

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MICHELLE BARNES,

Respondent,

v.

CITY OF HILLSBORO AND PORT OF
PORTLAND,

Petitioners.

Land Use Board of Appeals
Case No. 2010-11

CA Case No. A146145

**EXPEDITED PROCEEDING UNDER
ORS 197.850, 197.855**

**BRIEF OF AMICUS CURIAE LEAGUE OF OREGON CITIES
IN SUPPORT OF PETITIONERS CITY OF HILLSBORO AND
PORT OF PORTLAND**

Appeal from the Final Opinion and Order Dated June 30, 2010
of the Land Use Board of Appeals Case No. 2010-11
The Honorables Tod A. Bassham, Board Member; Melissa M. Ryan, Board Member,
Participating; and Michael A. Holstun, Board Chair, Concurring

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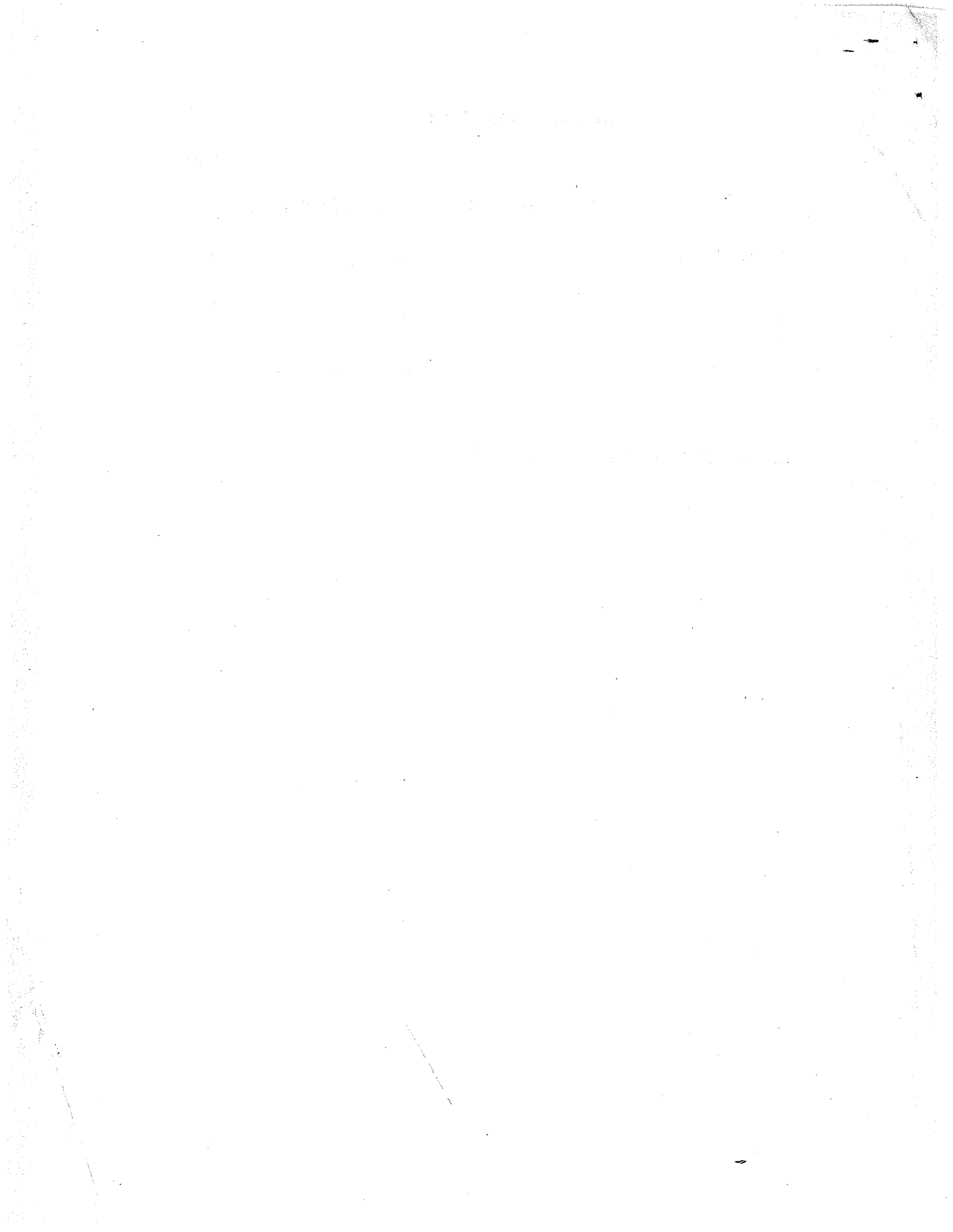


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AMICUS CURIAE BRIEF OF THE LEAGUE OF OREGON CITIES

By leave of the Court, the League of Oregon Cities (“League”) appears as *amicus curiae* to support Petitioners City of Hillsboro and the Port of Portland. Founded in 1925, the League is a voluntary statewide association representing all of Oregon’s 242 incorporated cities. Its mission is to be “the effective and collective voice of Oregon's cities and their authoritative and best source of information and training.” The League advocates for improved quality of municipal services through technical assistance, research and education.

I. INTRODUCTION

The sole question presented by this appeal as to which *amicus* desires to be heard is: when is the appropriate time to challenge the substantive requirements and limitations of a zoning designation adopted by a local government? There are three possible answers to this question: when the zone is defined and the requirements and limitations are adopted by the local government; when the zoning designation is applied to particular property; or when the property or its owner is subject to the limitations or requirements through a development application or enforcement action.

Amicus respectfully submits that a facial challenge to the substantive requirements and limitations of a zoning designation is appropriate when LUBA and the courts review the legislative enactment creating or amending

those zoning designations. An as-applied challenge (and, in appropriate circumstances, perhaps a facial challenge) is appropriate when a person seeks review of a decision subjecting the property or its owner to those requirements or limitations through a development application or through an enforcement action. But when, as is the case here, a person challenges the decision of a local government to rezone property to apply previously adopted designations to particular properties, the only appropriate inquiry is whether it is proper to *apply* the zoning designation to the property. In other words, the only question presented is did the local government comply with the procedural and substantive rules regarding designating property for particular uses?

When the zoning map is amended simply to apply previously adopted zones, a challenge to the substantive requirements of the zone itself is either too late, because that challenge should have been made at the time the zones were created and defined, or too early, because the challenger has neither yet been required to do the thing he or she does not want to do, nor prohibited from doing the thing he or she wants to do on the property.

Why does it matter that this Court hold that the challenge to the constitutionality of a requirement for development in the zone is not timely in an appeal of a legislative action to designate property with that zone, when *amicus* freely concedes that there will be a time in the future when that challenge will be ripe for decision? Oregon's cities face significant negative

consequences if the Court affirms LUBA's order. Currently, cities (as well as counties) must defend a given zone's substantive regulations: (1) after those regulations are adopted or amended through a legislative process subject to ORS 197.610 through 197.625 (i.e. a facial challenge to new or amended legislation); and (2) when and if development occurs and those regulations are applied (i.e. in an as-applied challenge). LUBA's order effectively permits persons to challenge land use regulations in a third context – a zone change proceeding – and forces cities and counties to defend such criteria when they are not being applied to a specific development proposal or being adopted or amended in a legislative proceeding.

The order presents an additional, unnecessary legal risk where no such risk previously existed. As the Court knows, Oregon's cities are currently experiencing significant fiscal pressures. They are expected to provide a high level of services to their residents with reduced revenues and less staff.

Land use litigation already occupies a large portion of the average city's legal budget (and of this Court's resources, as well). LUBA's order will only increase the amount of land use litigation cities confront at a time when they can least afford it. As demonstrated above, the law does not compel this result. Moreover, public policy does not either.

Deciding that Respondent's challenge is best left to another day will not prejudice her. Respondent had the opportunity to assert her facial challenge to

the 2009 Amendments after their adoption. She retains the opportunity to challenge regulations contained in the 2009 Amendments when they are applied in the future. Persons who seek to test the legality of land use regulations, for constitutional reasons or otherwise, have ample opportunity to do so. In the absence of a legal justification and a compelling policy concern, this Court should not provide another avenue to those who wish to challenge a city's efforts in adopting land use regulations.

In addition, LUBA's order further complicates an already complex land use planning program. For instance, if LUBA's order stands, it is not clear what standards and criteria (i.e. the "applicable law") govern zone change applications. In the public notices and statements it must make prior to a hearing, is a city now required to list all of the regulations in the proposed zone as applicable criteria, in addition to those standards that specifically apply to zone changes? If so, and if a city fails to list the underlying regulations, it would be subject to appeals from persons who never appeared or participated in the local hearing on the application. ORS 197.830(3).

Finally, LUBA's order may result in cities attempting to avoid proactively proposing zone changes in order to mitigate the increased legal risk and minimize additional complications. Most zone changes are initiated to make property more productive or more compatible with local markets and demands. Their merits can be readily evaluated against a set of logical and

predictable criteria (e.g. comprehensive plan consistency, public need for the requested zone, etc.).

The Board's order results in an absence of predictability and certainty regarding zone changes and the standards upon which they are to be judged. Planning departments confront many challenges and have the responsibility to complete many tasks. It takes months – and sometimes years - of hard work to establish new zones and their associated regulations. The same can be said of amending existing zones and their standards. Cities rightly appreciate knowing that these legislative efforts will not be subject to wholesale challenges when a zone change is requested and a map amendment is approved. LUBA's order acts as a disincentive for cities to continue to responsibly plan for their future, as the constant threat of facial challenges to existing legislation may result in jurisdictions avoiding zone changes at all costs.

In the proceedings below, Petitioners urged the Land Use Board of Appeals ("LUBA" or "Board") to deny Respondent's First and Second Assignments of Error because, *inter alia*, they were directed at a land use decision that was not before the Board. The decision appealed to LUBA amended Hillsboro's zoning map and changed the zoning on a number of properties in the city. However, LUBA did not confine its review to the applicable law – in this instance the relevant criteria governing zone changes under Hillsboro's development code. Instead, the Board exceeded its authority

and reviewed substantive underlying regulations contained in the zones that were not adopted or amended in the decision on appeal, but were previously adopted months earlier in a wholly separate land use decision.

The League believes LUBA's order is unlawful because the Board's scope of review does not extend to land use decisions that are not before it. The League is concerned about the consequences to Oregon's cities if the order is not reversed. Therefore, the League joins the Petitioners in respectfully urging this Court to reverse LUBA's order regarding Respondent's First and Second Assignments of Error.

II. DISCUSSION

The Hillsboro City Council adopted Ordinance No. 5926 in October 2009 (the "2009 Amendments"). SER. 1-25. The 2009 Amendments added two new zones to the Hillsboro Zoning Ordinance ("HZO") – the Airport Use ("AU") zone and the Airport Safety and Compatibility Overlay ("ASCO") zone. *Id.* These new zones contained a variety of new criteria intended to apply to future development in the AU and ASCO zones. The 2009 Amendments contain the "aviation easement" requirement and the alleged unlawful delegations of legislative authority that Respondent challenged as unconstitutional in her First and Second Assignments of Error before LUBA. *Id.* The 2009 Amendments

were not appealed by any party, including Respondent, and are now deemed acknowledged under ORS 197.625. Rec. 97B.¹

Three months after adopting the 2009 Amendments, Hillsboro proposed a separate, subsequent amendment to the city's zoning map that would apply the new AU and ASCO zones to various properties in and around the Hillsboro Airport. The City Council adopted Ordinance No. 5935 in January 2010 (the "2010 Rezoning"). SER. 26-34. The Council found that the proposed zone changes met the city's zone change criteria at HZO Section 114(2), the sole criteria applicable to the Council's map amendment decision. *Id.* Respondent, whom the record does not disclose to have *any* interest in property affected by the 2010 Rezoning, appealed the 2010 Rezoning to LUBA. That land use decision was the only decision before the Board in the proceedings below.

In her appeal to LUBA, Respondent did not assert that the 2010 Rezoning did not meet the City's zone change criteria, or that it failed to comply with HZO Section 114(2) or any other provision of the HZO. Rather, she alleged that certain provisions in the 2009 Amendments were unconstitutional. The Board reviewed these allegations and agreed that the 2009 Amendments contained unconstitutional elements.

¹ See Petitioners' Opening Brief, fn. 1. Consistent with Petitioners' approach, the League will refer to an un-numbered page by adding a "B" to the page number that precedes it.

