



534 SW Third Avenue, Suite 300 • Portland, OR 97204 • (503) 497-1000 • fax (503) 223-0073 • www.friends.org

Southern Oregon Office • PO Box 2442 • Grants Pass, OR 97528 • (541) 474-1155 • fax (541) 474-9389

Willamette Valley Office • 220 East 11<sup>th</sup> Avenue, Suite 5 • Eugene, OR 97401 • (541) 520-3763 • fax (503) 575-2416

Central Oregon Office • 115 NW Oregon Ave #21 • Bend, OR 97701 • (541) 719-8221 • fax (866) 394-3089

House Judiciary Committee  
State Capitol  
900 Court St. NE  
Salem, Oregon 97301

RE: HB 2181 Legislation to amend fee awards at LUBA

Dear Co-Chair Barker, Co-Chair Krieger, and members of the Committee,

Thank you for this opportunity to present testimony on HB 2181, legislation to amend fee awards at the Land Use Board of Appeals. 1000 Friends of Oregon is a membership nonprofit organization that works with Oregonians to enhance our quality of life by building livable urban and rural communities, protecting family farms and forests, and conserving natural and scenic areas. A summary of our specific legislative recommendations regarding this bill is on the reverse side of this testimony.

The first goal of the Oregon land use program is “To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.” When local governments make illegal decisions, an aggrieved party can sometimes appeal the decision to the Land Use Board of Appeals (LUBA). This gives citizens the opportunity to fully participate in the planning process. Appeals to LUBA are quick<sup>1</sup>, they can only address issues that were raised before the local government, and appellants are penalized by having to pay their opponents attorney fees when they bring frivolous cases.

HB 2181 changes the system so that even good cases that LUBA decides do not require remand or reversal bring attorney fees if the applicant is the prevailing party. LUBA is already required to award attorney fees to the prevailing party if a frivolous case is brought. This offers the proper balance – those that bring frivolous cases are penalized by paying the other party’s appeal fees while those bringing cases that have merit are not penalized. There is never a guarantee that any court will rule in a particular way – they’re human, sometimes they get it wrong. HB 2181 would penalize local citizens who lost a close case or had a case incorrectly decided. It would also make it prohibitively daunting to bring a case to clarify ambiguous areas of the law where the outcome is unclear. HB 2181 would intimidate local citizens and have a chilling effect on citizen participation.

In cases involving a permit applicant, LUBA is currently constrained by law to consider only issues that were raised in front of the local government. A party cannot hoodwink the local government by failing to raise a grounds for appeal and then bring the issue up at LUBA.<sup>2</sup> This means the local government is aware of all appealable facts and issues and has a full opportunity to address them before making a final decision. If the local government chooses to make the illegal decision anyway, there must be a way for citizens to say “No!” By putting a local citizen on the hook for the entire enterprise, HB 2181 makes that significantly more daunting.

---

<sup>1</sup> LUBA is required to make its decisions in 77 days and there is expedited appeal for LUBA cases that go to the higher courts. An appeal to LUBA cannot be used to hold up a development for years.

<sup>2</sup> All issues involving a permit decision must be raised before the local government or they are deemed to be waived, even if they have legal merit. Also, LUBA makes its decision based on the same set of facts the local government used to make its decision (the record).

HB 2181 is not a “loser pays” bill. A “loser pays” bill would make either party liable for any prevailing party’s fees and costs. HB 2181 is a one-sided bill that only protects applicants and penalizes citizens and local governments who are trying to protect their communities. Under the scheme set up by HB 2181, a local government would be given a strong incentive to approve any application that comes before it – legal or not. If the government approves the permit, it is off the hook, if it denies it, it may be liable for attorney fees. This would cause a sharp increase in illegal land use approvals because the local government would be worried about paying both side’s attorneys in the event it lost at LUBA.

HB 2181 is also about property rights. A person cannot protect their property rights under this bill unless they are willing to risk paying their own attorney fees as well as the other side’s – without even knowing the potential cost up front. Since the local citizen will not know the other side’s costs until afterwards, there is no way to balance the trade-offs of bringing the case in the first place. A neighbor to an illegal development will not even know if they can afford to defend their property rights until after their case is decided.

HB 2181 is unfair (only the applicant gets protection while the average citizen does not) and punitive (since it applies to even good cases). We urge you to oppose HB 2181.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Steve McCoy', with a stylized, cursive flourish at the end.

Steve McCoy  
Farm and Forest Staff Attorney

#### **Summary of testimony:**

- LUBA is already required to award attorney fees to the prevailing party if a frivolous case is brought. HB 2181 would remove the ability of a local government to collect attorney fees for frivolous cases.
- This is not a “loser pays” bill. A “loser pays” bill would make either party liable for the prevailing party’s fees and costs.
- Appeal to LUBA is quick as is appeal of LUBA decisions.
  - Appeals to LUBA involving permit applications can only address issues raised before the local government and are generally made on the set of facts used by the local government.
- There is never a guarantee that any court will rule in a particular way – especially for cases that are brought to clarify current law – so it is unfair to penalize a party that brings a good case that they lose.
- It’s about property rights. A person cannot protect their property rights under this bill unless they are willing to risk paying their own attorney fees as well as the other side’s – without even knowing the potential cost up front.