



March 28, 2023

Chair Maxine Dexter
Vice-Chairs Jeffery Helfrich and Mark Gamba
Members of the House Committee on Housing and Homelessness

Re: HB 3197

VIA OLIS

Chair Dexter and Members of the Committee:

As you know Washington County is the second largest county in the state, with a population over 600,000. As a rapidly growing county, we have worked to find solutions to house the increasing number of families and people moving into the county. The vast majority of those households are located within our urban areas – with approximately 360,000 in the incorporated cities and over 200,000 in the urban unincorporated area within the Metro urban growth boundary. The remaining five percent reside within the rural areas of our county.

While a small percentage of Washington County's population resides in these rural areas, the rural area comprises 80 percent of Washington County's acreage. The rural area varies in use and type significantly from exclusive farm use to exclusive forest use to marginal lands, which are only located in Washington County and Lane County, to exception land. Each type of rural usage has statutory and regulatory considerations that guide how and when development can be approved, placed, and serviced.

Those considerations often require land use professionals to review the specifics of a property for a proposed development application to determine how a proposed house can be properly sited in line with the many potential conflicts with surrounding uses or protections. This professional discretion is needed in these rural areas because the potential for conflicts can directly result in impacts to farming practices, forestry practices, or other state land use planning goals. Failure to properly balance regulatory considerations and use professional discretion can lead to litigation when others assert their rights to use their property for rural uses or to protect habitat or natural resource lands.

In 2017, stakeholders worked throughout the session to develop a compromise package of legislation intended to speed up the process for housing permitting. One piece of that package was to change the needed housing policy in ORS 197.307 by modifying ORS 197.307(4). Originally, that section required local governments to provide clear and objective standards for needed housing on the buildable lands described in ORS 197.307(3), which referred to buildable land in an urban growth boundary. The change in SB 1051 (2017) modified the requirement to

apply to all housing, not just needed housing, and deleted the reference to buildable land inside the urban growth boundary. The conversation around the 2017 proposed bill was related to the work inside the urban growth boundary (both city and county areas of planning jurisdiction). The phrase “buildable land” was removed as it was considered overly restrictive when housing could be placed in areas not included in a buildable land inventory within an urban growth boundary, but that did allow housing to be constructed.

When the bill was enacted, the state provided no additional guidance to counties to create clear and objective standards in rural areas nor were rules changed to support that need. No model codes were written. This is based on the shared understanding that the intent of the 2017 legislation was to create standards of review related to urban areas. This means that counties did not expect to adopt clear and objective standards in rural areas, and most did not take on this very intensive and expensive work for rural areas. Instead, counties have been required to update their codes that apply to lands within the urban growth boundaries that remain controlled by county development codes.

The state and counties were caught off guard when a recent Land Use Board of Appeals decision ruled that the clear and objective standard requirements of Section 197.307(4) applied outside of the urban growth boundary areas and across all lands where housing might possibly be built. In examining the likely result of that interpretation, Washington County asked for HB 3197 as the best fix to return to the shared understanding of planning practitioners. This exclusion of areas outside the urban growth boundary in the bill is reflective of the concerns that county planners across the state realized after the LUBA decision was rendered.

Clear and Objective Standards

At a basic level, clear and objective standards are a set of criteria that a developer can show their proposed housing development meets and the local government must approve the development. Using this pathway speeds up the process by reducing the level of review and process that an application is subject to. The law states that any clear and objective standards should not be so restrictive that they make housing development prohibitively expensive or restricted in such a manner that housing cannot be built.

When a proposed development plan cannot meet the clear and objective standards, it does not preclude the development. Instead, a developer would opt to take their proposed project through a more discretionary pathway, where variances or conditional or special use may be considered for the development to be approved.

Therefore, writing clear and objective standards must carefully balance the expectations of development with the ability for the standards to apply across multiple lots and neighborhoods. Local governments can opt to have different standards, like density of development, in different zones or geographic areas to account for the development expectations to meet the needed housing in residential or mixed use areas. In urban areas, a development code meets

the goal of the zoning – build housing – and clear and objective standards establish a faster path for approval that meet that code.

The primary purpose of most land in the rural area is for farm or forest use. While housing might be allowed, housing development is not the primary purpose of rural land. As a result, there are not as many building applications for housing in these areas. However, there is a greater diversity of potential conflicts between housing and other land uses. The process to create clear and objective code provisions that account for all of these potential conflicts would be a significant undertaking and potentially impossible given state law requirements.

State law applicable to rural land creates approval criteria and use criteria that must be considered for any development. It includes terms and requirements such as “in conjunction with farm use”, “managed as part of a farm use”, and a test related to the potential for a residential use to have undesirable impacts on surrounding farm and forest uses. Some of these standards in state law are intended to protect neighbors that are actively farming or harvesting timber from being prevented from continuing their work. The county is obligated to make a subjective determination based on the facts of each proposal as a result of these laws. Discretionary review allows for professional reviews of proposed development reduce or eliminate conflicts between the farm or forest use and housing that is not related to those practices.

Therefore, in rural areas, the requirement to develop clear and objective standards will be a large, expensive, and capacity draining exercise where minimal housing is intended or allowed.

Rural Residential and Urban Unincorporated Communities

There are rural areas that have been granted an exception from land use goals to allow more density of development than is typically permitted by statute and regulation in rural areas. These are called “exception areas” and those that allow housing development are either “urban unincorporated communities” or “rural residential areas”. Urban unincorporated communities are creatures of state rules, and reflect the fact that certain areas were developed prior to 1973, when the state land use system was enacted, and that remain unincorporated but develop at higher densities than rural areas are typically allowed. They are specifically named in the state rule. Rural residential areas are areas that have been granted an exception from state land use planning goals after the enactment of the goals to allow for housing development. Both designations reflect a recognized need for some development outside an urban growth boundary on otherwise protected farm or forest land.

In many counties, most exception areas remain subject to overlays as part of the planning process that require subjective review, particularly related to Goal 5, for proposed housing development. Goal 5 requires the protection of significant natural resource lands, particularly for streams and wildlife habitat. Trying to develop clear and objective standards that also maintain the requirements of Goal 5 rules within urban areas is how Washington County ended

up before LUBA in the case that re-interpreted the clear and objective standard statute. That issue remains in litigation and has created a barrier to housing development in those areas.

Trying to apply that same set of subjective reviews within a clear and objective process in exception areas will leave counties across the state unable to comply with a part of the law. Either a county will violate ORS 197.307 or will violate other Goal requirements. And the delays to housing development will be even greater as the litigation moves from Washington County's urban areas that have Goal 5 conflicts to rural areas where housing development fails to follow the processes for farm or forest conflict resolution or required goal overlay analysis.

Options for Counties

While HB 3197 would remove the requirement that counties create clear and objective standards in rural areas, it would not preclude a county from recognizing that some exception areas do not have overlays and that clear and objective standards could be created to assist in housing development. There would be a cost for a county undergo a Development Code amendment process aimed at creating a faster path for housing development while not running afoul of other land use requirements.

However, it is not possible to account for the variety of exception areas in statute in a manner that would leave counties with less litigation or out of compliance with the law. Therefore, leaving the option open but removing the mandate better balances the work that counties must do in rural areas while building communities for all.

For these reasons, Washington County requests that you pass HB 3197 as introduced.

Sincerely,

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