

**FOCUS: Statutes/rules/ordinances/practice limits and mandates on local projects and permits from state and local jurisdictions.**

## **TOPIC**

Public Appeals Process

## **TOPIC WORK GROUP LEAD**

Steve Pfeiffer

## **PROBLEM/OPPORTUNITY STATEMENT**

Oregon has created a very open process for the appeal of land use decisions. This highly transparent process is characterized by (1) very minimal standing requirements, (2) opportunities for participation with little or no legal costs, and (3) a very broad definition of "land use decisions" eligible for appeal.

The state's citizen friendly land use appeals process has a chilling effect on the state's competitiveness and business climate. Given the accelerated pace of business in today's global marketplace, the real or perceived threat of an appeal increases risk and creates uncertainty about whether land is really ready for development. Appeals, even when unsuccessful, result in costly and time consuming delays, which translate to lost economic opportunity.

The topic work group on the public appeals process was charged with identifying ways to simplify and expedite the appeals process in order to improve the climate for economic development in Oregon.

## **SITUATIONAL ANALYSIS**

### **Lebanon**

John Hitt, City Administrator for the City of Lebanon, talked about Lebanon's recent siting of a Walmart. In his experience the appeals process takes far too long. For example, even though Walmart's application received affirmative action every step of the way from city staff, the Planning Commission, the City Council, LUBA and the Court of Appeals, it still took 23 months from application submission to approval.

John pointed out that the scope and nature of many of the appeals to LUBA deal with "strictly local applications of strictly local rules" such as site design and application of approved comprehensive plans and zoning ordinances.

He also talked about how the state's appeals process clouds the "project ready" industrial site certification program. At this time, an appropriately zoned industrial site that's adequately served by infrastructure can still be subjected to a lengthy appeals process that can easily exceed the 180-day timeline implied by "project ready."

## **Clackamas County**

Doug McClain, Planning Director for Clackamas County, provided another local government perspective. Doug suggested that there might be permit activities that could be removed from the land use process. As an example, site design review in Clackamas County typically is non-controversial and involves issues such as parking, loading, street improvements, building design and color. The county processes between 150-200 design review applications a year, less than 5% of the applications are appealed, with almost all of those appeals filed by the applicant.

For decisions of this type, which involve not whether a use is allowed but how it should be configured or developed in appropriately zoned industrial parks or other areas designated as employment areas, exempting such decisions from notice and appeal presents opportunities for streamlining of the permit review process.

## **POTENTIAL SOLUTIONS**

The work group agreed that the following ideas warrant further discussion by the full advisory committee and the ERT directors. This list includes some ideas that the group finds worthy of further consideration without a consensus or even recommendation for final action. In those instances the rationale of why the group didn't recommend further action is included.

### **Standing – An easy target for fixing the appeals system but a bad idea.**

As noted, the test for standing to file appeal of land use decisions is relatively minimal. Generally, any individual or entity who participates orally or in writing during local land use proceedings or who was not provided with required notice of such proceedings is able to file an appeal of the local decision to the Land Use Board of Appeals at minimal expense. Currently, there is no real requirement for a demonstration by the appellant that they are adversely affected in any meaningful way by the decision under appeal.

While it is apparent that modification of state and local standing requirements to require a demonstration of "adversely affected or aggrieved" or similar status could reduce appeals to LUBA, it is also apparent to the group that other remedies of appeal to the Circuit Court would be available as an alternate remedy. Further, experience with such alternate Circuit Court appeals prior to the formation of LUBA lead many of us to believe that this remedy may prove more time consuming and unpredictable than the developed LUBA process. Consequently, modification of standing requirements to "raise the bar" for the filing of land use appeals may prove to offer limited benefits and would be at the expense of historical opportunities for full participation in the land use process.

In addition, a more technical standing requirement at LUBA would likely lead to greater debate as to who has standing and would force people to use lawyers earlier in the appeals process at the local level in order to protect their standing to appeal later at the LUBA level. All of which would not necessarily lead to a simpler or more expedited appeals process.

## **Caseload**

It became apparent to the work group that caseload contributes to the 'slowness' of the current appellant system. The number of Land Use Board of Appeals (LUBA) referees and the number of judges in the court system was last increased in the mid-1970s even though caseload has grown significantly in the intervening 30 years. Given the state's flat revenue forecast for the 2005-07 biennium, the group focused primarily on ways to reduce caseload, rather than increased funding for LUBA or the court system.

## **Limited appeal of certain decisions, or categories of decisions, to local level**

Exempt certain decisions or categories of decisions, such as design review, variances or similar implementation of existing code/mapping from appeal beyond the local governing body. Based upon our further discussion, it is clear that conditional use and similar local determinations regarding whether a use is allowed – as opposed to what it might look like – should not be placed in this category. Further, it is noted by many that an alternate avenue of appeal to Circuit Court by writ of review or similar avenue still would be available to an interested party, which in the minds of many of us may prove counter productive for purposes of appeal timetables and costs to all parties.

Under this approach, decisions in this category would be subject to appeal only at the local level through final action by the City Council or Board of Commissioners. Presumably, local communities would be given the option to terminate appeal options at a Hearings Officer/Planning Commission level from an earlier Type II decision. Once again, it is important to assume that Circuit Court review would be available under a Writ of Review or similar avenue.

***Rationale for not recommending further action:*** Would not necessarily simplify or expedite the process because if you take the decision out of LUBA, it will just come forward as a writ of review to the Circuit Court. Some members of the work group felt that the number of appeals carried forward to the Circuit Court would be reduced.

## **Enhance utility of local government ability to withdraw its decision or request voluntary remand(s)**

Require the Notice of Intent to Appeal (NITA) that is filed with LUBA to include the specific assignments of error that the petitioner intends to raise in the petition. By including those assignments of error in the NITA, a local government will have a more useful opportunity to quickly withdraw the decision or request a voluntary remand in order to address a possible procedural or substantive defect.

Currently, a local government has an absolute right to withdraw its decision for reconsideration before the record is filed, and it is LUBA's practice to grant any local

government request for a voluntary remand made prior to the filing of the petitioner's brief. However, the NITA does not provide any indication of the issues to be raised by the petitioner, and no such indication is provided until after the record of the local decision is developed and filed, and the petitioner has filed its brief with LUBA. If a petitioner intends to raise an issue before LUBA that a local government could easily address, the local government may be willing to immediately address that concern (by withdrawing or requesting a voluntary remand of the decision and fixing the process or decision) in order to avoid the delay and expense resulting from the filing of the record, and the preparation of a brief in response to the petitioner's brief.

Once the petitioner's brief has been filed, LUBA will grant a local government request only if the local government agrees to address all issues raised in the petitioner's brief. At this point, some local governments choose to fully respond to the petitioner's brief (including defending an assertion of a procedural or substantive error that could have been easily "fixed"), since the local government has gone to the expense of preparing the record and may eventually need to file a brief on the other assignments of error if the reconsidered decision is appealed.

Issues to be addressed with this concept include (1) whether the failure to include a specific assignment of error in the NITA should preclude its inclusion in the brief; and (2) the extent to which a voluntary remand after the filing of the NITA might allow other people to appeal the land use decision.

***\*Comments against this proposal were submitted by Doug DuPriest and supported by others attending the subcommittee meeting are attached.***

### **Eliminate Dual Filing**

- Eliminate any role of LUBA as a review authority for decisions that are pending before LCDC. This concept is particularly applicable to Urban Growth Boundary (UGB) amendments, which may be the subject of parallel review or, at a minimum, require precautionary dual filings under the current system. In addition, LCDC may consider modifying current rules to allow parties who do not object to the decision under review to participate.
- Require Court of Appeals to hear appeals from LCDC on fast track now used for LUBA appeals.

### **Establish LUBA as "Magistrates" under Court of Appeals.**

- Transfer LUBA from the executive branch to the judicial branch as "magistrates" under the court of appeals.
- Make review of "LUBA" decisions by Court of Appeals discretionary.
- Provide time limits for decision by Court of Appeals on whether to review the "LUBA" decision.

Advantages:

- Allow faster decision by Court of Appeals if they decide not to review.
- By consolidating “LUBA” into Court of Appeals structure and budget, savings may be possible.
- “Judicial” test for standing would apply, however “magistrates” as used in Tax Court do not require parties to use attorneys.

Disadvantages:

- “Judicial” test for standing would apply (this is a major issue and may be insurmountable).

**Policy Review of Local Land Use Requirements.**

It is noted that many local land use permit requirements are a matter of local discretion in that the decision of a particular city or county to require, for example, architectural review or design review is not a state mandate. Indeed, many cities do not impose such permit reviews to all or some uses including industrial or employment uses and rely instead upon either objection performance standards (i.e.: height, lot coverage, building mass) or the base zone designation alone. In these instances, opportunities for further appeal of a use otherwise allowed under the zone map are eliminated by local policy. Simply stated, this local policy option and review of current city and county ordinances for the purpose presents a further streamlining opportunity. Any changes to this policy needs to be part of the proposed 30-year review so that local governments and citizens around the state can weigh the issue carefully.