



American Planning Association
Oregon Chapter

Creating Great Communities for All

March 15, 2023

Senate Committee On Housing and Development

Senator Kayse Jama, Chair

Senator Dick Anderson, Vice-Chair

RE: Testimony from the Oregon Chapter of the American Planning Association (OAPA) in Support of Senate Bill 847

Dear Chair Jama, Vice-Chair Anderson, and Members of the Committee:

We appreciate this opportunity to provide comments on proposed amendments to SB 847. OAPA is a nonprofit professional membership organization of over 800 planners and those who work with planning in formulating and implementing development and conservation policies at the state and local level. As planners, our members seek to make sure our land use system works.

Our concerns touch on sections 4-7 of the original bill, which relate to LUBA's role in our planning system. LUBA has worked well for over 40 years as an appellate body, which considers appeals, mostly from cities and counties to determine whether they properly interpreted the law, whether substantial evidence supports factual determinations and whether gross errors in procedures occurred. LUBA is speedy, efficient, and a bargain to the taxpayer; moreover, it is affirmed by the appellate courts at a very high rate.

We believe that the appellate function of LUBA should not be confused with the work of cities and counties to make land use decisions, subject to appeals. LUBA should not be taking and evaluating evidence and should not be rewriting findings for local governments. Making land use decisions are proper functions of local governments – not the state. Moreover, having LUBA undertake these functions will take more time for cases to be resolved.

Further, we believe that it is not a good idea to do away with procedural objections for housing cases at LUBA. The current law does not say that any procedural objection is a ground for an appeal. Only those procedural deficiencies that "that prejudiced the substantial rights of the petitioner" may be grounds for reversal or remand – such as not providing a hearing at all, letting one party give evidence outside the record, or not letting an applicant know about a condition until after the final order is entered. There are actually very few LUBA cases where gross procedural error is an issue and even less where it is successful.

We understand the problem to be solved by these sections deals with the extra time that might be taken by appeals of housing cases. We suggest two

remedies for this problem, neither of which compromises LUBA's function, and present our suggestions in the attachment to our testimony. Summarized, the proposed amendments would substitute for sections 4-7 of the bill as introduced the following:

Additional Time to Get the Order Right – Most housing decisions must be made within 120 days of the application being complete. That creates problems, particularly in controversial cases, when the local government is up against that deadline and fears the possibility of a mandamus proceeding, which, if successful, will result in an attorney fee award. We propose that the city be able to add another 7 days to the timeline if it has already tentatively approved the housing application and needs a bit more time to get the findings right.

Fixing Local Decisions After a LUBA Appeal – We propose to change the LUBA statutes so that, in housing cases, local governments have up to the time of the filing of their own briefs, to be able to voluntarily remand a case that they feel a risk of reversal or remand from reviewing the petitioner's brief, enabling the problem to be fixed expeditiously. Under current law, that voluntary remand can only be done before the record is transmitted to LUBA.

We believe these amendments would speed up the process of housing approvals, much as the use of "clear and objective" standards and use of attorney fee provisions for housing decisions that do not comply with state law. We urge you to adopt them.

Again, we thank you for the opportunity to express OAPA's support of SB 847.

Please find our proposed amendments below on the following two pages.

Sincerely,

Kevin C. Cook

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Chair, Legislative and Policy Affairs Committee
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PROPOSED AMENDMENTS TO SB 847

1. Extension of the 120 day period to accommodate residential housing (Applies to all housing)

Add the following sections to the proposed bill:

Section ____ -- ORS 227.178(7) is amended to read:

Notwithstanding subsection (6) of this section, the 120-day period set in subsection (1) of this section and the 100-day period set in ORS 197.311 do not apply

- (a) to a decision of the city making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610; or
- (b) to a decision of a city involving an application for the development of residential housing, where the city has tentatively approved the application, and extends these periods for no more than 7 days in order to assure the sufficiency of its final order.

Section ____ -- ORS 215.427(7) is amended to read:

(7) Notwithstanding subsection (6) of this section, the period set in subsection (1) of this section and the 100-day period set in ORS 197.311 do not apply:

- (a) to a decision of the county making a change to an acknowledged comprehensive plan or a land use regulation that is submitted to the Director of the Department of Land Conservation and Development under ORS 197.610; or
- (b) to a decision of a county involving an application for the development of residential housing within an urban growth boundary, where the county has tentatively approved the application, and extends these periods in order to assure the sufficiency of its final order.

The purpose of these sections is to allow a local government up to 7 days regarding housing applications within an urban growth boundary to formulate final orders.

2. Special Reconsideration Provisions for Housing in Lieu of Section 5

Original Section 5 in SB 847 would be deleted
(Applies to all housing applications within UGBs)

Section 5 – ORS 197.830(13) is amended to read:

- (13)(a) The board shall adopt rules establishing deadlines for filing petitions and briefs and for oral argument.
- (b) At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, or, on appeal of a decision under ORS 197.610 to 197.625 **or of a local government decision approving residential housing within an urban growth boundary**, prior to the filing of the respondent's brief, the local government or state agency may

withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent is not required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.

Note: This amendment extends the voluntary withdrawal powers of a local government to all housing applications within an urban growth boundary, but does not remove objections for objections at LUBA for failing to follow the procedures applicable to the matter before it "in a manner that prejudiced the substantial rights of the petitioner" as exists in current law, i.e., ORS 197.828 (2)(d) or 197.835 (9)(a)(B). Nor does it allow LUBA to take evidence and make decisions on facts that the local government did not do. Instead, it provides that the local government (and a housing applicant) can quickly take the decision back a decision for reconsideration and fix any errors identified in the petition for review. At present for most land use decisions, reconsideration may be made only before the record is filed, except for post-acknowledgement plan amendments (PAPAs), where it can be done at any time prior to filing of the respondent's brief.

No objections to section 9.

Conclusion – These amendments provide for two opportunities for local governments to assert local control to assure its housing approvals survive LUBA appeals by allowing an additional 7 days beyond the existing 120 day deadline for local decision-making on urban housing to provide for a more sufficient order. Additionally, housing decisions may quickly and automatically remanded upon request of the local government if the decision-maker determines there is an error identified in the petitioner's brief that can be fixed. Current law would have housing decisions proceed to the conclusion of briefing, argument, and a final decision – a process that might take months.

Combined with existing law, which already requires housing in urban growth boundaries to be subject only to "clear and objective" standards and provides for attorney fees for violation of this requirement, the legislative provision for urban housing becomes expedited and certain.