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Chapter 2: Land Use Decision Coordination

2.1 Introduction

Land use regulation, including the TPR is under the authority of LCDC, not ODOT.

The Oregon State Land Use Goals apply to all government activities within the state that affect land use. The state level authority for the Goals and related land use statute and administrative rules is the responsibility of the Land Conservation and Development Commission and their administrative agency, the Department of Land Conservation and Development. This includes the Transportation Planning Rule or TPR (OAR 660-0012) located on line at: http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_012.html .

State agencies whose business practices have an effect on land use are required to make related plans consistent with the statewide land use planning goals. ODOT decisions about where state facility investments will be made affect local land use because of its direct impacts on real property and because creating new capacity and improving road conditions can support local economic development. Local government decisions about land use affect ODOT facilities by increasing demand and by raising safety and operations issues.

Cities and counties are required to plan ahead for land use needs consistent with the state goals and regulations, including the transportation goal and TPR, and to continually respond to growth projections and infrastructure needs. In addition, the State Agency Coordination rules require that state and local plans be consistent with one another. To achieve these ends, state and local coordination in both long- term planning and review of site development applications is necessary.

2.2 State Agency Coordination

The Land Conservation and Development Commission state agency coordination rules apply to all state agencies with decision authority that affects land use. There are two general areas of agency authority that are addressed:

- **Land Use Decisions Generally:** OAR 660 Division 30 regulates coordination among affected jurisdictions when agencies make decisions related to land use other than permitting decisions. The rule requires agencies whose programs and activities affect land use to adopt their own rules and develop a program to spell out how state agency coordination will be administered. The rule also requires LCDC certification of agency programs to *“assure that state agency rules and programs which affect land use comply with the statewide goals and are compatible with acknowledged city and county comprehensive plans.”*

http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_030.html

- **Permitting:** OAR 660 Division 31 regulates coordination among affected jurisdictions when agencies make decisions related to issuing permits.

“The rule establishes procedures and standards which require consideration of Goals and Acknowledged Plans prior to approval of state permits. The rule establishes a process for state agencies to rely on a local determination of compliance with the State Planning Goals and the Acknowledged Comprehensive Plan when issuing certain permits.”

Highway approach permits are the permits of concern in development review and are identified as Type B permits that, under this rule, do not require public notice and hearings for department decisions. The Land Use Compatibility Statement is the tool used to accomplish coordination as set up in this rule.

http://arcweb.sos.state.or.us/pages/rules/oars_600/oar_660/660_031.html

ODOT's programs that affect land use include, generally, the adoption and amendment of administrative rules, system plans and facility plans; the development of highway facility construction projects; the management of land owned by the agency; and permitting work in state right of way that is usually related to private land development on adjoining lands. ODOT has a certified SAC program and rules:

- OAR 731 Division 15 sets out coordination and public outreach requirements for the types of agency decisions that fall under the LCDC definition of decisions affecting land use. The rule is online: http://arcweb.sos.state.or.us/pages/rules/oars_700/oar_731/731_015.html
- The ODOT State Agency Coordination Program is documented in a 1990 handbook that is not published electronically. Many of the organizational bases for the program have changed over time due to reorganization and lessons learned, but in the meantime the procedures described in the handbook have become standard practice in the affected ODOT Divisions and have been adapted to changing needs consistent with the rule.

In the more than twenty five years that the LCDC SAC rules have been in effect, interagency coordination has become a standard business practice for ODOT. Local governments are required to adopt transportation system plans that are consistent with the Oregon Highway Plan and other state system plans. They are required to notify ODOT of their proposed actions that affect ODOT programs or facilities. ODOT is required to be sure that facility plans are consistent with local TSPs and to have assurance that proposed agency activities are consistent with local plans before those plans go forward.

2.3 System Planning

2.3.1 Transportation System Plans Are Intended To:

- Provide long-range direction for the development of local transportation facilities and services for all modes.
- Integrate transportation and land use.
- Provide a rationale for transportation investments and land use decisions.
- Provide preliminary planning for local and regional projects that may become part of the State Transportation Improvement Program (STIP) which is ODOT's capital improvement plan for highway. The STIP development process identifies projects for development and construction and sets funding levels and timelines. Additional Information regarding the STIP process is available online at: <http://cms.oregon.gov/ODOT/HWY/STIP/pages/index.aspx>

2.3.2 Transportation system plans are required for the following

- Oregon Department of Transportation;
- Metropolitan planning organizations;
- Counties with populations greater than 25,000 (Counties smaller than 25,000 population may qualify for a whole or partial exemption from the TSP requirement);
- Cities with populations greater than 10,000 (Cities smaller than 10,000 population may qualify for a whole or partial exemption from the TSP requirement).

Many jurisdictions below these population thresholds already have, or are working on, transportation system plans for their areas.

Local planners have learned and ODOT increasingly recognizes that system planning is an effective way to identify and help prioritize transportation projects for funding. For example, project criteria developed for the 2001 Oregon Transportation Investment Act (OTIA) established a linkage between plans, projects and funding. The Transportation Commission may be heading in the same direction in its review of the STIP process, and, in the future, STIP projects may be required to come from adopted and acknowledged transportation system plans.

The inclusion of needed projects in fully developed TSPs is the best tool a local jurisdiction has to make their case to get projects elevated into the STIP. And participating in the local TSP process is the best opportunity ODOT has to ensure that local priorities are consistent with the needs of state facilities. For a

more detailed discussion on how long-range provisions are implemented, see Chapter 3.1.

2.3.3 The Oregon Transportation Plan

The OTP is the State TSP. It provides overall policy direction for the development of transportation facilities and services in Oregon. The OTP was adopted by the Oregon Transportation Commission in 1992 and a significant update was adopted in 2006. Find the current OTP online at:

<http://cms.oregon.gov/odot/td/tp/pages/otp.aspx> .

The whole OTP also comprises the various mode and topic plans identified below. Of these, the 1999 Oregon Highway Plan typically has the most relevance in the development review process.

- Department of Aviation; Oregon System Plan (2007):
http://www.oregon.gov/Aviation/docs/system_plan/2007_oregon_system_plan_details.shtml
- Oregon Highway Plan (1999, revised 2006):
<http://cms.oregon.gov/ODOT/TD/TP/pages/ohp.aspx>
 - Subsequent amendments to the OHP are located in the Registry of OHP Amendments:
http://www.oregon.gov/ODOT/TD/TP/pages/ohp.aspx#Registry_of_Highway_Plan_Amendments
- Public Transit Division; State Management for Public Transportation Programs (2009): <http://cms.oregon.gov/ODOT/TD/TP/docs/plans/optp.pdf> .
- Oregon Bicycle/Pedestrian Plan (1995, Bicycle and Pedestrian Design Guide - 2011):
<http://cms.oregon.gov/ODOT/HWY/BIKEPED/pages/planproc.aspx>
- Oregon Rail Freight Plan (2011):
<http://cms.oregon.gov/ODOT/TD/TP/pages/ofp.aspx>
- Transportation Safety Action Plan (1995):
http://www.oregon.gov/ODOT/TS/TSAP2.shtml#2004_TSAP
- Willamette Valley Transportation Strategy (1995)
- Facility Plans (Corridor Plans, Interchange Area Management Plans, Access Management Plans, etc.) are posted on the Registry of Amendments for the Highway Plan:
<http://cms.oregon.gov/ODOT/TD/TP/Pages/registry.aspx>

2.3.4 ODOT Facility Planning

ODOT does facility planning at a local or sub-regional level. In conjunction with local governments and other stakeholders, ODOT develops Interchange Area Management Plans (IAMPs), Access Management Plans and Corridor Plans. ODOT also can coordinate with local government to develop Highway Segment

Management Plans for special transportation areas (STAs), urban business areas (UBAs) and Commercial Centers, particularly where Oregon Highway Plan (OHP) freight routes are affected, though few segment management plans have been completed. Facility plans set forth strategies and long-term management priorities for the subject facility or corridor. To research adopted ODOT facility plans in effect see the OHP Registry of Amendments (linked in previous section).

2.3.5 ODOT Guidance on Long Range Planning

Internal Guidance

ODOT has developed guidelines for facility and area planning to meet changing needs, beginning with the Corridor Planning Guidelines prepared in 1995 (not published on line). Interchange Area Management Plan Guidelines were last updated in 2011: <http://cms.oregon.gov/ODOT/TD/TP/docs/plans/iampguide.pdf> . Agency Procedures and various less formal technical memos have provided methods or best practices for addressing planning needs for freight capacity issues, special transportation areas, local interest roads and jurisdictional transfers, among others. To find the available guidance for a particular type of state facility planning effort, make contact through the related web site and request the most current available reference.

As a precursor to corridor or other facility planning, ODOT prepares Transportation Conditions Reports for Oregon Highways. These reports are not plans. However, they provide a wealth of background and forecast information, including “no build” information for each subject corridor. This information includes operational, geometric, and safety analysis, access locations, environmental data, management system data, land use data, topographical and geologic data, and a full set of air photos in static and customizable map sets. These reports can be very valuable tools to aid plan preparation, project prospectus development, or development review activities.

Guidance for Local Planners

ODOT publishes the Transportation System Planning Guidelines, last updated in 2008 and currently under review in response to revisions of the TPR effective January 1, 2012. The latest rule amendments affected only Section 0060, so do not affect many of the activities governed by the rules. The current guidelines are on line: <http://cms.oregon.gov/ODOT/TD/TP/docs/plans/guidelines.pdf> .

ODOT also provides guidance and support for local transportation planning through Refinement Planning, Highway Classification, Highway Segment Designations and Existing Conditions Reports. Much of the Department’s technical guidance for project development can be found in the AASHTO Policy on Geometric Design and the ODOT Highway Design Manual (HDM) located online at: http://cms.oregon.gov/ODOT/HWY/ENGSERVICES/Pages/hwy_manuals.aspx .

2.3.6 ODOT Policies and Procedures

A Policy or Procedure is developed by a Division when there is a need for an agency-wide understanding of a business practice or set of business practices that is not otherwise established. Before adoption, policies and procedures are vetted with all affected business line teams and leadership teams. Final approval of policies and procedures is by the agency Executive Committee. Policies and Procedures of particular interest for ODOT Planners include:

Facility Plan Adoption:

http://intranet.odot.state.or.us/ssb/BSS/documents/p&p/PLA_01_PROCEDURE.pdf

Classifying and Reclassifying Highways:

http://intranet.odot.state.or.us/ssb/BSS/documents/p&p/PLA_03-01_PROCEDURE.pdf

Jurisdictional Transfer: http://intranet.odot.state.or.us/ssb/BSS/documents/p&p/ROW_10-01-01_PROCEDURE.pdf

The other Policies and Procedures are located at:

http://intranet.odot.state.or.us/ssb/BSS/ppmanual_manual.htm

2.3.7 Project Delivery Operational Notices

As noted on the related web page, “(o)perational notices are ODOT’s Project Delivery policy guidelines intended to ensure consistency in project delivery practices throughout ODOT. The audience for these notices is all staff, internal to ODOT and contractors doing business on behalf of ODOT using ODOT’s practices and policies.”

Operational Notice topics that may be of interest in development review include access management (pd03, pd03(A)), environmental guidance (pd04), water quality management (pd05), highway mobility and planning (pd16) and planning and project development integration (pd18). Find the directory for all of them at: http://www.oregon.gov/ODOT/HWY/PDU/pages/operational_notices.aspx#Directives

2.3.8 Periodic Review of Local Long Range Plans

Periodic Review is a term used in Oregon land use law to describe the periodic evaluation and revision of a local comprehensive plan. In 2007, the Oregon Legislature enacted a bill that revised the scope of Periodic Review to include only those cities with a population greater than 10,000. While Statewide Planning Goal 2, Land Use Planning, requires that all local governments’ comprehensive plans be maintained and updated, counties and smaller cities are no longer legally obligated to complete the formal statutory requirements for Periodic Review. As part of the 2007 legislative amendments, the scope of Periodic Review was also scaled back to include only the fundamental building blocks of local planning: housing, economic development, transportation, public facilities and services, and urban land supply.

Although the legal requirements have changed, the fundamental purpose of Periodic Review is to ensure that local comprehensive plans are:

- Updated to respond to changes in local, regional and state conditions,
- Coordinated with other comprehensive plans and investments; and
- In compliance with the statewide planning goals, statutes and rules.

ODOT's interest in local comprehensive plans is primarily the transportation system plan (TSP), but other elements of the plan are important to transportation planning. In particular, the population projections in comp plans are very important for anticipating facility needs over time. In the best case, population projections are updated as the basis for the facility needs analysis in a TSP update. Economic development and housing elements can also be valuable for anticipating facility needs.

ODOT participation in local periodic review is an opportunity to work with local governments to collaborate on issues important to all affected jurisdictions while the comprehensive plan, including the transportation system plan, is being updated. ODOT planners can advise the local governments of consistency issues related to the OHP and other ODOT policy or regulations that may need to be addressed. Periodic review is an opportune time to address ways the local development code can be updated to better protect the short and long term function of the local transportation system, particularly as it functions in relationship to state facilities.

Most cities and counties in Oregon have adopted and may be currently working on an update to a **Transportation System Plan** (TSP). Many TSPs are funded through the ODOT/DLCD Transportation Growth Management Program (TGM). In addition, the Regions sometimes pay for new TSPs and updates with SPR planning funds.

Local governments also frequently have transportation related **Mode and Area Plans**. Downtown Redevelopment Plans, Local Street Network Plans, Parking, Bike, Pedestrian and Transit Plans are a few examples of types of plans that may articulate street design preferences and enable or require certain conditions of approval relevant to development review.

Cities and Counties inside Metropolitan Planning Organizations (MPOs) are also subject to **Regional Transportation Plans** (RTPs) which are subject to federal standards. Projects recognized in the plans have to be "fiscally constrained" which means it is reasonable to expect that such projects will be funded for construction within the plan period. RTPs may also contain land use and transportation elements and alternative mobility standards. When an MPO's RTP includes alternative mobility standards that are approved by the Oregon Transportation Commission (OTC) they supersede the mobility targets / standards in Table 6 of the OHP.

2.4 Local Decision-Making Authority

Under Oregon's land use program, the local city or county makes land use decisions within their political boundaries. City and county boundaries overlap in most urban growth boundary areas. The local decision-making authority is delegated to a series of decision makers, based primarily upon the amount of discretion allowed for each type of decision. Authorities can include local or regional planning staff members, a hearings officer, planning commission, city council or board of commissioners or an administrative body such as a Variance Committee or Design Commission. Each type of land use action has prescribed procedures whose execution varies among local jurisdictions. Different kinds of procedures are subject to different requirements regarding public notice, participation, approval criteria, process time frames, hearings, accepting new information and comments and appeal processes.

ODOT is one of many stakeholders that are notified of pending land use decisions. In addition to service providers, local development codes require notification of nearby property owners whose land falls within specified distances of the subject property. Ministerial decisions may not require notice and legislative decisions may be noticed in newspaper ads rather than directly to property owners, but input from affected property owners and owners' associations is a significant factor in the land use decision process. ODOT may be contacted by affected neighbors and development review planners need to anticipate that those interactions can result in additional questions about ODOT's point of view and neighbor input on local conditions and anticipated safety and operational issues in a development area.

In order to effectively carry out the ODOT development review program it is necessary to have a basic understanding of the different types of local land use reviews and procedures. The land use procedures used by local government are similar, but because no two local codes are quite the same, it is important for a development review planner to become familiar with local zoning codes in their area of responsibility.

Many local zoning codes may be accessed via the Internet. Local government information can be found at: <http://bluebook.state.or.us/local/index.htm> , including links to local jurisdiction web sites that typically post development plans and ordinances.

2.4.1 Types of Local Land Use Applications/Actions

Oregon's land use statutes create four types of decisions: a land use decision [ORS 197.015(10)]; a limited land use decision [ORS 197.015(12)]; a ministerial decision [ORS 197.015(10)(b)(A)]; and an expedited land division [ORS 197.360-197.380]. Many jurisdictions in Oregon classify land use applications into four categories or procedure types. Each type of decision has different procedural requirements, including notice, hearing and decision-making. These descriptions are generalized; local ordinances may include variations on these themes.

Type I: (Ministerial or administrative decisions.) This procedure is applied where the approval criteria are clear and objective and the decision does not require the exercise of policy or legal judgment (i.e. “discretion”). Often, no public notice is provided and there is no opportunity for an appeal. Lot line adjustments and minor setback adjustments are often classified as Type I.

Type II: (Ministerial decisions or quasi-judicial, depending upon the local code.) This procedure is applied where the approval criteria require minimal discretion by the decision-maker and the development impacts are minor. Type II decisions are generally made without a public hearing, but public notice is provided with an opportunity to comment and/or appeal. Applications for partitions and site/development plan review are often classified as Type II procedures.

Type III: (Quasi-judicial decisions.) This procedure is applied where the approval criteria involve substantial discretion by the decision-maker. Type III procedures involve notice, a public hearing, and an opportunity for appeal. Zone changes that are consistent with the underlying comprehensive plan designation, subdivisions and conditional use permits are typically classified as Type III procedures.

Type IV: (Legislative decisions.) This procedure is used for decisions that generally affect large areas and result in a new or amended plan and/or ordinance. The notice requirements are usually broader than a quasi-judicial review and allow more time for comment, often including public hearings before more than one decision body. Comprehensive plan map amendments and related zone changes, plan and zoning code text amendments, urban growth boundary amendments and, in some cities, annexations are processed through Type IV procedures.

2.4.2 Notice of Proposal

Several provisions of State law and Oregon Administrative Rule require local government to provide public notice of land use proposals to ODOT. It is through these notices that ODOT becomes advised of the proposed action and involved in the development review comment process. Under the TPR (OAR 660-12-0045(2)(f)), local governments are required to have:

“Regulations to provide notice to public agencies providing transportation facilities and services, MPOs, and ODOT of:

1. Land use applications that require public hearings;
2. Subdivision and partition applications;
3. Other applications which affect private access to roads; and
4. Other applications within airport noise corridors and imaginary surfaces which affect airport operations.”

Local governments are also required to notify DLCD of proposed plan and land use ordinance amendments. DLCD provides copies of these notices to ODOT.

Oregon Revised Statute (ORS) 215.402 (County) and 227.160 (City) contain statutory requirements for public notice of land use reviews. An index to statutes can be found at <http://www.leg.state.or.us/ors/vol5.html> .

Many jurisdictions require pre-application conferences for certain types of land use and development applications; pre-application conferences are not required by law, but are often required locally for large projects and those anticipated to have significant offsite impacts. If they are held ODOT should be at the table. ODOT staff should coordinate with local jurisdictions to ensure that ODOT is notified of pre-application conferences, particularly for larger land use and development applications. A pre-application conference provides the opportunity for ODOT to help determine whether a traffic study is needed, what the scope of the traffic study should be, the appropriate methodology and standards to use in the analysis and other issues related to the impact of the proposal on state facilities.

2.4.3 Timelines for Land Use Review and Response

There are two statutory timelines that need to be recognized in the development review process. Both the local application review process and ODOT approach permitting are subject to a “120 day rule” that requires that all steps of the decision process including local / internal appeals must be completed within 120 days unless parties agree to an extension (both) or other specific issues arise (approach permitting). When an approach permit is processed at the same time as the local land use decision, it can be a challenge to keep both applications on time.

The way that local jurisdictions breaks down their 120-day time period will vary by jurisdiction and by type of application. There is a period of time for preliminary review to identify whether there is enough information to support a decision. LUBA and Oregon case law has established that applicants bear the burden of proof for providing adequate information in support of their proposals (more on this later in this chapter). There are set periods of time for public notice as required, submittal of written comments prior to hearings, public hearings, final decisions, acceptance of appeal filings and scheduling appeal hearings.

Extensions of time require the written agreement of both the applicant and the local jurisdiction. The situation that typically precipitates an agreement to grant an extension of time is a need for additional information that will require consultation with a professional planner or engineer, for example, when not supplying that information would likely result in a denial or conditions of approval unfavorable to the developer. The clock restarts when the needed information is accepted by the local planner. As long as the applicant and jurisdiction agree, an extension may be granted without cause.

ODOT’s timeline for approach permitting is set out in 734-051-3040(4). ODOT has 30 days to determine whether the application is complete and the application must be accepted as complete before the 120-day period begins. An application

cannot be found to be complete until it is confirmed that a right of access exists at the proposed location. A letter is sent to the applicant confirming that the application is complete and noting that a decision will be made within 60 days of the date of the notice. If the application “meets the applicable spacing, channelization and sight distance standards” the decision shall be made within 30 days; more complex decisions get the full 60 days. An appeal to a decision to deny or approve an application with mitigation requirements must be resolved within the 120-day limit.

Situations that might result in suspension of the 120 days for an approach permit application include the need for additional information before accepting the application as complete that will require consultation with a professional engineer, for example, when not supplying that information would likely result in a denial or conditions of approval unfavorable to the developer. Submittal of an application for a grant of access or application for an indenture of access stays the 120-day timeline. Submittal of a written request for a post-decision collaborative discussion under OAR 734-051-3090 or dispute review board review under OAR 734-051-3100 also stays the 120-day timeline until the process is completed. And timelines in division 51 may be extended where the applicant and the department agree to an extension in writing before the applicable deadline.

The timelines can overlap in several places:

- The need for Traffic Impact Analysis is a circumstance that can stall both the land use and approach permit applications before the applications are deemed complete. Getting to this concern at the same time may be the biggest benefit of reviewing state and local applications at the same time.
- ODOT may issue an approach permit approval (subject to the 120 day rule) and a construction permit (not part of the 120 day rule) while the local land use decision is still pending. However, a permit to operate will not be issued until approval of the land use is confirmed, and if the land use application is denied, the applicant is responsible for any necessary deconstruction of the approach.
- A local land use condition of approval may require verification of a successful approach permit application before construction permits are issued. Meeting conditions of approval is outside of the 120 day decision period and sometimes takes months or even years.

2.5 ODOT’s Role in Local Development Review

ODOT is a service provider in the local development review process like local water, sewer, and fire protection providers. As the service provider of the state transportation system, ODOT adopts policies, performance targets and standards that define facility function and performance. These standards are

considered in the context of the applicant's proposal and local approval criteria to form ODOT's recommendation to the local government.

The responsibility for a local land use decision is with the local governing body. Like other interested parties who participate in the local decision process, ODOT has the opportunity to appeal the local land use decision. (See Chapter 4 for additional information on preventing the need for, and at the same time being prepared for, possible appeals).

2.5.1 Determine Whether ODOT Has an Interest in the Proposal

When an application or notice is first received by ODOT it is reviewed to determine whether the proposal will impact ODOT's facilities. Region staff utilize their local knowledge about problematic sections of highway that may have high crash rates, substandard geometrics or other operational issues.

The following types of local land use proposals are generally of interest to ODOT:

1. Plan amendments and zone changes (includes map and text amendments affecting transportation).
2. Sites adjacent to a state highway.
3. Any proposal that includes proposed access to a state highway.
4. A development site off the highway that will send significant trips to the highway.
5. Land division or lot line adjustment for property with highway frontage or proposed access.
6. Sites located in the footprint of a future highway alignment.
7. Proposed noise sensitive land uses adjacent to state highways.
8. Land use/development proposals that could affect state airport expansions such as cell towers, or noise sensitive land uses in the vicinity of public use airports.
9. Airport expansions.
10. Sites located adjacent to a rail right of way or that could affect a rail crossing.
11. Any proposal that is within 500 ft of a rail line or rail crossing.
12. Aggregate resource sites.
13. ODOT surplus property sales.
14. Off-premise signs (billboards).

2.5.2 Evaluating a Local Land Use/Development Proposal

To assist in evaluating whether ODOT has any interest in the proposal, answer the following five questions. Keep in mind; this is a first cut review. Chapter 3 contains detailed discussion of how to evaluate a proposal.

1. Is a comprehensive plan amendment or zone change proposed that could have a “significant effect” on a transportation facility as defined by the TPR, OAR 660-12-060? See Chapter 3.2 of these guidelines and OAR 660-012-0060 at:
http://arcweb.sos.state.or.us/rules/OARS_600/OAR_660/660_012.html
2. Could a proposal that does not trigger the TPR significantly impact a state highway in some other way? For example, will it trigger signal or left turn warrants, increase AM, PM or average daily traffic (ADT) on the highway, or add traffic to an already dangerous intersection or one where mobility targets are not met?
3. Does the proposal include any new or additional approaches to the highway?
4. Will the proposal as designed change the use of an existing state highway approach in a way that will adversely impact the state highway operations or safety?
5. Does the site drainage plan discharge into a state highway drainage facility or into a local facility that discharges into the state facility?
6. Is the proposed land use action/development proposal within 500 ft of a railroad track?

If the answer is NO to ALL of the above questions, then there is probably no impact to a state facility and no further ODOT analysis or response is required. The Region may wish to establish a business practice to routinely submit a letter to the local jurisdiction stating: “ODOT has no objection to the proposal as submitted”. This confirms to the local government that ODOT received notification and conducted at least a preliminary review. In the case that the proposal changes significantly before it is adopted, and the changes create impacts that could not have been anticipated in the above assessment, the letter also establishes standing for ODOT to participate in review of any proposed changes and to appeal the decision if necessary.

If the answer is YES to ANY of the above questions then further review is warranted as discussed below.

2.5.3 All Development Applications that Raise ODOT Concerns

Once it is determined that ODOT has an interest in the application, questions to consider include:

1. Traffic Impact Analysis: A Highway Approach Permit application may require a TIA when the local government does not, and vice versa. Has a traffic impact study been prepared and is it available? If a TIA has not yet been prepared, is there an opportunity to work with the developer on the TIA? For more detailed guidance on working with applicants on TIA documents, see Chapter 3.3.
2. Mobility Targets: Are there segments of the highway that already exceed the highway mobility targets (volume/capacity ratios), or that will exceed those targets as a result of the development?
3. Local Street Network:
 - a. Will the development overwhelm the local street network, causing traffic to reroute to the state highway?
 - b. Does the development anticipate future local streets connecting to the state highway?
 - c. Will the development provide local streets, particularly those that would offer a parallel route that creates an alternative to using the state highway for local trips?
4. Safety: Are there sections of the state highway with safety issues and/or will the development trigger turn lane or signal warrants and require highway improvements?
5. Rail:
 - a. Will the proposed land use action alter or construct sidewalks, bike lanes, bike paths or roadway within 500 ft of a public rail road crossing?
 - b. Will the proposed land use action involve the relocation, construction or closure of any railroad grade crossings?
 - c. Will the proposed land use action increase or decrease vehicle traffic at a grade crossing?
 - d. Will the proposed land use action encroach on the railroad's right of way? The typical r/w for a railroad is 50 ft on each side of the centerline of the tracks.
 - e. Will the proposed land use action involve installation of new vehicle traffic signals or changes to existing traffic signals within 500 ft of a grade crossing?
6. Are there any other questions of consistency with agency policy or regulations?

YES answers to any of these questions suggest the need to include other ODOT staff specialists in the review. For example, if the answer is YES to ANY of

questions under 5, the ODOT review should be coordinated with the ODOT Crossing Safety Section.

2.5.4 Development Application with Access to a State Highway

Direct access to a state highway has to be reviewed by ODOT in a prescribed process that is completely separate from the local land use decision, even though the issues addressed may be very similar. For development sites that have or intend to add direct access to a state highway, the state access management rules (OAR-734-051) apply.

A legal right of access must exist or be applied for and approved and an *Application for State Highway Approach* must be submitted and approved. Though the approach application process is separate from the development review process, there are issues that arise that affect both processes. Part of the development review planners' job is to be sure local planners are aware of access issues that may arise related to a site design and be sure access management staff are included in the local planning review when appropriate.

Link to access management rules (Division 51):

http://arcweb.sos.state.or.us/pages/rules/oars_700/oar_734/734_051.html

Local development codes may include requirements that affect state approach permits. For example, the code may require that highway access issues be resolved before approval of a site plan or that an approved state highway permit to construct the approach be issued as a condition of approval before building permits will be issued for the development. The local code may also include site design requirements that result in stricter standards than the state access spacing standards; such standards are implemented by the local jurisdiction, not by ODOT.

The access management rules underwent extensive revisions in 2011-12. Further details related to those changes will be discussed in Chapter 3.2, including decision timelines.

For applications that include direct access to a state facility, in addition to the questions in the previous section, consider:

1. Right of Access: If there are any existing approaches to the property, are they being operated under valid permits? Grandfathered? If not, has a legal right of access been established for the property?
2. Does the proposal result in a Change of Use as described in section 734-051-3020: Change of Use of an Approach? If the development does not constitute a change of use, no new approach permit is required. There is an ongoing policy discussion on what standards should apply where there is no technical "change of use" and an existing approach is neither permitted nor grandfathered (as defined in the rules). At this time¹

¹ August 2012

- interpretation of the rule does not require such approaches to be brought under permit.
3. **Alternate Access:** Are there other ways to provide access to the property besides the highway, such as using local streets? In most circumstances, the availability of alternate access will not prevent an applicant from getting access to the highway.²
 4. **Spacing between Approaches:** How does spacing of any existing or proposed approach road on the subject and adjacent properties conform to the standards applicable to highways of the same classification set out in OHP Appendix C and regulated by Division 51?
 5. **Location of Approaches:** Can the development function without a highway approach? Can a single approach road shared by adjoining users provide adequate, safe access to the development?
 6. Based on the existing and proposed approaches to the highway and to local streets, are there site design options that will reduce safety and operations impacts on the highway? ODOT's direct authority in these situations is limited to the situations described in OAR 734-051-4020 (3), but situations may arise where the local government may agree that a recommended site design change is justified.
 7. If a new approach to the highway is necessary, what is the preferred location for highway safety and operations? Note that recommending redesign / relocation of an approach off of the state facility is not something we would require under the new alternate access provisions, but could still be a defensible recommendation, particularly if the local decision makers agree that there are safety concerns.

2.6 Review and Response to Land Use Proposals

2.6.1 Development Review System

Development review application tracking, data storage and quarterly reporting are supported by the Development Review System or DRS.

When a land use notice is first reviewed a decision is made whether ODOT intends to participate in the local decision process. The Regions use the DRS "Tally" function to count the notices that will not be processed further. If further work will be done to review the proposal, a "Case" is created for the proposal where basic information is entered and related documents can be stored.

² 1. Note that the 2012 access management rule amendments significantly changed how the availability of alternate access can be considered in approach permitting. See OAR 734-051-3040(5)(a) and 4020(5)-(7)

ODOT Users have varying status for access to DRS. “Users” can make changes and additions to case files. “Guests” can look at case files but not modify them. “System Administrators” have additional permissions including adding or deleting users.

The DRS platform has email capability for correspondence related to each file, with the outgoing emails saved within the data base. Contact information is entered into each case file identifying who will be collaborating on the internal review and the external contacts who can receive email through DRS. In addition, other electronic files including incoming emails can be copied into a case file as “Documents.”

An important function of DRS is assembling and transmitting “Responses.” The system is set up to cache “Clauses” and “Templates” to meet a variety of response needs.

- Clauses include discrete parts of Responses, such as a Region’s letterhead or the text and typical recommendation for a particular area of applicable law or policy. Clauses also may include bookmarks for auto fill of data from fields in the related case file.
- The system has a simple method of assembling clauses into templates. Staff can customize templates for a variety of standard circumstances, and if a proposal falls outside the bounds of standard responses, clauses can be added or deleted on a case by case basis.
- When a template is opened through the case file “Response” function, all the bookmark fields are populated from the case file entries. The response can be edited in Word and when saved the edited version will remain in the case file without having modified the template. When the Response is finished it can be emailed directly from DRS. A “finalized” response becomes a permanent record of what was sent to the local government.

A “Comments” function supports internal correspondence and maintains a record of that correspondence in the case file. Similar functions that build the case file record are “Decisions” and “Meetings.”

Quarterly reports are set up for two purposes: reports to the Planning Business Line Team (PBLT) and to support reporting requirements for the federal State Planning and Research (SPR) funding that supports ODOT planning programs. These reports are intended to show the level of effort put into development review and to show successes getting favorable conditions in local decisions or other means of mitigation of the development impacts on state highway facilities.

2.6.2 Content of ODOT Responses

ODOT comments to local governments on land use/development applications are made in the form of recommendations. It is the local government decision-

making body that makes the decision. In written and oral comments to the local jurisdiction, make clear whether the ODOT recommendation is simply a good practice being recommended or whether compliance is necessary to be consistent with local code/or state law. It is sometimes useful to distinguish comments and proposed conditions of approval based upon the weight of law backing them up.

- Mandatory/required by law (OAR 734 Division 51 approach permits, permits to connect to ODOT stormwater system, miscellaneous permits to work in the state right of way, TPR 0060, Rail Crossing Order ORS 823/824, etc.).
- Recommended/Supported by law (TPR, TSP, Comprehensive Plan Policies, and case law).
- Informational only (potential future issue, permit coordination/contacts).

General Types of ODOT Recommendations:

- No objection to the development as proposed.
- Support the proposal as submitted.
- Support the proposal if certain conditions of approval are applied.
- Object to the proposal as submitted unless certain conditions are applied. If possible, recommend the course of action that would make the proposal acceptable to ODOT. For example, the applicant may be responsible for installing a traffic signal or working with the local government to amend their TSP to identify needed intersection improvement(s) with funding mechanisms and a timeline for improvement(s).
- Object to the proposal with sufficient findings of fact addressing the local decision criteria to justify a recommendation to deny.

2.6.3 Response Letters

In order for ODOT's input to local governments to become part of the official decision record and to establish standing in any subsequent appeals,³ ODOT submits response letters. The response letters should be formal and written in terms of the applicable local approval criteria. The letters should be written in a way that will help the local decision-makers understand how ODOT standards and practices relate to the local approval criteria. The DRS templates are set up to serve this purpose.

For quick reference, the regulatory bases for ODOT's participation in development review can be found at these sites:

³ See Chapter 4 for more information on avoiding, and when necessary participating in, land use appeals

- Transportation Planning Rule:
http://arcweb.sos.state.or.us/rules/OARS_600/OAR_660/660_012.html ;
- Access Management Rule, OAR 734 Division 51,
http://arcweb.sos.state.or.us/rules/OARS_700/OAR_734/734_051.html ;
- Highway Procedures and Operations (generally), OAR 741,
http://arcweb.sos.state.or.us/rules/OARS_700/OAR_734/734_tofc.html ; and
- OHP Land Use and Transportation Policy 1B and Action 1B.4,
<http://www.oregon.gov/ODOT/TD/TP/docs/orhwyplan/hwyplan/goal1.pdf>

ODOT's comments are based on the materials submitted by the applicant, relevant state and local plans and state policies, practices and administrative rules. ODOT comments may include draft recommended findings of fact, conclusions related to ODOT interests and recommended conditions of approval. Because the local government has the authority to interpret its own ordinance, ODOT staff may want to state "It is ODOT's understanding that this requirement means that..." to help support ODOT's position. Chapter 3, Sections 1, 2 and 3 of these Guidelines go into more detail about the analysis that is necessary to form ODOT's position on a proposal.

ODOT's most common response to the local land use proposal is to recommend approval subject to certain conditions. The conditions allow the applicant the opportunity to modify their plans to meet local and state standards. The most common condition of approval proposed by ODOT is a requirement that the applicant obtain a *State Highway Approach Permit* prior to final development approval. This helps ensure that ODOT-related conditions of approval pertaining to access are satisfied before the building permit is issued. In this manner, the local and state regulations are coordinated.

2.6.4 Mitigation Proposed as Condition of Approval

Local governments are required to adopt land use and subdivision regulations that include "(a) process to apply conditions to development proposals in order to minimize impacts and protect transportation facilities, corridors or sites" as a part of implementation of the Transportation Planning Rule, under OAR 660-012-0045(2)(e).

- In the land use decision process, conditions requiring mitigation measures must be enabled in the local development code.
- Mitigation measures related to highway approach permits are enabled by the Division 51 access management rules and implemented as conditions of approach permit approval.

The local government can decide to apply conditions that protect state facilities and are supported in doing so by state agency coordination requirements, but the discretion to do so is theirs unless their development code includes the same or

arguably similar requirements. Remember that land use regulation, including the TPR is under the authority of DLCD, not ODOT.

When a land use application includes a TIA, that study will typically include recommended mitigation of development impacts. If not, or if other mitigation measures are preferred, ODOT staff may recommend mitigation. Unless the mitigation is a requirement of an approach permit approval, ODOT relies on the local government to require the recommended mitigation measures.

It is important that conditions of approval ensure the applicant is responsible for completion of the identified mitigation measures. This may be accomplished, for example, by withholding construction permits until certain measures are taken, phasing development so that mitigation for one phase is completed before a next phase is permitted, monetary deposit with the local jurisdiction, and/or formal agreements between two or more of the parties.

Conditions of approval are stated in the record of decision. If the mitigation is substantial or exceeds the proportionate share of the applicant's impact and the applicant is not willing to make the improvements, other TPR-identified remedies (for plan and code amendments) or denial may be appropriate. Chapters 3.1 – 3.3 of these Guidelines discuss mitigation in more detail.

2.7 Findings

Technically, ODOT does not write findings for local government decisions. However, ODOT's recommendations are part of decisions that must be based on findings of fact in order to be legally defensible. If ODOT conditions are going to be included and supported in a local decision, they need to be backed up by sound findings.

A response letter may include recommended findings for the local decision document and/or statements consistent with the definition of findings may used in the letter to support recommended conditions. If it becomes necessary to appeal a local decision, well considered findings that support ODOT's position become even more important.

"Findings" can be defined as statements of fact related to criteria for decision making as to compliance with a regulation, and are often referred to as findings of fact. A finding of fact is distinguished from a conclusion of law which can only be made by the deciding authority, in this case the local jurisdiction.

This is one point in the decision process where the notion of "interpretation" is of interest. Findings identify the facts and relate them to the criteria in a way that indicates whether the criteria are met, but do not rise to the level of interpreting the regulations to reach conclusions of law.

Oregon law requires that a local government decision be supported by substantial evidence in the whole record (ORS 197-835(9)(a)(C)). Substantial evidence is evidence upon which a reasonable, prudent person could rely in reaching a decision, [City of Portland v. Bureau of Labor and Industries, 298 Or

104, 119, 690 P2d 475 (1984)]. One way to provide the required substantial evidence is through development of “findings.”

Findings are required by Oregon law to accompany administrative decisions to explain how and why a decision is reached. “Findings ensure that applicable legal standards have been addressed and show that the decision complies with the applicable law. This protects participants in the land use process from arbitrary government action.” (Land Use CLE S10.78.)

“Approval or denial of a permit...shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.” (ORS 227.173(3) (cities)) and (215.416(9) (counties)).

In review of local land use proposals, ODOT’s recommended findings and findings supporting recommendations should identify 1) the applicable local ordinance provision(s) and any other applicable regulations, 2) the facts of the case related to each regulation and 3) discussion whether or not the facts support a conclusion that the proposal complies with the subject regulation. Where ODOT recommended findings are included in written or oral testimony submitted in a local decision process, testimony should be accompanied by a written request that the findings be adopted into the local decision document.

2.7.1 Applicability of Findings

Findings are applicable in two aspects of development review:

Any time a decision is made by ODOT staff in the area of permitting, the file should contain a set of findings to substantiate the basis for the decision. The Access Management CHAMPS database includes prompts for findings related to approach permitting.

Similarly, when ODOT makes a case for a recommended mitigation measure or other condition of land use approval the recommendations should be backed up by findings of fact.

Findings are required to be prepared by the local government staff to support the local decision. Local planners may sometimes use or paraphrase findings from ODOT responses in their staff reports or decision documents. Note that the tone of recommendations and findings to support them needs to be considerate of local sensibilities to the extent practicable, and may be the determining factor whether they are actually included in the staff report and decision.

2.7.2 Preparing Findings

The local jurisdiction, as the decision-making body, has responsibility to prepare the findings supporting a local decision. Typically, findings are drafted in a staff report that is submitted to the planning commission (or other decision authority)

to explain the relationship of the facts to the decision criteria. Based upon the deliberations and decision of the decision body, the findings may be revised in the final decision document, establishing the rationale for the decision. ODOT may prepare findings relative to the state transportation system. Ideally, the ODOT comments are incorporated into the staff report and final decision document findings.

The ODOT findings must speak to how the facts of a case relate to the local approval criteria. For plan amendments and zone changes, the local approval criteria will have to address the TPR, reference the appropriate portions of the local government's development ordinances and tie their approval criteria to the OHP and OAR Division 51 as appropriate. In the case of TPR reviews, findings should provide details explaining whether or not, and, if so, how the proposed land use is inconsistent with the jurisdiction's adopted comprehensive plan and/or transportation system plan. As a matter of practice, the bar is set higher for plan amendments/zone changes and conditional uses than for uses subject to site review but otherwise permitted outright. For uses permitted outright it is adequate to refer to the pertinent local zoning code criteria without making reference to local comprehensive plan policies.

- Findings should typically be concise;
- Keep as neutral (or, where appropriate, supportive) a tone as possible in the submitted correspondence, focusing on the function of the roadway;
- Where an appeal appears likely, the Department of Justice can be a resource to help you include citations to any applicable LUBA cases that would buttress ODOT's position;
- Explain how the applicant has not met the burden of proof where applicable. The burden of proof has not been met if a reasonable person would not conclude that the applicable criteria are met based upon the facts of the case and the information provided by the applicant; and
- Include in the letter references to specific examples from the application materials that demonstrate failure to meet the burden of proof, describing what is missing or inaccurate.

For example, most local codes have sections that require that "adequate" public infrastructure be available to serve proposed new development. Adequacy of the state highway facility includes mobility, operations, safety, etc. Note the mobility targets / standards⁴ in Policy 1F of the OHP as amended in 2011:

<http://cms.oregon.gov/ODOT/TD/TP/Pages/registry.aspx> and consider whether the traffic impacts of the proposed development will cause those standards to be exceeded. Offer suggested conditions of approval to either meet the standards or

⁴ The OHP Policy 1F volume to capacity ratio (v/c) performance measures are applied as "targets" except for decisions that trigger TPR section 0060 in which case they are applied as "standards."

to keep the volume to capacity (v/c) ratio at its current level after the development occurs. Identify the mitigation measures necessary to achieve the standards.

Policy 1F includes provisions for “alternate mobility standards” for a facility or area of a transportation system that may lower the bar for compliance with the policy. However, alternate standards cannot be applied in the approval process for an administrative or quasi-judicial land use decision. Alternate mobility standards must first be adopted by the local government and the OTC, based on a long-range planning process and local legislative decision.

2.8 Working Effectively with Local Partners

2.8.1 Local Agency Planning and Public Works Departments

Local departments offer a wealth of information regarding local plans, policies, land use ordinances, street standards, drainage issues and existing stormwater facilities. ODOT and local staff can work cooperatively to craft conditions of land use approval that meet the requirements of the state and local governments.

The following strategies can help ODOT work with local partners on land use/development reviews:

1. Work with local governments to get them to notify ODOT Regions/Districts of major development proposals on a pre-application basis.
2. Attend pre-application conferences.
 - Identify information that needs to be included in the land use application in order for the applicant to address the local approval criteria and impacts on transportation facilities and services.
 - Provide written comments either at the pre-application meeting or as soon as possible following the meeting.
 - Provide the best information available.
 - Try to resolve conflicts.
 - Advise applicant when a new approach permit or change of use of an existing approach may be needed.
 - Discuss the need for traffic impact analysis if needed.
 - Provide ODOT contact information.
3. Know the local approval criteria. This is essential because it forms the primary basis for the decision. The local approval criteria are the regulations in place at the time of the application submittal (not at the time the application is deemed complete).
4. The approval criteria may include previous conditions of approval that apply to the site. For example, the site may be part of a planned unit

- development (PUD) that has specific approval criteria that apply at the time of development.
5. Note that comments do not have to be limited to the criteria identified by the local planning department. State policy, plans and standards are applicable to ODOT facilities and should be included as part of the ODOT analysis and discussion.
 6. Know the review process including the timelines, decision-making body and appeal process.
 7. Provide timely responses. Respond to the local government in time to get the ODOT comments included in the staff report and decision documents.
 8. Provide the local staff with any recommended condition of approval language written clearly and completely. This provides clarity and helps the local staff. The condition language should address when the condition is to be performed. Stating that the condition is to be performed prior to the issuance of the primary building permit works well when it is feasible. It may be helpful to discuss the language of the condition with the local staff to see if there are ways the condition can be written to best fit with their development and/or building permit review process. The local staff can make their own recommendations and offer modified language following the receipt of the ODOT comments. Having a uniform position with the local staff helps eliminate confusion and enhances our chances of gaining agreement from the decision-making body.
 9. When a proposal goes to a public hearing, attend the hearing and testify if needed to be sure ODOT interests have been heard. Request the hearing record be kept open if necessary to allow time to address unanswered questions. This request must be made before the conclusion of the first evidentiary hearing. If requested, the record for a hearing must be kept open for a minimum of seven additional days (ORS 197-763(6)).

2.8.2 Participate Effectively in Public Hearings

The following tips are intended to help ODOT participate in the local land use hearings process:

1. To prepare for a hearing, become familiar with the following:
 - All materials filed by the applicant.
 - Relevant ordinances (Development Code) which are typically documented in a staff report.
 - Traffic Analysis, if any.
 - Staff report(s).
 - Previous proposals and/or existing uses on the property; do a site visit if possible.

- Local comprehensive plan text and map.
 - Other studies, plans and minutes relating to the proposal.
 - The Transportation Planning Rule (TPR) when applicable.
 - Statewide Land Use Goals: <http://www.oregon.gov/LCD/goals.shtml>
2. Before the hearing, discuss the proposal with the local staff. Try to get a feel for their position on the proposal and whether it promotes local priorities. Use the opportunity to increase local understanding of highway facility issues and be persuasive about mitigation needs.
 3. Be familiar with the procedural rules such as the order of presentation, local jurisdiction's appeal requirements and review procedure. For example, would an appeal be heard de novo (new hearing, additional information may be added to the record) or on the record (hearing is based on the record, with no new introduction of evidence)? If appeals are heard on the record it is even more important to submit thorough and accurate comments at the first level of review.
 4. Know all deadlines for submission of evidence / comments and appeal requests.
 5. Know your audience. It is helpful to have some background for the individuals on the local body hearing the case.
 6. The ODOT staff presentation can be either in writing or oral. You will have a better opportunity to persuade the local hearings body if you are present and can respond to questions. If an oral presentation is given, it should also be submitted in writing.
 7. Carefully listen and take notes on the other testimony in order to be prepared to rebut any evidence submitted by the others that detracts from ODOT's testimony, whether ODOT is the proponent or opponent. Note that opponents do not usually get the opportunity to rebut during the public hearing. If rebuttal is needed it will be necessary to request that either 1) the record be kept open for a specific period of time, or 2) the hearing be continued to a certain future date, typically the next scheduled meeting of the hearings body. The hearings body is required to keep the record open when requested by a party with legal standing, but will often only keep it open for a week or two, and continue deliberations at a future meeting. Typically, the hearings body may continue the hearing at its discretion. (See also discussion on burden of proof below.)
 8. If ODOT is a proponent of a local land use action, listen carefully for any additional criteria raised by the opposition. If additional criteria are raised, staff may need to explain why those criteria are not applicable and/or submit evidence to show why the proposed change complies with the criteria. Proponents do get a chance to rebut, but in some communities only the applicant may do so. If that is the case, and ODOT is not the applicant, ODOT may be allowed to rebut at the

request of the applicant. In the case where new evidence or new criteria are raised, a request to keep the record open and/or continue the hearing may be the best course.

9. If ODOT is an opponent to the local land use decision, do not rely on the local government to identify all applicable criteria. If you believe certain decision criteria apply but have not been identified by the local jurisdiction, discuss the matter with the local government staff, and be prepared to identify those criteria and defend their applicability to the subject application in testimony. Also be prepared to address the facts of the case and whether it can be demonstrated that the claimed additional criteria are not met.

10. Identify whether the proposal amends a functional plan, acknowledged comprehensive plan or land use regulation. If yes to any of these, the local government has a responsibility to identify whether the proposal will have a significant impact on transportation facilities per OAR 660-12-060 of the TPR.

11. If it will be helpful use charts, maps and other graphics to illustrate your position. If oversize graphics are used, be sure to supply a legible, smaller format version with identical content that can be placed in the application file. Everything relied upon as a basis for the decision needs to be part of the record, particularly if there are resulting appeals, and large maps on foam core, for instance, do not stay with the file.

12. Identify, by reference to number and name, all applicable statutes, administrative rules, plan provisions and ordinances that are applicable to the subject local land use decision.

2.9 Legal “Burdens” in the Planning Decision Process

Two legal definitions, whose applicability to land use decisions is well established in case law, are useful in understanding the legal responsibilities of applicants and other parties in land use decisions. When ODOT has concerns about a proposal that appears have adverse impacts on state facilities, looking at whether these burdens have been met is part of the process of addressing the benefits and/or shortcomings of a proposal or making a case for mitigation or an appeal.

2.9.1 “Burden of Proof”

The applicant for the local land use/development application has the burden of proof to demonstrate that the application meets all applicable review criteria. This applies to the applicant initially and then to the local government whenever a decision approving the proposal is made in full or in part. The burden of proof is met if a reasonable person would conclude that the decision criteria are met, based upon the facts of the matter and the materials submitted by the applicant. Professionally prepared traffic impact studies are often submitted as part of the local land use application to address the burden of proof.

2.9.2 “Substantial Evidence”

Substantial evidence that the proposal complies with the applicable criteria must be contained in the record of decision. “Substantial evidence” is evidence a reasonable person would accept as adequate to support a conclusion. The proponent must provide evidence to show that the applicable criteria have been met. The burden of proof then shifts to the opposition to show why this evidence is not substantial, i.e., that it does not address the criteria, it does not answer the question raised by the criteria, it is not technically correct, or the person producing the evidence is not qualified, etc. If opponents provide evidence that contradicts the proponents’ evidence, the burden shifts back to the proponent to bolster their evidence. The bottom line is, if you are the opponent, you cannot simply mention applicable criteria and rest. You need to see whether the proponent then provides evidence to show why those criteria are not applicable or have already been met. Opponents do not usually get an opportunity to rebut unless a request to keep the record open is accepted by the decision body.

2.10 ODOT Internal Coordination

For the agency to successfully participate in the local land use process, the responding ODOT planner must ensure that the agency speaks with one voice. This means contacting other units of ODOT as well as managers as needed prior to submitting a comment letter. The specifics of the local land use proposal will determine which of the parties listed below should be brought into the review. At a minimum, the ODOT planner needs to contact District staff for their input before submitting the agency’s response. The managers and units discussed below are the primary resources to use when analyzing a local land use proposal.

2.10.1 Coordination with ODOT Access Management

Both local and state approvals are required to develop a parcel of land with access to a state highway. The state approval is in the form of an ODOT *State Highway Approach Permit* regulated by OAR 734-051 (Division 51) and administered through the ODOT District offices. Additional information related to the applicability of Division 51 is included throughout Chapter 3.

Access management decision making is also subject to State Agency Coordination. ODOT’s rule regarding state agency coordination for permit decisions is OAR-731-015:

http://arcweb.sos.state.or.us/pages/rules/oars_700/oar_731/731_015.html .

A complete application for a *State Highway Approach Permit* includes a Land Use Compatibility Statement (LUCS) filled out and signed by the applicable land use authority (OAR 734-051-3030 (3) (i)). The LUCS ensures that ODOT knows the status of the proposal relative to local land use regulations, whether it is permitted outright or has a current approval or that it requires a new land use approval, and whether or not an application is currently under review. If an

application is required and an application has been submitted, ODOT can accept and review an approach application,

It is usually preferable for an applicant to apply for a state highway approach permit prior to the final decision on a land use application. The reason is that ODOT decisions about highway access may affect the site layout and the way vehicles enter, exit, and circulate on the property. ODOT may also require mitigation that affects access to the property⁵. However, Division 51 provides for flexibility in the timing of the application. See OAR 734-051-3040 for additional detail on the time frames for approach permit decision making.

The questions and answers below help explain how the two processes can be coordinated to provide flexibility in the sequence of events leading to application approval.

Local land use approval may be obtained prior to state highway approach approval. The applicant runs the risk of having the state deny the approach, requiring the applicant to either revise the site plan through the local review amendment process or to appeal ODOT's decision to deny the approach road.

The applicant decides whether to obtain the state approval prior to the local land use approval. A property owner may apply for an ODOT State Highway Approach Permit before, after or during the local land use review. This flexibility allows applicants to decide for themselves the best course of action. To allow them some flexibility in terms of the timing of their applications, section 3040 (8) allows approval of an approach permit pending verification of local land use approval. In addition, 3040 (8) (b) allows a construction permit for a highway approach (driveway) to be issued while a land use action is pending, with a bonding requirement to cover the cost of removal if the land use is ultimately denied. The final Permit to Operate Maintain and Use an Approach will only be issued upon the applicant receiving local land use approval and the completion of construction of the approach to state standards. In this manner, the state and local governments coordinate their reviews and have assurances that the same set of site plans are being approved by both agencies.

ODOT recommends that applicants obtain state approach approval prior to local land use approval. In the best case for coordinating an approach permit application with the local land use decision, the same site plan is submitted for both reviews. However, either decision process may require changes to the site plan to meet approval criteria.

In cases where the local land use action includes site plan approval, obtaining ODOT approach permit approval prior to the local approval is typically the best course of action. Agency staff can identify approaches the agency can support or would oppose. ODOT recommends that applicants know both the local and

⁵ OAR 734-051-3070 establishes allowable mitigation measures and limitations on them. Conditions of approval of approach permits are appealable.

state rules pertaining to access prior to designing their project and submitting either the state or local application.

When the state approves an approach location and the local government objects, the applicant must take steps to address the local government's issues. ODOT will only allow an approach where the provisions of OAR 734-051 are satisfied.

If the local government approves an approach location that ODOT can't approve outright, ODOT staff needs to decide the most effective means to get the approach in the best feasible location. ODOT:

1. May object through the local appeal process; and
2. Will withhold issuing the approach permit until the provisions of OAR 734-051 are satisfied.

The applicant may have to submit an amended site plan or other application to the local government to modify the approach location. OAR 734-051 includes an appeal process which is separate and distinct from the local land use appeal process.

If more time is needed to work through issues, the time lines for review of an approach permit may be extended by mutual consent of ODOT and the applicant. The applicant may also submit a letter to the local jurisdiction to suspend the land use "120-day rule" to allow more time for the local land use process while issues with the approach permit application are worked out.

2.10.2 Coordination with Managers

Planning Managers are responsible for the development review and long range planning programs in the Regions and supervise the current and long-range planners, and in some regions supervise development review engineers and the regional access management engineer. The Planning Manager or designee (e.g. Development Review Team Lead) is responsible for keeping other managers in the region informed about development review issues. In some regions the Planning Managers oversee access management related to long range planning and development review. The Statewide Transportation Improvement Program (STIP) can reside in the Planning unit. It is the responsibility of the development review planners and engineers to be aware of upcoming ODOT projects in the vicinity of a proposed development. The statewide STIP coordinator is another source of information about when projects will be delivered, (<http://transnet.odot.state.or.us/tdd/ActiveTransportation/Web%20Pages/STIP%20Development.aspx>).

District Managers have the legal authority to issue approach road permits. The District Manager may refer planners to the Region Access Management Engineer on access management issues. The District Manager supervises staff that is involved in the daily maintenance and operation of the state's highway system and all features on the right of way (signs, signal poles, fences, etc.). This includes non-ODOT signs on state right of way.

Traffic Managers have legal authority for the placement of official ODOT signs (regulatory, warning, guide) and certain informational signs on the highway. Other responsibilities include the location, timing and other operations of traffic signals, striping the highway and conducting speed zone studies.

http://www.oregon.gov/ODOT/HWY/TRAFFIC-ROADWAY/publications_traffic.shtml

Area Managers oversee the project development process when ODOT constructs facilities. Examples would be building passing lanes, new alignments, general widening, etc. The Area Manager also serves as ODOT's liaison to the Area Commission on Transportation, a consortium of local jurisdictions. There can be a degree of overlap between the Planning Manager and the Area Manager on setting the long-term goals for ODOT's facilities.

Region Right of Way Managers oversee the acquisition, management and disposal of state-owned property. Salem Right of Way has the capability to research properties to determine whether ODOT has purchased access control, identify the location of reservations of access and research other property deed information related to the highways.

Region Managers oversee all managers within the region with the exception of Right of Way. The Region Manager normally does not get directly involved in development review except in unusual circumstances. It is prudent to brief the Region Manager about applications that may become politically sensitive, particularly when it may be pertinent to appeal a local decision. That briefing is coordinated through the Planning Manager.

Rail Crossing Safety Section Manager is responsible for the railroad crossing safety program. The Crossing Safety Section manages the application process for constructing, altering or closing public rail crossings; mediating agreements between "public authorities in interest" (road authorities) and railroads; preparing final *Crossing Orders* authorizing improvements at rail crossings; and participating in the review of land use actions as needed.

2.10.3 Coordination with Other ODOT Units

ODOT is one of the most complex state agencies in terms of roles, responsibilities and regulations. Below are examples of units that may need to be contacted for input or just to discuss problems and possible solutions to land use application concerns.

It is preferable to begin with staff at the Region or District level.

Bicycle and Pedestrian Program: This program provides technical assistance and grants to local officials regarding bicycle and pedestrian issues.

Geo/Environmental Section: The Geo/Environmental Section has staff in both the Regions and in Salem. The section can assist in assessing drainage issues. ODOT Drainage Permits, however, are handled through the Districts. Environmental issues can range from threatened and endangered species and wetlands to historic buildings.

Long Range Planning: The Regions have long-range planners who are expected to be familiar with the local governments' TSPs and Comprehensive Plans. Salem's Transportation Development Division (TDD) also has specialized long-range planners for various travel modes. Where a local government's plans for an area on the highway are at odds with the classification of the highway, there may be long-range planning measures that will allow the community's desired outcome

- A Highway Segment Designation per OHP Policy 1B may be a viable approach to propose as a long-range solution.
- Alternate Mobility Standards, as enabled in OHP Policy 1F, can be established to allow the local jurisdiction to accept more congestion on the highway as a trade-off for allowing a traffic intensive use, or any new use on a facility that is operating near capacity.

These approaches can't be used in the course of development review. They must be developed as part of an OHP amendment that requires both local and state adoption.

TDD Freight Unit and Motor Carrier Division: ORS 366.215 requires that OTC cannot permanently reduce the vehicle-carrying capacity of an identified freight route when altering, relocating, changing or realigning a state highway unless specific conditions are met. Additional information is available online at: www.oregon.gov/ODOT/TD/TP/ORS366.215.shtml

Rail Division: This division based in Salem, has exclusive legal authority over public grade crossings and provides coordination with the railroads for affected private rail crossings.

Signs: Authority to regulate signs depends on the type of sign and its location. Signs on state right of way are the province of the District Maintenance office. Signs on private property, but visible from the state highway, are handled by the Outdoor Advertising Sign Program in Salem. The state Travel Information Council deals with logo signs for gas, food and lodging as well as tourist-oriented directional signs.

2.10.4 Coordination with Other State Agencies

Business Oregon: From their home page: "Business Oregon works to create, retain, expand and attract businesses that provide sustainable, living-wage jobs for Oregonians." Business Oregon may be a participant in a land use action as a proponent or sponsor of an economic development project. In addition the new TPR Section 11, which allows "partial mitigation" of traffic impacts under circumstances that provide certain types of economic benefits, requires the decision process to be coordinated with OBDD (<http://www.oregon.gov/OBDD/>)

Department of Land Conservation and Development: DLCD, through its Commission, adopts statewide planning goals and reviews local jurisdictions'

comprehensive plans for compliance with those goals. DLCD acknowledges local governments' comprehensive plans and TSPs. The department also reviews proposed amendments to those plans for compliance with state planning goals and associated administrative rules including the Transportation Planning Rule which is under their authority. Interpretations and implementation of the Transportation Planning Rule and other rules and statutes in their purview sometimes need to be coordinated with DLCD.

<http://cms.oregon.gov/lcd/pages/index.aspx>

Oregon Department of Aviation: The department reviews local land use applications for their effects upon airport operations. These can include noise-sensitive uses locating near airports, cell towers, waterfowl attractions in flight paths and development in runway protection zones. Structure height and some kinds of lighting can be significant issues in the vicinity of airports:

<http://cms.oregon.gov/Aviation/pages/index.aspx>

2.10.5 Coordination with Other Groups

ODOT has established practices for outreach to local governments and the general public on all of its activities that relate to land use. This can result in the agency's development review responses extending beyond submitting letters to the local government. Larger projects and those that raise sensitive issues can require ODOT staff coordination and interaction with the following groups:

Area Commissions on Transportation (ACT): The ACTs are advisory bodies chartered by the OTC. Representatives from cities, counties and Indian nations comprise the ACTs, which are organized geographically and typically include a decision making body of local government officials and a technical advisory body of planning, transportation and public works staff. ODOT Area Managers serve as agency liaisons to the ACTs.

Metropolitan Planning Organizations: Federally authorized MPOs are required to create and maintain regional transportation plans (RTPs) for urban and urbanizing areas as participants in federal transportation funding. There are several in Oregon located in the areas of Portland (Metro), Salem/Keizer Area Transportation Study), Corvallis Area MPO, Eugene/Springfield (Central Lane MPO), Medford (Rogue Valley MPO), and Bend Area MPO. As many as three additional MPOs will be formed as a result of population increases documented in the 2010 U.S. Census, centered in Albany, Grants Pass and Milton-Freewater (in an interstate MPO with Walla Walla, Washington).

Regional Solutions Teams (RST): ODOT is one of eight state agencies participating in RST. Coordinated through the Governor's office, the effort now includes the following agencies:

- Oregon Economic and Community Development Department (OECDD)
- Oregon Department of Transportation (ODOT)
- Department of Land Conservation and Development (DLCD)

- Department of Environmental Quality (DEQ)
- Department of State Lands (DSL)
- Oregon Department of Agriculture (ODA)
- Oregon Housing and Community Services (OHCS)
- Department of Consumer and Business Services (DCBS)

The ERT assists local communities with economic and community development issues that involve multiple state agencies through regional ERT teams.

<http://cms.oregon.egov.com/GOV/ERT/Pages/index.aspx>