

Dear Chair Helm, Vice-Chair Hartman, and Vice-Chair Owens, and Members of the Committee,

Thank you for taking the time to consider this important piece of legislation. Appeals of local legislative land use decisions, such as Comprehensive Plan amendments and zoning code changes, are subject to repeat appeals that result in costly delays and prevent local governments from implementing critical local and state policy goals in a timely fashion. This is the result of statutes that require LUBA review appeals of local legislative land use decisions differently than quasi-judicial appeals. HB 3458, as amended by -1, will provide a more fair and balanced review of legislative decisions.

Currently, LUBA review of legislative land use decisions is problematic in three significant ways:

- First, in contrast to appeals of quasi-judicial decisions where a “raise it or waive it” rule applies, Oregon law does not require a party to raise an issue before the local decision maker during legislative land use proceedings. As a result, opponents can raise their factual and legal arguments for the first time in their briefs at LUBA. This denies local governments the opportunity to consider potential challenges and revise the decision or the findings to respond before a LUBA appeal is filed.
- Second, unlike a quasi-judicial decision, the Court of Appeals has held that the “law of the case” waiver doctrine does not apply to legislative land use decisions. *Hatley v. Umatilla County*, 256 Or App 91 (2013). In a quasi-judicial decision, when the local government reopens its record on remand, parties may raise new issues when they relate to new evidence or testimony but may not raise old issues that LUBA resolved in its order remanding the decision. Additionally, in a quasi-judicial appeal, parties may not raise issues that could have been raised in the first LUBA appeal but were not. *Beck v. Tillamook*, 313 Or 148 (1992). In contrast, for a legislative remand, even if a City readopts the same code amendments but with revised findings, the parties are not limited to challenging the new findings. As a result, a party can repeatedly appeal a remanded ordinance raising new issues each time.
- Third, when LUBA remands a legislative city decision, LUBA has held that remand has the effect of invalidating the entire ordinance, even when the remand is limited to only a single issue that does not affect other portions of the legislative decision. LUBA has held that, pursuant to ORS 197.835, it does not have the authority to remand a decision in part. The result is that when an ordinance is remanded by LUBA, the City must re-adopt the entire ordinance, rather than correcting the limited issues identified by LUBA. When re-adopting the entire ordinance, new appeals may be raised on entirely different issues that were never challenged in the first appeal. As a result, appeals could continue indefinitely, despite local governments only correcting specific errors identified by LUBA.

HB 3458, as amended by -1, will partially address the first two issues by limiting a party’s ability to raise new issues on remand of a local legislative land use decision. Prior to the first LUBA decision, the procedures remain the same—any party can raise new issues in their briefs before

LUBA. However, on remand, if LUBA directs the local government to adopt supplemental findings or consider additional evidence and the local government is adopting substantively the same legislative package, parties may not raise new issues that could have been but were not raised in the prior appeal. Instead, parties may only challenge the revised findings or new evidence. This amendment evens the playing field and prevents parties from unfairly blocking or delaying legislative action through repeat appeals.

Regarding the third issue, HB 3458, as amended by -1, will allow LUBA to remand a legislative decision in part when the local government demonstrates that the decision contains a severability clause and is reasonably severable. This would prevent entire legislative packages from delayed implementation, or continuous appeals, while specific issues are resolved.

Cumulatively, HB 3458, as amended by -1, minimizes appeals while continuing to provide a fair process for all parties. Thank you again for your consideration and we urge you to vote Yes on HB 3458 with the -1 amendments.

