

Representative Brian Clem, Chair  
House Committee on Land Use  
State Capitol  
Salem, Oregon 97301

RE: Proposed -7 Amendments to SB 77

Dear Representative Clem,

We are writing as former referees at the Oregon Land Use Board of Appeals (LUBA). Corinne Sherton was on the Board from 1987-95. Peter Livingston was on the Board from 1995-98. We both continue to practice in the land use planning field.

The proposed -7 amendments to the A-Engrossed version of SB 77, which would change ORS 197.835(1) and (11)(a) by adding that LUBA shall affirm, reverse or remand a land use decision or limited land use decision "in whole or in part," raise a host of new questions that were not considered in the Senate and do not seem to have been adequately considered by the proponents of these new amendments. On its face, the amendments might not appear to change current practice. LUBA already does partial affirmations and partial remands, in the sense that it analyzes the assignments of error, denying some (thereby upholding certain aspects of the decision) and sustaining some (thereby creating the need for the local government to do more on remand).

LUBA performs a different function from the Department of Land Conservation and Development (DLCDC), which has more of a to-and-fro relationship with local government planners. While DLCDC can make suggestions for modifications to local legislation that include a number of provisions, LUBA must focus on specific issues raised by the parties to an appeal. LUBA analyzes only the issues that are the subject of an assignment of error. Having found error and remanded, it does not consider the relationship between the issue that is the basis for a remand and other parts of the local government decision that were not the subject of an assignment of error. In other words, LUBA does not specifically affirm anything that is not the subject of its analysis, and that analysis is confined to the issues raised by the parties.

Unfortunately, the -7 amendments to the A-Engrossed version of SB 77 could be understood to stop local governments from considering LUBA's remands in the context of the entire remanded quasi-judicial or legislative decision. If the amendments are aimed at preventing a local government from using the remand to modify the entire decision, including in ways that are not specifically the subject of LUBA's remand, then they would seem to interfere with the sensible integration by the local government of LUBA's thinking and analysis into the decision as a whole. For example, sometimes LUBA remands local government legislation on the basis of one provision that is interrelated with another. The -7 amendments to the A-Engrossed version of SB 77 might be read to "affirm," and thereby make unchangeable, any provision in a legislative decision that is not specifically remanded. This would prevent a local government from addressing the remanded provision in the proper "big picture" context. Under ORS

197.625(1), the parts that were “affirmed” would be considered acknowledged, which would make it even more complicated to integrate them into a final legislative decision.

The fact that one has to ask what is intended by the -7 amendments to the A-Engrossed version of SB 77 raises some real red flags. If they are aimed at the transfer by HB 2254 to LUBA of jurisdiction over certain urban growth boundary amendment decisions, they are misguided. The choice of what lands to include in an urban growth boundary is not made for each parcel of land in isolation. If a provision of an urban growth boundary amendment regarding one parcel is ultimately remanded by LUBA, the local government should be able to re-evaluate other parcels in the context of the remand in order to reach the best result overall.

We are concerned that the proposed -7 amendments will give rise to a new wave of very costly and time-consuming litigation. Because it is so unclear what is intended by “in whole or in part,” and because at least one possible interpretation could seriously interfere with comprehensive decision making at the local government level, we urge the committee not to adopt the proposed amendments.

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