

# House Bill 3362

Sponsored by Representatives CONGER, WHISNANT; Representatives HUFFMAN, MCLANE, Senator KNOPP

## 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 review by Land Use Board of Appeals of post-acknowledgement legislative changes to comprehensive plans and land use regulations implementing plans to issues raised during local planning process.

Requires Department of Land Conservation and Development to study requirements for citizen involvement in local land use planning to identify changes that can reduce potential for appeals by ensuring more effective involvement in local land use planning.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to review of post-acknowledgement land use decision-making; creating new provisions;  
3 amending ORS 197.195, 197.620 and 197.835; and declaring an emergency.

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

5 **SECTION 1.** ORS 197.620 is amended to read:

6 197.620. (1) A decision to not adopt a legislative amendment or a new land use regulation is not  
7 appealable unless the amendment is necessary to address the requirements of a new or amended  
8 goal, rule or statute.

9 (2) Notwithstanding the requirements of ORS 197.830 (2) that a person have appeared before the  
10 local government orally or in writing to seek review of a land use decision, the Director of the  
11 Department of Land Conservation and Development or any other person may appeal the decision to  
12 the Land Use Board of Appeals if:

13 (a) The local government failed to submit all of the materials described in ORS 197.610 (3) or,  
14 if applicable, ORS 197.610 (6), and the failure to submit the materials prejudiced substantial rights  
15 of the Department of Land Conservation and Development or the person;

16 (b) Except as provided in subsection (3) of this section, the local government submitted the ma-  
17 terials described in ORS 197.610 (3) or, if applicable, ORS 197.610 (6), after the deadline specified in  
18 ORS 197.610 (1) or (6) or rules of the Land Conservation and Development Commission, whichever  
19 is applicable; or

20 (c) The decision differs from the proposed changes submitted under ORS 197.610 to such an ex-  
21 tent that the materials submitted under ORS 197.610 do not reasonably describe the decision.

22 (3) Subsection (2)(b) of this section does not authorize an appeal if the local government cures  
23 an untimely submission of materials as provided in this subsection. A local government may cure the  
24 untimely submission of materials by either:

25 (a) Postponing the date for the final evidentiary hearing by the greater of 10 days or the number  
26 of days by which the submission was late; or

27 (b) Holding the evidentiary record open for an additional period of time equal to 10 days or the  
28 number of days by which the submission was late, whichever is greater. Additionally, the local

**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 government shall provide notice of the postponement or record extension to the Department of Land  
 2 Conservation and Development.

3 **(4) For an issue to provide a basis for an appeal to the Land Use Board of Appeals, the**  
 4 **issue must be raised:**

5 **(a) In writing prior to the expiration of the comment period.**

6 **(b) With sufficient specificity to enable the decision maker to respond to the issue.**

7 **SECTION 2.** ORS 197.835 is amended to read:

8 197.835. (1) The Land Use Board of Appeals shall review the land use decision or limited land  
 9 use decision and prepare a final order affirming, reversing or remanding the land use decision or  
 10 limited land use decision. The board shall adopt rules defining the circumstances in which it will  
 11 reverse rather than remand a land use decision or limited land use decision that is not affirmed.

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

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

19 (3) *[Issues shall be limited to those]* **The board shall limit issues reviewed on appeal to the**  
 20 **issues** raised by any participant before the local hearings body as provided by ORS 197.195, **197.620**  
 21 or 197.763, whichever is applicable.

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

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

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

30 (5) The board shall reverse or remand a land use decision not subject to an acknowledged  
 31 comprehensive plan and land use regulations if the decision does not comply with the goals. The  
 32 board shall reverse or remand a land use decision or limited land use decision subject to an ac-  
 33 knowledged comprehensive plan or land use regulation if the decision does not comply with the  
 34 goals and the Land Conservation and Development Commission has issued an order under ORS  
 35 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to  
 36 apply the goals to the type of decision being challenged.

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

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

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

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

45 (8) The board shall reverse or remand a decision involving the application of a plan or land use

1 regulation provision if the decision is not in compliance with applicable provisions of the compre-  
 2 hensive plan or land use regulations.

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

5 (a) The local government or special district:

6 (A) Exceeded its jurisdiction;

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

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

10 (D) Improperly construed the applicable law; or

11 (E) Made an unconstitutional decision; or

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

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

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

18 (B) That the local government's action was for the purpose of avoiding the requirements of ORS  
 19 215.427 or 227.178.

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

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

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

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

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

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

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

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

45 **SECTION 3.** ORS 197.195 is amended to read:

1 197.195. (1) A limited land use decision shall be consistent with applicable provisions of city or  
 2 county comprehensive plans and land use regulations. Such a decision may include conditions au-  
 3 thorized by law. Within two years of September 29, 1991, cities and counties shall incorporate all  
 4 comprehensive plan standards applicable to limited land use decisions into their land use regu-  
 5 lations. A decision to incorporate all, some, or none of the applicable comprehensive plan standards  
 6 into land use regulations shall be undertaken as a post-acknowledgment amendment under ORS  
 7 197.610 to 197.625. If a city or county does not incorporate its comprehensive plan provisions into  
 8 its land use regulations, the comprehensive plan provisions may not be used as a basis for a decision  
 9 by the city or county or on appeal from that decision.

10 (2) A limited land use decision is not subject to the requirements of ORS 197.763.

11 (3) A limited land use decision is subject to the *[requirements of paragraphs (a) to (c) of this*  
 12 *subsection.] following requirements:*

13 (a) In making a limited land use decision, the local government shall follow the applicable pro-  
 14 cedures contained within its acknowledged comprehensive plan and land use regulations and other  
 15 applicable legal requirements.

16 (b) For limited land use decisions, the local government shall provide written notice to owners  
 17 of property within 100 feet of the entire contiguous site for which the application is made. The list  
 18 shall be compiled from the most recent property tax assessment roll. For purposes of review, this  
 19 requirement shall be deemed met when the local government can provide an affidavit or other cer-  
 20 tification that such notice was given. Notice shall also be provided to any neighborhood or commu-  
 21 nity organization recognized by the governing body and whose boundaries include the site.

22 (c) **For an issue to provide a basis for an appeal to the Land Use Board of Appeals, the**  
 23 **issue must be raised:**

24 (A) **In writing prior to the expiration of the comment period.**

25 (B) **With sufficient specificity to enable the decision maker to respond to the issue.**

26 [(c)] (d) The notice and procedures used by local government shall:

27 (A) Provide a 14-day period for submission of written comments prior to the decision;

28 [(B) *State that issues which may provide the basis for an appeal to the Land Use Board of Appeals*  
 29 *shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with*  
 30 *sufficient specificity to enable the decision maker to respond to the issue;*]

31 (B) **State that for an issue to provide the basis for an appeal to the Land Use Board of**  
 32 **Appeals, the issue must be raised:**

33 (i) **In writing prior to the expiration of the comment period; and**

34 (ii) **With sufficient specificity to enable the decision maker to respond to the issue;**

35 (C) List, by commonly used citation, the applicable criteria for the decision;

36 (D) Set forth the street address or other easily understood geographical reference to the subject  
 37 property;

38 (E) State the place, date and time that comments are due;

39 (F) State that copies of all evidence relied upon by the applicant are available for review, and  
 40 that copies can be obtained at cost;

41 (G) Include the name and phone number of a local government contact person;

42 (H) Provide notice of the decision to the applicant and any person who submits comments under  
 43 subparagraph (A) of this paragraph. The notice of decision must include an explanation of appeal  
 44 rights; and

45 (I) Briefly summarize the local decision making process for the limited land use decision being

1 made.

2 (4) Approval or denial of a limited land use decision shall be based upon and accompanied by  
3 a brief statement that explains the criteria and standards considered relevant to the decision, states  
4 the facts relied upon in rendering the decision and explains the justification for the decision based  
5 on the criteria, standards and facts set forth.

6 (5) A local government may provide for a hearing before the local government on appeal of a  
7 limited land use decision under this section. The hearing may be limited to the record developed  
8 pursuant to the initial hearing under subsection (3) of this section or may allow for the introduction  
9 of additional testimony or evidence. A hearing on appeal that allows the introduction of additional  
10 testimony or evidence shall comply with the requirements of ORS 197.763. Written notice of the  
11 decision rendered on appeal shall be given to all parties who appeared, either orally or in writing,  
12 before the hearing. The notice of decision shall include an explanation of the rights of each party  
13 to appeal the decision.

14 **SECTION 4. (1) The Department of Land Conservation and Development shall review a**  
15 **statewide land use planning goal related to citizen involvement to determine whether**  
16 **changes can reduce the potential for appeal of local land use decision-making to the Land**  
17 **Use Board of Appeals by ensuring more effective citizen involvement in the review of local**  
18 **land use planning.**

19 **(2) The department shall report to the appropriate legislative interim committees on or**  
20 **before January 1, 2015.**

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

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