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March 14, 2012

TO: The Honorable Brian Clem, Chair
House Committee on Land Use

FROM: Bob Rindy, Department of Land Conservation and Development

RE: HB 3362

This bill requires that participants in a local "legislative" land use decision cannot appeal an issue to the Land Use Board of Appeals unless they have raised the issue to the local government in a hearing "(a) in writing prior to the expiration of the comment period, and (b) with sufficient specificity to enable the decision maker to respond to the issue." The bill also requires this department to review a statewide land use planning goal related to citizen involvement (Goal 1) to determine whether changes to the goal can reduce the potential for appeal of local land use decision-making to the Land Use Board of Appeals by ensuring more effective citizen involvement in the review of local land use planning." The department is required to report on this review to the legislature prior to January 1, 2015.

The department is not taking a position on this bill, but is providing these comments in response to the bill's direction to this department to consider changes to statewide planning Goal 1. The department has also submitted an estimate of the fiscal impact to the department as a result of this portion of the bill.

Regarding the bill: first, the requirement to raise an issue with particularity in order to be able to appeal already exist in state law (see Attachment), but only with respect to so-called "quasi-judicial" land use decisions. Those are decisions (for example a zone change or a permit) that involve only a particular area or a particular property. In contrast, "legislative" land use decisions are typically much broader, and could involve the entire land use plan for a city or county.

The current statute at ORS 197.763 regarding quasi-judicial decisions includes not only the "raise it or waive it" burden on participants, but at the same time requires that local governments ensure participants are aware of that requirement, that they have adequate notice of the hearing and all the elements of the proposal, that they have a reasonable opportunity to understand the proposal and view staff reports, and have an opportunity to respond to changes to a proposal as it proceeds through the approval process. Time frames are clearly set forth in the statute so that participants are well aware of deadlines to provide comments (we note that HB 3362 provides that local governments may set a "comment period," but imposes no particular time frames or other limits on that authority).

We have provided a summary of the public notice and related provisions of ORS 197.763 because, while these provisions have been long viewed as a fair "tradeoff" for the increased "raise it or waive it" burden on citizens and other participants, HB 3362 imposes no such provisions. Instead, the bill proposes that this department (DLCD) consider whether to make

amendments to the statewide land use planning goal concerning citizen involvement, Goal 1. It may be assumed that in this manner, citizens and others may be provided some assurance that local governments will provide better notice, and citizens will be better informed of their obligation to raise issues with sufficient specificity and in time for local consideration. Statewide goals apply to legislative plan amendments, and as such, the proponents of this legislation may reasonably expect that Goal 1 could be changed to better ensure that local governments adequately involve citizens and better information about proposed legislative plan amendments.

The Land Conservation and Development Commission (LCDC) has been discussing changes to Goal 1 for quite some time now. Within the past year the statutorily designated Citizen Involvement Advisory Committee (CIAC, which advises LCDC on citizen involvement matters) has renewed its efforts urging LCDC to consider goal changes or administrative rules in order to improve local government efforts toward citizen involvement in land use planning. The goal does not currently include clear provisions such as those in ORS 197.763. Many citizen advocates believe the goal in its current form has been unsuccessful toward that end, especially in the past few years as local government budgets have increasingly been unable to fund citizen involvement efforts.

While LCDC has expressed a commitment to improved citizen involvement, at the same time it recognizes that proposed changes to Goal 1 are highly controversial. Many proposals to change the goal raised in the course of these discussion are viewed as potentially burdensome to local governments struggling to maintain basic local planning functions. The statutory process and requirements necessary for LCDC to amend goals is extensive (understandably since such amendments potentially all local governments and, for this goal, all citizens). As such, as the committee considers ways to balance proposed new restrictions on participants with related adjustments to local government responsibilities for notice and citizen involvement, the committee should consider other available options in addition to, or rather than, asking LCDC to consider the imposition of such measures through Goal 1.

Finally, we remind you that this department and the governor's office have presented this committee with a package of legislation concerning the urban growth boundary (UGB) process, HB 2253, HB 2254, and HB 2255. These measures intend LCDC to adopt a set of rules over the next year to 18 months following the session, and this effort will be a substantial commitment of time and energy by the department and LCDC. We ask the committee to recognize that an additional and likely very controversial assignment for Goal 1 changes will be very challenging in part because of the other work assigned to the commission.

We would also note that the process to design HB 2253, HB 2254, and HB 2255 included almost two years of work in groups that included a broad spectrum of interests in land use planning. The proposed legislation has, at this point, support from most interests. Those discussions have focused a great deal on land use appeals, and indeed, one of the main purposes was to reduce appeals. The proposed legislation provides that, in the future, UGB amendments (which are "legislative land use decisions") will increasingly rely on LUBA, rather than LCDC, to resolve conflicts that are inherent in UGB planning. As such, procedures and "standing" for participation at LUBA is increasingly important. The proponents of HB 3362 were at the table for those

discussions. However, at no point in this process has there been mention or discussion of the proposals in HB 3362.

On an unrelated matter, the department wishes to point out a technical issue with the proposed bill: Section 1 inserts a new (4) into ORS 197.620. However, as drafted, this amendment would seem to override the current (2) of that statute, and possibly the related (3). We do not think this is the intent of the proponents. We suggest that, if the bill goes forward, the new subsection (4) should be reworded to start off "except in the circumstances described in subsections (2) and (3) of this section …"

Thank you for this opportunity to provide you with information about HB 3362. If committee members have questions about this testimony, I may be reached at 503-373-0050 Ext 229, or through email at bob.rindy@state.or.us.

Cc: Richard Whitman, Governor's Natural Resources Advisor
Marilyn Worrix, LCDC Chair

197.763 Conduct of local quasi-judicial land use hearings; notice requirements; hearing procedures. The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:

(1) An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.

(2)(a) Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:

(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary;

(B) Within 250 feet of the property which is the subject of the notice where the subject property is outside an urban growth boundary and not within a farm or forest zone; or

(C) Within 500 feet of the property which is the subject of the notice where the subject property is within a farm or forest zone.

(b) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.

(c) At the discretion of the applicant, the local government also shall provide notice to the Department of Land Conservation and Development.

(3) The notice provided by the jurisdiction shall:

(a) Explain the nature of the application and the proposed use or uses which could be authorized;

(b) List the applicable criteria from the ordinance and the plan that apply to the application at issue;

(c) Set forth the street address or other easily understood geographical reference to the subject property;

(d) State the date, time and location of the hearing;

(e) State that failure of an issue to be raised in a hearing, in person or by letter, or failure to provide statements or evidence sufficient to afford the decision maker an opportunity to respond to the issue precludes appeal to the board based on that issue;

(f) Be mailed at least:

(A) Twenty days before the evidentiary hearing; or

(B) If two or more evidentiary hearings are allowed, 10 days before the first evidentiary hearing;

(g) Include the name of a local government representative to contact and the telephone number where additional information may be obtained;

(h) State that a copy of the application, all documents and evidence submitted by or on behalf of the applicant and applicable criteria are available for inspection at no cost and will be provided at reasonable cost;

(i) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing and will be provided at reasonable cost; and

(j) Include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings.

(4)(a) All documents or evidence relied upon by the applicant shall be submitted to the local government and be made available to the public.

(b) Any staff report used at the hearing shall be available at least seven days prior to the hearing. If additional documents or evidence are provided by any party, the local government may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Any continuance or extension of the record requested by an applicant shall result in a corresponding extension of the time limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.

(5) At the commencement of a hearing under a comprehensive plan or land use regulation, a statement shall be made to those in attendance that:

(a) Lists the applicable substantive criteria;

(b) States that testimony, arguments and evidence must be directed toward the criteria described in paragraph (a) of this subsection or other criteria in the plan or land use regulation which the person believes to apply to the decision; and

(c) States that failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal to the board based on that issue.

(6)(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

(b) If the hearings authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence, arguments or testimony. If new written evidence is submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven days to submit additional written evidence, arguments or testimony for the purpose of responding to the new written evidence.

(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

(d) A continuance or extension granted pursuant to this section shall be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179, unless the continuance or extension is requested or agreed to by the applicant.

(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant's final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.

(7) When a local governing body, planning commission, hearings body or hearings officer reopens a record to admit new evidence, arguments or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony or criteria for decision-making which apply to the matter at issue.

(8) The failure of the property owner to receive notice as provided in this section shall not invalidate such proceedings if the local government can demonstrate by affidavit that such notice was given. The notice provisions of this section shall not restrict the giving of notice by other means, including posting, newspaper publication, radio and television.

(9) For purposes of this section:

(a) "Argument" means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. "Argument" does not include facts.

(b) "Evidence" means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision. [1989 c.761 §10a (enacted in lieu of 197.762); 1991 c.817 §31; 1995 c.595 §2; 1997 c.763 §6; 1997 c.844 §2; 1999 c.533 §12]