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Via electronic mail

House Committee on Agriculture and Land Use
900 Court Street NE
Salem, OR 97301

Re: HB 3272 (Limits on the extension to briefing deadline for record objections denied by the Land Use Board of Appeals).

I have had the opportunity to argue a number of cases before the Land Use Board of Appeals (LUBA) on behalf of a number of clients. I have been through the record objection process numerous times, and I have seen that counties differ in the way they organize and submit the record to LUBA. Land use cases can be complex, and in most all of my cases, the county has failed to include materials that were important to the record. Although, I believe LUBA could improve the way in handles record objections, HB 3272 proposes amendments to ORS chapter 197 that more than anything appear to be punitive as opposed to constructive. For that reason, I oppose HB 3272.

Amendment to ORS 197.830(10)(a)

In part, Section 1 of HB 3272 proposes to amend ORS 197.830 to limit the deadline for filing the petition for review to seven days from the date LUBA denies a petitioner's objection to the record. The amendment sets an impossible deadline. First, LUBA issues all of its opinions by first class mail. Service of LUBA's order can take 3 to 4 days, which leaves practically no time to draft and submit a brief if LUBA denies the record objection. Second, even if LUBA switched to electronic service, 7 days does not provide adequate time to prepare a brief, especially if an attorney's caseload has overlapping deadlines. Having a full and complete record is a necessary prerequisite to drafting and finalizing a brief. In many cases, it would waste time and money, to draft a brief before the record has been finalized.

Finally, the proposed amendment to ORS 197.830(10)(a) is punitive. In contrast to a petitioner whose objection is sustained, the amendment seeks to punish a petitioner whose objection is denied by limiting the time that petitioner has to file a brief. The amendment sets an impossible deadline for the attorney who misjudges the merits of a record objection. Rather than make the objection process more efficient or timely, the proposed amendment does little more than set the stage for a missed deadline and a malpractice claim.

Amendment to ORS 197.830(15)(b)

The proposed amendment to ORS 197.830(15)(b) is unnecessary and could itself be a source of "frustration and delay." The Rules of Professional Conduct already prohibit the conduct that the amendments to ORS 197.830(15)(b) seek to prevent. In similar language, RCP 4.4 "Respect for the Rights of Third Persons; Inadvertently Sent Documents" states in part, that "in representing a client… a lawyer shall not use means that have no substantial purpose other than to… delay… or burden a third person…." Rule 3.1 for "Meritorious Claims and Contentions" also prohibits a lawyer from "delay[ing] a trial or tak[ing] other action on behalf of a client, unless there is a basis in law or fact for doing so that is not frivolous."

In the context of a record objection, the purpose of the objection is to ensure that the record includes all of the material that was placed before the decisionmaker and that the index conforms to the standards required by LUBA. As currently written, ORS 197.830 already ensures that a party's objection, or "position," must be "well-founded in law" or based "on factually supported information." A party who objects to the record because it included material not placed before the decision-maker or for failure to include material that was placed before the decision-maker will have the effect of delaying the proceedings. But the primary purpose of that objection is always to ensure that the record is complete and accurate. OAR 661-010-0026(2)(a), (b) ("Objections may be made on the following grounds: (a) The record does not include all materials… [and] (b) The record contains material not include as part of the record…."). Instead of making the record objection process more efficient, the proposed standard encourages parties who oppose an objection to speculate about the motives for the objection and the reason for the delay while wielding the threat of attorney's fees like a cudgel against the objecting party.

Note that counties often request an extension of the 21-day deadline for filing the record. In my experience, this is the cause of the greatest delay in LUBA proceedings. I have had cases where the county has delayed filing the record for more than a month, and a request for an additional 21 to 30 days is common. The proposed amendments to ORS 197.830(15)(b) would apply to a county's motion for an extension of time to file the record. Often these motions are accompanied by pro forma and non-specific language that attempts to justify the delay. Just as the amendment allows an opponent to attack a record objection, the amendments open counties up to motions for fees for their requests for extensions to file the record. These changes do not promote efficient or speedy resolution of LUBA appeals.

Finally, the ORS 197.830(15)(b) amendments could themselves be a source of delay. If a party files a motion, then its opponent could file a response and motion for fees, attorney alleging that the movant acted "for the primary purpose of causing frustration or delay." LUBA would have to address both motions, which could itself cause additional delay in the proceedings.

Amendment to ORS 197.835(2)(b)

Like the other two proposed amendments, the amendment in Section 2 to ORS 197.835 is unnecessarily punitive and seeks to prevent a party who has a meritorious motion from raising the issue by setting up a rushed deadline. With mailing times factored in, the parties have about 11 to 10 days to review the record, which can sometimes involve back and forth with a client.

Adding additional tasks during that period places an unnecessary burden on the party. As a practical matter, the proposed amendment asks the party objecting to the procedural irregularities to do an impossible task. ORS 197.835(2)(b) allows a party to file a motion to take evidence for—among other reasons—"other procedural irregularities not shown in the record." A party cannot file a motion to take evidence for irregularities not shown in the record before the record has been finalized. The deadline makes it impossible to know what the record contains.

Conclusion

I think there are a number of constructive amendments to LUBA's procedural rules that the legislature (or potentially LUBA) could make, one of which would be to allow electronic service after a petitioner files and serves the Notice of Intent to Appeal. Another constructive change would be to separate the deadline for filing record objections from the briefing deadline. Currently, a petitioner has 21 days to file a petition for review after LUBA receives the record and an overlapping 14 days to file a record objection. A better system would provide a separate 14-day deadline to review the record, and then set the briefing schedule for 21 days from the date the record becomes final. If no objection is filed, then the record would become final on the 14th day, and the briefing timeline would start. And in the event that a party files an objection, another beneficial change would be to set a timeline for the county to file an amended record. Rather than proposing common sense amendments that promote order and efficiency, the proposed amendments in HB 3272 appear to set the stage for more punitive procedure and acrimonious LUBA appeals. I do not recommend passage of HB 3272 in any form.

Respectfully,

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