

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

Measures Heard HB 2261 (PUB)

HOUSE COMMITTEE ON ENVIRONMENT AND ENERGY

January 30, 1991

Tapes 22 - 23

Hearing Room E 1:30 p.m.

MEMBERS PRESENT: Rep. Parkinson, Chair Rep. Whitty, Vice-Chair Rep. Burton Rep. Courtney Rep. Naito Rep. Norris Rep. Repine Rep. Van Leeuwen Rep. Watt

STAFF PRESENT: Kathryn VanNatta, Committee Administrator Annetta Mullins, Committee Assistant

WITNESSES: Greg Wolf, Department of Land Conservation and Development Dale Blanton, Department of Land Conservation and Development Fred VanNatta, Oregon State Homebuilders Association Charles Hales, Home Builders Association of Metro Portland Richard Waker, Registered Engineer Don Miner, Manufactured Housing Association Bob Stacey, Planning Director, City of Portland and League of Oregon Cities Richard Angstrom, Oregon Concrete and Aggregate Producers Association Jon Chandler, Common Ground, The Urban Land Council of Oregon Russ Nebon, Association of Oregon Counties Kelly Ross, Oregon Association of Realtors Dave Smith, Oregonians in Action

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TAPE 22, SIDE A

005 CHAIR PARKINSON calls the meeting to order at 1:35 p.m. and opens the public hearing on HB 2261.

HB 2261 - CHANGES LAND USE APPEAL PROCESS

010 GREG WOLF, Department of Land Conservation and Development, reviews pages one and two of a memorandum previously submitted to the committee explaining the history of activities which resulted in HB 2261, and calls the committee's attention to proposed hand-engrossed amendments to HB 2261 (EXHIBIT A).

058 DALE BLANTON, Senior Policy Analyst, Department of Land Conservation and

Development: Before I go into a more orchestrated presentation and go through the bill section by section, I would like to answer Rep. Whitty's question. In the initial report to the Joint Legislative Committee on Land Use (JLCLU) there were concerns raised about the number of different levels of appeal that might occur at local government. There was a concern that in some instances that could cause

delays. As a result of that we looked at whether a limit on the number of levels of appeal at local government was needed. The group decided ultimately not to add a limit to the statute on the number of levels that local government appeals could happen because there was a feeling that the overall statutory time limit of 120 days was adequate to keep the appeals within a reasonable amount of time.

He summarizes the section-by-section analysis of HB 2261 (EXHIBIT A, Pages 2 - 9): >Subdivisions would fall in definition of limited land use decision. >Affect of definition is to decide where appeals go and what standards of local approval would apply. >A limited land use decision would be appealable to the Land Use Board of Appeals (LUBA) with a slightly narrower scope of review. >Items exempt from land use decision would be appealed through circuit courts through writ of review. >There was consensus on technical committee that the option of LUBA to remand a decision ought to be eliminated for the relatively minor actions. There is also a technical change. There is a requirement in the statutes that all decisions be based on substantial evidence in the record. Younger vs. City of Portland decided what "whole record" means. It means both sides. We have tried to eliminate the term "whole" and have limited land use decisions based on substantial evidence in the record. Section 3 outlines the local requirements for review and approval of limited land use decisions. It still requires mailed notice to adjacent property owners. It requires a 10 day notice instead of 20 days notice and it authorizes local government to process these minor actions administratively if they choose. Many local governments have processes that require planning commission approval, but many staff could do it. Section 4 is a set of refinements to requirements for a full land use decision.

165 REP. VAN LEEUWEN: Where in Section 3 does it change 20 to 10 days.

BLANTON: This is all new language; it is in lines 30 and 31 on page 3.

185 MR. BLANTON: (Section 4) There has been some confusion based on requirements that before you take a case to LUBA, that you must raise that issue before the local decision maker first. We have had some experience with provisions passed last session. LUBA decided you don't have to raise concerns over the list of criteria locally because if they used the wrong list of criteria, it was a procedural error and could be raised for the first time at LUBA and be a basis for overturning or remanding the decision. This says if you have an objection to those criteria, you must also raise it at the local level before taking it to LUBA. A couple of other sections have parallel conforming language. 211 >Section 4(2) is unchanged. >Subsection 3 clarifies the list about decision-making criteria. >This is the first section where continuance is raised. It allows, if there is a contingent hearing, in the first 7 days to raise issues you might raise to LUBA. There was also some confusion about amount of time counties and cities have for notice. It says if they have more than one hearing they can give 10 days notice of the first hearing and if they have only one hearing they can give 20 days notice. This makes it clear in the statute that if they use the option for two hearings, they give 10 days notice from the first hearing and a new notice 10 days in advance of subsequent hearing. 240 Subsection 4 clarifies procedures for continuances. The continuance process was left to each local government. This allows only one continuance where that continuance is based on a request from an applicant or opponent. It allows the governing body to have more than one hearing if they need more time. There is only one mandatory continuance. 295 >No new issues can be raised after the seven-day period and continuance hearing must be at least 21 days after the continuance is granted. >Subsection 5 outlines requirements for the statement made at the beginning of the hearing. Copies of the applicable documents would be required to be in the hearing room. Normally that is the comprehensive plan, land use regulations adopted by the local government or other kinds of regulations or standards that jurisdiction would have in place.

344 MR. BLANTON reviews memo (page 4) on subsections 6 through 9.

370 REP. VAN LEEUWEN: Please elaborate on the cost of the hearing to the applicant.

MR. BLANTON: On page 6 of the hand-engrossed version, at lines 23 through 26, we are recommending the deletion. We don't believe it is important or necessary for that to be a part of this bill.

413 REP. BURTON: In subsection 4, what is meant by "issue?"

416 MR. BLANTON: An issue is something that could be dealt with by LUBA; it is an allegation that local government made an error that is subject to LUBA review. LUBA's scope of review includes being unconstitutional and violation of the comprehensive plan or the goals. They would have to raise the issue at the local level and at LUBA they could then argue that local government did not show a public need.

TAPE 23, SIDE A

008 REP. BURTON: The germaneness of that issue is determined by the establishment of the record itself. A person could raise any question and there is no opportunity for LUBA or anyone else to make a determination that it is a specious kind of an issue to raise.

016 MR. BLANTON: A specious issue could be raised at LUBA, but on the merits LUBA would not be able to affirm that. Our intent wasn't that we allow any issue to be raised, but only those issues that provide LUBA with the ability to overturn it.

048 MR. BLANTON reviews page 5 of the memo explaining subsections 5 through 8 of Section 4.

081 REP. NAITO: What is the minimum notice requirement (for local government legislative actions)?

084 MR. BLANTON: Currently, there is a statute that applies to counties, but not cities, on legislative actions. The requirement for counties is for individual mail notices; there is an exemption that says if there isn't money provided by the Legislature to the Department of Land Conservation and Development to fund the notice locally, then local government is not obligated. Quite often the requirements are reflected in charter provisions or local governments will impose upon themselves a requirement. This is an attempt to put something in statute.

095 MR. BLANTON explains provisions of Sections 9 through 23 of HB 2261 (EXHIBIT A, pages 5 and 6).

129 MR. BLANTON: The recommended amendments are in Attachment A (EXHIBIT A, pages 7 through 9) and are hand-engrossed in the bill (EXHIBIT A, pages 10 through 28). On page 3 of the hand-engrossed version, a couple of words are left out. Beginning at line 14, delete "is consistent" and insert "complies" and in line 15, delete "be consistent" and insert "complies."

145 CHAIR PARKINSON: For the next hearing, could you have a better hand-engrossed copy?

151 MR. WOLF: The most important thing in this bill is the creation of the "limited land use decision." The goal is to create a more streamline process for those decisions that we don't believe deserve the kind of legal scrutiny the bigger decisions should have.

161 REP. NORRIS: Does Section 10 and 11, relating to aggregate, open up and simplify some of the problems in some areas in being able to dig up and use gravel?

166 MR. WOLF: I believe it does. The reason we included those permits in the definition of "limited land use decision" is that we are going

through a lengthy Goal 5 process in trying to get counties to identify the circumstances under which minerals and aggregate can be extracted.

189 FRED VANNATTA, Oregon State Homebuilders Association: The issue we are discussing today is process that Oregon has developed over the years of getting to no or hopefully, getting to yes on land use applications or process. One learned observer of the process has said, "The noble purpose of Oregon's land use process has become too fossilized, too trivialized and too legalized..." I think that sets the stage for this legislation.

220 CHARLES HALES, Home Builders Association of Metro Portland, submits and reviews a prepared statement in support of HB 2261 (EXHIBIT B).

293 RICHARD WAKER, Waker Associates: I am a Registered Civil Engineer. We do land use planning, civil engineering and surveying and we do a great deal of work for private developers. I have a multiple family project in Beaverton in the design review process. The project was started last year. The developer had to assemble a number of parcels in order to get sufficient area to build a reasonable sized project. Generally speaking, those parcels are purchased on a per-unit basis. The project was started in August, had a hearing at the Board of Design Review in November and met all criteria in the city plan. A small piece of language in the city code said that consideration should be given to the trees that were on the site. At the November hearing, the Board of Design Review set it aside and asked them to come back the following month and demonstrate what consideration had been given to the trees. It went back to the board, an architect showed sketches of attempts to preserve some of the trees. In January the Board of Design Review affirmed the decision to deny the project because in their view the architect had not given sufficient consideration to preservation of the trees. We are going to the Beaverton City Council next month and ask them to overturn that decision on the basis that it is a criteria we can't possibly put a handle on. If that fails we will be off to LUBA and if LUBA agrees that condition is arbitrary and capricious they will remand it and we will go back through the system again. We will have been in this project for over a year before we get a decision. I think Section 2 will correct that by giving LUBA some tools to make a decision to approve or deny, not just make a decision to send it back because they think the governing body has made an inappropriate decision.

Issues discussed: >Reason for Board of Design Review's decision.  
>Beaverton's comprehensive plan provision designating "significant tree stands."

TAPE 22, SIDE B

054 REP. NORRIS: In the bill, page 3, line 11, do you feel the language totally precludes a remanding?

062 MR. HALES: I think that is about as clear as it can get and if that isn't clear enough, hopefully the legislative history on this measure should remove any remaining doubts in LUBA's mind as to what was intended by that section. The statutes that permit LUBA review of other general land use decisions do also include the possibility of a remand. So its absence here should be sufficient to let them know that is the case.

073 DON MINER, Manufactured Housing Association: We support this bill. We particularly like the concept of a limited land use decision. When a case is remanded, it becomes a bouncing ball. You never get a yes or a no and it is very costly. We have a question about the scope of what is encompassed in the concept of a limited land use decision. On page 3 of the bill, lines 8 and 9 say "or other review procedure where the procedure concerns how, but not whether---." It is our reading that the language would include those kinds of housing identified in ORS 197.295 through .307 where the Legislature has said certain types of housing shall be permitted. The question is not "whether" it will be permitted; the only issue left to be decided is what will the standards be. We

would hope needed housing types identified in the statutes are included within that language of the review procedures.

We have talked to the proponents of this legislation and it is their belief that needed housing types would also come in the limited land use review procedures. We would like some legislative history on that.

105 CHAIR PARKINSON: Have you been working with the department and the consensus group?

105 MR. MINER: We have discussed this issue with them.

104 CHAIR PARKINSON: Have they assured you that they think you are covered?

106 MR. MINER: Yes. But this body decides whether we are covered there and not necessarily the proponents.

115 BOB STACEY, Planning Director, City of Portland and speaking for League of Oregon Cities, submits and summarizes a prepared statement in support of HB 2261 (EXHIBIT C).

262 RICHARD ANGSTROM, Oregon Concrete and Aggregate Producers Association: Long ago we supported land use planning because we believed there would be some certainty into the process of siting aggregate operations. We found along the way, however, that the light at the end of the tunnel has a block in it and we call that appealing to LUBA. The strategy on remands might be equated to hunting with a shot gun. LUBA will almost always find on two or three technical points and remand it back to the counties. We are trying to limit LUBA's scope of review so they are giving decisions and letting the process go ahead.

288 JON CHANDLER, staff attorney, Common Ground, The Urban Land Council of Oregon, submits and reviews a prepared statement in support of HB 2261 (EXHIBIT D).

Mr. Stacey talked about design review. The building should fit with the community and locality. We object to those sorts of decisions resulting in extensive LUBA delays. Pages 4 and 5 discuss the way the hearing is conducted. Currently, you can have appeal by ambush. We have intended to say that before the matter leaves local government all arguments will be on the table and be discussed before it can go to LUBA. It is a procedural point because it allows LUBA to do its job. It should make the system go more smoothly and quickly. It is notable that participants in this work group don't always agree, but we agree and urge passage of this bill.

375 CHAIR PARKINSON: This legislation addresses instances inside the urban growth boundary.

MR. CHANDLER: It does, with the exception of tightening up the hearing process. It is aimed at the urban growth boundary and the aggregate producers.

Issues Discussed: >"Whether" and "how" in siting of projects.

413 CHAIR PARKINSON declares the meeting in recess for 10 minutes.

421 CHAIR PARKINSON reconvenes the meeting at 3:10 p.m. and announces that the committee has received a letter via FAX from Edward Sullivan on HB 2261, suggesting proposed amendments. The letter from Mr. Sullivan is hereby made a part of these minutes (EXHIBIT E).

TAPE 23, SIDE B

001 RUSS NEBON, Association of Oregon Counties (AOC): In 1989, when HB 2288 was adopted, we participated in developing the bill in an attempt to address many of the issues the bill addressed. We had the task of

explaining to the county planners the changes they had to make in their procedures in their local ordinance. Then I realized how different 36 zoning ordinances can be in terms of procedures. After about six months most of the counties were able to adapt to the new procedures. But a number of questions did arise which we felt if the opportunity presented itself, we would address this session. I think this bill attempts to do that. The AOC Land Use Committee heard some of the concerns about how the procedures were working and adopted a priority to get involved. The final version of the bill was given to this committee today with the amendments. This bill is important to the counties. We support most of the provisions in the bill. We oppose none of the provisions; I will explain the latest version of the bill to the AOC committee next week to make sure in agreeing to some of the changes we haven't made mistakes.

049 CHAIR PARKINSON: Will you explain how this bill helps the counties?

053 MR. NEBON: There is a question legally as to the procedure of how to identify the criteria in the hearing, whether you have to spell out the criteria or whether you can use common references. This bill clarifies that point. This clarifies the 10-20 day notification period and continuances. There are some things we have done in regard to gravel operations that have gone through the Goal 5 planning process where we may be able to use the limited land use decision. Counties also administer zoning regulations inside urban growth boundaries. To that extent, many of the provisions that apply in urban areas will also benefit the counties.

Wording in the existing law, which is being left in, will allow us to make the same kinds of determination with regard to permitted uses in rural areas. The cut isn't as clean because rural zones range from rural residential to EFU and forest zones. The courts have clearly indicated that if the Legislature or the local zoning ordinance attaches qualifiers to a use, those qualifiers make it a land use decision. But in a rural residential zone, a residential dwelling is permitted and I don't think there is a problem, but we need to make sure.

112 REP. PARKINSON: After the counties convene, perhaps you can contact the department and agree on a final version. We have Mr. Sullivan's letter outlining objections to the bill which you can review.

120 REP. NAITO: Mr. Sullivan raises a question under the notice requirements. Perhaps there should be some requirement to show in the record that the notice was made.

131 MR. NEBON: The portion of the bill Mr. Sullivan is referring to is eluding to the written notice that is provided to everybody within a certain distance. The letter address other concerns and the working group would like to try to address them.

173 KELLY ROSS, Oregon Association of Realtors: We support the bill and consider it a further step in tightening up the appeals process. We would like to see some of these concepts being applied to decisions outside the UGB but that may be something for next session.

181 Sections 8 and 20 deal with notice when a local government is proposing a legislative change to the comprehensive plan or zoning ordinance. The requirement that the notice appear in a newspaper at least 10 days prior to the scheduled hearing, we believe, is fine if they are proposing a minor change to the wording of the zoning ordinance or change in plan policies. We have a bill in that would require mailed notice to property owners when there is a proposed change to change the zoning of a property. That is consistent with what is required when a property owner proposes to change the use on his property. We may come forth with amendments to incorporate the provisions of our bill. We have made our thoughts known to the cities and counties and we will be meeting with them.

217 DAVE SMITH, Oregonians in Action: We are in general support of this bill as it has been hand-engrossed by the department and particularly

the concept of limited land use decisions. It will make life easier to cope with inside UGB's as well as how it pertains to aggregate uses on resource lands.

Section 4 on page 5 deal with procedures for continuances. Continuances have been a problem. I think this bill goes a long way to solve the uncertainties on the part of local government on how continuances should be handled. I would suggest an amendment in lines 6-10 where it talk about written notice at the beginning of land use process. A problem exists when one gets into continuance with the submission of supplemental evidence. It is not clear in the notice provisions that copies of supplemental evidence will be available for inspection and copying by participants in the proceeding. Materials which the applicant files are required to be served on opponents during the continuance process. However, there is no requirement for opponents to serve their papers on the applicant. I would suggest that it say that a copy of materials submitted in the continuance proceedings, if any are held, will be available for inspection and copying at reasonable costs. I will draft wording with the department if they find it to be an agreeable idea. It would cut down on the number of lawsuits that flow out of proceedings, the number of appeals to LUBA and give the local decision maker the best opportunity to adjudicate the quasi-judicial land use decision on the merits.

281 I would also like to emphasize Mr. Ross's comments about legislative land use decisions. Our organization has a bill which also requires written notice in the case of legislative land use decisions that affect individual land owners.

341 CHAIR PARKINSON closes the public hearing on HB 2261, announces that since no one has signed up to testify on HB 2150 the hearing will not be held, and that there are no requests for introduction of committee bills.

355 CHAIR PARKINSON declares the meeting adjourned at 3:37 p.m.

Respectfully submitted, Reviewed by,

Annetta Mullins Kathryn VanNatta Assistant Administrator

#### EXHIBIT SUMMARY

A -HB 2261, memo, Greg Wolf and Dale Blanton B -HB 2261, prepared statement, Charles Hales C -HB 2261, prepared statement, Bob Stacey D -HB 2261, prepared statement, Jon Chandler E -HB 2261, letter, Ed Sullivan