



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: August 12, 2009

TO: Michael Baker, ODOT Region 3, Planning and Finance
Anna Henson, ODOT Region 3 Environmental Project Manger

FROM: Kathryn A. Lincoln, Assistant Attorney General
Government Services Section

SUBJECT: Fern Valley Interchange Project Alternatives
DOJ File number 734-630-GG1523-09

SUMMARY

The Fern Valley Interchange project is proposed to reduce congestion and improve operational conditions at the Interstate 5 (I-5) interchange with Fern Valley Road within the city of Phoenix, and on OR 99 near its intersection with Fern Valley Road. For the Draft Environmental Assessment, the ODOT Project Development Team and the Citizens Advisory Committee developed and reviewed two alternatives that meet the purpose and need for the project. They are the Fern Valley Thru Alternative, and the N. Phoenix Thru Alternative. Maps showing both of the proposed alternatives are available at: www.oregon.gov/ODOT/HWY/REGION3.

You have asked for our opinion regarding application of the Transportation Planning Rule, OAR 660-012-0065 and -0070 (TPR) to the two alternatives. The TPR includes provisions that regulate what type of transportation facilities are permitted on rural lands consistent with Goals 3, 4, 11 and 14. When we apply the provisions of the TPR to the two alternatives, it is clear that the N. Phoenix Thru alternative must be selected over the Fern Valley Thru alternative.

ANALYSIS

The TPR identifies transportation facilities, services and improvements that may be permitted on rural lands consistent with statewide planning goals 3 (Agricultural Land), 4 (Forest Land), 11 (Public Facilities and Services) and 14 (Urbanization). These include road realignments and road improvements that are statutorily permitted on farm lands (*e.g.*, reconstructing or modifying public roads and highways; constructing additional travel lanes

requiring the acquisition of right of way but not resulting in the creation of new land parcels).¹ Transportation facilities and improvements not identified in OAR 660-012-0065 require goal exceptions to locate on rural lands.²

When a transportation project includes proposed alternatives that would require goal exceptions, an applicant taking goal exceptions must demonstrate compliance with OAR 660-012-0070 (Exceptions for Transportation Improvements on Rural Lands). This effort requires, in part, that the applicant satisfy the following requirements³:

- Identify a transportation need, consistent with TPR planning requirements. OAR 660-012-0070(3), (4).
- Demonstrate that the transportation need “cannot reasonably be accommodated through one or a combination of” measures not requiring an exception, including (1) alternative modes of travel; (2) traffic management measures; and (3) improvements to existing transportation facilities (including existing facilities on rural lands where permitted without an exception under OAR 660-012-0065). OAR 660-012-0070(4).
- Demonstrate that non-exception locations (*e.g.*, locations inside an urban growth boundary) “cannot reasonably accommodate the proposed transportation improvement or facility.” OAR 660-012-0070(5).⁴
- If the identified transportation need cannot reasonably be accommodated through measures or locations not requiring goal exceptions, demonstrate that the “net adverse impacts associated with the proposed exception site, with mitigation measures designed to reduce adverse impacts,” are not significantly more adverse than the net adverse impacts from other locations also requiring exceptions. OAR 660-012-0070(7).

Even where an exception alternative “best” meets the identified transportation need, the selection of that alternative is not justified under the TPR if a non-exception alternative can still “reasonably” accommodate that need. In such a circumstance, the decision would likely be overturned on judicial challenge.

In regard to the two alternatives considered by ODOT for the Fern Valley Interchange, the principal differences occur east and north of the existing interchange. The N. Phoenix Thru Alternative would realign N. Phoenix Road from the interchange northward through the UGB to where it reconnects with existing N. Phoenix Road near Campbell Road on land outside the UGB

¹ See, generally, 215.283(1) and (2).

² See ORS 215.283(3)(a), authorizing other types of transportation improvements on rural lands subject to “adoption of an exception to the goal related to agricultural lands and to any other applicable goal with which the facility or improvement does not comply.”

³ Until 2006, exceptions to locate transportation improvements on rural lands required compliance with exceptions standards in both OAR 660, Division 12 (TPR) and OAR 660, Division 4 (Interpretation of Goal 2 Exceptions Process). However, under LCDC’s 2006 amendments to the TPR, exceptions now are taken pursuant only to OAR 660-012-0070.

⁴ To determine whether alternative measures or locations could reasonably accommodate the identified transportation need, cost, operational feasibility, economic dislocation and other relevant factors must be addressed. Moreover, the thresholds chosen to judge whether an alternative measure or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception. See OAR 660-012-0070(6).

zoned for exclusive farm use (EFU). The realigned road would be widened to two lanes in each direction until it tapers to reconnect to existing N. Phoenix Road. South Phoenix Road would be extended northward from Fern Valley Road to a connection with a realigned N. Phoenix Road inside the UGB. Existing Fern Valley Road would be improved along its existing alignment from east of S. Phoenix Road (inside the UGB) to just west of Breckinridge Drive (outside the UGB).

The Fern Valley Thru alternative would realign N. Phoenix Road outside the UGB in essentially the same location as the N. Phoenix Thru alternative and widen that road to two travel lanes in each direction. The major difference between the two alternatives is that the Fern Valley Thru alternative would realign Fern Valley Road to run parallel to and about 250 feet north of the existing Fern Valley Road alignment from the interchange to Breckinridge Road. The realigned Fern Valley Road would be widened to two lanes in each direction. While most of this realignment would be located inside the UGB, the easternmost portion connecting to Breckinridge Road would extend onto land outside the UGB zoned EFU.

OAR 660-012-0065 identifies transportation improvements that may be permitted on rural lands consistent with statewide planning goals 3, 4, 11 and 14. As relevant to the Project, these include:

- Transportation improvements that are allowed or conditionally allowed by ORS 215.283 (including modification or widening of existing roads) (OAR 660-012-0065(3)(b))
- Road realignments (OAR 660-012-0065(3)(d))⁵

However, not all road realignments are permitted within exclusive farm use zones without goal exceptions. Under OAR 660-012-0065(5), when realignments are proposed, local governments must consider reasonable build design alternatives, and only the realignments having the “least impact” on farm lands, when compared with other reasonable build alternatives, may be allowed without goal exceptions:

“(5) For transportation uses or improvements listed in subsections (3)(d) to (g) and (o) of this rule within an exclusive farm use (EFU) or forest zone, a jurisdiction shall, in addition to demonstrating compliance with the requirements of ORS 215.296:

“(a) Identify reasonable build design alternatives, such as alternative alignments, that are safe and can be constructed at a reasonable cost, not considering raw land costs, with available technology. The jurisdiction need not consider alternatives that are inconsistent with applicable standards or not approved by a registered professional engineer;

⁵ OAR 660-012-0065(2)(f) defines “realignment” as “rebuilding an existing roadway on a new alignment where the new centerline shifts outside the existing right of way, and where the existing road surface is either removed, maintained as an access road or maintained as a connection between the realigned roadway and a road that intersects the original alignment. The realignment shall maintain the function of the existing road segment being realigned as specified in the acknowledged comprehensive plan.”

“(b) Assess the effects of the identified alternatives on farm and forest practices, considering impacts to farm and forest lands, structures and facilities, considering the effects of traffic on the movement of farm and forest vehicles and equipment and considering the effects of access to parcels created on farm and forest lands; and

“(c) Select from the identified alternatives, the one, or combination of identified alternatives that has the least impact on lands in the immediate vicinity devoted to farm or forest use.” (Emphasis added.)

Both alternatives provide essentially the same realignment of N. Phoenix Road northward from the UGB to near Campbell Road. No reasonable build design alternatives to that realignment have been identified that would have less impact on agricultural lands in the vicinity. Jackson County’s TSP designates N. Phoenix Road as an arterial, and there is no change in function planned for the road after it is realigned. The realignment of N. Phoenix Road north of the interchange is permitted under OAR 660-012-0065(3)(d) without an exception.⁶

East of the UGB, the alternatives differ in their manner of improving Fern Valley Road. Here, the N. Phoenix Thru Alternative modifies or improves Fern Valley Road along its existing alignment, while the Fern Valley Thru Alternative realigns Fern Valley Road from a point about 250 feet north of the existing alignment to a connection with Fern Valley Road at Breckinridge Road.

Given the “least impact” language in OAR 660-012-0065(5)(c), this difference is significant. As noted, in the case of realignments, OAR 660-012-0065(5)(c) requires a local government to consider reasonable build alternatives and select the one “that has the least impact on lands in the immediate vicinity devoted to” farm use.⁷ The Fern Valley Thru Alternative extends into and bisects farm land, whereas the N. Phoenix Thru alternative, a “reasonable” alternative, has no impact on farm land east of the interchange. Because of that, the Fern Valley Thru alternative could be selected only by justifying goal exceptions pursuant to OAR 660-012-0070. To select the Fern Valley Thru Alternative under this circumstance, an exception would be needed justifying why the N. Phoenix Thru Alternative cannot reasonably accommodate the identified transportation need.⁸ N. Phoenix Thru has been shown to be a reasonable alternative that meets the purpose and need for the project. It would not be possible to make the appropriate findings for an exception to allow the Fern Valley Thru alternative.

⁶ If the realigned section outside the UGB does not maintain the function of the road segment being realigned, then the realignment would not be of a kind permitted under OAR 660-012-0065, and goal exceptions would be required.

⁷ By their EFU zoning designation, the rural lands immediately east of the UGB would be considered “devoted to farm use.”

⁸ It is possible that Phoenix and Jackson County could avoid an exception by amending the Phoenix urban growth boundary to include the EFU-zoned land east of the existing UGB that would be fragmented by the Fern Valley Thru alternative. However, it is questionable whether such a UGB amendment can be justified for transportation purposes where a reasonable alternative not requiring a UGB amendment exists. An unrelated process by the city to expand the UGB has stalled, and there is a need to move forward with the transportation improvements at this time in order take advantage of funding opportunities.

In addition, the Fern Valley Thru Alternative would widen Fern Valley Road outside the UGB from two to four travel lanes. Jackson County's TSP classifies this portion of Fern Valley Road as a minor collector. As defined in OAR 660-012-0065(2)(f), a realignment "shall maintain the function of the existing road segment being realigned as specified in the acknowledged comprehensive plan." Widening of Fern Valley Road to four travel lanes would change the function of that segment of Fern Valley Road to an arterial. Thus the Fern Valley Road realignment would not be the type that is permitted under OAR 660-012-0065(2)(f), and a goal exception would be required.

CONCLUSION

The Transportation Planning Rule mandates that transportation improvement alternatives not requiring new goal exceptions be selected over alternatives requiring exceptions unless the "non-exception" alternatives cannot "reasonably accommodate" the identified transportation need. When an exception alternative is selected over non-exception alternatives, the TPR requires the local government to establish and justify in the exception why the non-exception alternatives could not reasonably accommodate the transportation need.

Through this analysis it is apparent that the N. Phoenix Thru Alternative is permitted on rural land without an exception. However, the Fern Valley Thru Alternative would require an exception because of its greater impact on farm land compared to the N. Phoenix Thru Alternative. In addition, the Fern Valley Thru alternative would require an exception as a "realigned" road, since the function of the road in the Jackson County TSP would change from a "minor collector" to an "arterial". In this circumstance, the TPR directs that the N. Phoenix Thru Alternative be selected over the Fern Valley Thru Alternative.