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March 13, 2013

Hon. Brian Clem, Chair
House Land Use Committee
900 Court St NE, H-284,
Salem, OR, 97301

Re: HB 3362

Dear Rep. Clem and Committee Members:

I am a practicing lawyer in a firm and have nearly 44 years experience in the field of land use law. The principal portions of this bill would impose the "raise it or waive it" provisions of ORS 197.763, which currently apply only to quasi-judicial decisions made by local governments, to legislative decisions made by those governments in post-acknowledgment plan amendment proceedings. These legislative decisions include text amendments to comprehensive plans, zoning, subdivision and other ordinances or regulations, and may also include zoning map amendments. I believe the current version of the above bill is bad policy for the State of Oregon for the reasons set forth below.

1. It is fair to apply "raise it or waive it" to quasi-judicial proceedings, as now provided by ORS 197.763. The universe of standards is limited and included in the notice and the required statutory cautions given to hearing participants. Both the notice and cautions list the applicable standards, invite discussion of other applicable criteria the participant may wish to raise, and warns that, unless that participant raises a criteria before the local hearing closes, he or she may not raise it for the first time at LUBA or the appellate courts. In policy-making or legislative acts, however, that universe of potentially applicable criteria is greatly expanded to include constitutional, statutory, rule, plan and ordinance provisions, where Oregon has not previously constrained appeals by "raise it or waive it" requirements.

2. However, the "raise it or waive it" provisions of ORS 197.763 come with a tradeoff – the notice of hearing contains all the criteria in it and if a criterion is not included, there is no waiver of that criterion for appeal purposes. Moreover, at the commencement of a quasi-judicial hearing, an announcement is made to identify the specific criteria applicable and a caution is given to the audience that the hearing will focus on those criteria or any other such criteria a participant may raise (with sufficient specificity to allow the deciding person or body and the other participants to address that criteria) and that failure to raise a criterion will not allow an appellant to raise that criterion for the first time on appeal to LUBA or an appellate court. No such notice or announcement is required by this legislation, nor is the failure by the local government to list a criteria a ground to raise the same on appeal. In other words, policy making is procedurally worse off than quasi-judicial decision making.

3. As a practical matter, it is very difficult to list criteria that might be applicable to a legislative proceeding. Should the local government use each provision of the federal and state constitutions

(especially the bill of rights-type provisions), always list ORS ch. 197 and the city or county enabling legislation as a part of any hearings notice? That kind of notice would be meaningless.

4. What happens when a local government changes a legislative proposal, especially after a hearing? It would be not required by this legislation to give new notice, nor is there any statutory exemption from challenge under the "raise it or waive it" provisions for failing to anticipate that someone lay in the weeds and made a surprise change at the end. How can one be specific when one has not seen the change? Note that a change has been made to require such listing of criteria for limited land use decisions (Section 2(3) of the proposed bill) but not for policy making. Again, the rules for challenging policy making would be stricter than for quasi-judicial proceedings instead of the other way around.

5. Current provisions of ORS 197.763 allow an issue to be raised orally, as well as in writing for quasi-judicial cases. Once again, the challenges to policy making are made more difficult than for a variance or other quasi-judicial case.

6. Further, the notice in quasi-judicial cases is given personally to those in the notice area around the subject property, as required by law. For legislative changes, either no personal notice is given (except in the newspaper perhaps) or the changes are bundled in with many others and given without much detail in notices under Measure 56, which are most often given in property tax statements. It is likely that most Oregonians will never hear about, or know, the policy changes coming before local governments and, if they do find out about them somehow, will not be able to participate effectively.

7. Unrelated to these statutory considerations, but still important, are sections 4 and 5, which appear to say that there is an objective that appeals should be reduced by "more effective citizen involvement." That is not the history of citizen involvement in this state. Appeals are the means to keep local governments within their bounds. This state has spent very little time and effort in an effective citizen involvement program over the last 35 years and I do not see any desire to change that policy. Planning can be a contentious process, but it does resolve public policy issues. Planning is for people, not the convenience of governments.

Unless significant changes are made to this legislative proposal, I urge you to table the same. I would be happy to discuss these issues further if the Committee wishes.

Sincerely,

Garvey Schubert Barer

By
Edward J. Sullivan

EJS:kms