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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

DEPARTMENT OF TRANSPORTATION,)
)
Petitioner,)
)
vs.)
)
DOUGLAS COUNTY,)
)
Respondent.)

LUBA No. 97-178

)
DEPARTMENT OF LAND CONSERVATION)
AND DEVELOPMENT,)
)
Petitioner,)
)
vs.)
)
DOUGLAS COUNTY,)
)
Respondent.)

FINAL OPINION
AND ORDER

LUBA No. 97-181

Appeal from Douglas County.
Lucinda D. Moyano and Celeste Doyle, Salem, represented petitioners.
Paul E. Meyer, Roseburg, represented respondent.
HOLSTUN, Board Chair.

REMANDED 04/12/99

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's adoption of amendments to its comprehensive plan
4 and zoning ordinance.

5 **FACTS**

6 The present case is on remand to us from the Court of Appeals. Dept. of
7 Transportation v. Douglas County, 157 Or App 18, 967 P2d 901 (1998). The relevant factual
8 and procedural background is set out in our original opinion:

9 "The state Transportation Planning Rule (TPR), codified at OAR chapter 660,
10 division 12, requires affected local governments to adopt local transportation
11 plans, provides standards for development of those local transportation plans,
12 and requires conformance with those standards. On August 13, 1997, the
13 county legislatively amended its Transportation System Plan (TSP), its
14 comprehensive plan, and its land use ordinance to comply with the TPR.

15 "Several authorities control transportation planning in Oregon. The Oregon
16 Transportation Commission (OTC), the governing body for the Oregon
17 Department of Transportation (ODOT), is responsible for developing state
18 transportation policies and a comprehensive, long-range plan for a state
19 multimodal transportation system. ORS 184.618; ORS 366.220. In 1992, the
20 OTC adopted the Oregon Transportation Plan (OTP) which includes the
21 Oregon Highway Plan (OHP). The TPR, developed by DLCDC [Department of
22 Land Conservation and Development], requires conformance with the OTP
23 and hence the OHP. OAR 660-012-0015(2)(a).

24 "Petitioners appeal several of the county's TPR amendments to its
25 comprehensive plan and zoning ordinances."

26 Dept. of Transportation v. Douglas County, ___ Or LUBA ___ (LUBA Nos. 97-178/181,
27 July 8, 1998) slip op 2-3.

28 In our opinion, we sustained a number of petitioners' assignments of error directed at
29 whether the county's amendments to its comprehensive plan and zoning ordinance complied
30 with the TPR, and remanded the county's decision. However, in our decision we concluded
31 that assignments of error four and six and two subassignments of error under the third
32 assignment of error asked us to resolve challenges to the county's preexisting legislation in a

1 manner that, in our view, was beyond our review authority. Consequently, we denied those
2 assignments and subassignments of error.

3 On appeal, the Court of Appeals held that the matters we declined to address were
4 within our review authority, stating:

5 "* * *[T]he county was required by applicable provisions of state law to bring
6 its land use legislation into full compliance with the TPR by the time of and
7 through the present land use decision. Accordingly, we conclude that the
8 county's failure to enact any necessary legislation, including changes to any
9 existing noncomplying provisions, could constitute an error in this decision
10 and was reviewable by LUBA as such. We remand for LUBA to consider
11 petitioners' contentions that existing county provisions are contrary to the
12 TPR."

13 Dept. of Transportation v. Douglas County, 157 Or App at 25 (footnote omitted). Pursuant
14 to the Court of Appeals' remand, we now address the assignments and subassignment of error
15 that we did not resolve in our previous opinion.

16 **THIRD ASSIGNMENT OF ERROR**

17 In the first and fifth subassignments of error under the third assignment of error,
18 petitioners argue that the county erred in failing to amend its TSP in two particulars.

19 **A. County Definition of "Principal Highways" (First Subassignment of** 20 **Error)**

21 Petitioners contend that the county's definition of "Principal Highways" is
22 inconsistent with OHP access requirements, and hence inconsistent with the TPR. The
23 county's definition provides:

24 "Principal Highways are major urban and rural Highways connecting regions,
25 communities, towns, and cities. The Principal Highway provides through
26 traffic movement and its distribution to lower order classifications of
27 roadways. Access control and on street parking are a function of the number
28 of lanes, lane and shoulder width, design, speed, traffic volumes and land use.
29 These roadways fall [primarily] under state jurisdiction and the management
30 of these facilities is outlined in the Oregon Highway Plan." Record 27
31 (bracketed material deleted, underlined material added by the amendments).

1 Petitioners argue that the third sentence of this definition, that access control is a
2 "function of the number of lanes, lane and shoulder width, design, speed, traffic volumes and
3 land use" is inconsistent with the OHP. According to petitioners, "[t]he OHP Access
4 Management Policy sets forth the standards used to determined access onto state highways
5 and the standards used to determine access onto 'Primary Highways.'" Petition for Review 8.
6 Petitioners attach to their petition for review a copy of the five-page OHP Access
7 Management Policy (Access Policy), but do not identify what "standards" the Access Policy
8 adopts, nor cite to any language in the Access Policy that is inconsistent with the third
9 sentence of the county's definition.

10 The county responds, and we agree, that petitioners' argument is undeveloped and
11 does not establish that the third sentence in the above quoted definition is inconsistent with
12 the Access Policy. We cannot discern from petitioners' argument why the county's definition
13 is inconsistent with the Access Policy.

14 To the extent petitioners argue that the terms of the definition conflict with standards
15 in the Access Policy, petitioners have failed to identify any standards in the policy with
16 which the third sentence of the definition might conflict. On the other hand, petitioners may
17 be arguing, not that a conflict exists, but that the definition and the policy are "inconsistent"
18 because the definition does not specify the complete range of standards provided in the
19 Access Policy. If that is petitioners' argument, petitioners' failure to identify the standards in
20 the Access Policy and hence any difference between the definition and those standards makes
21 it impossible to evaluate that argument. Finally, petitioners may be arguing that the third
22 sentence of the definition implies that it, and not the OHP, is the definitive source of access
23 standards for principal highways. If that is petitioners' argument, we disagree that the
24 definition contains that implication. The definition's third sentence merely lists several
25 considerations that go into resolving access issues, without implying that it is a complete or
26 definitive list of those considerations. Further, the fourth sentence of the amended definition

1 specifies that principal highways are subject to state jurisdiction and the OHP, which negates
2 any implication that the definition controls access issues for principal highways.

3 Because we conclude that petitioners' argument under this subassignment of error is
4 undeveloped and fails to state a basis for reversal or remand, the first subassignment of error
5 is denied. Deschutes Development v. Deschutes Cty., 5 Or LUBA 218, 220 (1982).

6 **B. Notation Regarding Unfunded Improvements (Fifth Subassignment of**
7 **Error)**

8 Petitioners argue that:

9 "ODOT requested that a notation be added to the list of unfunded
10 improvements in the county's Support Document to the Transportation
11 Element of the Comprehensive Plan to the effect that this list was not to be
12 relied upon to satisfy the requirements of OAR 660-012-0060(1)(b). This
13 notation was not added to the list. This clarification is needed to assure that
14 'conceptual, unfunded' improvements cannot be used to mitigate the
15 significant impact a proposed amendment to the functional plan,
16 comprehensive plan or land use regulation may have on a transportation
17 facility." Petition for Review 9 (citations to record omitted).

18 The county responds, and we agree, that petitioner's argument fails to identify how
19 the county's failure to add the requested notation renders the county's TSP inconsistent with
20 adopted elements of the state TSP/OHP, within the meaning of OAR 660-012-0015(2)(a).
21 Petitioners do not identify what provisions in the OHP or elsewhere require a notation to the
22 effect requested by ODOT, or prohibit the use of conceptual, unfunded improvements from
23 being used to mitigate the significant impact of a proposed amendment on a transportation
24 facility under OAR 660-012-0060(1)(b). Such requirements or prohibitions may exist, but
25 without identification of those requirements, petitioners have not established that the list of
26 unfunded improvements in the county's TSP is inconsistent with the OHP.

27 The fifth subassignment of error is denied.

28 **FOURTH ASSIGNMENT OF ERROR**

29 Petitioners argue that the challenged decision does not meet the requirements of OAR
30 660-012-0020, which requires that the county's TSP include a determination of

1 "transportation needs" and a bicycle and pedestrian plan, which in turn must be based on an
2 inventory and general assessment of existing bicycle and pedestrian facilities and a system of
3 planned transportation facilities and improvements, including a map of planned
4 improvements.¹

5 Petitioners contend that the county TSP, as amended, fails to properly inventory and
6 assess bicycle and pedestrian facilities and fails to identify planned facilities and
7 improvements. Absent completion of those steps, petitioners argue, the county cannot

¹OAR 660-012-0020 provides, in relevant part:

"(2) The TSP shall include the following elements:

"(a) A determination of transportation needs as provided in OAR 660-012-0030;

"* * * * *

"(d) A bicycle and pedestrian plan for a network of bicycle and pedestrian routes throughout the planning area. The network and list of facility improvements shall be consistent with the requirements of ORS 366.514;

"* * * * *

"(3) Each element identified in subsections (2)(b)-(d) of this rule shall contain:

"(a) An inventory and general assessment of existing and committed transportation facilities and services by function, type, capacity and condition:

"* * * * *

"(b) A system of planned transportation facilities, services and major improvements. The system shall include a description of the type or functional classification of planned facilities and services and their planned capacities and levels of service;

"(c) A description of the location of planned facilities, services and major improvements, establishing the general corridor within which the facilities, services or improvements may be sited. This shall include a map showing the general location of proposed transportation improvements, a description of facility parameters such as minimum and maximum road right of way width and the number and size of lanes, and any other additional description that is appropriate;

"(d) Identification of the provider of each transportation facility or service."

1 develop, and has not developed, a bicycle and pedestrian plan that meets the requirements of
2 OAR 660-012-0045(6).²

3 To explicate what petitioners believe OAR 660-012-0020 requires, the petition for
4 review incorporates arguments in a letter that a staff member of petitioner DLCD sent to the
5 county. In relevant part, that letter states:

6 "[T]here appears to be a difference of opinion regarding what constitutes an
7 'inventory and general assessment' of existing and committed bicycle and
8 pedestrian facilities. County staff have stated that the Designated Bike Routes
9 in Table 5 of the Bikeway Master Plan, other portions of the Bikeway Master
10 Plan which refer to pedestrians, or the adopted Circulation Plans for the
11 UUs [urban unincorporated areas] meet these requirements. After reviewing
12 these materials, we disagree. The TPR requires: (1) an inventory (i.e., a
13 listing) of existing and committed bicycle and pedestrian facilities; (2) a
14 general assessment of the physical and operational condition of the facilities
15 (using standards of the planning profession); (3) a system of planned
16 transportation facilities and improvements; and (4) a map showing the general
17 location of proposed transportation improvements. These inventories,
18 analyses and maps are not present either in the county's acknowledged
19 comprehensive plan or in the proposed amendments to the [TSP].

20 "To comply with this requirement, we suggest the county complete the
21 necessary inventory and analysis of bicycle and pedestrian facilities. Along
22 rural portions of state and county highways, this analysis would appropriately
23 focus on bicycle facilities, although the analysis should note locations where
24 pedestrian usage is high and whether the pedestrian facility provided (paved
25 shoulder, gravel shoulder, etc.) is adequate for the use. Within urban areas,
26 including portions of the county within urban growth boundaries and the
27 UUs * * *, the analysis should include a detailed description of both bicycle
28 and pedestrian facilities, focusing on routes between residential areas and
29 nearby destinations, such as schools, parks, shopping areas, and places of
30 employment, and locations where vehicular volumes and speeds may
31 contribute to unsafe conditions for bicyclists and pedestrians. The assessment
32 of operational conditions should document and consider bicycle and

²OAR 660-012-0045(6) provides:

"In developing a bicycle and pedestrian circulation plan as required by OAR 660-012-0020(2)(d), local governments shall identify improvements to facilitate bicycle and pedestrian trips to meet local travel needs in developed areas. Appropriate improvements should provide for more direct, convenient and safer bicycle or pedestrian travel within and between residential areas and neighborhood activity centers (i.e., schools, shopping, transit stops). * * *"

1 pedestrian volumes or usage, the types of users (children, adults, elderly, etc.),
2 and traffic volumes and speeds. The plan should clearly identify any locations
3 where deficiencies exist and identify appropriate planned improvements to
4 remedy the identified deficiencies. * * * Record 571-72.

5 The county responds that its bicycle and pedestrian facilities are addressed together in
6 a single bicycle master plan, and that the inventory and facility needs assessment in that plan,
7 as amended by the challenged decision, are adequate. With respect to inventory, the county
8 argues that its bikeway master plan, found at Record 241 to 353, meets the inventory
9 requirement because it contains an inventory of approximately 500 miles of planned and
10 designated bikeways in the county, reflected at Record 341-53 and at Douglas County
11 Comprehensive Plan (DCCP) 13-26 to 35. Further, the county refers us to maps of bicycle
12 routes at Record 81 to 86, and amended finding 190 at Record 52, which recognizes that two
13 cities within the county have adopted bikeway master plans.

14 With respect to facility needs assessment, the county cites to portions of the
15 challenged decision that discuss needed improvements for bicycle and pedestrian facilities,
16 relying in particular on an amendment to the bikeway master plan, found at Record 248-50,
17 which discusses six transportation studies conducted in Douglas County between 1991 and
18 1996. The amended text summarizes the recommendations of those studies for
19 improvements to bicycle and pedestrian facilities in the Roseburg area, the Myrtle Creek
20 area, and the Highway 101 and Highway 38/42 corridors. The county argues that the
21 discussion at Record 248-50 satisfies whatever OAR 660-012-0020 requires in terms of a
22 needs assessment.

23 We agree with petitioners that the county's TSP does not comply with the
24 requirements of OAR 660-012-0020(3). The list of "Designated Bikeway Routes" at Record
25 341-53 appears to include only designated bicycle routes and thus is not a complete
26 inventory of the existing and committed bicycle and pedestrian facilities in the county. The
27 county does not cite to any part of its TSP or the challenged decision that purports to assess
28 the "capacity and condition" of bicycle and pedestrian facilities. OAR 660-012-0020(3)(a).

1 The recommendations for improvements cited at Record 248-50 do not constitute a "system
2 of planned transportation facilities, services and major improvements" within the meaning of
3 OAR 660-012-0020(3)(b), in part because the decision merely reports those
4 recommendations and does not adopt them into any recognizable "system" of planned
5 facilities and improvements, and in part because the studies underlying those
6 recommendations address only four small sections of the county. Further, none of the maps
7 the county cites to in the record constitute the "map showing the general location of proposed
8 transportation improvements" required by OAR 660-012-0020(3)(c).

9 Although we need not and do not decide whether OAR 660-012-0020(3) requires the
10 type and degree of detail and information outlined in DLCD's letter at Record 571-72, we
11 conclude for the foregoing reasons that the county's existing and amended TSP is not
12 consistent with the requirements of the TPR.

13 The fourth assignment of error is sustained.

14 **SIXTH ASSIGNMENT OF ERROR**

15 Petitioners argue that the county failed to comply with OAR 660-012-0045(7), which
16 requires standards for local streets and accessways that minimize paved width and total right-
17 of-way. OAR 660-0012-0045(7) requires that local governments

18 "establish standards for local streets and accessways that minimize pavement
19 width and total right-of-way consistent with the operational needs of the
20 facility. The intent of this requirement is that local governments consider and
21 reduce excessive standards for local streets and accessways in order to reduce
22 the cost of construction, provide for more efficient use of urban land, provide
23 for emergency vehicle access while discouraging inappropriate traffic
24 volumes and speeds, and which accommodate convenient pedestrian and
25 bicycle circulation."

26 The county's existing standards for "urban roadways" require a 56' minimum right-of-
27 way, and 32' pavement width for local streets. Petitioners assert that the county did not re-
28 evaluate these standards, and did not justify them as appropriate or sufficient to meet the

1 requirements of OAR 660-012-0045(7). Without proper justification, petitioners contend,
2 the county's previously existing standards cannot be found to comply with the TPR.

3 The county responds, first, that this issue is foreclosed because prior to making the
4 challenged decision county planning staff met with staff from petitioner ODOT, the result of
5 which was an agreement that the county had met the requirements of OAR 660-012-0045(7).
6 The county cites to letter from ODOT's regional Transportation Development Unit Manager,
7 which states:

8 "[ODOT employee] Ross [Kevlin] indicated that closure was reached in many
9 areas. I understand that we have resolved the issue of functional
10 classification. Also resolved are the issues surrounding street standards and
11 mass transit, conditioned on acceptance by DLCD and URCOG, respectively.
12 Likewise, the issue of a bicycle system plan is resolved. I am pleased with
13 our staffs' progress on these tough issues." Record 631 (emphasis added).

14 A party may affirmatively waive an issue during a land use proceeding. Newcomer
15 v. Clackamas County, 92 Or App 174, 186, 758 P2d 369 (1988). However, we do not agree
16 that the above-quoted language in ODOT's letter constitutes such a waiver. The author is
17 simply expressing his understanding of general issues that have been resolved by county
18 planning staff and an ODOT employee, subject to acceptance by other agencies. Further,
19 there is no indication in the citations from the record what the parties resolved, and therefore
20 what issue ODOT may have waived. For all we can tell, the county may not have
21 implemented the resolution that the parties achieved. Finally, even if petitioner ODOT
22 waived the issue raised in the sixth assignment of error, the county does not explain why that
23 waiver would also apply to petitioner DLCD.

24 On the merits of whether the county complied with OAR 660-012-0045(7), the
25 county argues that its comprehensive plan, as amended, contains findings that establish
26 standards for local streets that minimize pavement width and right-of-way, as OAR 660-012-
27 0045(7) requires. The county refers us to findings at Record 118, 295, DCCP 15-61, 15-66
28 to 67, 15-76, 15-87, 15-94 to 95, and 15-105 to 106. We disagree with the county that any of

1 the provisions the county cites us to in the record or the DCCP demonstrates compliance
2 with OAR 660-012-0045(7). The gist of those citations appears to be that the county will
3 consider, on a case-by-case basis, whether reductions of standards related to pavement width
4 and right-of-way for local streets are warranted, and that the county has done so in the past
5 for particular local streets in certain unincorporated urban areas. However, as petitioners
6 point out, OAR 660-012-0045(7) requires more. The rule requires that the county evaluate
7 its road width and right-of-way standards to ensure that those standards are the minimum
8 consistent with operational needs, not that the county consider departures from those
9 standards in particular cases. A county procedure that calls for considering street standard
10 reductions on a case-by-case basis is not inconsistent with OAR 660-012-0045(7). However,
11 such a procedure does not eliminate the county's obligation to conduct the requisite
12 evaluation of the county's local street standards.

13 The sixth assignment of error is sustained.

14 The county's decision is remanded.