SENATE COMMITTEE ON AGRICULTURE AND NATURAL RESOURCES

DATE: July 19, 1993 TAPES: 245 - 246 PLACE: Hearing Room C
TIME: 8:00 AM

MEMBERS PRESENT: Senator Ron Cease, Chair Senator Jim Bunn, Vice-Chair Senator Joyce Cohen Senator Bob Kintigh Senator Bob Shoemaker Senator Gordon Smith Senator Shirley Gold

STAFF PRESENT: Peter Green, Administrator Chris Warner, Research Associate Kus Soumie, Clerk

MEASURES HEARD: HB 3661 WRK

____ __ THESE MINUTES CONTAIN MATERIALS WHICH PARAPHRASE AND/OR SUMMARIZE STATEMENTS MADE DURING THIS SESSION. ONLY TEXT ENCLOSED IN QUOTATION MARKS REPORTS A SPEAKER'S EXACT WORDS. FOR COMPLETE CONTENTS OF THE PROCEEDINGS, PLEASE REFER TO THE TAPES.

TAPE 245 SIDE A

005 CHAIR CEASE CALLS MEETING TO ORDER 8:00 AM

WORK SESSION ON HB 3661

010 CHAIR CEASE: another draft of the lot of record issue and another draft on the right to farm. The third item is Smith in reference to the lot

of record. Asked for comments. (None) He then decided to move ahead

on the agenda and discuss the Court of Appeals' Von Lubkin decision.

020 CHRIS WARNER, Committee Staff, notes that the HB 3661-A62 amendments address primarily the Clark decision. WARNER also introduced the memo

from Gary Conkling, Currier/McCormick, regarding the Von Lubkin

decision, EXHIBIT A.

050 DICK BENNER, LCDC, offers testimony on HB 3661, and presents overview of EXHIBIT A.

- Clark decision is an Appellate Supreme Court decision (1992) involving interpretation of a county ordinance and its applicability to a

particular land use decision.

- When LUBA or an Appellate Court is reviewing a local land use

ordinance it will give deference to the local interpretation of the

local ordinance. It would overturn the local government's

interpretation of that ordinance only if it is inconsistent with the

express language of the comprehensive plan or land use regulation where the apparent purpose behind the plan or land use regulation. Also the

opinion discussed the consistency with the underlying policy that was the basis of the plan or land use regulation.

- The reason it "has created a bit of a stir" is that many people perceived that it changed the law behind "scope of review" what authority LUBA or a reviewing court has when it is reviewing a local ordinance. How much is it bound by the local government's interpretation. It is fair to say, prior to the Clark decision, the view was that when you are interpreting an interpretation of a provision of law that LUBA or an Appellate Court can read and consider its setting in a full framework of laws and come to a different interpretation. It's the courts job to interpret the law. The concern that the Clark decision raised with the department is, when looking at local ordinances, if you pick up a comprehensive plan or landuse regulation, you will see things that are solely of local origin but there are also things in the ordinances because they are implementing state law. They carry out local and state policy.

- In the course of acknowledgement that went on in the late 70's and first part of the 80's, and LCDC was reviewing local ordinances, Because the statewide planning goals do not speak with precision about every part of implementing the statewide planning program, ordinances that would come into the commission and would be reviewed by the commission. The ordinances took several of approaches to solving the same kind of problem. One of those is the Yamhill County situation, "what is a minimum lot size intended to do in Yamhill County?" The language that is used in ordinances and plans is not always concise. When the department and commission were reviewing ordinances in the 70's and early 80's, there was a large force of momentum behind getting those plans and ordinances approved. Although the ordinances were acknowledged, they often were not very clear.

- As an example which indicates LUBA's concern about this issue; recently Wilsonville made an amendment to some of its land use regulations; the changes were aimed at responding to statutory direction and goal 10 direction on manufactured housing. When LUBA reviewed the

Wilsonville amendment the department found that the language that was used was not clear.

- LUBA was given a guarantee of a representation by the planning commission that the unclear language in the Wilsonville amendment proposal was going to be interpreted so that it was not meant to interfere with the citing of manufactured housing. A couple of years later, a new planning commission and some changes of the city administration, they took the new language and they interpreted it differently, to exclude manufactured housing. The home builders and the LCDC went to LUBA and LCDC lost. LUBA lost because the Clark decision states "deference of a local interpretation of a local ordinance".

- The HB 3661-A62 amendments try to make a distinction between local ordinances that are intended to achieve local purposes and those which are intended to carry out a state policy in state statute or state regulation.

137 CHAIR CEASE asked if it were clear in most cases what the distinction is between the two?

140 BENNER: Yes, it is "pretty" clear. It is easier to know whether a local ordinance is intended to carry out a state regulation of statute where the state regulation of statute is clear and objective. It's more difficult to distinguish between the two when the state regulation is discretionary.

148 BENNER: The Clark case illustrates Chair Cease's point. The language interpreted in Clark was the "generally unsuitable" language. The term "generally unsuitable" is in state statute. If you were interpreting the language "generally unsuitable" in a local ordinance, the interpretation would be the same as that found in case law. The county that wrote the language "generally unsuitable" was applying the language to a use for which the language is not used in state statute. - If the HB 3661-A62 amendments were codified it would not call upon the courts to review the language in a manner different from the Clark Court. If the language "generally unsuitable" had been used in

conjunction with a nonfarm dwelling; because state statute does apply "generally nonsuitable" to farm dwellings; it would be clear that the language in the local ordinance was intended to carry out a state direction. When it is interpreted by an Appellate Court it need not defer to the local interpretation of it, but instead it should refer to the case law. Sometimes it is easy to review an ordinance and know whether it is carrying out direction from state regulation/statute and other times it is not that easy.

175 BENNER: Responds to CHAIR CEASE by referring the committee to HB 3661-A62, lines 5 - 16, Section 30 (NOTE: all references in this paragraph to Section 30(1)(2)(3)(4) lines 5-16 are to the HB 3661-A62 amendments dated (7-16-93). Explains Section 30(1)(2)(3) are a paraphrase of the actual holding of the Supreme Court's decision in Clark. Unless LUBA found in Section 30 (1) that the local government's interpretation of the ordinance is inconsistent with the written express language of the plan, than it should affirm it. Benner reads Section 30 (2)(3) verbatim. Section 30(4) is where the split is made; for instance, if LUBA were to interpret the local landuse regulation as "contrary to a state statute, land use goal or rule" than it is not bound by the local government's interpretation.

197 CHAIR CEASE: The interpretation of local ordinances is a problem for LCDC. Asks Benner to explain the process for how this type of situation moves through the system.

202 BENNER: Responds to the process between the department and local government: - If the local government plan is acknowledged and it has not been changed than the issue doesn't arise until it goes to court.

- If there is a change LCDC receives notice prior to the final hearing at which the landuse regulation change is heard by the local government. The department has an opportunity at that point to comment on whether it is consistent or otherwise with the statewide planning goals. The local government can choose to make the amendment. After the amendment is made, if the department participated in the hearing, has an opportunity to appeal that decision to the Land Use Board of Appeals. At this time discussions occur about the Appellate interpretation of the meaning of a particular provision.

220 SENATOR JIM BUNN: Notes in Yamhill County's case they had an acknowledged plan that had a 40 acre zone. It was a periodic review

that brought about the discrepancy. What happened in the Yamhill

situation?

228 BENNER: The disagreement over the language that was adopted into the Yamhill Comprehensive Plan actually exhibited itself about a year after acknowledgement of the plan. During the acknowledgment process there

was disagreement between the department and the county about whether the 20 or 40 acre minimum house size meant that you could have a house on a 20 or 40 acre size or whether that minimum lot size satisfied the goal

three test for a dwelling. When the Yamhill County received its

acknowledgement it was the impression of the county understood that the 40 acre minimum lot size did not guarantee the owner of a 40 acre to a

house. Shortly after Yamhill implemented their plan it was interpreted

in that fashion.

245 SENATOR JIM BUNN: Wasn't the Yamhill implementation a continuation of what Yamhill had done since the late 1970's?

247 BENNER: I'm not sure I can answer that, you may be right. SENATOR JIM HILL: thoughts Yamhill County had one of the first acknowledged plans

in the state. It had been operating on the same basis continually with

period review. Then they were told that they were not doing it right.

252 DALE BLANTON, Policy Analyst, LCDC: In the Yamhill County situation it is more complicated that.

- The initial acknowledgement action by the Commission had been

appealed. There was disagreement about whether the lot size provisions

met the standard in goal three for an adequate minimum lot size.

- As part of the settlement of the initial case Yamhill County added

language to its code and plan which sublimated the lot size language by stating that "a lot size of 40 acres or which is adequate to maintain

the commercial agricultural enterprise in the area, whichever is

greater". That raised a case-by-case analyses issue for the county.

The county had two standards: 1) a fixed minimum lot size that citizens thought meant you get a dwelling, and (2) or which is adequate to

maintain the commercial agricultural enterprise, whichever is greater.

In some contested cases this would allow them to "bump it up". It was not clear in the county's plan what the size of the lot would be.

275 SENATOR JIM BUNN: Would the modification to the Clark decision be seen as impacting Yamhill County's case? BLANTON: Does not think it would impact the Yamhill County case because the disagreement between the Commission will be resolved in periodic review. If there were not periodic review or say it was ten years off; if the language that Dale Benner discussed was added to the county plan after resolution of the court case. That language is sufficiently clear that it would not be subject of disagreement if there were to be litigated. I think that is the case; to be certain I would have to go back and review the language.

289 SEN SHOEMAKER: What is BENNER'S interpretation of the meaning of the word "apparent", HB 3661-A62, line 11? BENNER: "that language is perhaps a synonym for 'express' or maybe it penetrates past express a little bit. It ought to be the purpose that appears to you without having to go beyond the record or beyond the language itself."

305 SENATOR SHOEMAKER: "Apparent" is often used to mean "somebodies hunch about what a purpose is" at least in common parlance. It's use in the HB 3661-A62(2) amendments is suppose to be more precise than that? BENNER: The term is taken out of the Court's decision. CHAIR CEASE: Questions whether that is a reason to use it. BENNER: The reason for its inclusion in HB 3661-A62(2) is that with respect to HB 3661-A62 (1)(2)(3), we do not want to appear to be trying to disturb the holding of the court as it applies to those provisions in the plan or landuse regulation which are implementing local purposes and objects.

329 SENATOR SHOEMAKER: Asks BENNER how the department would like to see the word "apparent" used. Instead should the term be something like: express, clear, or obvious purpose? BENNER: The addition of the term "apparent" is a limiting term. If the term where not there it would give a reviewing court slightly more discretion to find that the local government's reading was not consistent with the purpose of the plan or

landuse regulation. I think the court was using "apparent" as limiting

language and it was a direction for them not to probe to far behind the actual words. SENATOR SHOEMAKER: Responds to Chair Cease saying he

might want to pursue the language discussed above but it isn't necessary to do it during the meeting. 353 SENATOR COHEN: In the context of any alternate language I would suggest reviewing the case itself to see how the court used the term "apparent".

360 BENNER: Refers the committee to the HB 3661-A52 amendments which are an effort to restore the law to what it was before the Clark decision (-52 amendments). Reads from the HB 3661-A52 amendments: "the meaning of

local government legislation is a question of law to be decided by the

courts and other reviewing bodies to which it is presented. Although

the local government's interpretation must be considered on review; the reviewing body is not bound by the local government's interpretation.

CHAIR CEASE: Whose proposal is this? BENNER: I think it is from 1000

Friends of Oregon.

374 WARNER: Responds to the Chair that this is the only Clark language they have at this point.

386 BENNER: Notes that HB 3661 has language bearing on Clark. It essentially codifies Clark for all plan and landuse regulation language.

379 CHRISTINA COOK, 1,000 Friends of Oregon: Our organization developed the HB 3661-A52 amendments, (EXHIBIT ?). The amendments are an attempt

to reverse the Clark decision. The Supreme Court decision on the Clark

case overruled years of precedent from the courts that interpretation of local government's plans and ordinances were matters of law subject to

review by LUBA and the court. 1,000 Friends continue to think the

policy overruled by the Clark decision was good policy.

COOK: Quotes from a Court of Appeals case Cope vs. City of Cannon Beach, which was issued in late August of 1992 as a response to the Clark

decision. The Court of Appeals states: "The legislature has expressly

provided that after acknowledgment the implementation and enforcement of the complying local landuse legislation (that is acknowledged

comprehensive plans and ordinances) remains a matter of state-wide

concern." (ORS 197.013) The interpretation of local legislation plays a major role in every landuse decision and all local landuse legislation

is susceptible to different interpretations that are consistent with its

text. Automatically, legislation that complies facially with the state-wide requirements can be interpreted in ways that are inconsistent with state law. The limited scope of LUBA and the court review that Clark vs. Jackson County defines may have the effect of making post acknowledgement compliance with state law a matter of local option. COOK summarized her written testimony (EXHIBIT B).

- 1,000 Friends believes the correct direction of state-wide landuse policy in Oregon is to reverse the Clark decision.

480 CHAIR CEASE: Would it be correct to say that: 1) HB 3661-A52 is a reversal of the Clark decision; 2) HB 3661-A62 is a modification of the Clark decision; and 3) HB 3661 would leave the interpretation of the ordinances to local government. Is that correct? COOK: Agrees with the Chair.

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038 SENATOR SHOEMAKER: Addresses COOK asking her to comment on 1,000 Friends of Oregon's position on the HB 3661-A62 amendments. COOK: In the sense that LCDC specify that those items which are subject to local interpretation, to which LUBA and the courts must defer to the local government's interpretation, to the extent that the HB 3661-A62 amendments specify that those are matters of only local concern. For example, set back requirements or very particularized local methods of doing something, 1,000 Friends would support that. Also, to the extent of statewide concern and implementation of statewide concern are matters for review by LUBA and the courts, 1,000 Friends of Oregon would also support that. The HB 3661-A62 amendments do raise the initial question, "what is a manner of purely local concern; what is a matter that implements state statute goal, rule, policy."

067 SENATOR COHEN: Asks BENNER if HB 3661-A62(4) addresses the issue of implementation? 069 BENNER: Agreed. If there is a provision in an ordinance aimed at implementing from state law. It has to be when LUBA is reviewing the local government's interpretation of the plan it is entitle to say "your local interpretation is contrary to that state statute or rule.

079 SENATOR COHEN: Asks SENATOR SHOEMAKER to review HB 3661-A62 amendments to make sure that he is satisfied.

080 SENATOR SHOEMAKER: "They look good to me. It seems pretty tight; right where it belongs based on fairly short exposure to it."

082 COOK: 1,000 Friends or Oregon is concerned about litigation that will focus on whether this is a matter of local or is this a matter of state concern. To the extent that this is clear, we think it is correct that

matters of state concern should be reviewed by the courts and matters of local concern maybe a matter of local interpretation.

100 CHAIR CEASE: Closes the discussion on the Clark case and opens the discussion on the Von Lubkin Decision. The Chair submits for the record a memorandum from Gary Conkling on the Von Lubkin Decision (EXHIBIT A)

memorandum from Arthur J. Schlack, Association of Oregon Counties

regarding A-Engrossed HB 3661 (EXHIBIT D).

112 WARNER: submits for the record the HB 3661-A61 amendments (introduced by Chair Cease, LCDC and the League of Oregon Cities) (EXHIBIT E) and HB

3661-A65 amendments (introduced by Gary Conkling representing Brookside, Inc.) (EXHIBIT C) address the Von Lubkin Decision. CHAIR CEASE: Notes

for the record he has authorized a number of amendments and the fact

that his name is associated with a particular set of amendments does not indicate that he is in favor of them.

123 BENNER: Gives a review of the Von Lubkin case. The Von Lubkin case involved an application in Hood River for a golf course in an EFU zone. The exclusive farm use statute authorizes golf courses in exclusive farm use zones. Therefore, it did not require an exception. However, it did

require the application of policies and criteria in the Hood River

County comprehensive plan. The County plan, at that time, had a D9

provision which states that certain kinds of uses would be appropriate

in an exclusive farm use zone if it could be found that the use was not taking land that is good for commercial land use out of production.

That is in addition to the statute. This also bears on the Clark case,

this was a provision the county chose to put in its plan even though

state law did not require that it be in the plan. This language is not

in the exclusive farm use statute. The Hood River County language was

in addition to the state statute.

The County's plan was tougher on golf courses than the state law

requires. Also, in Hood River County's set of regulations were other provisions that spoke to conflicts between nonfarm uses and farm uses. A neigHB oring orchardist objected to the application so it went through a series of hearings at the County level. The County approved the golf course, finding that there were not going to be significant conflicts but that the golf course was consistent with the policy and the their comprehensive plan.

145 CHAIR CEASE: Therefore the added restrictions (inaudible) the added restrictions.

153 BENNER: The provision that a nonfarm use, like a golf course, can't be on land that is suitable for commercial agriculture. The county applied it and said that is not a problem in this situation.

148 SENATOR SMITH: Why? BENNER: I can't answer that. I don't know how they could make that finding but it eventually caused problems because it went to appeal. LUBA said the County couldn't make that finding (for the golf course) because the record and the evidence are otherwise. SENATOR SMITH: Was the land in question ever used for commercial orchards? BENNER: I can't answer that question; I don't know. When it went back to the county, they knew on remand that they were going to have to do something about the policy if they were to approve the course. It is also worth noting that the golf course was started.

171 SENATOR SMITH: I'm also interested in knowing if what you are saying is that the local control exceeded state requirements. BENNER: The exclusive farm use statute, at the time this first came up, said that golf courses may be authorized by a county as a conditional use. It didn't specify criteria for review and approval of a golf course; it left that to local government. It certainly didn't say you could only have a golf course if the land wasn't appropriate for commercial agriculture, so when the county added that to it's plan, it was going beyond what the statute and what our goal required.

190 GARY CONKLING, Currier/McCormick, representing Brookside, Inc.; Attorney representing Von Lubkin case: The applications were broader than just

to golf courses; there was discussion about whether or not a park would be permitted on land that had commercial value.

207 BENNER: The matter then went back to Hood River County, who concluded that, if they wanted to continue approval of the golf course, was going to have to amend their plan, and they did. ORS 215.296 said that

certain specified non-farm uses, from that point forward, had to comply with interference criteria.

234 SEN. SHOEMAKER: When did Brookside start to build the golf course?

CONKLING: The construction of the golf course occurred during the phase of the dispute when the first appeal occurred; this matter has been to

the Court of Appeals twice. The appeal was over a broader set of

questions than just the golf course.

265 SEN COHEN: Has that property ever been used for orchards?

271 COOK: Yes, a portion of that land had been used and operated as a commercial orchard.

BENNER: Continues overview and explanation of Von Lubkin case history.

329 BENNER: In periodic review, it is typical for a city or county to adopt a plan and land use regulations, then complete periodic review by

applying the regulations on the ground. In many cities, when they adopt the regulations, they are appealed, hence, they aren't acknowledged,

hence, they can't use them when trying to complete periodic review.

353 SEN SMITH: While they make these amendments, they pursue them statewide before they are acknowelged?

BENNER: Generally they would become acknowleged twenty one days after

implementation if they are not appealed.

CHAIR CEASE: How long is it from the time they adopt the plan and there is final resolution?

BENNER: It can go fairly rapidly; describes possible processes.

SEN SMITH: There needs to be a more expidited process for this.

398 SEN KINTIGH: If a county makes a relatively minor change in a plan, does this mean the whole plan is up in the air, or just that part of the project?

BENNER: Just the piece being changed.

410 SEN COHEN: What are you proposing with your (-61) amendments to get us further down a tighter path?

419 DALE BLANTON, LCDC, offers testimony on HB 3661, and presents overview of EXHIBIT B (-B61 amendments). - Gives overview of language.

445 SEN. COHEN: Who has the ability to enact a stay?

BLANTON: LUBA has the power to do a stay. Continues describing amendments. You can still get a stay from LUBA if there is an appeal.

TAPE 245 SIDE B

042 SEN. SHOEMAKER: We could have an automatic stay so that anything that you would do contrary to an unacknowelged plan amendment which would distrib an existing situation other than an improvement, would be automatically stayed.

070 BRENT CURTIS, Planning Manager, Washington County, reoresenting county Planning Directors, offers testimony on HB 3661, and presents overview of EXHIBIT B and C. - Under the Von Lubkin case, an appeal of a local enactment of an ordenance automatically is stayed; that wasn't the case previously. - This provision cuts both ways; a great deal of the time we are enacting laws that are more rigourous in regard to developments and by a mear appeal of those actions, you can, under the Von Lupkin case, stay those, and that allows someone to apply under the old less rigoruos law. - This isn't just a periodic review situation.

110 CURTIS: We support the (-A65) amendments; we have a number of ordanances that have been appealed and for the legislature to be clear about how Von Lupkin applies in a retroactive sense is very important to us.

123 CONKLING: June 1, 1991 was selected because that was the date of passage of the land use amendment by Hood River County. I would like to note that Hood River County made the change in early June and my client applied for it's second permit shortly there after. As I understand the process that land use change was remanded and in fact, there was no challenge to the change and it was acknowelged in early 1992. The approval for the permit followed acknowlegement of the plan change. The case itself revolves around the fact of when the application was filed.

175 SEN KINTIGH: If there is no appeal, when does final closure take place?

BENNER: Within twenty one days without any appeal. I emphesize

periodic review but it isn't the only time this comes into play. We see periodic review as the more serious implication of this.

220 SEN SHOEMAKER: I have a problem regarding, possibly the Deschutes County situation, and certainly the Portland Fanno Creek situation where what was done on the land was done without land use decisions, done

under the former land use regualtions of the cities, which didn't

prohibit cutting these old growth trees. That wouldn't have been a

situation where a stay was appropriate, because there was no lan use

decision to stay. If we are going to fix Von Lubkin and we need to fix

that problem too.

BENNER: The issue you are speaking to is a policy matter and would be

difficult to deal with and implement. These amendments are attmepting

to deal with the problem by saying that on the date specified in the

local ordinance, we are going to reverse Von Lubkin, effective upon the appropriate effective date.

287 BENNER: I'm aware of five jurisdicitions that have run into this problem to one degree or another. I mentioned the Deschutes County

scenic ordinances. Clackamas County is in the process of revising its

periodic review to protect aggregate sites; the City of

Portland...you've heard about; Washington County has mentioned to you

its situation with its transportation ordinances; and there may be other situation which haven't come to our attention. Because the vonLubken

decision is fairly recent, the problem is fairly recent.

300 CHAIR CEASE: So, would it be fair to say that, under this system, the parties, in most cases, can feel comfortable that they can go ahead with the periodic review for the planned amendment before there's actual acknowledgement?

304 BENNER: Yes, they could do that.

308 CHAIR CEASE AND BENNER: Discussing making goal-findings prior to acknowledgement.

322 COOK: We have not proposed any language to change the vonLubken ruling for the simple reason that, in general, we think it's a good ruling. - Commenting on legislation that was adopted in the vonLuben case. - Commenting that the provision using the date of 1991 as a retroactive date is simple and wrong. - Stating that the county's position on this case is incorrect and the

law, as argued in this case, is different.

382 SENATOR SHOEMAKER: Was the second appeal also done in a sloppy manner?

390 COOK: Yes, that' precisely what I'm saying.

391 SENATOR SHOEMAKER AND COOK: Discussing first and second decisions (vonLubken case), and the fact that the third decision was not appealed.

TAPE 246 SIDE B

005 COOK: Continuing testimony as to why they (1,000 Friends) don't believe the -61 and the -65 amendments are protective of statewide land use

policy. Referring to EXHIBITS B and C.

- Explaining what's wrong with subsection C in both the -61 and the -65 amendments.

012 CHAIR CEASE: Are you saying that you don't agree that what we have here is a return to the "period" part of the vonLubken case?

014 COOK: No...that's not our view of what the law was. Although we are told that is the practice many have followed, there is nothing in state law that requires "goal-findings with permitting decsions" is this sort of situation.

- Explaining the two different processes that are being talked about in the -61 and the -65 amendments: 1) the enactment of the legislation itself, and 2) the issuance of a permit under the new legislation.

050 CHAIR CEASE: Outlining what direction future meetings on HB 3661 will take, and what will be expected of the committee.

064 CHAIR CEASE ADJOURNS MEETING AT 9:55 AM

EXHIBIT LOG:

A - Memo regarding von Lubken decision - Gary Conklinge - 3 pages B - Memo from 1,000 Friends - Christine Cook - 3 pages C - -65 proposed amendments to HB 3661 - Committee Staff - 4 pages D - Memo from Association of Oregon Counties - Art Schlack - 1 pages

Transcribed by: Reviewed by:

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