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Via Electronic Mail
House Committee on Agriculture, Land Use, Natural Resources, and Water
Oregon State Capitol
900 Court St. NE
Salem, OR 97301

RE: Testimony on Behalf of TLM Holdings LLC *Against* Proposed HB 3013

Dear Honorable Legislators:

Thank you for this opportunity to comment. This firm represents Ted Millar and TLM Holdings LLC (collectively "TLM"), and this testimony is submitted in opposition to HB 3013 (the "Bill") because it would have unintended and disastrous consequences for Oregon businesses and municipal governments. I have been practicing Oregon land use law for more than 40 years including six years of service on the Oregon Land Use Board of Appeals. I can unequivocally say I have not ever seen a more catastrophic legislative proposal.

HB 3013 is a solution in search of a problem. It does not address an existing problem with Oregon's land use laws. Instead, and as the testimony in support of the Bill shows, it is a reaction to a single lawsuit in which the plaintiff in the lawsuit, who is also the proponent of this Bill, brought ill-advised litigation that was in no way an attempt to "enforce" anything ordered by LUBA.

If passed, however, HB 3013 would upend Oregon's long-held requirement that a litigant must have "standing" in order to sue, stifle and dramatically increase the expense of development in Oregon, and create incentives for a whole new category of litigation to further burden our courts. The Bill would affect not only private developers but would also impact municipal governments seeking to authorize important housing or economic development proposals within their boundaries. The many problems that HB 3013 would create are discussed in greater detail in the balance of this testimony.

I. HB 3013 does not address a problem of statewide concern – it is instead about a litigant (the Bill proponent) who is disappointed about the outcome of case that is still on appeal.

A. Background.

TLM applied for, and Marion County approved, airport related development at the Aurora Airport. TLM's property still happens to be zoned EFU even though it is on the airport side of Airport Road, is surrounded by existing airport development, and every single airport master plan including the airport master plan in the Marion County acknowledged plan has determined such property to be suitable for airport development. LUBA affirmed Marion County's approval (twice) and approved that development too. The opponent (Mr. Schaefer), and this Bill's proponent, appealed to the Court of Appeals, which surprised most everyone with an interpretation of state law that development at the airport could not rely upon the airport (a "transportation facility") to justify an airport development approval.[1]

B. HB 3013 does not address a problem of statewide concern.

HB 3013 is not about some serious problem of statewide land use concern – it is about a litigant's disappointment following a completely foreseeable loss after filing a meritless lawsuit. When LUBA issues an order it is and can be enforced. The process is working and has worked for decades.

Mr. Schaefer sued agencies and individual people in circuit court advancing novel legal theories and seeking extraordinary action from the circuit court that were not the subject of LUBA's order. He asked the circuit court to force parties to undo contracts and approvals to which he was not a party and in which he has no legal interest, to enjoin **unformed** contracts and **draft** documents, and to prohibit Marion County **from granting any future permits** to TLM to develop its property at the airport. He also sought to compel TLM to undo site stabilization actions that TLM was required by law to take in order to terminate a DEQ 1200-C stormwater permit. More on that below.

The premise of his lawsuit was false: that he was "enforcing" an order from LUBA which had acted on a court of appeals opinion that airport development cannot rely upon the presence of the airport for approval and so reversed a permit and zone change that was based in part on serving the needs of the Aurora Airport. LUBA did not say the property could not be developed under a different application. The problem for Mr. Schaefer is that the LUBA order in fact did not mention **any of the relief he sought**. He nevertheless wanted the court to take extraordinary actions to rescind or declare null and void various documents including:

- An unexecuted HDSE (sewer provider at the airport) Drain Field Easement Amendment.

[1] A few years earlier ODOT had a rest stop on I-5 approved (after a LUBA appeals process) relying on I-5's (a transportation facility) needs.

- A Draft Aurora State Airport Master Plan, Figures 2-12 and 2-14, which was a discussion draft.
- A TLM Through the Fence Agreement, which does not refer to and is not contingent on any specific land use approval, including the approval reversed by LUBA. It does not authorize any development.
- A Marion County Septic Site Evaluation, which is not tied to any particular development proposal. The site evaluation does not identify the TLM property, the now-reversed land use decision, or any other development decision.

The circuit court rightly rejected all of Mr. Schaefer's claims against all defendants.

II. HB 3013 threatens property owners who merely seek to maintain their land.

If a property owner gains a local government approval for a permit or one change that is based in whole or **in part** on an "effective but unacknowledged" regulation, ostensibly anything the owner does with his land to maintain it or irrigation or water systems or driveways or fences on the property is subject to "removal" under the bill, if acknowledgement is not obtained for whatever reason, because it may have something however tangentially to do with the approval.

III. HB 3013 would unreasonably delay development, because property owners, public and private developers including municipalities would need to wait until all appeals were exhausted before taking any steps to do anything with the subject property.

The fact that HB 3013 would slow legitimate development to a crawl is easy to show. Taking TLM's case as an example – after TLM was granted a conditional use permit and zone change, TLM removed from the subject property the following: dying trees; old tree root balls; and dilapidated structures. TLM also engaged in some grading work and erosion control on the property. According to Mr. Schaefer's complaint, these actions were "improvements" to the property.

HB 3013 would require any improvements to be "removed." Taken literally, that would mean finding and putting back on the property, the dilapidated structures and the dead or dying trees. It would also require the developer to simulate the various holes, ruts, etc. that had previously existed on the land but that had been smoothed over by the grading. It would require removal of any lifesaving infrastructure installed. This is obviously a costly and impossible task. If faced with this prospect, no property owner, developer or municipality would take any action on the property until the multi-year appellate process had played out.

Additionally, the ability to force a developer go back in time and re-create (at whatever the expense) the pre-development conditions of the property effectively grants the complaining party an injunction, without ever having to demonstrate the most critical showing for injunctive relief – which is that the complaining party will be irreparably harmed.

Other examples come to mind. What about a municipality that obtains permission for a new water or sewer infrastructure improvement? They can't make any improvement to their system if it is in any way related "in whole or in part" to an "effective but unacknowledged land use rule, without taking the risk of being sued.

What about citizens or municipal governments who obtain approval for goal exceptions to protect their property from catastrophic flooding or other disasters? Exceptions are often appealed by project opponents and remanded by LUBA at least once "for more adequate findings" on some issue. Must the citizen or municipality face the Hobbesian choice of neglecting approved lifesaving infrastructure or install or improve the needed infrastructure and take the risk of being sued because some opponent appeals to LUBA and might win a first round? If this bill is adopted, the focus of Oregon's land use system will be on opposition to development, and everything will come to a halt if there is an opponent. Opponents will become the arbiters of what happens in Oregon.

Right now, if a LUBA litigant wants to foreclose the person who got a local land use approval from doing anything with the property they can file requests at LUBA for stays. However, this bill if approved, would make getting stays irrelevant, unnecessary and unprofitable. Opponents are incented to wait in the weeds to see if they can get some technical LUBA remand so they can sue in circuit court for their purported "actual damages."

IV. HB 3013 eliminates Oregon's requirement that a plaintiff have "standing" to bring a claim.

The Bill's elimination of Oregon's normal "standing" requirement invites an unlimited number of intermeddlers to stymie legitimate development. Under longstanding Oregon law, a plaintiff generally must show three things to demonstrate he has standing to sue:

First, that he has some "right, status or other legal relation," rather than merely "an abstract interest in the correct application or the validity of a law." *Foote v. State*, 364 Or 558, 563, 437 P3d 221 (2019). This means that if a plaintiff does not demonstrate any "injury or other impact on a legally recognized interest beyond an abstract interest in the correct application or the validity of [the] law," then he does not have standing. *DeParrie v. State*, 133 Or App 613, 617, 893 P2d 541, rev den, 321 Or 560 (1995) (quoting *Budget Rent-A-Car of Washington-Oregon, Inc. v. Multnomah Cnty.*, 287 Or 93, 95, 597 P2d 1232 (1979)).

Second, a plaintiff must show that his rights, status, or other legal relations are "affected." *Foote*, 364 Or at 563. The effect must be real or probable, not hypothetical, or speculative.

Third, the "court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate"—that is, the "relief that the plaintiff seeks, if granted, must redress the injury that is the subject of the declaratory judgment action." *Id*. (*quoting Morgan v. Sisters School Dist. No. 6*, 353 Or. 189, 197 (2013))

Oregon law requiring "standing" is a critical doctrine that generally allows someone to sue only if they truly have something at stake in the outcome of the litigation. The effect is to help ensure that only meaningful and meritorious cases are presented to our already-overburdened courts.

HB 3013 would completely upend the settled law that a plaintiff needs standing to sue. For example, the proposed bill would grant standing to bring a lawsuit to "Any person who participated in an appeal of, or submitted testimony in opposition to, the unacknowledged provision." Someone from South Dakota, who is not even an Oregon resident, could "submit testimony" in opposition to a development and thus magically have standing to bring a lawsuit even though they have *nothing* at stake in the litigation. Similarly, someone living in Multnomah County could submit written testimony in opposition to a development in Malheur County – even if the person was totally unaffected by the development – and nevertheless have standing to sue in circuit court to halt it or seek "actual damages" under the Bill.

The grant of "standing" would be similar for for someone who "participated in an appeal." Apparently, the Bill would allow someone who merely attended oral argument on an appeal to have standing to sue. Ostensibly it is good enough to do something in any appeal along the way to have the right and incentive under the Bill to sue.

This law would make a mockery of Oregon's standing doctrine and expose property owners, developers and the courts to all manner of specious litigation from persons who have nothing personally at stake in the outcome.

V. HB 3013 threatens to eliminate Court of Appeals' review of LUBA decisions.

HB 3013 purports to immediately make "void" and "without further effect" a permit or zone change that fails to gain acknowledgment. If LUBA remands a county or city approval because, LUBA believes it needs "more adequate findings", then the developer's approval will be "void" on the first loss, and it would not matter what the Court of Appeals says. That means the Court of Appeals is likely to say it lacks authority to decide the appeal because the underlying approval is already "void", and so any order by that court would be an unlawful "advisory opinion" and/or "moot" because it would affect no party's rights.

VI. HB 3013 would chill legitimate development in Oregon by making it too risky for a developer who successfully obtained a permit or zone change to do any work during the pendency of appeals that can take years to resolve.

Oregon's land use system has a web of extremely complex rules that already invite litigation and incents opponents to challenge development. Important developments that cities and counties all over the state want and approve for **jobs or housing** – are *routinely* challenged at LUBA and can get caught up in appeals for years, sometimes decades. For example, the Thornburg destination resort in central Oregon has been tied up in appeals for 20 years.

If a developer of a destination resort, data center, housing development, Intel factory, or airport related development will have their approved development permits "voided" the minute they lose

the first of what may be years of appeals, remands, do overs, and so forth, then a "remand" from LUBA or the court of appeals for "more adequate findings" (which is common), will be pointless. You get sued before you can do what LUBA says. Further, you cannot act on remand to fix a "void" approval. If the approval is "void", it is gone. And if a developer tried to seek action after a remand on the already "void" approval, opponents of the approval (if this Bill is passed) could file a claim in circuit court for an injunction or for whatever they allege to be their "actual damages," regardless of how minor the remand is The development permit becomes "void" and exposes the developer to damages sought by any number of litigants, upon an initial remand from LUBA. It is hard to imagine what developer or municipality would expose themselves to that.

VII. HB 3013 conflicts with Oregon Department of Environmental Quality rules and regulations.

As noted above, the Bill seeks to require developers who have begun work on their property to do the impossible in the event a permit or zone change later fails to gain acknowledgement – which is to go back in time and re-create the precise pre-development condition of the property. This requirement in HB 3013 is in direct conflict with Oregon DEQ regulations. This can be demonstrated based upon the very case that the proponent of the Bill lost against TLM.

After Marion County granted TLM a zone change and conditional use permit, TLM applied for and received a DEQ 1200-C construction stormwater permit. The DEQ permit that TLM obtained is a National Pollutant Discharge Elimination System ("NPDES") Construction Stormwater Drainage Permit which was issued pursuant to ORS 468B.050, under power delegated to Oregon under the Federal Clean Water Act. *See Tualatin Riverkeepers v. Or Dep't of Environmental Quality*, 235 Or App 132, 135 n.2, 230 P3d 559, *ren den*, 349 Or 173, 243 P3d 468 (2010); 33 U.S.C. § 1342. DEQ 1200-C Permit conditions are mandatory and have the force of law. OAR 340-045-0015(5)(b) (providing that permit holders must "[f]ulfill all terms and conditions of the permit issued").

Once TLM engaged in clearing dilapidated buildings on its property and removing dead or dying trees, then TLM would have to take certain legally-required steps when it became time for the 1200-C permit to be terminated. One of these steps is to ensure that the site is "stabilized" for purposes of water runoff. For example, Section 2.2.21 of the 1200-C permit provides that registrants like TLM must ensure that the site is stabilized, that there is "no reasonable potential for discharge from the site of construction-related sediment or turbidity to surface waters," and that a vegetative cover is placed over the site to help prevent improper water runoff.

After the Marion County permit and zone change was reversed, and cognizant of its legal obligations, TLM worked with DEQ on an acceptable plan for site stabilization so that the 1200-C permit could be terminated. **TLM performed necessary fill/grading work pursuant to DEQ 1200-C permit termination procedures**. But HB 3013 would purport to prohibit the fill and grading work necessary to stabilize the site – and the planting of a

vegetative cover, which was also required for site stabilization – because that fill and grading is not the same as the pre-development condition of the property. There is no getting around this conflict if HB 3013 were to be passed.

HB 3013 should not be passed because it would conflict with critical site stabilization requirements required by Oregon DEQ, which power is delegated to Oregon DEQ by the United States under the Clean Water Act.

VIII. HB 3013 incentivizes litigation as a means to freeze needed development.

If the Bill is passed, all litigant groups will coordinate so they all do some nominal participation in the process so they can file their litigation against a hapless developer after the first "more adequate findings" remand, exposing the developer of a project a city or county badly wants or needs, to their collective ginned-up litigation in which they will hope to recover their "actual damages".

IX. What about "effective but unacknowledged" regulations that are unacknowledged because of a technical failure by local government to file required notice with DLCD?

Property owners and developers do not control or even know when, if or whether cities or counties send off the notice of a final approval to DLCD to gain acknowledgement. They presume in good faith local governments do that, but sometimes that step is forgotten by local governments entirely or for a long time. Meanwhile the property owner or developer moves forward. Under the Bill, the technical failure by a city or county to send in a notice for acknowledgement exposes citizens who acted in good faith to anyone's "claim for damages" and their approval – even if years ago approved – is "void" and the apartment, house, intel factory, airport – whatever – must be "halted and removed."

X. HB 3013 appears to be an end-run around currently-pending litigation.

Proponents of HB 3013 have argued that ORS 197.625 (as presently worded) gives Mr. Schaefer standing to bring enforcement actions under ORS 197.825(3)(b) in a *currently pending* case before the Oregon Court of Appeals. The Legislature should not get involved in the merits of a legal case currently under way.

For these reasons, as well as those expressed in other testimony in opposition to HB 3013, I urge you not to advance the Bill out of Committee.

Very truly yours,

Wendie L. Kellington

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CC: Ted Millar
TLM Holdings LLC