

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 DAVID SETNIKER, JOAN SETNIKER

5 and WILLAMETTE OAKS, LLC,

6 *Petitioners,*

7  
8 vs.

9  
10 OREGON DEPARTMENT OF TRANSPORTATION,

11 *Respondent.*

12  
13 LUBA No. 2012-002

14  
15 FINAL OPINION

16 AND ORDER

17  
18 Appeal from Oregon Department of Transportation.

19  
20 Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of  
21 petitioners. With him on the brief were William H. Sherlock and Hutchinson, Cox, Coons,  
22 Orr & Sherlock, P.C.

23  
24 Bonnie E. Heitsch, Assistant Attorney General, Oregon Department of Justice, Salem,  
25 filed the response brief and argued on behalf of respondent. With her on the brief was John  
26 R. Kroger, Attorney General.

27  
28 BASSHAM, Board Chair, participated in the decision.

29  
30 RYAN, Board Member, concurring.

31  
32 HOLSTUN, Board Member, concurring.

33  
34 AFFIRMED

07/26/2012

35  
36 You are entitled to judicial review of this Order. Judicial review is governed by the  
37 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal amendments to the Oregon Highway Plan (OHP) mobility standards.

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a seven-page reply brief to address seven alleged “new matters” raised in the response brief, pursuant to OAR 661-010-0039.<sup>1</sup> Respondent Oregon Department of Transportation (ODOT) opposes the reply brief, arguing that some of the alleged new matters are not new matters that warrant a reply brief.

While we tend to agree with ODOT that three of the seven subsections of the reply brief do not address “new matters,” explaining why would lengthen an already lengthy opinion and, further, rejecting those three subsections would not affect our resolution of any assignment of error. We allow the entire seven-page reply brief.

**FACTS**

The OHP is the transportation system plan for the state’s highways. The OHP includes mobility standards for state highways, expressed as a volume to capacity (v/c) ratio. As an example, a .90 v/c ratio would be violated if, during the peak traffic hour, the actual volume of traffic exceeded 90 percent of the highway’s planned capacity.

The OHP mobility standards function as performance standards for state highways, for purposes of the Transportation Planning Rule (TPR) at OAR 660-012-0060. In relevant part, OAR 660-012-0060 requires that, in approving comprehensive plan and land use regulation amendments, local governments must take specified actions, including mitigation,

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<sup>1</sup> OAR 661-010-0039 provides in relevant part:

“A reply brief shall be confined solely to new matters raised in the respondent’s brief, state agency brief, or amicus brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. \* \* \*”

1 to ensure that the traffic impacts of uses allowed under the amendments are consistent with  
2 the performance standards of affected transportation facilities, as measured at the end of the  
3 applicable planning period, typically 20 years. Since 1999, the OHP has provided that, for  
4 state transportation facilities that are already in violation of the relevant v/c mobility standard,  
5 the applicable performance standard is to “avoid further degradation.”

6 In 2011, the legislature adopted Senate Bill (SB) 795 (Oregon Laws 2011, chapter  
7 432), which directed the Land Conservation and Development Commission (LCDC) and the  
8 Oregon Transportation Commission (OTC)<sup>2</sup> to “streamline, simplify and clarify the  
9 requirements” of the TPR and the OHP, respectively, and to encourage “an appropriate  
10 balance between economic development and transportation planning.” *Id.* at section 2.2 and  
11 section 1.1. SB 795 recognized on-going efforts by a joint subcommittee established by  
12 LCDC and OTC to respond to concerns about OAR 660-012-0060 and the OHP mobility  
13 standards for state highways, and required LCDC and OTC to take action by January 1, 2012.  
14 The joint subcommittee recommended a number of amendments to the TPR and OHP  
15 mobility standards. LCDC adopted the joint subcommittee’s recommended changes to the  
16 TPR on December 11, 2011. Those TPR amendments are not challenged in this appeal. The  
17 OTC adopted the recommended amendments to the OHP mobility standards on December  
18 21, 2011.

19 In this appeal, petitioners challenge some of the amendments to the OHP mobility  
20 standards, particularly amendments to Action 1F.3, and 1F.5, and Table 6, which implement

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<sup>2</sup> The OTC is a body responsible for adopting statewide transportation policies, which are then implemented by respondent ODOT, much as LCDC adopts statewide land use policies implemented by the Department of Land Conservation and Development (DLCDC). For purposes of this opinion there is no meaningful difference between OTC and ODOT. Generally, we will use “OTC” when referring to policy-making functions, “ODOT” when referring to actions ODOT takes to implement OTC policies, and “respondent” when referring to arguments made by respondent ODOT in this appeal.

1 Policy 1F.<sup>3</sup> As amended, Table 6 revises upward by approximately 10 percent the v/c  
2 mobility standards for urban highways, to allow more traffic to occur during the peak hour  
3 without violating the standard.

4 Action 1F.3 as amended establishes a process to determine alternative mobility  
5 standards for particular facilities when it is infeasible to meet the standards set forth in Table  
6 6. Such alternative mobility standards are adopted by the OTC as an amendment to the OHP.

7 Action 1F.5 as amended refines the “avoid further degradation” performance standard  
8 for facilities that are failing or are projected to fail the applicable v/c mobility standard within  
9 the planning period. Under the amendments, local governments may approve plan and land  
10 use regulation amendments that result in small increases in traffic up to 400 average daily  
11 trips (ADTs) for any state highway, and result in increases between 400 and 1000 ADTs for  
12 certain state highways, without triggering the obligation to take action under OAR 660-012-  
13 0060.

14 In this appeal, petitioners argue that the OHP amendments violate Statewide Planning  
15 Goal 1 (Citizen Involvement), Goal 6 (Air, Water and Land Resources Quality), Goal 9  
16 (Economic Development), Goal 11 (Public Facilities and Services) and Goal 13 (Energy  
17 Conservation). Petitioners also argue that the OHP amendments violate Goal 12  
18 (Transportation) and the TPR.

19 **FIRST ASSIGNMENT OF ERROR**

20 As amended, OHP Policy 1.F and Action 1.F.3 allow the OTC to amend the OHP to  
21 specify alternative mobility standards for particular transportation facilities, where it is

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<sup>3</sup> The OHP amendments generally changed references from mobility “standards” to mobility “targets.” However, Policy 1F and the footnotes to Tables 6 and 7 clarify that mobility targets are considered “standards” for purposes of determining compliance with OAR 660-012-0060 of the TPR. It is reasonably clear that, unless a Table 6 or 7 mobility target is modified or replaced with an alternative, it functions for all practical purposes as a “standard.” For purposes of this appeal, we see no significance in the new nomenclature, and for consistency will refer generally to mobility “standards.”

1 impractical or infeasible to meet the OHP mobility standards set out in Table 6, through a  
2 collaborative planning process between ODOT and affected local governments.<sup>4</sup>

3 Goal 1 is “[t]o develop a citizen involvement program that insures the opportunity for  
4 citizens to be involved in all phases of the planning process.” Goal 1 requires state agencies  
5 to “coordinate their planning efforts with the affected governing bodies and make use of  
6 existing local citizen involvement programs established by counties and cities.” Petitioners  
7 argue that the OHP amendments violate Goal 1 because the amendments allow OTC to adopt  
8 alternative mobility standards without expressly requiring that ODOT make use of affected  
9 local governments’ existing local citizen involvement programs when adopting alternative

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<sup>4</sup> Policy 1F as amended provides, in relevant part:

“Where it is infeasible or impractical to meet the mobility targets, acceptable and reliable levels of mobility for a specific facility, corridor or area will be determined through an efficient, collaborative planning process between ODOT and the local jurisdiction(s) with land use authority. The resulting mobility targets will reflect the balance between relevant objectives related to land use, economic development, social equity, and mobility and safety for all modes of transportation. Alternative mobility targets for the specific facility shall be adopted by the [OTC] as part of the OHP.” Record 94.

Action 1F.3 as amended provides, in relevant part:

“In the development of transportation system plans or ODOT facility plans, where it is infeasible or impractical to meet the mobility targets in Table 6 or Table 7, or those otherwise approved by the [OTC], ODOT and local jurisdictions may explore different target levels, methodologies and measures for assessing mobility and consider adopting alternative mobility targets for the facility. \* \* \*

“\* \* \* \* \*

“Any proposed mobility target that deviates from the mobility targets in Table 6 or Table 7, or those otherwise approved by [OTC], shall be clear and objective and shall provide standardized procedures to ensure consistent application of the selected measure. The alternative mobility target(s) shall be adopted by the [OTC] as an amendment to the OHP. Consideration of alternative mobility targets shall be coordinated with other local jurisdictions in the affected corridor, consistent with OTC Policy 11—Public Involvement.

“The [OTC] has sole authority to adopt mobility targets for state highways. It will be necessary for affected local jurisdictions to agree to the alternative mobility target for the state highway facility as part of a local transportation system plan and regional plan (MPO) as applicable. Findings shall demonstrate why the particular mobility target is necessary, including the finding that it is infeasible or impractical to meet the mobility targets in Table 6 or Table 7, or those otherwise approved by the [OTC].” Record 51-52.

1 mobility standards. Petitioners concede that, *after* OTC adopts an alternative mobility  
2 standard for a particular facility, the local governments with land use authority over the area  
3 of the facility must adopt conforming amendments to the applicable transportation system  
4 plans, and that the local citizen involvement programs required by Goal 1 will be used for  
5 those local conforming plan amendments. However, we understand petitioners to argue that  
6 Goal 1 requires that ODOT make use of local citizen involvement programs *prior* to OTC  
7 adoption of the alternative mobility standard, as part of the coordination process, at a juncture  
8 when no local public planning process may have yet occurred.

9         Respondent argues that petitioners’ argument is based on the incorrect premise that  
10 adoption of alternative mobility targets would occur outside of the process for adopting or  
11 amending a local transportation system plan or ODOT facility plan. Respondent notes that  
12 Action 1F.3 expressly applies “[i]n the development of transportation system plans or ODOT  
13 facility plans[.]” *See* n 4. According to respondent, Action 1F.3 does not authorize adoption  
14 of alternative mobility targets in circumstances other than developing transportation system  
15 plans or ODOT facility plans. Respondent argues that development of a local transportation  
16 system plan would necessarily involve the local citizen involvement process, while  
17 development of an ODOT facility plan must be coordinated with affected local governments,  
18 as required by ODOT’s state agency coordination program, at OAR chapter 731, section 015.  
19 Respondent notes that its state agency coordination program, which is acknowledged to  
20 comply with Goal 1, does not require it to make use of local government citizen involvement  
21 programs when OTC amends a plan such as the OHP, only to coordinate in advance with  
22 local governments.

23         We agree with respondent that petitioners have not established that the OHP  
24 amendments violate Goal 1. Prior to the amendments, the OTC could amend the OHP in any  
25 way it chose, subject to the coordination requirement in its state agency coordination  
26 program, which did not necessarily require use of a local public process prior to the OTC

1 amendment, much less use of a local citizen involvement program. That coordination  
2 program is acknowledged to comply with Goal 1. In relevant part, Action 1F.3 as amended  
3 simply specifies a particular basis for OTC to amend the OHP: to adopt alternative mobility  
4 standards in coordination with affected local governments. As part of that coordination  
5 process, affected local governments may or may not invoke their local citizen involvement  
6 program, depending on the local process used in coordination and the particulars of their  
7 local citizen involvement program. If the local government does not conduct a public process  
8 as part of its coordination role, then there may be at that point in time no local public process  
9 on which the local citizen involvement program can operate. While Goal 1 requires ODOT  
10 to “make use” of *existing* local citizen involvement programs, it does not require that ODOT  
11 *create* new citizen involvement programs, or amend the OHP to expressly mandate that local  
12 governments create or invoke such programs as part of the coordination process for a  
13 contemplated OHP amendment.

14 The first assignment of error is denied.

#### 15 **SECOND, THIRD, FOURTH, AND SIXTH ASSIGNMENTS OF ERROR**

16 Under the second, third, fourth and sixth assignments of error, petitioners argue that  
17 the OHP amendments violate Statewide Planning Goals 6, 9, 11 and 13, respectively.  
18 Because these assignments of error have a common theme, we address them together.

19 The common theme in these assignments of error is that the amendments to Policy  
20 1F, Action 1F.3, Action 1F.5 and Table 6 will make it easier for local governments to  
21 approve development that will likely cause increased congestion on state highways, some of  
22 which may be failing or projected to fail, without necessarily requiring development  
23 applicants to mitigate impacts on such highways. In turn, petitioners argue, that increased  
24 and unmitigated congestion could create consequences (violation of air quality standards,  
25 impaired economic development, inadequate transportation facilities, and increased energy  
26 use) that petitioners argue are contrary to Goals 6, 9, 11 and 13.

1           Petitioners’ arguments are mostly couched as a challenge to the adequacy of OTC’s  
2 findings addressing the four goals. According to petitioners, remand is necessary for OTC to  
3 adopt more adequate findings addressing the impacts of increased congestion that could  
4 result under the OHP Policy 1F amendments on the various policy objectives embodied in  
5 Goals 6, 9, 11 and 13.

6           OAR 731-015-0055(5) requires the OTC, when it adopts a final modal plan like the  
7 OHP, to adopt findings addressing compliance with all applicable statewide planning goals.  
8 The OTC adopted such findings, at Record 63-80. Even in the absence of a findings  
9 requirement for a legislative decision such as the present one, “there must be enough in the  
10 way of findings or accessible material in the record of the legislative act to show that  
11 applicable criteria were applied and that required considerations were indeed considered.”  
12 *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 17, n 6, 38 P3d 956 (2002).  
13 However, it is worth observing that the findings that support a legislative decision,  
14 particularly a legislative decision like the present one, which amends general standards  
15 governing transportation facilities in every city and county in this state, need not and cannot  
16 be as detailed or as comprehensive as is typically required for findings supporting a quasi-  
17 judicial decision, or even a geographically-focused legislative decision. As discussed below,  
18 some of petitioners’ findings challenges appear to presume that OTC must adopt detailed  
19 findings addressing issues, such as compliance with state and federal air quality regulations,  
20 that cannot be practicably addressed except in the context of a much more limited geographic  
21 scale. Similarly, we note that the planning obligations imposed by Goals 6, 9, 11 and 13, as  
22 discussed in more detail below, are rather general in nature. Moreover, ORS 197.340(1)  
23 obligates state agencies to “give the goals equal weight in any matter in which the goals are  
24 required to be applied.” As discussed below, the challenged findings addressing Goals 6, 9,  
25 11 and 13, as well as others, attempt to recognize and balance if necessary sometimes  
26 competing policy objectives embodied in various goals. In some cases, the findings expressly

1 acknowledge tradeoffs between goal objectives, for example acknowledging that increased  
2 traffic congestion may be necessary to encourage multi-modal transportation options. We  
3 believe that a statewide policy-making body such as the OTC has a significant degree of  
4 latitude in how it chooses to balance the policy objectives embodied in various goals,  
5 particularly where, as here, that body is directed by the ultimate policy-making body, the  
6 legislature, to adopt OHP amendments reflecting a different balance than found in the  
7 existing OHP. Absent a demonstration of legal error, it is not LUBA’s role to second-guess  
8 the OTC’s policy choices. With those observations, we turn to petitioners’ specific findings  
9 challenges.

10 **A. Goal 6 (Air Quality)**

11 Goal 6 provides that “[a]ll waste and process discharges from future development,  
12 when combined with such discharges from existing developments, shall not threaten to  
13 violate, or violate applicable state or federal environmental quality statutes, rules and  
14 standards.” The OTC findings regarding Goal 6 state:

15 “One of the primary objectives in the proposed amendments to OHP Policy 1F  
16 is to better facilitate mobility objectives and measures that consider and  
17 balance a broader range of goals for the transportation system and  
18 communities. This includes broader OTP and OHP objectives considering  
19 resource impacts from transportation. For a number of years, stakeholders  
20 have pointed to the existing OHP Policy 1F as being too focused and  
21 unyielding towards vehicle mobility and encouraging development on the edge  
22 of urban areas. The new policy amendments allow a more multimodal  
23 perspective to mobility considerations to lessen reliance on one single mode of  
24 transportation. These policy amendments also allow better consideration for  
25 enhanced development in existing urban areas. These considerations and  
26 tradeoffs are anticipated to promote efficient use of resources overall,  
27 including for land development and to enhance air quality and promote  
28 greenhouse gas objectives.” Record 69.

29 As noted, Action 1F.5 as amended modifies the existing “avoid further degradation”  
30 performance standard for transportation facilities that are failing or projected to fail during  
31 the planning period, to provide that “small increases” in traffic generation are not subject to

1 the “avoid further degradation” performance standard.<sup>5</sup> Further, Table 6, which sets out v/c  
2 mobility standards for different types of state highways, was modified to increase the v/c  
3 ratios for highways in urban areas. For example, the mobility standard for state highways in  
4 Special Transportation Areas (STAs), which are typically dense urban downtown areas, was  
5 increased to 1.0 v/c, or full capacity. Petitioners contend that these amendments, individually  
6 or collectively, will allow local governments to approve plan and zoning amendments under  
7 OAR 660-012-0060 that will result in development that will increase traffic congestion,  
8 which will increase air pollution, which combined with existing pollution might threaten to  
9 violate state or federal air quality standards for some urban areas.

10 Petitioners fault the above-quoted findings for failing to identify the air quality  
11 standards that might be violated by the increased congestion that might occur under the  
12 amended OHP mobility standards. Petitioners argue that the findings identify no facts relied  
13 upon that relate to compliance with state or federal air quality standards, or explain how the  
14 facts relied upon lead to the conclusion that the OHP amendments will not result in  
15 congestion and pollution that threaten to violate air quality standards, and thus will not

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<sup>5</sup> Action 1F.5 as amended provides, in relevant part:

“In applying ‘avoid further degradation’ for state highways already operating above the mobility targets in Table 6 and Table 7 \* \* \* or facilities projected to be above the mobility targets at the planning horizon, a small increase in traffic does not cause ‘further degradation’ of the facility.

“The threshold for a small increase in traffic between the existing plan and the proposed amendment is defined in terms of the increase in total average daily trip volumes as follows:

“[1] Any proposed amendment that does not increase the average daily trips by more than 400.

“[2] Any proposed amendment that increases the average daily trips by more than 400 but less than 1001 for state facilities where:

“The annual average daily traffic is less than 5,000 for a two-lane highway.

“The annual average daily traffic is less than 15,000 for a three-lane highway.

“The annual average daily traffic is less than 10,000 for a four-lane highway.

“The annual average daily traffic is less than 25,000 for a five-lane highway.”

Record 55.

1 violate Goal 6. *See Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569  
2 P2d 1063 (1977) (adequate findings supporting a quasi-judicial decision must identify the  
3 relevant approval standards, set out the facts which are believed and relied upon, and explain  
4 how those facts lead to the conclusion of compliance with the approval standards).

5         The above-quoted findings regarding Goal 6 do not specifically address petitioners’  
6 speculation that future plan amendments under OAR 660-012-0060 based on the Action 1F.5  
7 and Table 6 performance standards will allow development that will cause increased traffic,  
8 that will cause increased congestion, that will cause increased pollution, that might,  
9 combined with pollution from existing development, ultimately threaten to violate a state or  
10 federal air quality standard in some urban areas.<sup>6</sup> However, we disagree with petitioners that  
11 the OTC was necessarily required to address that issue specifically in adopting the challenged  
12 amendments to OHP Action 1F.5 and Table 6. As far as we can tell, the “small increases”  
13 exception to the avoid further degradation performance standard in Action 1F.5, and the  
14 amended v/c performance standards in Table 6, will be applied only to future local land use  
15 decisions, such as post-acknowledgment plan amendments, which will be subject to OAR  
16 660-012-0060 and the statewide planning goals, including Goal 6. Petitioners do not argue  
17 otherwise. If that is the case, it makes far more sense to evaluate in a local land use decision  
18 whether a particular application of the Action 1F.5 and Table standards complies with Goal  
19 6, than it does in the present appeal of the OHP amendments. Indeed, we do not see how  
20 petitioners’ speculations regarding the causative links between increased congestion and  
21 violation of state and federal air quality standards in particular urban areas could be  
22 meaningfully addressed in findings supporting the legislative OHP amendments. There are  
23 simply too many variables, necessarily dependent on local circumstances. Those variables

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<sup>6</sup> As discussed below, the OTC did generally address the impacts of increased congestion in its Goal 12 findings, and concluded basically that the policy benefits provided by the amended mobility standards outweigh the policy detriments of increased congestion. Record 73; *see* n 8.

1 are better addressed in the context of local land use decisions applying the amended OHP  
2 standards to a local plan amendment, to which Goal 6 will necessarily apply.

3 Stated differently, in the present appeal the statewide OHP amendments are  
4 essentially subject only to facial challenges, arguments that the amendments are facially  
5 inconsistent with some legal requirement, or the amendments will categorically violate some  
6 legal requirement when they are eventually applied, without regard to local variables. The  
7 issue that petitioners fault the OTC for failing to address—the possible causative links  
8 between increased traffic from new development approved under a plan amendment,  
9 increased congestion, increased pollution, and possible violation of state and federal air  
10 quality standards in some urban areas, and hence the possible violation of Goal 6—fails as a  
11 facial challenge because it is too speculative and too dependent on unknown and unknowable  
12 local factors. The issues that petitioners attempt to raise here can only be meaningfully  
13 addressed only in an as-applied challenge to a local post-acknowledgment plan amendment or  
14 similar plan adoption or amendment, to which Goal 6 will necessarily apply. We do not  
15 believe that the OTC was obligated to address that issue in the findings it adopted to support  
16 the OHP. We conclude that the OTC’s findings regarding Goal 6 are not inadequate for any  
17 reason stated in the petition for review.

18 **B. Goal 9 (Economic Development)**

19 Goal 9 is “[t]o provide adequate opportunities throughout the state for a variety of  
20 economic activities vital to the health, welfare, and prosperity of Oregon's citizens.” Goal 9  
21 requires that comprehensive plans for urban areas “[p]rovide for at least an adequate supply  
22 of sites of suitable sizes, types, locations, and service levels for a variety of industrial and  
23 commercial uses consistent with plan policies.”

1 In its findings, the OTC concluded that the OHP amendments would remove  
2 regulatory barriers to economic development, and thus are consistent with Goal 9.<sup>7</sup>

3 Petitioners argue that the amendments to Action 1F.5 and Table 6 will undermine  
4 economic activity in the state by increasing congestion on state highways and worsening or  
5 hastening failure of transportation facilities, particularly designated freight routes, that are  
6 essential to move goods and services. With respect to impacts of congestion on rural  
7 economic activity, petitioners cite to testimony from the Oregon Farm Bureau that increased  
8 congestion on rural highways can increase costs and delays to deliver farm products. Record  
9 200. With respect to impacts on urban economic activity, petitioners cite to testimony that  
10 increased congestion in urban areas nullifies the locational and site characteristics of lands  
11 zoned for industrial and commercial uses. Because the Action 1F.5 and Table 6 amendments  
12 will cause increased congestion in urban areas, petitioners argue, it will undermine the  
13 suitability of lands zoned for industrial and commercial uses, contrary to the Goal 9  
14 requirement to provide in the comprehensive plan for urban areas “an adequate supply of  
15 sites of suitable sizes, types, locations, and service levels for a variety of industrial and  
16 commercial uses consistent with plan policies.” Petitioners contend that the OTC’s Goal 9  
17 findings are inadequate and not supported by an adequate factual base, because they fail to

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<sup>7</sup> The OTC findings state:

“The proposed amendments to OHP Policy 1F have a considerable foundation in facilitating economic development opportunities for Oregon. SB 795 includes statutory findings that the ‘growth and economic development of this state requires an appropriate balance between economic development and transportation planning.’ Many of the changes proposed in the OHP amendments, in close coordination with the revisions proposed in the TPR, seek to enhance and promote economic opportunities for Oregonians.

“Specific revisions include better consideration of economic development objectives with transportation mobility, lessening analysis and mitigation burdens for smaller developments that have a lower risk on transportation system mobility, and permitting increased levels of development by working with local jurisdictions to balance mobility and development considerations in a specific area.

“The OHP Policy 1F amendments are in compliance with and supportive of Statewide Goal 9, Economic Development.” Record 70.

1 address the impacts of increased congestion on economic activity and ignore evidence that  
2 such impacts are inconsistent with Goal 9.

3 Respondent argues that OTC adopted, at Record 73, findings that concede that the  
4 amendments may result in some increase in congestion, but generally conclude that the  
5 adverse impacts of increased congestion on state highways, and specifically on freight routes,  
6 are outweighed by the advantages offered by OHP amendments.<sup>8</sup> With respect to the issue of  
7 impacts on farmers and rural highways raised by the Oregon Farm Bureau, respondent argues  
8 that OTC responded in part to the concerns expressed at Record 200 by limiting the increased  
9 mobility standards in Table 6 to urban highways. Although the “small increases” exception  
10 to the “avoid further degradation” standard in Action 1F.5 will apply to all highways,  
11 respondent argues that the statewide planning goals already restrict the type and intensity of  
12 development allowed on rural lands, particularly rural resource lands. According to  
13 respondent, there is no evidence in the record that future quasi-judicial post-acknowledgment

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<sup>8</sup> The OTC Goal 12 findings state, in relevant part:

“While increased congestion can cause concerns and lead to issues, especially in urban areas with high levels of congestion, the revised policies provide opportunities to better accommodate transportation options and multimodal solutions that make transportation more convenient to all users of the transportation system, including the transportation disadvantaged. These options also strive to mitigate congestion concerns to the extent possible. The policy revisions promote transportation demand management and operational improvements that enhance the efficiency of the existing or improved transportation system.

“The proposed revisions better achieve a clear TPR objective to balance vehicular use with other transportation modes, including walking, bicycling and transit in order to avoid principal reliance upon any one mode of transportation.

“While freight may be impacted from policies that recognize more congestion on state facilities given growth in population and travel, and constrained financial resources, the revised policies continue to recognize the importance of state facilities for freight transportation. The revised mobility policy carries forward greater mobility expectations on higher classified facilities and designated freight routes. OHP Policy 1F continues to acknowledge and consider other OHP policies regarding the importance of facilities best serving their respective functions given current realities and future expectations. To reflect this key concern, freight stakeholders were notified of potential OHP Policy 1F amendments through several outreach methods and participated in the revisions through the TPR Rules Advisory Committee.” Record 73.

1 plan amendments on rural lands that apply Action 1F.5 are likely to congest rural highways to  
2 the extent of suppressing economic activity on rural lands.

3 With respect to the impacts of congestion on urban highways and urban economic  
4 activity, respondent argues that the findings explain that a primary motivation for the  
5 amended OHP mobility standards was that the previous mobility standards made it difficult  
6 to provide for dense urban development, which in turn can support a multimodal  
7 transportation system, promote a more efficient and compact land use pattern, and reduce the  
8 tendency for inefficient urban sprawl. Respondent cites to the testimony of several cities that  
9 previous mobility standards were a deterrent to development, and that the amended mobility  
10 standards will support business and economic development. According to respondent, the  
11 OTC balanced the economic interests of the development community with that of freight and  
12 agricultural interests, and the OTC's choice on how to balance those competing economic  
13 interests is fundamentally a policy decision, directed by the legislature, that should not be  
14 disturbed by LUBA on review. Respondent argues that there is an adequate factual base  
15 supporting the OTF's finding that the Policy 1F amendments are consistent with Goal 9.

16 We agree with respondent that petitioners have not established that the OTC's Goal 9  
17 findings are inadequate or not supported by an adequate factual base. The OTC found that  
18 the amended mobility standards will remove barriers to development, including economic  
19 development, and offer a number of advantages that offset the adverse impacts of increased  
20 congestion. We understand petitioners to argue, essentially, that Goal 9 requires the OTC to  
21 protect existing economic interests (farmers, current users of freight routes, etc.) from any  
22 harm, and that Goal 9 is violated if the OTC amends the OHP in ways that might indirectly  
23 harm such economic interests, even if those amendments benefit other economic interests.  
24 However, Goal 9 is simply to "provide adequate opportunities throughout the state for a  
25 variety of economic activities vital to the health, welfare, and prosperity of Oregon's  
26 citizens." Nothing cited to us in Goal 9 suggests that the OTC is obligated to protect any and

1 all economic interests from harm. *See Home Depot U.S.A., Inc. v. City of Portland*, 169 Or  
2 App 599, 602, 10 P3d 316 (2000) (Goal 9 does not require local governments to make land  
3 available for every specific kind of economically productive use that anyone wishes to  
4 conduct). It is entirely consistent with Goal 9 for the OTC to balance competing economic  
5 factors and choose what it believes to be the best policy outcome for all, even if some  
6 economic interests may be adversely affected by that choice, as long as comprehensive plans  
7 for urban areas continue to provide an adequate opportunity for a variety of economic  
8 activities. Petitioners do not contend that the amended mobility standards will deny any  
9 urban planning jurisdiction the ability to provide for a variety of economic activities.

10 **C. Goal 11 (Public Services and Facilities)**

11 Goal 11 is to “plan and develop a timely, orderly and efficient arrangement of public  
12 facilities and services to serve as a framework for urban and rural development.” Goal 11  
13 also requires cities and counties with jurisdiction over areas within an urban growth boundary  
14 to adopt a public facility plan. A public facility plan in relevant part describes the  
15 “transportation facilities which are to support the land uses designated in the appropriate  
16 acknowledged comprehensive plan or plans within an urban growth boundary containing a  
17 population greater than 2,500.”

18 Petitioners argue that Action 1F.5, in modifying the “avoid further degradation”  
19 performance standard to allow for “small increases” in traffic on facilities that are failing or  
20 projected to fail, without requiring any mitigation, violates the Goal 11 requirement to  
21 provide for a “timely, orderly and efficient arrangement of public facilities.” Petitioners  
22 argue that the OTC’s findings are inadequate and not supported by an adequate factual base,  
23 because the findings do not address the issue of whether allowing increased unmitigated  
24 congestion on failing facilities under Action 1F.5 is consistent with Goal 11.<sup>9</sup>

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<sup>9</sup> The OTC findings under Goal 11 state:

1 Respondent argues that the substantive objectives and guidelines of Goal 11 are  
2 largely concerned with how and when public utilities can be extended or established in rural  
3 areas, and the appropriate type of public infrastructure allowed on rural versus urban lands.  
4 We understand ODOT to argue that the goal language that petitioners rely upon, to provide  
5 “timely, orderly and efficient arrangement of public facilities and services,” is general, almost  
6 aspirational language that is not concerned with the performance standards governing state  
7 highways. In any case, respondent argues, the OTC findings explain that the amendments are  
8 intended to implement the legislature’s directive to ‘better balance economic development  
9 and the efficiency of urban development with consideration of development of the  
10 transportation infrastructure.’ According to respondent, the amendments to Policy 1F strike  
11 a slightly different balance than the unamended Policy 1F provisions, between the operational  
12 performance of highway facilities, economic development and other policy considerations,  
13 and that policy choice is consistent with the legislature’s direction, and should not be  
14 disturbed on appeal.

15 We generally agree with respondent that the Goal 11 requirement to provide “timely,  
16 orderly and efficient arrangement of public facilities and services” is not particularly  
17 concerned with the performance standards that govern state highways. There is a separate  
18 statewide planning goal, Goal 12, which is immediately concerned with the performance of  
19 transportation facilities, including state highways. We address Goal 12 and its lengthy and

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“Public facilities and services are an important consideration of the proposed amendments to OHP Policy 1F. A statutory requirement of SB 795 is to ‘better balance economic development and the efficiency of urban development with consideration of development of the transportation infrastructure...’ The proposed amendments to OHP Policy 1F do not proposed specific facility improvements, but do have a role in identifying transportation system needs. This includes working with local jurisdictions to meet and/or refine mobility objectives through development of their Transportation System Plans (TSPs), consistent with the adopted comprehensive plan for the area. The enhanced flexibility in OHP Policy 1F provides additional context for working with local jurisdictions on timely, orderly and efficient transportation facilities and services consistent with the local comprehensive plan.

“The OHP Policy 1F amendments are in compliance with and supportive of Statewide Goal 11, Public Facilities and Services.” Record 71.

1 complex implementing administrative rule under the fifth assignment of error. It seems  
2 highly unlikely that the general Goal 11 requirement to provide “timely, orderly and efficient  
3 arrangement of public facilities and services” adds anything new or different to the many  
4 specific Goal 12 requirements, with respect to the performance of state highways. As noted  
5 above, the OTC adopted unchallenged findings addressing whether any increased congestion  
6 that might result from application of the Action 1F.5 “small increases” exemption from the  
7 avoid further degradation standard is consistent with Goal 12. *See* n 8. For present purposes,  
8 we agree with respondent that petitioners have not demonstrated that the OTC’s Goal 11  
9 findings are inadequate or not supported by an adequate factual base.

10 **D. Goal 13 (Energy Conservation)**

11 Goal 13 is “[t]o conserve energy.” More specifically, Goal 13 requires that “[l]and  
12 and uses developed on the land shall be managed and controlled so as to maximize the  
13 conservation of all forms of energy, based upon sound economic principles.” Again,  
14 petitioners argue that Action 1F.5 and the increased mobility standards in Table 6 will allow  
15 local governments to approve plan amendments that will increase congestion on state  
16 highways, which petitioners argue will result in greater energy use, contrary to Goal 13.

17 Specifically, petitioners contend that the OTC’s findings fail to address the issue of  
18 congestion and compliance with Goal 13.<sup>10</sup> Petitioners note that the findings justify the

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<sup>10</sup> The OTC Goal 13 findings state:

“Many stakeholders viewed the existing OHP mobility standards as a hindrance to state and local community objectives to increase developmental intensities in urban areas, provide multimodal transportation options and encourage operational or demand management solutions to transportation issues. These actions are often the focus of planning work seeking to promote energy conservation by reducing reliance on single occupancy vehicles and providing travel options. Input on the existing TPR and OHP found the two policy areas were making it more difficult to increase development intensities with urban areas and provide multimodal travel options. The proposed amendments to Policy 1F bring broader multimodal and energy objectives into better balance with transportation mobility for vehicles.

“The OHP Policy 1F amendments are in compliance with and supportive of Statewide Goal 13, Energy Conservation.” Record 77.

1 Policy 1F amendments based on the conclusion that the previous mobility standards had  
2 discouraged denser urban development and associated multimodal transportation options and  
3 demand management solutions, which promote energy conservation. However, petitioners  
4 argue that that rationale applies only to urban development, not to development in rural areas  
5 where multimodal transportation is largely absent and Action 1F.5 will still allow increased  
6 congestion on already failing rural highways. Even with respect to urban areas, petitioners  
7 argue that there is no evidence in the record indicating that increased use of multimodal and  
8 transportation demand techniques available in urban areas will be sufficient to completely  
9 offset the energy waste created by increased traffic congestion.

10 Respondent argues that Goal 13 does not mandate conservation of energy above all  
11 other policy objectives, and in fact recognizes that energy conservation must be “based upon  
12 sound economic principles.” Respondent argues that the OTC findings adequately explain  
13 that the amended mobility standards will encourage denser urban development and associated  
14 multimodal transportation and transportation planning techniques that conserve energy,  
15 compared to other forms of development, and that OTC’s choice to strike a different balance  
16 between various policy objectives is consistent with Goal 13.

17 In *Barnard Perkins Corp. v. City of Rivergrove*, 34 Or LUBA 660, 684-85 (1998), we  
18 concluded that Goal 13 “is directed at the development of local energy policies and  
19 implementing provisions, and does not state requirements with respect to other land use  
20 provisions, even if those provisions have incidental impacts on energy use and conservation.”  
21 Goal 13 includes few implementation requirements, but one of them is that land use plans  
22 should be based on “density of uses, particularly those which relate to housing densities.”  
23 That supports the OTC’s finding that the amended mobility standards, by encouraging denser  
24 development, are consistent with Goal 13. The only language in Goal 13 that refers to  
25 transportation facilities is Guideline 3, which states that “[l]and use planning should, to the  
26 maximum extent possible, combine increasing density gradients along high capacity

1 transportation corridors.” Nothing cited to us in Goal 13 or elsewhere suggests that Goal 13  
2 is violated by, or even particularly concerned with, the possibility of increased traffic  
3 congestion related to the denser development encouraged by Goal 13.

4 It is true, as petitioners point out, that the denser development rationale would not  
5 apply to development in rural areas, where dense development and multimodal transportation  
6 options are largely absent. However, as explained above, the OTC addressed the issue of  
7 congestion in its Goal 12 findings, and concluded that the policy advantages gained by the  
8 amended mobility standards outweigh the disadvantages of increased congestion. *See* n 8.  
9 As respondent argues, there is ample testimony and other evidence in the record to support  
10 that conclusion. Petitioners do not explain why that conclusion would not apply equally well  
11 with respect to Goal 13. To the extent petitioners suggest that Goal 13 requires some kind of  
12 net decrease in energy use, or prohibits any plan amendment that would result in a net  
13 increase in energy use, we reject the suggestion.

14 The second, third, fourth and sixth assignments of error are denied.

#### 15 **FIFTH ASSIGNMENT OF ERROR**

16 Goal 12 is “[t]o provide and encourage a safe, convenient and economic  
17 transportation system.” LCDC’s rules at OAR chapter 660, division 012, the Transportation  
18 Planning Rule (TPR), implement Goal 12, and set out a lengthy and complex process for  
19 adopting and amending transportation system plans (TSPs). Petitioners argue that the Policy  
20 1F amendments are inconsistent with several provisions of the TPR.

#### 21 **A. OAR 660-012-0035**

22 OAR 660-012-0035(1) requires that, in developing a TSP, local governments must  
23 evaluate the “potential impacts of system alternatives that can reasonably be expected to meet  
24 the identified transportation needs in a safe manner and at a reasonable cost with available  
25 technology,” including improvements to existing facilities, new facilities, transportation

1 system management measures, demand management measures, and a no-build alternative.<sup>11</sup>  
2 OAR 660-012-0035(2) sets out additional alternatives for local governments in metropolitan  
3 areas. OAR 660-012-0035(3) and (4) set out the criteria used to evaluate the alternatives  
4 described in OAR 660-012-0035(1) and (2).

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<sup>11</sup> OAR 660-012-0035 provides, in relevant part:

“(1) The TSP shall be based upon evaluation of potential impacts of system alternatives that can reasonably be expected to meet the identified transportation needs in a safe manner and at a reasonable cost with available technology. The following shall be evaluated as components of system alternatives:

“(a) Improvements to existing facilities or services;

“(b) New facilities and services, including different modes or combinations of modes that could reasonably meet identified transportation needs;

“(c) Transportation system management measures;

“(d) Demand management measures; and

“(e) A no-build system alternative required by the National Environmental Policy Act of 1969 or other laws.

“\* \* \* \* \*

“(3) The following standards shall be used to evaluate and select alternatives:

“(a) The transportation system shall support urban and rural development by providing types and levels of transportation facilities and services appropriate to serve the land uses identified in the acknowledged comprehensive plan;

“(b) The transportation system shall be consistent with state and federal standards for protection of air, land and water quality including the State Implementation Plan under the Federal Clean Air Act and the State Water Quality Management Plan;

“(c) The transportation system shall minimize adverse economic, social, environmental and energy consequences;

“(d) The transportation system shall minimize conflicts and facilitate connections between modes of transportation; and

“(e) The transportation system shall avoid principal reliance on any one mode of transportation by increasing transportation choices to reduce principal reliance on the automobile. In MPO areas this shall be accomplished by selecting transportation alternatives which meet the requirements in section (4) of this rule.”

1 As noted, amended Policy 1F provides that “[w]here it is infeasible or impractical to  
2 meet the mobility targets [set out in Tables 6 and 7], acceptable and reliable levels of  
3 mobility for a specific facility, corridor or area will be determined through an efficient,  
4 collaborative planning process between ODOT and the local jurisdiction(s) with land use  
5 authority.” Action 1F.3 provides that OTC can approve an alternative mobility standard if,  
6 among other things, the local government proposes “feasible actions” for reducing impacts on  
7 the affected state transportation facility.<sup>12</sup>

8 Petitioners argue that:

9 “The amendments to OHP Policy 1F short-circuit [the] process [required by  
10 OAR 660-012-0035(1)-(4)] by eliminating the requirement for evaluating or  
11 selecting system alternatives to meet transportation needs, and replacing it  
12 with a more circumscribed list of local ‘actions’—including the provision of  
13 local streets, and traffic demand measures—that are not required to address  
14 any of the factors for the evaluation and selection of transportation system  
15 alternatives.” Petition for Review 33.

16 According to petitioners, the infeasibility or impracticability of meeting a mobility standard  
17 depends to some degree on the existence or availability of adequate alternatives to meet the  
18 identified transportation needs. In effect, petitioners argue, amended Policy 1F represents a

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<sup>12</sup> Action 1F.3 provides, in relevant part:

“In support of establishing the alternative mobility target, the plan shall include feasible actions for:

- “• Providing a network of local streets, collectors and arterials to relieve traffic demand on state highways and to provide convenient pedestrian and bicycle ways;
- “• Managing access and traffic operations to minimize traffic accidents, avoid traffic backups on ramps, accommodate freight vehicles and make the most efficient use of existing and planned highway capacity;
- “• Managing traffic demand and incorporating transportation system management tools and information, where feasible, to manage peak hour traffic loads on state highways;
- “• Providing and enhancing multiple modes of transportation; and
- “• Managing land use to limit vehicular demand on state highways consistent with Policy 1B (Land Use And Transportation Policy).” Record 53.

1 blanket “no-build” alternative, without consideration of the requirements of OAR 660-0012-  
2 0035(3), and thus violates the TPR and Goal 12.

3 With respect to the “feasible actions” standards to adopt an alternative mobility  
4 standard under Action 1F.3, petitioners similarly argue that “feasible actions” are simply  
5 repackaged transportation system alternatives that must be considered under OAR 660-012-  
6 0035, and that Action 1F.3 thus replaces, and is inconsistent with, OAR 660-012-0035.

7 Respondent argues, and we agree, that as amended Policy 1F does not “eliminate” the  
8 requirements in OAR 660-012-0035 for a local government to evaluate and select system  
9 alternatives, in developing its TSP. According to respondent, it has always been possible  
10 under the OHP to adopt alternative mobility standards for individual facilities, and the  
11 amendments to Policy 1F simply clarify that process. While the OHP mobility standards  
12 presumably play a significant role in determining a local government’s transportation needs  
13 and in evaluating system alternatives under OAR 660-012-0035, we agree with respondent  
14 that the amendment to Policy 1F to provide a formal process to adopt alternative mobility  
15 standards does not eliminate or replace any of the requirements or standards for developing a  
16 TSP under OAR 660-012-0035. Petitioners have not demonstrated that the amendments to  
17 Policy 1F are inconsistent with OAR 660-012-0035.

18 With respect to the “feasible actions” under Action 1F.3 that must be demonstrated  
19 for the OTC to approve an alternative mobility standard, some of the “feasible actions” are  
20 similar to some of the transportation system alternatives that must be evaluated under OAR  
21 660-012-0035(1) in developing a TSP, but we do not see that application of Action 1F.3  
22 replaces or undermines or otherwise is inconsistent with OAR 660-012-0035(1). A local  
23 government must comply with OAR 660-012-0035 in developing its TSP, and it must  
24 demonstrate “feasible actions” if it seeks adoption of an alternative mobility standard under  
25 Action 1F.3. The two requirements are cumulative, not conflicting.

1           **B.     OAR 660-012-0050(5)**

2           Action 1F.3 provides that one basis for requesting adoption of an alternative mobility  
3 standard is “[w]hen financial considerations or limitations preclude the opportunity to  
4 provide a planned system improvement within the planning horizon.” Petitioners argue that  
5 Action 1F.3 is inconsistent with OAR 660-012-0050, which is a section of the TPR  
6 governing transportation project development under an adopted TSP. Subsection (5) of OAR  
7 660-012-0050 provides:

8           “If a local government decides not to build a project authorized by the TSP, it  
9 must evaluate whether the needs that the project would serve could otherwise  
10 be satisfied in a manner consistent with the TSP. If identified needs cannot be  
11 met consistent with the TSP, the local government shall initiate a plan  
12 amendment to change the TSP or the comprehensive plan to assure that there  
13 is an adequate transportation system to meet transportation needs.”

14          Petitioners contend that if a local government decides not to build a transportation project  
15 project identified in its TSP for financial or other reasons, the local government will, instead  
16 of evaluating whether the needs that the project would serve could otherwise be met, or  
17 initiating a plan amendment to assure that there is an adequate transportation system to meet  
18 transportation needs, simply seek application of an alternative mobility standard under Action  
19 1F.3. If so, petitioners argue, the local government will eliminate or reduce the need for the  
20 transportation improvement identified in the TSP, and effectively circumvent OAR 660-012-  
21 0050(5).

22          However, we do not see that amended Action 1F.3 replaces or circumvents OAR 660-  
23 012-0050(5). If a local government decides not to build a transportation project identified in  
24 its TSP, it must evaluate whether the needs served by the project can be otherwise satisfied  
25 under the TSP, and failing that must amend the TSP to assure that needs are met, even if the  
26 local government also pursues an alternative mobility standard under Action 1F.3. If the  
27 OTC approves an alternative mobility standard under Action 1F.3, that alternative mobility  
28 standard might play a role in the local government’s efforts to satisfy the requirements of

1 OAR 660-012-0050(5), but even if so petitioners have not demonstrated that applying Action  
2 1F.3 to that end would be inconsistent with OAR 660-012-0050(5).

3 **C. OAR 660-012-0015(1) and Small Increases under Action 1F.5**

4 As noted, amended Action 1F.5 modifies the “avoid further degradation” performance  
5 standard for plan and land use regulation amendments evaluated under OAR 660-012-0060,  
6 to provide that “small increases” in average daily traffic do not violate the performance  
7 standard. As noted, the “small increase” amendment to OHP Action 1F.5 was developed and  
8 promulgated concurrently with amendments to OAR 660-012-0060, and the latter TPR  
9 amendments were not appealed and are acknowledged to comply with Goal 12. Petitioners  
10 do not argue that the OHP amendments are inconsistent with the OAR 660-012-0060 as  
11 amended. Instead, petitioners argue that allowing “small increases” in traffic on already  
12 failing facilities under Action 1F.5 violates ODOT’s obligation, at OAR 660-012-0015(1), to  
13 adopt a state TSP that identifies a system of transportation facilities and services “adequate to  
14 meet identified state transportation needs.”<sup>13</sup>

15 However, petitioners have not demonstrated that amending the OHP “avoid further  
16 degradation” standard as it applies to local plan amendments subject to OAR 660-012-0060  
17 violates the general OAR 660-012-0015(1) obligation to adopt a state TSP that identifies a  
18 system of transportation facilities and services “adequate to meet identified state  
19 transportation needs.” OAR 660-012-0060 is the TPR section most pertinent to operation of  
20 Action 1F.5. If application of Action 1F.5 is consistent with the specific provisions of OAR

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<sup>13</sup> OAR 660-012-0015(1) provides, in relevant part:

“ODOT shall prepare, adopt and amend a state TSP in accordance with ORS 184.618, its program for state agency coordination certified under ORS 197.180, and OAR 660-012-0030, 660-012-0035, 660-012-0050, 660-012-0065 and 660-012-0070. The state TSP shall identify a system of transportation facilities and services adequate to meet identified state transportation needs[.]”

1 660-012-0060, and petitioners do not contend otherwise, we do not see how Action 1F.5  
2 could violate a generally-worded TPR obligation such as OAR 660-012-0015(1).

3 We note that, in 2005 LCDC incorporated its own version of an “avoid further  
4 degradation” standard into OAR 660-012-0060(3), for the purposes of that subsection.<sup>14</sup>  
5 However, as noted, petitioners do not argue that the OHP amendments are inconsistent with  
6 any provision of OAR 660-012-0060.

7 For these reasons, petitioners have not demonstrated that OAR 660-012-0015(1)  
8 effectively prohibits OTC from modifying the OHP “avoid further degradation” performance  
9 standard to include an exception for plan amendments that result in a small increase in traffic.

10 The fifth assignment of error is denied.

11 The OTC’s decision is affirmed.

12 Ryan, Board Member, concurring.

13 I join the majority’s reasoning and result because I agree that petitioners do not argue  
14 anywhere in the petition for review that Action 1F.5, quoted in part at n 5, is inconsistent

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<sup>14</sup> OAR 660-012-0060(3) effective January 1, 2012, provides, in relevant part:

“Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:

“(a) In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;

“(b) Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures; [and]

“\* \* \* \* \*

“(d) For affected state highways, ODOT provides a written statement that the proposed funding and timing for the identified mitigation improvements or measures are, at a minimum, sufficient to avoid further degradation to the performance of the affected state highway. \* \* \*”

1 with OAR 660-012-0060, and absent any argument to that effect, petitioners' arguments  
2 challenging Action 1F.5 do not provide a basis for reversal or remand. I write separately to  
3 point out that Action 1F.5 is arguably inconsistent with LCDC's rule at OAR 660-012-  
4 0060(3)(b), because it allows plan and land use regulation amendments to be approved that  
5 do not "avoid further degradation to the performance of [a] facility" that is already failing or  
6 that will be failing at the time of development, in effect negating any requirement in OAR  
7 660-012-0060(3)(b) to mitigate the effects of the amendment on those facilities. Further, I do  
8 not think that Action 1F.5 is accurately characterized as a "performance standard" of the type  
9 that we found acceptable in *DLCD v. City of Warrenton*, 37 Or LUBA 933, 946 (2000)  
10 (nothing in the TPR restricts the OTC's ability to define the performance standard of failing  
11 state highways as one of avoid further degradation.). When Action 1F.5 is read in its  
12 entirety, it is clear that Action 1F.5 both attempts to define "avoid further degradation" as  
13 used in an LCDC rule, OAR 660-012-0060(3)(b), and then further attempts to exempt from  
14 OAR 660-012-0060(3)(b) what the OHP defines as "a small increase in traffic" from that  
15 definition and as a result, from any mitigation requirement. Both the definition of "avoid  
16 further degradation" as used in OAR 660-012-0060(3)(b), and the "small increase in traffic"  
17 exemption adopted in Action 1F.5 are within the authority of LCDC to adopt, pursuant to an  
18 amendment to OAR 660-012-0060 by LCDC. See *Dept. of Transportation v. Coos County*,  
19 158 Or App 568, 573, 976 P2d 68 (1999) (advising ODOT to address its concerns with the  
20 future application of OAR 660-012-0060(2)(d)(1999) to LCDC).

21 Holstun, Board Member, concurring.

22 The TPR has achieved a level of complexity that in my view is unmatched in other  
23 areas of Oregon's Statewide Planning Program. OAR 660-012-0060, the section of the TPR  
24 that regulates comprehensive plan and land use regulation amendments, probably has the  
25 dubious distinction of being the most complex section of the TPR. The majority opinion  
26 concludes in addressing the fifth assignment of error that the petition for review presents no

1 reviewable argument that OHP Action 1F.5 is inconsistent with any of the subsections of  
2 OAR 660-012-0060. I agree with that conclusion.

3         The other concurring opinion speculates that OHP Action 1F.5 is not accurately  
4 characterized as a “performance standard,” and is inconsistent with OAR 660-012-  
5 0060(3)(b). *See* n 14. One of the key purposes of the TPR is to require that appropriate  
6 actions be taken when amending plans and land use regulations to avoid causing  
7 transportation facilities to violate adopted performance standards.<sup>15</sup> But the TPR does not  
8 define the term “performance standard,” and leaves it to local governments and ODOT to  
9 adopt performance standards without any explicit guidance from LCDC on what those  
10 performance standards can include. Because the issue of whether OHP Action 1F.5 conflicts  
11 with any subsections of OAR 660-012-0060 is not raised in the petition for review, we have  
12 no argument from the parties concerning whether OHP Action 1F.5 can be accurately viewed  
13 as an OHP performance standard. Therefore, given the staggering structural and textual  
14 complexity of OAR 660-012-0060, and the lack of any attempt on LCDC’s part to define or  
15 otherwise limit the meaning of “performance standard,” I do not believe LUBA is in a  
16 position to confidently suggest that it cannot.

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<sup>15</sup> The mitigation obligations imposed under OAR 660-012-0060 are triggered when a comprehensive plan or land use regulation amendment would significantly affect a transportation facility. OAR 660-012-0060(1)(c) provides that a comprehensive plan or land use regulation amendment will significantly affect a transportation facility if it would:

- “(B) Degrade the performance of an existing or planned transportation facility such that it would not meet the *performance standards identified in the TSP or comprehensive plan*; or
- “(C) Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the *performance standards identified in the TSP or comprehensive plan*.” (Emphases added.)