March 5, 2019

House Committee on Agriculture and Land Use

Dear Honorable Chair Clem and committee members,

Please enter this document and associated documents attached to the submitting e-mail into the hearing record for HB 2003.

Summary

I support adoption of an appropriately revised version of HB 2003.

HB 2003 is a good start at addressing sound State housing policy at the right level. I believe it can be revised to address some flaws and to improve its structure so that the measure would be both more effective and garner wider support.

It's important to note that HB 2003, with one exception addressed below, stands in favorable contrast to HB 2001, SB 8 and SB 10, which are egregiously misguided and trample on Statewide Planning Goal One — Citizen Involvement. I've submitted testimony in opposition to those bills.

Background

In 2008-2009, I was on the Eugene "Citizens Advisory Committee" ("CAC") for the "Eugene Comprehensive Lands Assessment" ("ECLA"), which was a project in response to HB 3337 (2007).

I (and a couple other CAC members) fought hard, but unsuccessfully, for just what HB 2003 is getting at -- a legitimate and actionable analysis of what forms and other characteristics of housing (including cost) are truly "needed" and what buildable and housing policies and actions would legitimately ensure the need could be, and was reasonably likely to be, met. (Please read the attached letter from that period.)

Instead, ECLA blew up when Eugene Planning staff — *and ECONorthwest* — presented the City Council with a recommendation that I demonstrated was based on gross errors in the data analysis.

To save face, the Eugene City Manager convinced the pliant mayor and councilors to launch a "third way" project branded as "Envision Eugene." I also was deeply involved in the Envision Eugene "Community Resource Group" ("CRG") and, with two other very capable participants, we again pressed, again unsuccessfully, for legitimate "need" and "supply" analysis. Instead, last year, the City Council approved, and the feckless DLCD acknowledged, that Envision Eugene provide an analysis that met the requirements of current statutes — despite the fact that the housing "capacity" assessment was based on "phantom" density and other tricks.

As this brief history demonstrates, I was "in the game" ten years ago; and I'm glad to see a legislative effort to fix this fundamental requirement of Statewide Planning Goals. In particular, Eugene has a long record of dodging the intent of regular evaluation of housing needs and capacity. Consequently, Eugene has done very little of any consequence in taking productive actions. Eugene's inaction has been a significant factor in the housing challenges we face now. (However, HB 2001, SB 8 and SB 10 are not at all the right solutions; whereas HB 2003 and other state measures might make a positive difference.)

Discussion

The "Poison Pill" — Under SECTION 18, the addition of subsection (c) to section (15) of ORS 197.830 is a wholly unnecessary and an egregious trampling on Statewide Planning Goal 1 — Citizen Involvement. This new provision reads:

> "(c) The board shall award attorney fees to an applicant under subsection (7)(b)(A) of this section who is a prevailing party against a petitioner who appeals a local government's land use decision or limited land use decision that grants the applicant a permit to partition, subdivide or construct publicly supported housing, as defined in ORS 456.250."

The new provision is unnecessary because an equivalent (but clearer) provision is already in the OAR governing LUBA appeals. Oregon Administrative Rules and Oregon Revised Statutes already provide reasonable protection for applicants against abuse of the LUBA appeal procedure or errors by the local decision makers:

DIVISION 10 RULES OF PROCEDURE FOR APPEALS

OAR 661-010-0075 Miscellaneous Provisions

(1) Cost Bill and Attorney Fees:

(a) Time for Filing: The prevailing party may file a cost bill or a motion for attorney fees, or both, no later than 14 days after the final order is issued. The prevailing party shall serve a copy of any such cost bill or motion for attorney fees on all parties.

* * * *

(e) Attorney Fees:

(A) Attorney fees shall be awarded by the Board to the prevailing party **as specified in ORS 197.830(15)(b)** [See below]; a motion for attorney fees shall include a signed and detailed statement of the amount of attorney fees sought.
(B) Attorney fees shall be awarded to the applicant, **against the governing body**, if the Board reverses a land use decision or limited land use decision and orders a local government to approve a development application pursuant to ORS 197.835(10).
(C) Attorney fees shall be awarded to the applicant, against the person who requested a stay pursuant to ORS 197.845, if the Board affirms a quasi-judicial land use decision or limited land use decision for which such a stay was granted. The amount of the award shall be limited to reasonable attorney's fees incurred due to the stay request, and together with any actual damages awarded, shall not exceed the amount of the undertaking required under 197.845(2).

ORS 197.830(15)(b) 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**.

As is clear, OAR and ORS 197.830(15)(b) already provide an applicant protection against meritless appeals whose sole purpose is to delay a development project of any kind. It also compensates an

applicant when the local jurisdiction mistakenly denies an application that should have been approved.

Adding the new ORS 197.830(15)(c) provision, as proposed in HB 2003 adds no necessary or warranted protection against *meritless* appeals. Instead this provision will have the practical effect of preventing ordinary citizens from filing *legitimate* appeals because, no matter how strong an appeal case is, the decision by LUBA can never be known in advance with any degree of certainty

One of the fundamental elements of LUBA's *quasi*-judicial process is that all parties (jurisdiction, applicant and opponents) can participate without the risk of substantial financial costs if they don't prevail. The prejudicial intent of this bill in tilting the scales to developers is glaringly apparent in that a petitioner challenging an approval is not awarded attorney fees if the petitioner prevails.

In the past, wiser Oregon legislators understood the anti-democratic use of the threat of legal costs by powerful corporations against land use advocates -- the so-called "SLAPP" -- Strategic Lawsuit Against Public Participation. In response, and to protect the rights of citizens to have their day in court, Oregon was one of many states that adopted an "Anti-SLAPP" statute:

> **ORS 31.150(2)** A special motion to strike may be made under this section against any claim in a civil action that arises out of:
>
> (a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;
> (b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;
> (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
> (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Yet now, an unholy alliance of developers and density fanatics proposes to essentially institute a built-in "SLAPP" provision in the quasi-judicial land use appeal proceedings (see SB 8, as another example). If HB 2003's provisions intends to likewise put good-faith petitioners at risk, this will mean that no individual -- no matter how legitimate his or her case -- will dare to file an appeal of a partition, subdivision or publicly-supported housing development.

If Tom McCall were Governor today, he would oppose this proposal. It has no valid purpose beyond existing OAR and ORS provisions other than to citizen citizens who oppose jurisdictions approval of a covered application by means of intimidation.

The related “virtual SLAPP” provision in SB 8 has been strongly opposed by Oregon League of Women Voters of Oregon, League of Oregon Cities, Oregon Chapter of American Planning Association, and other organizations and citizens. I urge you to read their testimony, which is available at:

https://olis.leg.state.or.us/liz/2019R1/Committees/SHOUS/2019-02-25-15-00/SB8/Details

By removing this provision of HB 2003, you would not weaken the bill, and you would eliminate a "poison pill" that could be the primary reason for the bill's defeat, regardless of the merits of its main provisions.

Comments on the substantive elements of HB 2003

HB 2003 takes the first step to require a more useful categorization of housing inventory and need, by defining four household income levels and the following housing types: attached and detached single-family housing, multifamily housing and manufactured dwellings or mobile homes.

But there are several significant deficiencies that need to be addressed:

a) There must be more clarity of "housing need." In fact, although "need" is used in common parlance, it's a poor word for getting at the underlying issue in policy and legislation. A more precise way to restate the core of Goal 10 – Housing would be something like:

> *State and local plans and programs shall encourage availability of housing at a cost that enables households of all economic means to also meet their other basic human needs besides shelter, including food, medical care, child care, and so forth.*

Obviously, this language can be improved and "basic human needs" further articulated. The functional point is this: There is no "crisis" in housing for households who have safe and decent housing and still have adequate financial means to provide for their other basic needs. (Some households in relatively sound financial situations may, of course, have *desires* that they cannot afford, but that is not the current crisis.

The attached very recent Harvard research illuminates a critical point in structuring what's required of local regions and jurisdictions with respect to housing policies and actions. And that is, using better metrics to determine true "need," particularly the current and projected levels of *unmet* "need." Fundamental to guiding local jurisdictions and holding them accountable is replacing "housing cost as a percentage of household income" with "residual household income versus cost of basic human needs." (I'm expressing this *informally*. One of the first tasks appropriate for State action is to refine these metrics.)

It follows that the result of any adoption of HB 2003, whether in the statute or later OAR, must define "affordable" in terms that are based on residual income (which is dependent on household income and housing costs) and cost of other basic human needs. Both of these are dependent on location and household characteristics. (See the Harvard study for more technical details.)

b) As a consequence of (a), above (or any approach to "housing affordability," for that matter), there must be an adequate categorization of households by household characteristics. As an example, the census data already separates the summary statistics on housing by households that rent, own with a mortgage, and own without a mortgage. As another example, students sharing an apartment with a common kitchen, but four or five bedrooms operates under very different financial resources and costs than a family with two children occupying a dwelling.

An essential, although challenging, requirement for making plans for housing is to be able to categorize housing types in a way that supports deriving projections of household financial resources and costs, as well as appropriate dwelling types. Reliable, fine-grained categorization is likely to be intractable, so the goal should be a "Goldilocks" set of categories that have high utility and for which household data can be efficiently determined.

c) Most challenging, in order to estimate housing "need" based on household income, housing costs, and costs of other basic needs, you must project not only housing and other (e.g., medical) costs, which may go up and down over (e.g.) a twenty year period, but also income, which is highly dependent on the national and local economy, as well as in-migration (especially in Oregon). There is no analytic method to resolve this requirement adequately for an extended (twenty-year or more) forecasting horizon.

   Instead, the best way to address this would be to increase the frequency of analysis and shorten the planning horizon. Alternately, have different approaches to a (e.g.) a ten year horizon (finer-grained) and a twenty year horizon (broader projections). The bill has an unrealistic and not very pragmatic split of one- and two-year deadlines for cities to "take action" on the first half and the remaining half of the anticipated "need." This needs to be reworked, probably deferring the specifics to be able to incorporate expert advice.

d) Related to (a), no matter which data and analytic approaches are used, there needs to be a clear distinction between "need" and "demand." For example, one of the household income categories in the present bill is "high income." But "need" for this category is much lower than "demand," and there's recent research that makes clear high-income households are not "burdened" even if they spend more than 30% of HHI on housing. Essentially, the state should concern itself only with housing "need" below some appropriate cutoff level, e.g., 1.2 x AMI.

e) Planning also needs account for how policies shift households' decision on location. For example, it's well accepted that Eugene's decision to make almost no expansion to the Urban Growth Boundary that was established fifty years ago has shifted substantial demand for single-family homes to nearby towns (e.g., Creswell, Junction City and Veneta). This has in turn led to reduced construction in Eugene, which has led to both increased housing costs and an artificial shift in the recent data on single-family versus multi-family residency.

   HB 2003 is on the right track by promoting *regional* analysis. However, the appropriate regions need to be determined more carefully based on the "elasticity" of housing location choices (in colloquial terms "drive 'til you qualify). Portland Metro area modeling has demonstrated that (in rough terms) the greater land is constrained by the UGB, the more "leakage" there will be of demand (and need). As mentioned above, in Eugene's case, this means certain actions will simply shift demand and "need" to outlying cities. The regional approach of HB 2003 should adequately address this. As a glaringly obvious immediate step, the Legislature should revoke HB 3337 that sundered coordinated planning between Eugene and Springfield. (This was an incomprehensibly counter-productive State decision that should be a "learning" experience of how badly "shoot-from-the-hip" legislation can turn out.)

Some of the above issues might be properly addressed by the Admin and DLCD creation of a *methodology*; however, if history is any indicator, DLCD isn't qualified to do this (and neither is ECOnorthwest, on whom DLCD relies too much).

Finally, there is also a perhaps an unintended issue under SECTION 4. Subsection (2) states:

> "In establishing and undertaking actions, measures and policies under subsection (1) of this section, the metropolitan service district or city shall ensure that land zoned for needed housing is in locations appropriate for needed housing and is zoned at density ranges that are likely to be achieved by the housing market using the analysis conducted under section 1 of this 2019 Act. **Actions, measures or policies may include:** …."

Under the normal rules for statutory construction, it could be argued that "may include" limits the actions, measures and policies to *only* those items enumerated in (a) through (j). This should be amended to state: "… may include, but are not limited to, the following: …."

Thank you for your consideration of this testimony. I hope it is helpful, and I would be happy to participate in further discussions with committee members or staff in order to make 2003 a bill that will garner wide support and be effective.

Respectfully submitted,

Paul Conte
1461 W. 10th Ave.
Eugene, OR 97402
541.344.2552
paul.t.conte@gmail.com

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Sustainable Homes Professional

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