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Via email

House Committee On Agriculture, Land Use, Natural Resources, and Water
Oregon State Capitol
900 Court Street NE
Salem, Oregon 97301

RE: HB 3013 – opposed

Dear Co-Chair Helm, Co-Chair Owens, Vice-Chair McDonald, and members of the committee

I am a land use attorney with over 27 years of experience with Oregon's Land use system. I am writing on my own behalf and not on behalf of any client.

This bill is a solution in search of a problem; it has unintended consequences and creates more problems that it attempts to solve.

Although not a specimen of drafting clarity, the bill presumably only applies in the limited situation where land issue permits and/or zone changes are issued in conjunction with a Post Acknowledgement Plan Amendment ("PAPA") that "fails to gain acknowledgement." In that situation, the bill restates existing law by clarifying that "the permit or zone change is void and without further effect." However, the bill does not specify exactly what moment in time constitutes a "failure to gain acknowledgement." More often than not, LUBA will remand an approved PAPA for additional findings and additional evidence. Those issues identified by LUBA are often successfully addressed on remand. In this manner, the PAPA - or a modified version thereof - eventually "gains acknowledgment" after one or more trips up the appellate ladder. This bill could potentially be interpreted to allow an action in circuit court prior to the point in time when the case is truly finished.

In those situations where a land use decision is "effective" (because it was approved by the local government) but still under appeal to LUBA / the courts, the applicant moves forward with that approval at their own risk. It is rare for an applicant to move forward with development while land use appeals are pending. As attorney Mary Kyle McCurdy correctly notes in her letter to this Committee dated February 2, 2025, "[i]n almost all situations, the local governments and parties to the matter abide by the LUBA decision."

There are times, however, when a landowner needs to take a calculated risk and move

forward with the development "at their own risk." As an example, I was involved with a case where landowners obtained an exception to Goal 18 to build a beachfront protective structure ("BPS") to protect their 11 homes and 4 vacant lots. Opponents appealed the PAPA and associated permits to LUBA, but did not request a stay of the decision. Knowing that their homes would be destroyed by king tides if no immediate action was taken, the landowners moved forward with the PBS – at their own risk – while the LUBA appeal was pending. That was the only way to save their homes. LUBA later remanded the case on 6-7 issues, which were cleaned up on remand. The opponents did not file a second LUBA appeal, telling supporters that there was "no chance that [LUBA] would find in our favor again." As this bill is currently drafted, the opponents might have been able to take advantage of ambiguity as to what constitutes "fails to gain acknowledgement" to file in circuit court seeking removal of the BPS even though the case was far from over and would ultimately be one decided in favor of the applicants.

The bill ventures into uncertain territory by demanding that once the PAPA "fails to gain acknowledgement," that "any improvements or use based on the permit or zone change must be halted and removed." This is poor public policy, because there may be other PAPA applications that could be filed and "gain acknowledgment," thereby allowing the previously constructed development.

Some of the testimony submitted to this Committee misstates current Oregon law. For example, in a letter dated January 30, 2025, Central Oregon Landwatch states, in part:

> A hypothetical example of this loophole looks like this: a local government approves a land use application. An interested neighbor testifies in opposition to the application and believes the local government's land use decision fails to comply with an applicable land use regulation. The neighbor appeals the decision to LUBA. LUBA agrees with the neighbor and remands or reverses the local government land use decision. But the applicant proceeds with developing the land use on the property anyways. The neighbor goes to circuit court seeking to enjoin the development. The circuit court dismisses the neighbor's case because the neighbor doesn't have standing to enforce LUBA's order.

Under existing law, a true "neighbor" certainly would have standing to file an enforcement action in Circuit Court under ORS 197.825(3) and/or ORS 215.185. A "neighbor" living within sight and sound would be presumed to be adversely affected by development. What this bill does is open the courts to persons who merely have an abstract interest in the correct application of the law, which, in turn, will create a cottage industry for land use profiteers / pirates to clog the court up with "enforcement" cases. Oregon Circuit Courts are already painfully overtaxed, so this is extremely poor public policy.

Ironically, in the same breath of trying to relieve a potential litigant of any responsibility of

proving that they have a real "dog in the fight," the bill seeks to reward a litigant of an enforcement with a claim for "actual damages caused to the person by any improvements or use based on the permit or zone change." It is difficult to conceive how someone who cannot prove that they have standing to even *file* an enforcement action in circuit court would have any "*actual damages*" stemming from the same development. After all, the hallmark of a standing inquiry is the presence of some "actual damages." So the bill makes no sense in this regard.

Current law strikes the correct balance. As currently enacted, ORS 197.825(3) provides:

> ***(3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:***
>
> ***(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015 (10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and***
>
> ***(b) To enforce orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order.***

Similarly, ORS 215.185 provides:

> ***215.185 Remedies for unlawful structures or land use.***
>
> ***(1) In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use. When a temporary restraining order is granted in a suit instituted by a person who is not exempt from furnishing bonds or undertakings under ORS 22.010, the person shall furnish undertaking as provided in ORCP 82A(1).***
>
> ***(2) The court may allow the prevailing party reasonable attorney fees and expenses in a judicial proceeding authorized by this section that involves a dwelling approved to relieve a temporary hardship. However, if the court allows the plaintiff reasonable attorney fees or***

> ***expenses, such fees or expenses shall not be charged to the county if the county did not actively defend itself or the landowner in the proceeding.***
>
> ***(3) Nothing in this section requires the governing body of a county or a person whose interest in real property in the county is or may be affected to avail itself of a remedy allowed by this section or by any other law.***

ORS 215.185(3) is a curious provision insomuch as it absolves the County from any duty of enforcing its land use regulations. Perhaps in the limited situation where an appellate decision results in a PAPA that "fails to gain acknowledgement" and cannot be remedied with other applications, there should be some duty on the part of the County to enforce their zoning laws. This bill, however, is not the answer.

Section 1(5)(b) grants a cause of action in circuit court to two separate classes of individuals: those who "participated in an appeal of * * * the unacknowledged provision," as well as those who "submitted testimony in opposition to the unacknowledged provision." It would be poor public policy to grant appeal rights to persons who have not exhausted their administrative remedies or preserved issues for appeal. Again, this bill appears to be for the purpose of creating a new cottage industry for litigants to be awarded "actual damages" – whatever that means – despite only showing the minimal commitment of submitting a boilerplate form letter to a local proceeding to a PAPA.

I ask that the Committee vote no on this ill-advised bill.

Very truly yours,

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/s/ *Andrew H. Stamp*

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