

House Bill 3272

Sponsored by Representatives MEEK, SMITH DB, REARDON; Representatives BOSHART DAVIS, BYNUM, SALINAS, ZIKA

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

Prohibits board from accepting motions to take evidence not in record after period to object to record.

Authorizes board to award attorney fees for motions filed without merit or made for purposes of causing frustration or delay.

A BILL FOR AN ACT

1
2 Relating to Land Use Board of Appeals; amending ORS 197.830 and 197.835.

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

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

5 197.830. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to
6 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Ap-
7 peals.

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

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

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

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

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

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

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

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

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

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 established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

36 (9) A notice of intent to appeal a land use decision or limited land use decision shall be filed
 37 not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of
 38 intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to
 39 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is
 40 mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a
 41 statement identifying when, how and to whom notice was provided under ORS 197.615 does not
 42 render the notice defective. Copies of the notice of intent to appeal shall be served upon the local
 43 government, special district or state agency and the applicant of record, if any, in the local gov-
 44 ernment, special district or state agency proceeding. The notice shall be served and filed in the form
 45 and manner prescribed by rule of the board and shall be accompanied by a filing fee of \$200 and a

1 deposit for costs to be established by the board. If a petition for review is not filed with the board
 2 as required in subsections (10) and (11) of this section, the filing fee and deposit shall be awarded
 3 to the local government, special district or state agency as cost of preparation of the record.

4 (10)(a) Within 21 days after service of the notice of intent to appeal, the local government, spe-
 5 cial district or state agency shall transmit to the board the original or a certified copy of the entire
 6 record of the proceeding under review. By stipulation of all parties to the review proceeding the
 7 record may be shortened. The board may require or permit subsequent corrections to the record;
 8 however, the board shall issue an order on a motion objecting to the record within 60 days of re-
 9 ceiving the motion. **If the board denies a petitioner's objection to the record, the board may**
 10 **not extend the petitioner's deadline for filing a brief more than seven days from the later**
 11 **of the original deadline for the brief or the date of the determination.**

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

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

20 (12) The petition shall include a copy of the decision sought to be reviewed and shall state:

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

22 (b) The date of the decision.

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

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

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

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

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

44 (b) The board shall also award reasonable attorney fees and expenses to the prevailing party
 45 against any other party who the board finds presented a position **or filed any motion** without

1 probable cause to believe the position **or motion** was well-founded in law or on factually supported
 2 information **or was for the primary purpose of causing frustration or delay.**

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

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

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

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

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

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

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

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

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

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

30 197.835. (1) The Land Use Board of Appeals shall review the land use decision or limited land
 31 use decision and prepare a final order affirming, reversing or remanding the land use decision or
 32 limited land use decision. The board shall adopt rules defining the circumstances in which it will
 33 reverse rather than remand a land use decision or limited land use decision that is not affirmed.

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

35 (b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte
 36 contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities
 37 not shown in the record that, if proved, would warrant reversal or remand, the board may take ev-
 38 idence and make findings of fact on those allegations **only upon the motion of a party filed no**
 39 **later than the deadline for filing an objection to the record.** The board *[shall be]* is bound by
 40 any finding of fact of the local government, special district or state agency for which there is sub-
 41 stantial evidence in the whole record.

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

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

45 (a) The local government failed to list the applicable criteria for a decision under ORS 197.195

1 (3)(c) or 197.763 (3)(b), in which case a petitioner may raise new issues based upon applicable crite-
 2 ria that were omitted from the notice. However, the board may refuse to allow new issues to be
 3 raised if it finds that the issue could have been raised before the local government; or

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

7 (5) The board shall reverse or remand a land use decision not subject to an acknowledged
 8 comprehensive plan and land use regulations if the decision does not comply with the goals. The
 9 board shall reverse or remand a land use decision or limited land use decision subject to an ac-
 10 knowledged comprehensive plan or land use regulation if the decision does not comply with the
 11 goals and the Land Conservation and Development Commission has issued an order under ORS
 12 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to
 13 apply the goals to the type of decision being challenged.

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

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

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

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

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

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

27 (a) The local government or special district:

28 (A) Exceeded its jurisdiction;

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

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

32 (D) Improperly construed the applicable law; or

33 (E) Made an unconstitutional decision; or

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

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

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

40 (B) That the local government's action was for the purpose of avoiding the requirements of ORS
 41 215.427 or 227.178.

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

45 (11)(a) Whenever the findings, order and record are sufficient to allow review, and to the extent

1 possible consistent with the time requirements of ORS 197.830 (14), the board shall decide all issues
2 presented to it when reversing or remanding a land use decision described in subsections (2) to (9)
3 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
5 conclusions or failure to adequately identify the standards or their relation to the facts, but the
6 parties identify relevant evidence in the record which clearly supports the decision or a part of the
7 decision, the board shall affirm the decision or the part of the decision supported by the record and
8 remand the remainder to the local government, with direction indicating appropriate remedial
9 action.

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

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

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

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

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

22
