

To: Legal Issues Subcommittee

From: Vance M. Croney, Benton County Counsel  
Jeffrey G. Condit, Attorney at Law

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Question: Do conditions of approval imposed as part of a later land use approval supersede conditions imposed as part of a prior approval?

Answer: Unless the later land use approval expressly addresses whether the prior approval conditions continue or cease to be applicable, the issue will be subject to interpretation by the local government. LUBA will uphold the local government's interpretation of approval conditions unless the local government has improperly construed the applicable law.

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When evaluating the effect of later approval conditions on earlier approval conditions, the analysis will depend on the specific land use approvals at issue. If the later land use approval unambiguously states that the earlier approval conditions either continue or no longer apply, the express language of the later approval resolves the issue. If the later approval does not unambiguously address the issue, it is subject to interpretation by the local government, and LUBA will uphold that interpretation unless the local government has improperly construed the applicable law.

When the meaning of an earlier land use approval is disputed during review of a later land use application, the local government (here, the Benton County Board of Commissioners) will interpret the previous land use approval, including any conditions of approval. *See M & T Partners, Inc. v. Miller*, 302 Or App 159, 164-65, 460 P3d 117 (2020); *Bradbury v. City of Bandon*, 33 Or LUBA 664 (1997).

Once the local government has made the determination, LUBA will review under ORS 197.835(9)(a)(D) to determine whether the decision maker "improperly construed the applicable law." *Dahlen v. City of Bend*, \_\_ Or LUBA \_\_ (LUBA No. 2021-013, June 14, 2021). That is, LUBA will review for whether the interpretation is consistent with the statutory construction rules set out in ORS 174.010 to 174.090, *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). *Lennar Nw., Inc. v. Clackamas Cty.*, 280 Or App 456, 468, 380 P3d 1237 (2016).

This interpretative framework requires consideration of the text, context, and purpose of the land use approval. The fact that a specific condition was included in a prior approval but was not included in a later approval is relevant to the text, context, and purpose of the later approval.

Additionally, when reviewing a local government's interpretation of its later land use approvals to determine whether prior approval conditions continue to apply, LUBA cannot insert what has been omitted or omit what has been inserted. *Lennar*, 280 Or App at 469 (citing ORS 174.010); *Gould v. Deschutes Cty.*, 322 Or App 11, 24, 518 P3d 978 (2022); *M & T Partners*, 302 Or App at 172. LUBA will also give effect to the entire text of the later land use approval to the extent possible. *See* ORS 174.010; *Willamette Oaks LLC v. City of Eugene*, 76 Or LUBA 187 (2017).

Accordingly, it is for the Benton County Board of Commissioners to determine whether the later land use approvals continued or discontinued the conditions of approval attached to earlier land use approvals. And, so long as it applies the interpretative framework outlined above, that determination will be upheld by LUBA.