT

1
2 Relating to the Land Use Board of Appeals; creating new provisions; amending ORS 197.835; and
3 prescribing an effective date.

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

5 **SECTION 1. Section 2 of this 2023 Act is added to and made a part of ORS 197.610 to**
6 **197.625.**

7 **SECTION 2. When a local government adopts a change to an acknowledged comprehen-**
8 **sive plan or land use regulation, an issue may only serve as the basis of an appeal to the**
9 **Land Use Board of Appeals if:**

10 (1) **The issue was raised no later than the final evidentiary hearing or the close of the**
11 **record.**

12 (2) **The issue raised was accompanied by statements or evidence sufficient to afford the**
13 **governing body an adequate opportunity to respond to each issue.**

14 (3) **For an adopted change in response to a remand from the board under ORS 197.835,**
15 **the issue is one that could have been but was not previously raised before the board.**

16 **SECTION 3. ORS 197.835 is amended to read:**

17 197.835. (1)(a) The Land Use Board of Appeals shall review the land use decision or limited land
18 use decision and prepare a final order affirming, reversing or remanding the land use decision or
19 limited land use decision.

20 (b) **The board may affirm in part a land use decision adopting a change to an acknowl-**
21 **edged comprehensive plan or a land use regulation if the adopted change includes a**
22 **severability clause and the part is reasonably severable. The affirmed parts are not affected**
23 **by the reversal or remand, continue in effect and are considered acknowledged as described**
24 **in ORS 197.625.**

25 (c) The board shall adopt rules defining the circumstances in which it will reverse rather than
26 remand a land use decision or limited land use decision **or part of a decision** that is not affirmed.

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

28 (b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte
29 contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities
30 not shown in the record that, if proved, would warrant reversal or remand, the board may take ev-

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 idence and make findings of fact on those allegations. The board shall be bound by any finding of
 2 fact of the local government, special district or state agency for which there is substantial evidence
 3 in the whole record.

4 (3) **The board may only review** issues [*shall be limited to those*] raised by any participant before
 5 the local hearings body as provided by ORS 197.195 or 197.797 **or section 2 of this 2023 Act**,
 6 whichever is applicable.

7 (4) A petitioner may raise new issues to the board **to a quasi-judicial decision made under**
 8 **ORS 197.195 or 197.797 only** if:

9 (a) The local government failed to list the applicable criteria for a decision under ORS 197.195
 10 (3)(c) or 197.797 (3)(b), in which case a petitioner may raise new issues based upon applica-
 11 ble criteria that were omitted from the notice. However, the board may refuse to allow new issues to be
 12 raised if it finds that the issue could have been raised before the local government; or

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

16 (5) The board shall reverse or remand a land use decision not subject to an acknowledged
 17 comprehensive plan and land use regulations if the decision does not comply with the goals. The
 18 board shall reverse or remand a land use decision or limited land use decision subject to an ac-
 19 knowledged comprehensive plan or land use regulation if the decision does not comply with the
 20 goals and the Land Conservation and Development Commission has issued an order under ORS
 21 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to
 22 apply the goals to the type of decision being challenged.

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

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

27 (a)(A) The regulation is not in compliance with the comprehensive plan; [*or*] **and**

28 **(B) The regulation is not equally or more supportive of the comprehensive plan as a**
 29 **whole than the existing regulation, whether or not every policy in the comprehensive plan**
 30 **is satisfied or advanced; or**

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

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

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

39 (a) The local government or special district:

40 (A) Exceeded its jurisdiction;

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

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

44 (D) Improperly construed the applicable law; or

45 (E) Made an unconstitutional decision; or

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

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

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

7 (B) That the local government's action was for the purpose of avoiding the requirements of ORS
8 215.427 or 227.178.

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

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

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

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

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

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

30 (15) In cases in which a local government provides a quasi-judicial land use hearing on a limited
31 land use decision, the requirements of subsections (12) and (13) of this section apply.

32 (16) The board may decide cases before it by means of memorandum decisions and shall prepare
33 full opinions only in such cases as it deems proper.

34 **SECTION 4. Section 2 of this 2023 Act and the amendments to ORS 197.835 by section 3**
35 **of this 2023 Act apply to land use decisions made, and petitions filed with the Land Use Board**
36 **of Appeals, on or after the effective date of this 2023 Act.**

37 **SECTION 5. This 2023 Act takes effect on the 91st day after the date on which the 2023**
38 **regular session of the Eighty-second Legislative Assembly adjourns sine die.**

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