

Memorandum

Date: August 8, 2006

To: Joint OTC/LCDC Transportation Subcommittee

From: Frank Angelo

Re: Goal Exception Thresholds for Transportation Improvements

A. Introduction

The focus of the August 15, 2006 meeting of the Joint OTC/LCDC Subcommittee on Transportation is to identify and discuss possible implications of the recent LUBA and Court of Appeals decisions upholding Yamhill County's use of thresholds to judge the reasonableness of non-exception alternatives to the Newberg-Dundee Bypass and the East Dundee Interchange.

In *1000 Friends of Oregon v. Yamhill County*, 203 Or App 323 (2005), the Oregon Court of Appeals ruled that Yamhill County had adequately justified the thresholds it had chosen in finding that alternative methods or locations not requiring goal exceptions could not reasonably accommodate the transportation needs to be served by the Newberg-Dundee Bypass and the East Dundee Interchange. In so doing, the Court upheld use of an "operational feasibility and minimum transportation performance threshold" requiring that the transportation solution meet Oregon Highway Plan (OHP) highway performance standards and management objectives for the type of facility proposed.¹ For instance, if a non-exception alternative involved widening of existing Oregon 99W, which is a designated statewide highway and freight route, it would need to meet OHP performance standards and management objectives for statewide highways and freight routes in order to be considered a "reasonable" alternative. If a non-exception alternative involved a bypass, it would also need to meet OHP performance standards for bypasses, including expressway standards.

DLCD staff has expressed concerns that this holding, which affirmed a similar holding by LUBA, gives broad discretion to local governments to set thresholds when evaluating transportation project alternatives. These concerns and the perceived implications are discussed in the August 8, 2006 memorandum from Bob Cortright to the Joint Subcommittee. Conversely, ODOT staff believes the rulings do not change or expand the existing law and are a correct and reasonable interpretation of how the TPR exception criteria apply to transportation improvements. ODOT's comments regarding DLCD's concerns are presented in the August 8, 2006 memorandum to the Joint Subcommittee from Craig Greenleaf.

¹ ODOT highway performance standards are measured in terms of maximum volume-to-capacity (v/c) ratios for peak hour operating conditions. Many local governments measure highway performance in terms of level-of-service (LOS).

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LCDC has requested that the Joint OTC/LCDC Subcommittee meet to consider the outcomes of the *Yamhill County* decisions and their potential implications on future land use and transportation decisions. To assist the Subcommittee in its understanding and consideration of thresholds and the *Yamhill County* decision, discussion at the August 15th meeting will focus on the following topics:

- Background on Goal Exceptions and Thresholds;
- The LUBA and Court of Appeals Decisions in *1000 Friends v. Yamhill County*;
- Summary of Agency Perspectives; and
- Options and Direction

B. Background on Goal Exceptions and Thresholds

ORS 197.732(1)(c) and Statewide Planning Goal 2 authorize local governments to adopt “exceptions” where “reasons justify why the state policy embodied in the applicable goals should not apply.” In essence, the exceptions process is a means by which local governments may allow uses that are otherwise not allowed by one or more statewide planning goals.

For transportation facilities on rural lands, the relevant exceptions standards are set out in OAR 660-012-0070. In pertinent part, they require local governments to (1) justify a transportation need, and (2) demonstrate that the need “cannot reasonably be accommodated” through alternative methods (e.g., improvements to existing transportation facilities) or locations (e.g., inside urban growth boundaries) that do not require goal exceptions.

“Thresholds” are the yardsticks established and applied by local governments to determine whether alternative “non-exception” methods or locations can “reasonably accommodate” the identified transportation need. Under OAR 660-012-0070(6), in determining the reasonableness of non-exception alternatives, local governments must:

- Address cost, operational feasibility, economic dislocation and other relevant factors; and,
- Justify the chosen thresholds in the exception².

Relevant Threshold Factors

As noted, OAR 660-12-0070(6) requires local governments to address cost, operational feasibility, economic dislocation and other relevant factors when determining the reasonableness of non-exception alternatives. These factors are typically applied as follows:

² OAR 660-012-0070(6) provides in pertinent part:

“To determine the reasonableness of alternatives to an exception under sections (4) and (5) of this rule, cost, operational feasibility, economic dislocation and other relevant factors shall be addressed. The thresholds chosen to judge whether an alternative method or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception.”

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Cost, as typically addressed in exceptions, includes costs associated with planning, designing and constructing the needed transportation improvement. Cost factors include costs for right of way acquisition and relocation rights, sub-grade preparations, drainage features, surfacing, structures, and roadside amenities. While the extent to which raw land costs outside a UGB are generally cheaper than raw land costs inside a UGB is not considered a reasonable basis for determining reasonableness (see OAR 660-012-0065(5)(a)), comparative rural and urban land acquisition costs may be a legitimate basis for determining reasonableness when existing development patterns, required dislocations, loss of access and other factors are of such a magnitude as to substantially increase urban land acquisition costs above their raw land values.

Operational feasibility includes such factors as roadway design and geometry, operational safety, and engineering within the context of the identified transportation need. Relevant considerations include whether roadway design and engineering alternatives can reasonably and safely accommodate the identified transportation need consistent with accepted design/engineering and safety standards and practices. Operational feasibility also typically includes whether an alternative can operate in a manner that meets the identified transportation need and transportation function.

Economic dislocation includes direct and indirect impacts to existing and planned economic uses. It considers impacts to commercial and industrial businesses that are directly displaced or otherwise adversely impacted through loss of parking or access, reduced lot size, loss of expansion opportunities or by other means. It also considers adverse impacts to agricultural or forestry operations, including loss of acreage for farming or timber harvesting, loss of direct access to fields or timber tracts, impacts to irrigation and drainage systems, impacts to spraying and other accepted farming or forestry practices, cost impacts, and the like.

Other relevant factors commonly involve environmental considerations, such as avoidance of significant wetlands, parks, wildlife refuges, recreational areas or threatened or endangered species. These factors typically reflect circumstances that are unique to a specific area.

Justification of Thresholds

As noted above whatever thresholds are selected must be justified in the exception. In the event a local government selects a non-exception alternative, the requirement to justify thresholds no longer applies.

C. The LUBA and Court of Appeals Decisions in 1000 Friends v. Yamhill County

On September 30, 2004, Yamhill County approved goal exceptions to authorize the Newberg-Dundee Bypass Project. The county adopted two exceptions: one for the bypass itself, and a second for the East Dundee Interchange. The purpose of the Bypass is to alleviate congestion on Oregon 99W, a designated Statewide highway and freight route, particularly in Dundee where the highway narrows from four lanes to two. The proposed bypass is an approximately 11 mile long, four-lane limited access highway extending through rural lands in Yamhill County. Exceptions to goals 3, 11 and 14 were required to locate the Bypass and the East Dundee interchange on rural land.

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In adopting these exceptions, Yamhill County considered whether the identified transportation need could be “reasonably accommodated” through alternatives not requiring goal exceptions, including transit improvements, transportation system management measures and improvements to existing transportation facilities. The County adopted five “thresholds” to judge the reasonableness of non-exception alternatives to accommodate the need. These thresholds related to (1) operational feasibility and minimum compliance with Oregon Highway Plan highway mobility standards (the OHP standards), (2) economic displacements, (3) community livability, (4) consistency with local adopted Transportation System Plan *** and community vision statements, and (5) highway safety.

In July, 2005, 1000 Friends and Columbia Empire Farms appealed the Newberg-Dundee Bypass exceptions to LUBA, challenging in particular aspects of the OHP standards. LUBA rejected this challenge, holding that OAR 660-012-0020(3)(a)(B) directs ODOT to establish standards for facility performance that it deems acceptable on state facilities, and here the use of mobility standards as thresholds was consistent with the state performance standards acknowledged in the OHP, which is part of ODOT’s TSP. LUBA concluded that 1000 Friends had not persuasively explained why ODOT and the County erred in using this as a threshold. *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA 640, 648-650, 652-653 (2005). LUBA explained in relevant part:

“ORS 197.180 and OAR 660-012-0015(1) require ODOT to ‘prepare, adopt and amend’ a state TSP that ‘shall identify a system of transportation facilities and services adequate to meet identified state transportation needs.’ OAR 660-012-0020(3)(a)(B) provides that in developing a state TSP ‘the transportation capacity analysis shall be consistent with standards of facility performance considered acceptable by the affected state or regional transportation agency.’ The OHP serves as the state TSP in compliance with those requirements.

“Highway mobility performance standards are used to plan for and manage the operations of highways. The OHP measures highway mobility performance and capacity by measuring the volume to capacity (V/C) ratio. The OHP assigns different mobility performance standards, depending on the classification of the highway. Higher classification highways utilized for a less congested flow of traffic have a higher mobility performance standard (lower V/C) than lower classification highways. The portion of Highway 99 at issue is classified as a statewide highway that is also a freight route. The county set the mobility performance standards for a statewide freight route as its performance threshold when evaluating alternatives.

“Friends argue that it was improper to use the thresholds in the OHP. However, they do not persuasively explain why. Presumably, some thresholds had to be used, and we do not see that the county was barred from using the standards in the OHP. Although petitioners do not agree with the consequences of using the OHP thresholds, we see no error in respondents utilizing those thresholds.

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“OAR 660-012-0070(6) provides that the reasonableness of non-exception alternatives is determined by the thresholds, in this case the OHP. The rule requires consideration of ‘cost, operational feasibility, economic dislocation and other relevant factors.’ As discussed in the first assignment of error, those thresholds include highway mobility standards. Petitioners appear to ignore those factors and to focus almost exclusively on impacts to agricultural lands. Unless a proposed alternative meets the identified OHP performance standards, the proposed alternative will not meet the identified transportation need and it does not matter whether the alternative would have a smaller impact on agricultural land.

“Although petitioners offered many alternatives that do not require new exceptions, those alternatives do not meet the operational and mobility thresholds identified in the OHP necessary to satisfy the identified transportation need. We recognize that allowing the county and ODOT to utilize the OHP thresholds to identify the relevant transportation need may effectively predetermine the outcome. As long as the thresholds are appropriate, however, as they are here, nothing in the goals, statutes or rules prevents the county and ODOT from taking that path.”

The Court of Appeals affirmed this aspect of LUBA’s opinion on appeal, concluding that petitioner had failed to explain why the way the County used the OHP standards was inappropriate. It stated in pertinent part:

“LUBA upheld the county’s choice of thresholds, and particularly the OHP standards. * * *. Before LUBA, ODOT and the county argued that reliance on the OHP standards was appropriate because a provision of the LCDC transportation planning rule, OAR 660-012-0020(3)(a)(B), requires the state to establish standards for transportation facility performance on state highways. That provision states that, for state and regional transportation facilities, ‘the transportation capacity analysis shall be consistent with standards of facility performance considered acceptable by the affected state or regional transportation agency[.]’ Because the OHP standards serve as the State’s [TSP], LUBA concluded that those standards constitute an appropriate measure of ‘reasonableness’ for testing alternatives to a goal exception under OAR 660-012-0070(4) and (5).

* * * * *

“Although petitioner suggests that the way the county applied the OHP standards as a threshold violates ORS 197.732(1)(c)(A) and OAR 660-012-0070(4), it does not ground its argument in the wording of either provision. Instead, petitioner’s argument is based on the premise that ‘farmland is different.’ Particularlly, petitioner

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contends that, because the heavy weight of state policy under Goal 3 is on the preservation of farmland over converting it to urban uses, 'the threshold set by the county is so restrictive that it does not comply with ORS 197.732(1)(c)(A) and OAR 660-012-0070(4).' That understanding, however, is not reflected in either ORS 197.732(1)(c)(A) or OAR 660-012-0070(4), and we decline to insert what the legislature and LCDC have omitted. * * *. Petitioner does not otherwise explain why the way the county used the OHP standards as a threshold was inappropriate. Accordingly, we affirm LUBA's conclusion that the county did not misuse the OHP standards as a 'reasonableness' threshold." Yamhill County, 203 Or App at 330-332.

D. Summary of Agency Perspectives

As previously noted, DLCD and ODOT staff has differing views on this topic and whether or not there is a need to take any additional steps. Both agencies have provided written material for the Joint OTC/LCDC Subcommittee to consider and this information is included in the August 15th meeting packet.

DLCD staff explains its concerns regarding the implications of the Yamhill County decision in greater detail and identifies what they believe are potential future threats that may arise in as future transportation project decisions are made by local jurisdictions. Staff has identified a list of approximately 50 transportation projects that either already have an adopted exception or have the potential to obtain an exception. DLCD's memo also includes possible amendments to the TPR that would list specific factors to guide local governments as they set thresholds for transportation projects.

ODOT staff explains how thresholds have been applied to past transportation projects and how the exception process has led to decisions that have either adopted or rejected exceptions for transportation projects. ODOT states it belief that the TPR exception standards have worked in the past and will continue to work as intended and that there is no reason to amend those standards at this time. This memo also points out existing policy in the Oregon Highway Plan and the TPR that ODOT believes provide the ability for ODOT and DLCD to fairly consider thresholds and impacts of future transportation projects. A more detailed discussion of the facts underlying the Yamhill County decision is also provided.

E. Options and Direction

Based the above information and the discussion from DLCD and ODOT staff, the Joint Subcommittee could consider the following questions:

- Is there a need to provide additional guidance in OAR 660-012-0070(6) for setting thresholds for goal exceptions?
- Has there been a problem with the TPR threshold standards as they have been applied to date, i.e., has the standard been misused?
- Will the Yamhill County decisions make exceptions more likely to occur in the future?

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While the issues before the Joint Subcommittee are complex, the options are straightforward. The Joint Subcommittee can:

- Recommend that LCDC retain the threshold standards as written.
- Recommend that LCDC consider additional TPR amendments to provide guidance on the adoption of thresholds for goal exceptions.

Whatever decision the Subcommittee reaches, its action should be reported back to LCDC at the next LCDC Commission meeting.