1000 friends of Oregon

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

RE: HB 2182 Legislation to amend standing requirements at LUBA

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

Thank you for this opportunity to present testimony on HB 2182, legislation to amend standing requirements at the Land Use Board of Appeals (LUBA). 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[1], 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 2182 changes the law so that when a land use decision is made, only an adjacent landowner or a party that posts a large enough bond can appeal the decision to LUBA. If a farmer is leasing land – an extremely common occurrence – they cannot appeal a decision that impacts their ability to farm unless they can come up with a bond to cover the applicant's attorney fees. About 40% of Oregon residents do not own any property and many of these citizens are in the lower income tiers. Despite the fact that many of them have become an important part of their communities[2], they would be effectively shut out of this part of the land use planning program. HB 2182 reserves access to LUBA to the rich and powerful.

This bill is a solution in search of a problem. LUBA is already <u>required</u> to award attorney fees to the prevailing party if a frivolous case is brought. That 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. This has worked well to keep the number of cases at LUBA down. Of the tens of thousands of land use decisions that are made each year, only a small number are appealed. In 2009 137 cases were appealed to LUBA – that's about 4 per county. Only 109 cases were appealed to LUBA by the end of November of 2010 – about 3 per county. There is not an avalanche of appeals that needs to be stopped.

[1] LUBA is required to makes 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.
[2] According to Northwest Housing Alternatives, 46% of the residents in their portfolio have lived in their apartment for 3 or more years.

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.[3] 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 restricting who can bring a case at LUBA, HB 2182 makes it much harder to stop illegal developments.

HB 2182 is also about property rights. A person two doors down from a proposed development will not be able to appeal to LUBA and protect their property interests unless they have the means to make a large deposit.

People that oppose development that is adjacent to them are often pejoratively termed NIMBYs for "not in my backyard." HB 2182 turns NIMBYism on its head. Under this bill, only people who have the development in their backyard will be able to appeal. People wishing to protect their community but who live further away will often not be able produce the required bond – especially within the tight timeline required by the bill. HB 2182 would effectively eliminate these citizens ability to participate in this aspect of land use planning.

HB 2182 only allows landowners and the rich to participate. We urge you to oppose HB 2182.

Respectfully submitted,

Steve McCoy
Farm and Forest Staff Attorney

Summary of testimony:

- HB 2182 reserves access to LUBA to the rich and powerful.
- This bill is a solution in search of a problem. There is not an avalanche of appeals that needs to be stopped.
    - LUBA is already required to award attorney fees to the prevailing party if a frivolous case is brought.
    - In 2009 137 cases were appealed to LUBA – that's about 4 per county. Only 109 cases were appealed to LUBA by the end of November of 2010 – about 3 per county.
- HB 2182 is also about property rights. A person two doors down from a proposed development will not be able to appeal to LUBA and protect their property interests unless they have the means to make a large deposit.

[3] 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 makes its decision (the record).