

4004 NW Thurman
Portland, OR 97210
February 25, 2019

Senate Committee on Housing
State Capitol
Salem, OR 97310

Re: SB 8

Dear Chair Fagan and Committee Members:

My name is Edward Sullivan and I am a retired attorney who has represented applicants, neighbors and local governments in land use proceedings for more than 45 years. I have taught land use law for over 46 years and have participated in Oregon legislation on the subject throughout my career.

I am not able to attend today's hearing on the above legislative proposal, but request that my testimony be included in the record of these proceedings. For more than ten years I have worked with Housing Land Advocates, a nonprofit seeking to encourage the provision of affordable housing in urban areas.

The crux of this bill is an attorney fee provision found in Section 1(5), which states:

Notwithstanding ORS 197.830 (15), a person who petitions the Land Use Board of Appeals to challenge a local government's approval of development of affordable housing shall pay to a prevailing intervening applicant, as described in ORS 197.830 (7)(b)(A), the applicant's costs and attorney fees, including any costs and attorney fees on subsequent appeals from the board.

Oregon is ahead of most of the rest of the country in planning for all housing, including affordable housing. One of the characteristics of such housing is that it must be subject only to "clear and objective" conditions and standards. These are standards that only admit of a "Yes-No" answer. If those standards are met, the applicant should receive the necessary permits.

All that's great in theory; however, there are cases in which opponents have raised claims against permits at the local level and pursued those claims at LUBA and on appeal, notwithstanding the fact that they were never supportable. The time, money and effort to build affordable housing on a tight margin may push the prospects for this housing over the edge and frustrate its availability. This result should not occur and the legislature should intervene to assure it.

Some may argue that the legislature should not promote single-issue attorney fee awards. However, there are already such provisions where the legislature has chosen to intervene to assure that its housing and land use policies are implemented, including:

ORS 197.796 – If a local government imposes an unconstitutional or unlawful condition on a development, the applicant may contest that condition and, if an applicant prevails, he or she will be entitled to attorney fees.

ORS 197.830(15)(b) -- If a party in a LUBA proceeding presents a position with no probable cause to believe it is well founded in fact or law and that party does not, in fact, prevail, LUBA may award attorney fees against that party.

ORS 197.835(10) – If LUBA finds a local government has taken action to exceed the 120 or 150-day time limitations for deciding a permit without the applicant’s consent, LUBA may award attorney fees to a prevailing applicant.

ORS 197.845(3) – If a party requests a stay at LUBA over a permit that has been granted by a local government, puts up a bond, and does not prevail, LUBA may order the award of attorney fees.

ORS 197.850(12) and (13) – If a party appeals a LUBA decision in which the Board has found there was no probable cause to believe that party’s position is not well founded in fact or award, the Court of Appeals may award attorney fees.

Affordable housing is a significant policy issue and the possibility of awarding attorney fees will make those who would bring non-meritorious appeals think twice. That is a very good result and will serve the same purpose as the statutes listed above. In fact they are rarely applied and are designed to cause those who would undertake actions against strongly established state policies to calculate the consequences of their actions. Finally, please note that this bill does not purport to provide for awards against local governments, only those who would seek to thwart the local government from carrying out state policies.

I commend this bill for your favorable consideration. Thank you for the opportunity to state my views.

Sincerely,

Edward J. Sullivan