1000 friends of Oregon

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February 25, 2013

To: Senate Committee on Rural Communities and Economic Development
State Capitol
900 Court Street NE
Salem, OR 97301

Re: SB 77 - Oppose

Dear Chair Roblan and Members of the Committee:

Thank you for this opportunity to testify on SB 77, which amends provisions relating to appeals to the Oregon Land Use Board of Appeals (LUBA). 1000 Friends of Oregon is a nonprofit, membership organization that works with Oregonians to support livable urban and rural communities, protect family farms and forests, and provide transportation and housing choice. 1000 Friends of Oregon opposes SB 77 as currently drafted; while there are some provisions we support, it seems to be a solution in search of a problem.

SB 77 would raise the combination of LUBA filing fees and costs from $400 to $2000 for each appeal, it would require specific pleading in the Notice of Intent to Appeal (NITA), it would consolidate appeals at LUBA, and it would require LUBA to collect and report more information. We support portions of SB 77 and oppose others, as explained below.

The framework for this discussion is the citizen involvement element of Oregon's land use program, the purpose of which is reflected in Goal One: "To develop a citizen involvement program that insures the opportunity for citizens to be involved in *all* phases of the planning process." Tens of thousands of Oregonians have participated in developing and implementing the land use plans of their communities by serving on local planning commissions, crafting local plans, attending meetings, testifying, and sometimes even appealing their local government's decisions if they believe the decision is illegal. We should celebrate this involvement, not make it more difficult – it means Oregonians care about their communities and more importantly, believe *they can make a difference by participating.*

There are two ways in which SB 77 limits the ability of citizens to fully participate in land use planning.

First, Section 1(1) (page 1, lines 7-8) requires that when filing a notice of intent to appeal (NITA), a petitioner must list every assignment of error they intend to raise in their brief. This is both unnecessary, and will probably work against the efficiency that we assume is an objective of this bill.

Under long-standing land use law, with the right of appeal comes responsibility. Before appealing a local decision to LUBA, the petitioner must have testified in the local government decision making process *and* raised all legal issues at that level. This provides the local government an understanding of citizen concerns and a full opportunity to address those at the local level. Therefore, if a local decision is appealed to LUBA, there is no surprise to any party as to what the issues are. However, "assignment of error" is a legal term of art, referring to the technical way in which a lawyer sets out their arguments in a brief, based on the issues already raised below. If these are required to be included in a NITA, any competent lawyer will include every conceivable assignment of error on which they might rely, so as not

to preclude raising it later in a brief. That will tend to solidify those assignments of error, in a way that does not happen under current practice. Now, after the NITA is filed, the local government produces the record, and the petitioner refines and *narrows* the arguments they intend to raise in their brief. The current practice works efficiently; the proposed change may well have the opposite impact.

Second, SB 77 would change the combined LUBA filing fee to $2000, from $400. (Section 1(10), page 3, lines 9-12) Very few local land use decisions actually get appealed to LUBA. $2000 is a very high bar that will severely limit citizen access to this critical part of the land use process. People who are appealing decisions – either proponents or opponents – are often working on a shoestring and effectively shutting them out of the process unless they can navigate a process to get the fees reduced is counter to the idea of citizen participation.

For comparison, the Court of Appeals currently charges petitioners $355 to file a petition for judicial review. Yet LUBA operates quite efficiently.

Every year, local governments make an estimated 15,000-20,000 land use decisions.[1] Of those, only 150-250 are appealed every year,[2] and the past few years have seen even fewer appeals. That's 1-2% of all land use decisions. Appeals to LUBA are quick,[3] and because LUBA's decisions are thorough, very few of them are appealed to the Court of Appeals, and that court rarely overturns a LUBA decision.

Finally, current law provides that if an appellant brings a frivolous appeal, LUBA must require them to pay their opponent's attorney fees.[4] LUBA operates efficiently and well. These provisions of SB 77 are unnecessary.

1000 Friends does support some concepts in the bill. The proposal to consolidate appeals from multiple land use decisions that are generated by the same permit application and the proposal for LUBA to collect and publish more data are both fine proposals. However, we recommend some variations on the information that LUBA would collect and publish from what is contemplated by the bill. It would be more useful and appropriate for LUBA to report on:

- The total number of appeal-able land use decisions made by local governments by type of decision.
- The total number and rate of appeals filed (by type of decision) and success rate of these appeals.
- A list of petitioners and all of the decisions which they have appealed and success rate of these appeals.
- A list of respondents, their success rate, and whether or not they appeared in front of LUBA.
- Instances when LUBA has exercised its statutory requirement to require the losing party to pay the prevailing party's attorney fees and costs if the losing party's claims were not well founded in law.
- Summary statistics showing type of petitioner (applicant or opponent) and success rate by category of petitioner.

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[1] The range is due to the economy and consequent building activity.

[2] See attachment.

[3] LUBA is required to makes its decisions within 77 days of receiving the record of decision from the local government and there is expedited appeal for LUBA cases that go to the higher courts.

[4] ORS 197.830(15)(b) says "The board *shall* also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information." (emphasis added). "Probable cause" is an objective standard that is generally considered to exist when facts and circumstances are sufficient to warrant a person of reasonable caution to believe something is true.

Once these statistics are collected and analyzed it will be possible to move beyond isolated anecdotes and determine if policy changes are necessary, based upon the facts. We believe the data will show that few appeals take place, they are supported by the laws and the facts, and few frivolous appeals take place. Until it can be shown otherwise by objective data we ask that you wait to raise appeal fees.

Citizen participation is a core value of Oregonians, including in the land use program. The appeal fees and pleading requirements in SB 77 are contrary to that value. We ask that you oppose those portions of SB 77. Thank you for consideration of our comments.

Sincerely,

Mary Kyle McCurdy

Mary Kyle McCurdy
Policy Director and Staff Attorney