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HAND DELIVERY

March 12, 2013

Rep. Brian Clem, Chair  
Rep. Kevin Cammeron, Vice-Chair  
Rep. Lew Frederick, Vice-Chair  
Members of the House Committee on Land use

JIM CLINTON  
*Mayor*

JODIE BARRAM  
*Mayor Pro Tem*

VICTOR CHUDOWSKY  
*City Councilor*

DOUG KNIGHT  
*City Councilor*

SALLY RUSSELL  
*City Councilor*

MARK CAPELL  
*City Councilor*

SCOTT RAMSAY  
*City Councilor*

ERIC KING  
*City Manager*

Re: House Bill 3362, regarding the “raise it or waive it” standard and post-acknowledgement plan amendments

This letter provides testimony from the planning staff at the City of Bend in support of HB 3362.

At the outset, I want the members of the Committee to understand that HB 3362 addresses how issues are raised before the Oregon Land Use Board of Appeals (LUBA) in its review of certain types of land use decisions. HB 3362 does not impact the concept of “standing” and will not affect a citizen’s ability to petition LUBA to review a local government land use decision. I understand that you will receive testimony in opposition of the bill as written, and want to offer that the City is open to considering amendments that further preserve citizen rights to participate effectively in local land use matters.

Specifically, HB 3362 is intended to address situations where certain post-acknowledgement plan amendments (PAPA) are appealed to the LUBA for review. PAPAs can include such actions as zoning code text amendments, plan text amendments, zone and plan map changes, or adoption of new elements for comprehensive plans such as public facility plans. A local government’s legislative decision on a PAPA is submitted to the Department of Land Conservation and Development for review under ORS 197.610-197.625. Following submittal to DLCD, if a PAPA is not appealed to LUBA, it is deemed acknowledged according to the statute.

LUBA reviews all types of land use decisions. However, their review of PAPAs that are legislative decisions differs from other land use decisions, such as quasi-judicial land use decisions in one important respect. LUBA's statute at ORS 197.835 limits review of quasi-judicial land use decisions and limited land use decisions to those issues raised before the local government, also known as the "raise it or waive it" standard. For example, if a citizen appeals a city's decision approving a tentative plat for a subdivision, the issues this citizen can raise before LUBA are limited to those they also raised before the local government.

The "raise it or waive it" standard does not apply to LUBA's review of local legislative land use decisions that are PAPAs, which is the reason the planning staff supports this bill. In 2003, the City and Deschutes County learned the hard way that this standard does not apply to PAPAs. The County's adoption of a coordinated population forecast was appealed to LUBA in the spring of that year. After the county received the petitioners brief, we learned that the petitioners had raised issues before LUBA that they had not raised before either the county planning commission or the Board of Commissioners. The County rescinded the adopting ordinance to address the issues raised in the petitioner's brief (See LUBA 2003-058 - <http://www.oregon.gov/LUBA/docs/opinions/2003/09-03/03058.pdf>). The County worked with the cities of Bend, Redmond, and Sisters to address these issues, and adopted a coordinated population forecast in 2004. The petitioners appealed this decision to LUBA, which affirmed the County's decision in March in 2005 (See LUBA 2004-160 - <http://www.oregon.gov/LUBA/docs/opinions/2005/03-05/04160.pdf>).

The County and three cities spent an additional year re-working the forecast and preparing findings to address the issues raised in the petitioner's brief. The issues were legitimate to address; but the four local governments would rather have addressed them before the Board of Commissioners made a final decision in 2003. Similarly, City staff wants to be able to address issues before the City Council makes a final decision on a legislative decision. The result would then limit LUBA's review to those issues that were debated and discussed at the local level. Local policy decisions need to be considered by the local decision makers rather than having LUBA in a position to set that policy without appropriate local consideration.

Most recently, the City faced this situation again with a recent appeal to LUBA of the City's Water Public Facility Plan (See LUBA 2012-043 - available on-line through this link. <http://www.oregon.gov/LUBA/docs/Opinions/2012/11-12/12043.pdf>). The petitioners raised eight assignments of error, two of which were not raised below during local hearing process. The two issues that were remanded could have been easily addressed by the City prior to LUBA's remand if we had the chance to address the issue at the local level.

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The governing bodies of cities and counties in Oregon would rather have the opportunity to address, respond to, and hopefully resolve issues raised at a local hearing, than hear about them for the first time in a petitioner's brief before LUBA. Our intent with this legislation is to have issues raised before a planning commission and/or a governing body, so these issues can be addressed before a final land use decision is made. If an appeal to LUBA follows, our intention then is to know that LUBA will hear arguments from the petitioners and from the local government on an issue that has already been raised and responded to at the local level. If LUBA remands the decision on a specific issue that was addressed by the local government, it's because there are items that still need to be resolved and the remand is the appropriate forum for such resolution.

Thank you for the opportunity to provide testimony on HB 3362. Again, we understand that there will be testimony in opposition to the bill, and would offer the opportunity to consider amendments that would bring all parties involved to a position where we have a bill we can support.

Sincerely,

Damian Syrnyk, AICP  
Senior Planner