

**A-Engrossed**  
**House Bill 3272**

Ordered by the House April 16  
Including House Amendments dated April 16

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

Limits extension that Land Use Board of Appeals may provide petitioner whose objection to record is denied to *[seven]* **14** days from later of original deadline or date of denial.

Prohibits board from accepting **petitioner's** 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 (9) A notice of intent to appeal a land use decision or limited land use decision shall be filed  
40 not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of  
41 intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to  
42 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is  
43 mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a  
44 statement identifying when, how and to whom notice was provided under ORS 197.615 does not  
45 render the notice defective. Copies of the notice of intent to appeal shall be served upon the local

1 government, special district or state agency and the applicant of record, if any, in the local gov-  
2 ernment, special district or state agency proceeding. The notice shall be served and filed in the form  
3 and manner prescribed by rule of the board and shall be accompanied by a filing fee of \$200 and a  
4 deposit for costs to be established by the board. If a petition for review is not filed with the board  
5 as required in subsections (10) and (11) of this section, the filing fee and deposit shall be awarded  
6 to the local government, special district or state agency as cost of preparation of the record.

7 (10)(a) Within 21 days after service of the notice of intent to appeal, the local government, spe-  
8 cial district or state agency shall transmit to the board the original or a certified copy of the entire  
9 record of the proceeding under review. By stipulation of all parties to the review proceeding the  
10 record may be shortened. The board may require or permit subsequent corrections to the record;  
11 however, the board shall issue an order on a motion objecting to the record within 60 days of re-  
12 ceiving the motion. **If the board denies a petitioner's objection to the record, the board may**  
13 **establish a new deadline for the petition for review to be filed that may not be less than 14**  
14 **days from the later of the original deadline for the brief or the date of denial of the**  
15 **petitioner's record objection.**

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

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

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

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

26 (b) The date of the decision.

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

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

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

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

44 (15)(a) Upon entry of its final order the board may, in its discretion, award costs to the pre-  
45 vailing party including the cost of preparation of the record if the prevailing party is the local

1 government, special district or state agency whose decision is under review. The board shall apply  
2 the deposit required by subsection (9) of this section to any costs charged against the petitioner.

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

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

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

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

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

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

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

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

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

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

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

34 197.835. (1) The Land Use Board of Appeals shall review the land use decision or limited land  
35 use decision and prepare a final order affirming, reversing or remanding the land use decision or  
36 limited land use decision. The board shall adopt rules defining the circumstances in which it will  
37 reverse rather than remand a land use decision or limited land use decision that is not affirmed.

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

39 (b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte  
40 contacts, actions described in subsection (10)(a)(B) of this section or other procedural irregularities  
41 not shown in the record that, if proved, would warrant reversal or remand, the board may take ev-  
42 idence and make findings of fact on those allegations. **A motion by the petitioner or cross-**  
43 **petitioner to take evidence must be made no later than the date the record is settled for**  
44 **filing an objection to the record.** The board [*shall be*] is bound by any finding of fact of the local  
45 government, special district or state agency for which there is substantial evidence in the whole

1 record.

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

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

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

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

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

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

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

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

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

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

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

32 (a) The local government or special district:

33 (A) Exceeded its jurisdiction;

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

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

37 (D) Improperly construed the applicable law; or

38 (E) Made an unconstitutional decision; or

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

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

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

45 (B) That the local government's action was for the purpose of avoiding the requirements of ORS

1 215.427 or 227.178.

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

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

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

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

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

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

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

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

27