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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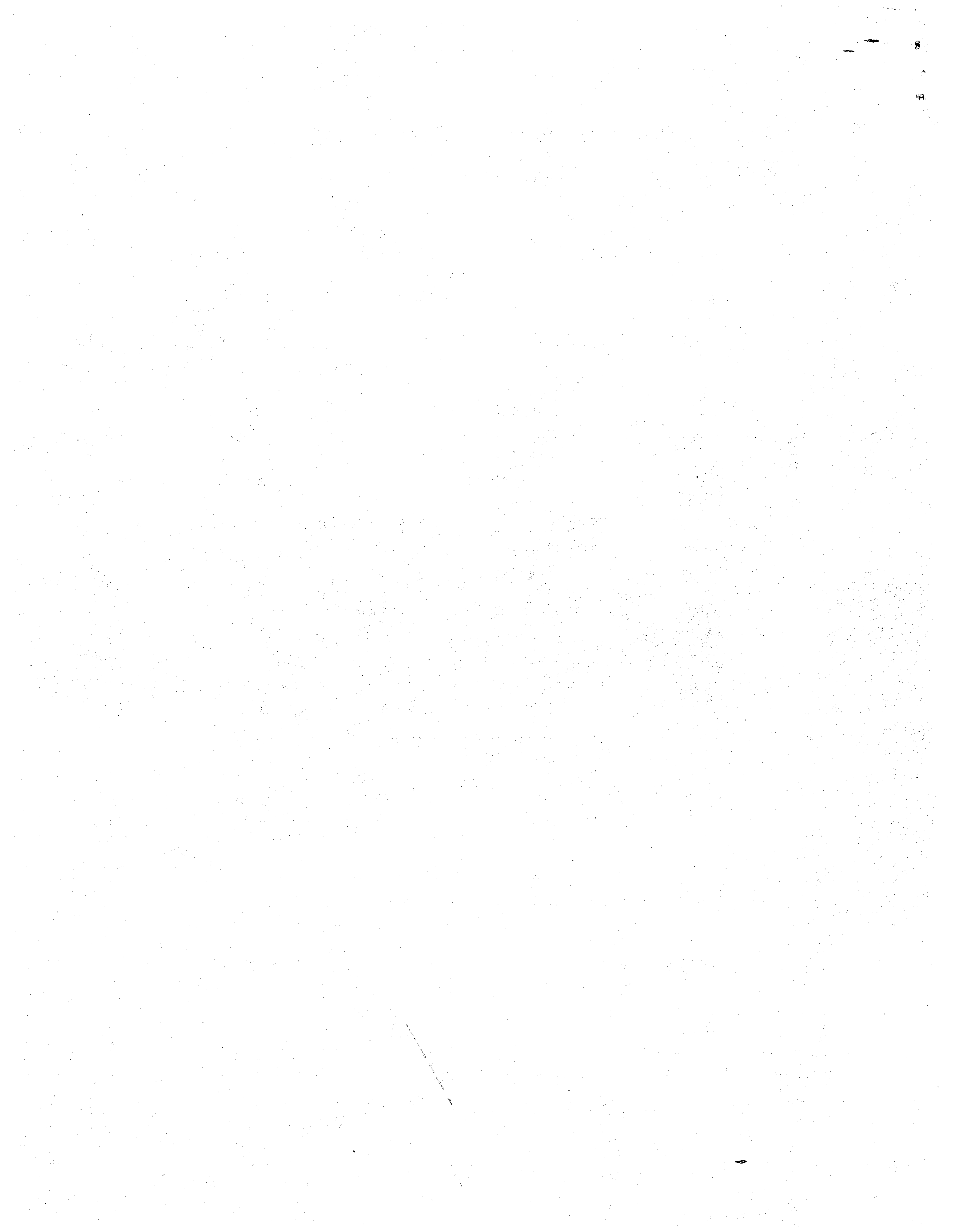

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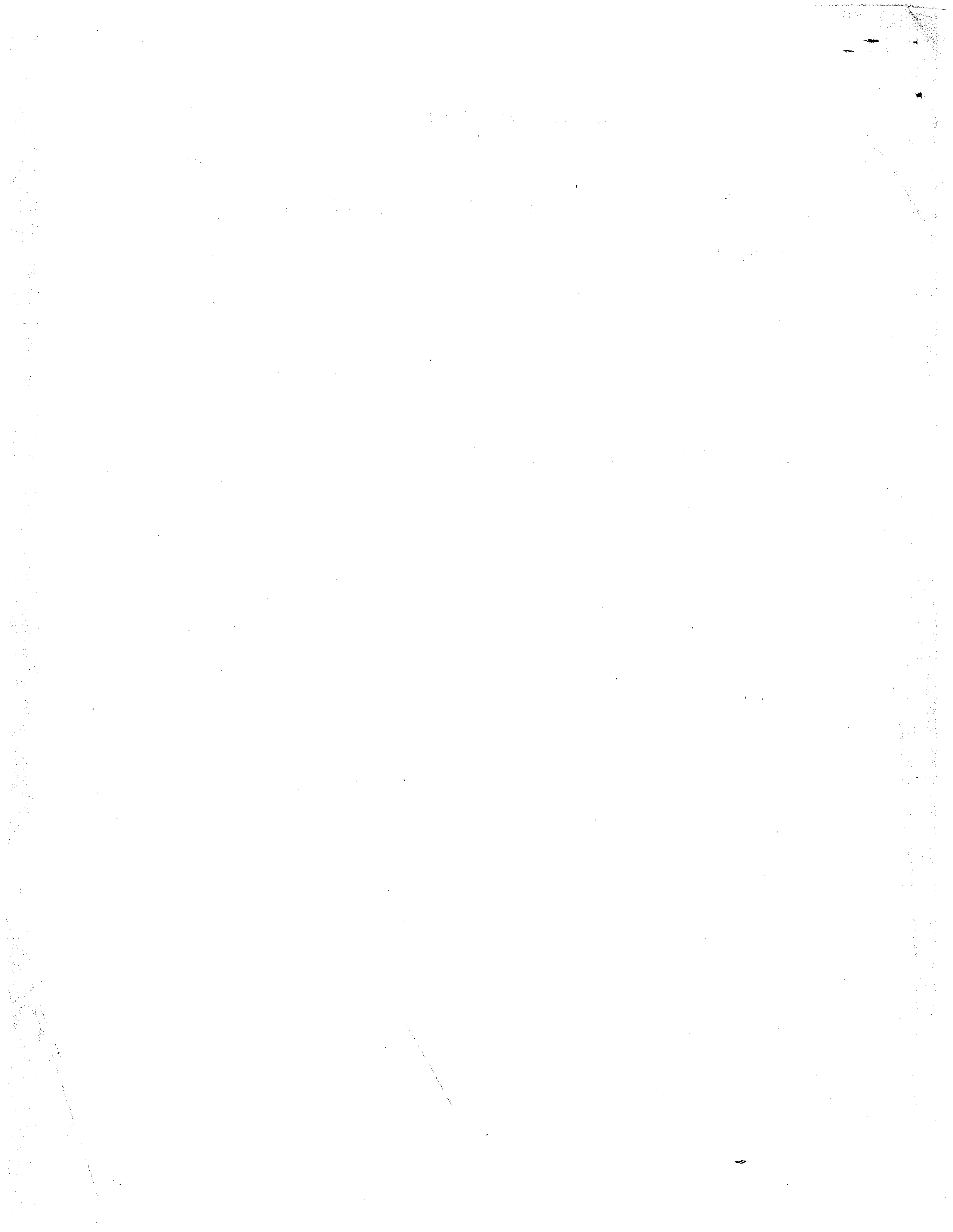

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AMICUS CURIAE BRIEF OF THE LEAGUE OF OREGON CITIES

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 "avigation 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.

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[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.

LUBA erred by affirming Respondent's First and Second Assignments of Error. This Court must reverse or remand a Board order if it finds the order "to be unlawful in substance or procedure . . ." ORS 197.850(9)(a). LUBA's order affirming Respondent's First and Second Assignments of Error is unlawful in substance because it reversed a land use decision that was not the basis of Respondent's appeal.

LUBA is a creature of statute. The legislature explicitly limited LUBA's jurisdiction to review land use decisions "in the manner provided in ORS 197.830 to 197.845." ORS 197.825(1). Pursuant to ORS 197.830(2), a person with standing may petition LUBA for review of "a land use decision or limited land use decision" and the Board's scope of review is expressly limited to "*the* land use decision or limited land use decision" presented to it on appeal. ORS 197.835(1) (emphasis added). Because Respondent only appealed the 2010 Rezoning decision, LUBA lacked the authority to review the 2009 Amendments, much less find criteria contained within them to be unconstitutional.

The Board has historically recognized the limits of its review authority. Indeed, in a decision affirmed by this Court, the Board acknowledged "the unexceptional principle that assignments of error that collaterally attack a decision other than the decision on appeal do not provide a basis for reversal or remand." *Butte Conservancy v. City of Gresham*, 47 Or LUBA 282, 291 *aff'd*

195 Or App 763, 100 P3d 218 (2004). This "unexceptional" and fundamental principle has been applied by this Court since at least 1987, prohibiting the "second bite at the apple" attempted by Respondent here. *See Doney v. Clatsop County*, 142 Or App 497, 503, 921 P2d 1346, 1349 (1996) (citing *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) and *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 746 P2d 728 (1987)).

As Petitioners discussed in their Response Brief to the Board, in several prior cases LUBA has held that it may not review a land use decision that is not the subject of a notice of intent to appeal ("NITA"). Rec. 99. Respondent's NITA only identifies the 2010 Rezoning decision as the basis for her appeal. Rec. 249. However, Respondent's First and Second Assignments of Error are directed solely at the 2009 Amendments, not the 2010 Rezoning decision.

With respect to zoning map amendments and LUBA's authority to review them, the Board recently addressed this issue in *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122 (2008). In that case, the Board considered an appeal of a new airport zone adopted by Scappoose.[2] As was the case with Hillsboro's 2009 Amendments, the decision in the *Scappoose* case adopted a new zone but didn't apply the zone to any properties. *Id.* at 130. As LUBA stated:

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[2] Respondent cited this case in her Reply Brief to LUBA and Petitioners discussed it at oral argument before the Board. Rec. 82.

> Although it seems likely that intervenor will seek to have property near the Scappoose Airport rezoned to AR in the future, it is also possible that no property will ever be zoned AR. If property is zoned AR in the future, that action would constitute a post-acknowledgment amendment of a land use regulation which would be reviewable at that time for compliance with applicable law. Similarly, any city decision to grant conditional use approval for airport residential development on any lands that might be zoned AR in the future would be a land use decision, subject to review by LUBA for compliance with applicable law.
>
> *Id.*

The Board then cited *Okray v. City of Cottage Grove*, 47 Or LUBA 297, 301 (2004) and explained:

> Where, as here, a petitioner appeals an ordinance that (1) adopts a new zone potentially applicable to a number of properties but (2) does not actually apply that new zone to any property, the only challenges we can meaningfully review are facial challenges to the new zone, i.e., arguments that the new zone is facially inconsistent with controlling legal standards such as comprehensive plan provisions, statutes, administrative rules or statewide planning goals. To advance such a facial challenge, the petitioner must demonstrate that the new zone is categorically incapable of being applied consistently with controlling legal standards.
>
> *Id.*

Here, Respondent did not appeal the 2009 Amendments to LUBA. Had she done so, the League concedes that like the LUBA petitioner in the *Scappoose* case, Respondent could have brought the facial challenge to the 2009 Amendments that she advanced in her appeal of the 2010 Rezoning. However, Respondent only challenged the 2010 Rezoning. As LUBA stated, when property is rezoned "that action would constitute a post-acknowledgment

amendment of a land use regulation which would be reviewable *at that time for compliance with applicable law*." *Id* (emphasis added). Similarly, if and when property with the new zoning is developed in the future, that action "would be a land use decision, subject to review by LUBA for compliance with applicable law." *Id.*

As LUBA recognized, developing property under a new or amended land use zone essentially consists of three steps: (1) the adoption or amendment of the zone itself and its associated standards and criteria; (2) the application of the zone to specific properties; and (3) development on those properties according to the zone's standards. As LUBA further acknowledged, legal challenges that may be brought at each stage are subject to Board review "for compliance with applicable law" at the time the challenge is advanced.

The League asserts that the "applicable law" at the map amendment stage (e.g. the 2010 Rezoning Respondent appealed to LUBA) is the local code criteria applicable to zone changes and any relevant state statutes or administrative rules.[3]

Currently, when a city processes a zone change application, it evaluates that application according to straightforward criteria. For example, before Hillsboro will approve a zone change request, an applicant must demonstrate:

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[3] For example, the League concedes that the Transportation Planning Rule is applicable to decisions that amend a zoning map. *See generally Willamette Oaks, LLC. v. City of Eugene*, 232 Or App 29, 220 P3d 445 (2009).

(1) that the proposed zone complies with the city's comprehensive plan; and (2) that the requested zone is best suited for the site based upon specific comprehensive plan policies, if two or more zones would implement the comprehensive plan. HZO Section 114(2). ER. 32.

Prior to a hearing to review a zone change request, cities (as well as counties) must provide written notice to certain persons that "[l]ist the applicable criteria" relevant to the application, and at the beginning of the hearing must again recite the applicable substantive criteria and state "that testimony, arguments and evidence must be directed toward" such criteria. ORS 197.763(3)(b) and (5)(a) and (b).

ORS 197.763 provides context to determine what law is applicable to a given application – and by extension – what law is applicable to a land use decision if it is appealed to LUBA. In this case, the Board had the authority to review an argument that the proposed zones did not comply with Hillsboro's comprehensive plan, or perhaps that a different zone was better suited for one or more of the properties based on specific comprehensive plan provisions, or (as Respondent successfully did argue under her Third Assignment of Error) that the 2010 Rezoning decision did not comply with the Transportation Planning Rule. The League agrees that the Board has the authority to review such challenges, as they would have been directed at criteria applicable to the appealed decision.

However, Respondent's First and Second Assignments of Error before the Board in this case were not directed at the decision's applicable criteria. They were directed at criteria contained in a decision that was not appealed to the Board.

As LUBA recognized in the *Scappoose* case, Respondent *has* the opportunity to challenge those criteria in a future as-applied challenge if and when they are applied to a specific development proposal, and she *had* the opportunity to challenge the criteria after Hillsboro adopted them through a legislative process last fall. Therefore, Respondent (and all other similarly-situated persons) possesses two meaningful opportunities to challenge the criteria of which she complains in her appeal, and this Court will not deprive Respondent of her right to judicial review of those criteria if it reverses LUBA's order.

In its order, LUBA cited no legal authority permitting it to reach Respondent's First and Second Assignments of Error and review the 2009 Amendments. The Board did little to obscure the fact that its decision to review the 2009 Amendments amounted to a policy choice. This is demonstrated through LUBA's statement that if it did not review collateral attacks on previously adopted legislation in the context of zoning map amendments, it worried that affected persons "would be limited to as-applied challenges when [a] city ultimately applied the new zoning requirements to deny or condition

proposed development," (Rec. 13) ignoring the fact that Respondent had not taken advantage of an opportunity to appeal the 2009 Amendments when they were enacted.

LUBA's decisions must not exceed the legal authority the legislature has granted it, even if LUBA believes there is a sound policy reason for allowing review. The Board exceeded its authority in this case. Under well settled law LUBA has held that a person affected by regulations in a given zone has two opportunities to challenge such criteria (i.e. after they are adopted *and* when they are applied), but in this case relied on no authority in permitting a person whom the record does not disclose to be affected to challenge the same criteria in a zoning map amendment. The legislature has limited LUBA's review of zoning map amendments to the criteria applicable to such amendments. ORS 197.830(2) and 197.835(1). Those criteria are the local code criteria governing zone changes and any applicable state statutes or administrative rules. If the Board *should* be able to review other criteria in the context of zoning map amendments, only the legislature is authorized to make that determination.

It is important to note that LUBA's policy choice is founded on a mistaken impression about the record. The Board stated "ORS 215.503 did not require the city to provide its citizens Ballot Measure 56 ("M56") notice of [the 2009 Amendments], and the city presumably did not provide such notice." Rec. 12-13.

Because ORS 215.503 is only applicable to counties, *it* did not require Hillsboro to provide M56 notice. However, the analogous statute applicable to cities did. That statute – ORS 227.186 – is substantively identical to ORS 215.503. And contrary to LUBA's presumption, Hillsboro *did* provide M56 notice pursuant to ORS 227.186 to roughly 6200 households before it adopted the 2009 Amendments. SER. 37.

At this juncture in the land use process, the dispute about the ability to test the constitutionality of the 2009 amendments is more than a question of standing. Whether or not LUBA is obliged to "...apply justiciability doctrines applicable to courts," (Rec. 15) the dispute is not ripe for determination at this time. Not only is there no affected property before LUBA to which the avigation easement may be applied, but the record is devoid of any evidence that an unlawful taking will occur. It is not unlawful for a local government to impose a regulation that constitutes a taking; it is unlawful to impose a taking without just compensation. *Dunn v. City of Redmond*, 303 Or 201 (1987). Nothing in the record makes it absolutely clear that the avigation easement would be acquired without compensation. Even if respondent is correct, and requiring the avigation easement would constitute a taking in every case, that doesn't mean that the requirement is unlawful. Thus, on the record before LUBA, a facial challenge must fail. Respondent essentially argues that Hillsboro will exact an avigation easement from every property in the zone, in

every case that exaction will constitute a taking, in every case that taking will be uncompensated, and that in every case the City will be unable to demonstrate a nexus and rough proportionality.

Contrary to what LUBA said, a determination of "nexus" and/or "rough proportionality" cannot really be made until there is a development or land division against which to measure the requirement. In such cases the inquiry is an ad hoc factual inquiry to determine whether the regulation results in a taking. *Garneau v. City of Seattle*, 147 F3d 802, 807 (9 Cir., 1998). Without an affected property, it is impossible to know what effect the zoning requirements will have and the extent to which, if any, the rights of the property owner are diminished. When those conditions are present any affected property owner, including Respondent if an owner of affected property, can mount a challenge. On the record now before LUBA, neither a facial nor an as-applied challenge can be sustained, and consequently, the LUBA decision must be reversed.

III. CONCLUSION

LUBA erred in holding that Respondent could challenge the 2009 Amendments in her appeal of the 2010 Rezoning. LUBA's authority to review land use decisions does not extend to a decision that is not the subject of a NITA. This Court must reverse or remand a Board order that is unlawful in substance, and LUBA acted without legal authority when it considered Respondent's challenges to the 2009 Amendments. Therefore, the League

respectfully requests the Court to reverse the Board's order affirming Respondent's First and Second Assignments of Error.

DATED this 18th day of August, 2010.

Respectfully submitted:

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SUPPLEMENTAL EXCERPT OF RECORD

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3. City of Hillsboro Ordinance No. 5926, Attachment A. LUBA Rec. 643-650. SER. 34-41.