From:	Paul Conte
To:	Rep Clem; Rep McLain; Rep Post; Rep BoshartDavis; Rep Helm; Rep Smith D; Rep Williams
Cc:	Raszka Shelley; Exhibits HAGLU; Rep Kotek; Rep Holvey; Rep Nathanson
Subject:	Re: HB 3272 Testimony in opposition: Unnecessary, unfair and nonsensical
Date:	Tuesday, April 9, 2019 8:13:10 AM

April 9, 2019

Chairman Clem,

I've reviewed the -2 amendments to HB 3272. The bill still does not warrant adoption.

A. I appreciate the adjustment of the foreshortening of filing a petition from 7 to 14 days, thus reducing the current 21 days by one week, instead of two. However, this more limited constraint still results in the "domino" issues that I described in "A" of my prior testimony (below). Furthermore, is the resulting one week "gain" of significant impact for an applicant intervenor? The real problem in the case of Eugene is an incompetent City Planning Division staff screwing up their review and recommendations to the decision makers, thus leading to both well-founded petitions and objections to flawed preparation of the record.

B. I also appreciate that the amendments removed the absurd criteria of "for the primary purpose of causing frustration or delay." However, the addition of "motion" still results an apparent over-reaction by awarding attorney fees for the entire appeal proceeding, even if the motion were of minor consequence and caused no significant delay. Thus, the change still doesn't adequately resolve the issues I raised in "B" in my prior testimony (below). Furthermore, the existing language uses "position," which is ambiguous, but LUBA has I believe always considered this to mean an entire petition without merit. I suggest you clarify that intent instead of worsening the language as HB 3272-2 would do. Alternately, add language that would provide LUBA discretion on the amount of attorney fees to award, and which must be proportional to the actual incremental cost resulting from the infraction.

C. The amendments simply reword the original bill's limiting when certain legal disputes can be resolved based on evidence. The issues that I raised under "C" in my prior testimony remain.

HB 3272-2 remains unnecessary, unfair and/or illogical. Please reject this bill.

Respectfully,

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= = = = PRIOR TESTIMONY BELOW = = = =

On Wed, Mar 27, 2019 at 6:33 PM Paul Conte <paul.t.conte@gmail.com> wrote:

> March 27, 2019
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> Chair Clem and committee members,

House Bill 3272 amendments to ORS 197.830 and ORS 197.835 are unnecessary, unfair and/or illogical. Please reject this bill.

A. Truncating the schedule for briefs to be filed.

HB 3272 proposes the following insertion (**bold-underlin**e):

> 197.830(10)(a) … The board may require or permit subsequent corrections to the record; however, the board shall issue an order on a motion objecting to the record within 60 days of receiving the motion. **If the board denies a petitioner's objection to the record, the board may not extend the petitioner's deadline for filing a brief more than seven days from the later of the original deadline for the brief or the date of the determination.**

LUBA operates under Oregon Administrative Rules that provide the following rules that this amendment would impact.

> OAR 661-010-0026(6) If an objection to the record is filed, the time limits for all further procedures under these rules shall be suspended. When the objection is resolved, the Board shall issue an order declaring the record settled and setting forth the schedule for subsequent events. Unless otherwise provided by the Board, the date of the Board's order shall be deemed the date of receipt of the record for purposes of computing subsequent time limits.
>
> 661-010-0030(1) Filing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. * * * * * * * * * *
> (7) Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. * * * * * The cross petition shall be filed within the time required for filing the petition for review * * * * *.
>
> 661-010-0035(1) Unless otherwise provided by the Board, respondent's brief together with four copies shall be filed within 42 days after the date the record is received or settled by the Board. * * * * * * * * * *
> (6) Response briefs that respond to a cross petition for review shall be filed within the time limit required for filing the response brief under subsection (1) of this rule * * * * *.
> * * * * *
> 661-010-0038 A state agency that wishes to file a brief under ORS 197.830(8) shall file the brief together with four copies within the time required for respondent's brief. * * * *.

There is absolutely no need for this HB 3272 amendment because OAR 661-010-0026(6) already provides LUBA the authority to establish the date for computing subsequent time limits, which can be earlier than the date the record is settled if LUBA believes record objections were meritless and/or had no purpose other than delay. Further, as can be seen in the OAR above,

briefs other than just the petition are tied to the date set under OAR 661-010-0026(6). The HB 3272 amendment language doesn't account for these other deadlines, and would create uncertainty and chaos.

B. Awarding attorney fees for a motion or motions that is/are deemed meritless or for the "primary purpose of causing frustration or delay."

HB 3272 proposes the following insertions (**bold-underlin**e):

> 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 **or filed any motion** without probable cause to believe the position or motion was well-founded in law or on factually supported information **or was for the primary purpose of causing frustration or delay**.

This is frankly an absurd and unworkable expansion of the basis for awarding attorney fees. Most ridiculous is the last clause, which places on LUBA a Solomonic duty to determine whether a party filing a motion did it to cause "frustration." In addition, LUBA has in the past actually *granted* motions to delay a deadline based on exceptional circumstance. In a case in which I was the petitioner, and Intervenor-Respondent's attorney moved for, and was granted (over my objection), a *delay* in filing his response brief. Under this proposed rule, he would have been liable for my attorney fees because motion had one and only one purpose -- to cause a delay.

This amendment would also open a Pandora's Box of claims far down the adjudication road because no matter at what point in the LUBA proceedings a motion were made, the resolution of attormey fees would have to wait until LUBA made its decision and all appeals and remand proceedings were resolved. Only then could a prevailing party file a claim based on some long-past, and perhaps inconsequential motion.

Furthermore, it would be disproportional for a party that may have made a minor legal misstep in filing any single motion to be responsoible for *all* of a prevailing party's legal fees. This would effectively place an extreme risk on a non-attorney who wishes to represent themselves in a LUBA appeal because it isn't unheard of for a non-attorney to file a motion without understanding a technical point that disallows the motion at certain points in the proceedings.

There is absolutely no need for this extreme crushing of any reasonable opportunity for ordinary citizens to be involved in "all phases" of land use decisions, as Statewide Planning Goal 1 requires. I've been involved in a number of appeals, and LUBA is quick to deny ill-timed or meritless motions, and no great delay or burden has arisen in any case that I've observed.

C. Limiting when certain legal disputes can be resolved based on evidence.

HB 3272 proposes the following insertion (**bold-underlin**e):

> 197.835(2)(b) In the case of disputed allegations of standing, unconstitutionality of the decision, ex parte contacts, actions described in subsection (10)(a)(B) of this section or other procedural

> > > irregularities not shown in the record that, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations **only upon the motion of a party filed no later than the deadline for filing an objection to the record.**
>
> > There's a "Catch-22" in this limitation. A party may object that the record doesn't contain some item, which LUBA may deny and thereupon settle the record. This amendment would then prevent a party from moving to have the board take the item evidence not in the record to resolve a dispute.
>
> > Furthermore, this precludes discovery from subsequent subpoenas, depositions and/or hearings, which are allowed under LUBA rules and would normally occur after the record is settled. This limitation would likely prompt parties to submit "precautionary" motions to take evidence immediately after filing a Notice of Intent to Appeal, which would add to LUBA's burden and potential delay. Finally, this amendment would completely eliminate the ability to address procedural irregularities that may come to light at any time after the record is resolved; for example, evidence of *ex parte* contacts which the offending parties attempted to hide but which were discovered belatedly.
>
> > This amendment is simply bad law, and no more than a "hack" that would undermine well-established principles of juriprudence practice.

Without knowing the true history of, and motivation for, these amendments, one can only surmise from their ham-handedness that they are another of several attempts in this legislative session (e.g., HB 2001, HB 2003 and SB 8) to impede ordinary citizens' ability to bring their cause to court (in this case LUBA) and be treated fairly and impartially.

The HB 3272 amendments deserve no place in a transparent and honest legal system. Please reject them.

Respectfully submitted,

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