

means to promote land use changes that reduce reliance on the automobile. The term “other land use designations” is broad and allows metropolitan areas to count some flexibility in crafting a regional strategy.

Recommendation

No change is recommended.

D. Other Issues and Comments

Testimony from 1000 Friends of Oregon, Washington County and the City of Jacksonville raised issues that are not directly related to the TPR amendments. Each of these issues is addressed below.

1. Goal Exception Thresholds

In response to comments from Rob Zako, 1000 Friends of Oregon, the Commission asked that the department assess the possible implications of the LUBA decision in *1000 Friends v. Yamhill County* on acceptable or appropriate thresholds for goal exceptions for new transportation facilities.

Relationship to Current Rulemaking

During stakeholder interviews, stakeholders commented that the broader standards in Division 004, which were developed for site-specific uses like rural residential or rural commercial development, often did not apply in a logical or relevant manner to transportation facilities or were redundant of standards in OAR 660-012-0070. They recommended that the TPR standards be rewritten to be self-contained and standalone. The proposed changes to OAR 660-012-0070 do that, incorporating from Division 004 those standards that are relevant to transportation facilities and can apply in a logical manner.

The proposed amendments to Rule 0070 have focused exclusively on consolidation of existing goal exception requirements into the TPR. Neither the Joint Subcommittee nor the Work Group discussed the policy issue raised by 1000 Friends about whether the “threshold” provisions of the exceptions process should be reconsidered. The issue was not addressed in part because the LUBA decision was issued in July, after the Subcommittee and the Work Group had completed work on this issue. As noted above, the Court of Appeals recently issued a decision in this case, upholding LUBA’s as it relates to the goal exceptions threshold issue.⁴

While not discussed in the context of goal exceptions, concerns about ODOT’s mobility standards were a major issue in the stakeholder interviews conducted by Frank Angelo in August 2004:

⁴ The Court of Appeals remanded the decision to LUBA to address compliance with Division 004 on issues not related to the “goal exceptions threshold” question.

“The relationship between the TPR and other state transportation policy documents, particularly the Oregon Highway Plan (OHP) and Oregon Transportation Plan (OTP) needs to be clarified. This is particularly true when it involves the application of the OHP’s Highway Performance Standards (volume to capacity standards). There is the perception that the performance standards are “unrealistically high” and may, in fact, produce unintended consequences that run counter to achieving land use objectives for more efficient land use patterns.”

“Of all the Stakeholder comments, concerns regarding the applicability of performance standards / level of service standards were the most consistent. Comments related to this topic were fairly universal. These include:

- The standards are “unrealistically high” and they can lead to an “overestimation” of transportation system needs.
- Because standards are perceived to be too high, they may have the unintended consequence of making higher density (or development that implements “smart development” principles) more difficult by promoting development “where transportation capacity exists”, which is most often located in lower density areas on the urban fringe.
- More local flexibility in terms of determining performance standards is viewed as a positive because the locals will be better able to consider the land use context in which a development is proposed and size transportation facilities accordingly.
- While alternative performance standards are possible to obtain on State facilities through the application of Special Transportation Areas (STA) in the OHP, obtaining agreement with ODOT on the application of a STA has been difficult and time-consuming.
- One possible outcome of a region or local jurisdiction accepting a lower performance standard is that the jurisdiction could potentially be penalized when it comes to receiving state highway funding (i.e.. the money goes to capacity solutions to address congestion). Therefore, there is a perceived financial incentive to “have congestion”.

(Memo from Frank Angelo to LCDC & OTC, September 14, 2004)

In August 2005, partly in response to the stakeholder concerns discussed in Frank Angelo’s September 28, 2004 memo, the Oregon Transportation Commission amended the OHP mobility standards for most urban highway segments with speeds of 35 mph or less. The amendments relax V/C standards for affected highways by .05 — increasing the allowable v/c ratio from .80 to .85. This change allows accommodation of roughly 200 additional vehicles hourly through a typical urban intersection. The change applies to highways in non-metropolitan areas and designated freight routes in metropolitan areas.

In addition, existing provisions in the OHP allow MPOs and local governments to propose alternate mobility standards for specific areas or for the entire MPO or city.

OTC has approved amendments setting alternate standards for the Portland Metro area and the South Medford interchange.

Background on Exceptions Requirements and Thresholds

Major new roads on rural lands require reasons exceptions to Goals 3, 4, 11 and 14. The standards for approval of a “reasons” exception require local governments to establish the transportation need for a planned facility and demonstrate that the need cannot reasonably be met by alternatives that would not require a goal exception. Rule 0070 requires that local governments justify and set “thresholds” to guide decisions about whether or not non-exception alternatives can reasonably meet the identified transportation need.

- (4) To address Goal 2, Part II(c)(1) the exception shall provide reasons justifying why the state policy in the applicable goals should not apply. Further, the exception shall demonstrate that there is a transportation need identified consistent with the requirements of OAR 660-012-0030 which cannot reasonably be accommodated through one or a combination of the following measures not requiring an exception:
 - (a) Alternative modes of transportation;
 - (b) Traffic management measures; and
 - (c) Improvements to existing transportation facilities.
- (5) To address Goal 2, Part II(c)(2) the exception shall demonstrate that non-exception locations cannot reasonably accommodate the proposed transportation improvement or facility.
- (6) 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.”

LUBA and Court of Appeals Decisions in *1000 Friends v. Yamhill County*⁵

In July 2005, LUBA upheld Yamhill County’s approval of goal exceptions for the Newberg Dundee Bypass⁶. On December 21, 2005, the Court of Appeals upheld LUBA’s decision as it relates to the use of OHP standards as thresholds for goal exceptions. The relevant holding in the LUBA and the Court of Appeals decisions was that the county was justified in using the volume-to-capacity (v/c) standards in the

⁵ *1000 Friends v. Yamhill County*, LUBA 2004-169, et seq., July 21, 2005. On December 21, 2005, the Court of Appeals issued a decision upholding LUBA’s decision as it relates to the use of OHP standards as thresholds for goal exceptions.

⁶ Yamhill County adopted two goal exceptions, one for the bypass itself and a second to allow an intermediate interchange on rural lands between the Dundee and Newberg UGBs.

Oregon Highway Plan (OHP) as the threshold for deciding what the transportation need is and for judging whether non-exception alternatives are reasonable. (The applicable standard calls for achieving a .85 volume-to-capacity (v/c) ratio at the end of the 20-year planning period.)

Here is LUBA's conclusion:

"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." (opinion at page 10)

"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." (Opinion at page 10)

The Court of Appeals upheld LUBA's conclusion on the thresholds issue:

"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 rules OAR 66-012-0030(3)(a)(B) requires the state to establish standards for transportation facility performance on state highways..... Because the OHP standards serve as the state's Transportation System Plan (TSP) LUBA concluded that those standards constitute an appropriate measure of "reasonableness" for testing alternative to a goal exception under OAR 660-012-0070(4) and (5)"

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." (Opinion at pages 5-6)

Implications

At the conclusion of the December 1 hearing, the Commission requested that the department provide an analysis of implications of the use of the v/c standards in the OHP as goal exceptions thresholds. The department's analysis is provided below.

Summary

The department has reviewed the LUBA and Court of Appeals decisions with ODOT staff and representatives from the Department of Justice. In general, the department believes that the effect of the LUBA and court decisions is to make it more likely that local governments will be able to justify goal exceptions for bypasses, new interchanges or other major highway improvements.

Whether the ruling actually results in more exceptions being pursued and approved is requires further analysis and is subject to debate. Some goal exceptions would be justified whether or not the OHP standards are used as threshold criteria. (i.e. in some situations congestion will be so bad, any reasonable measure of congestion would lead to approval of the exception.) In addition, ODOT staff contends that other OHP policies that guide planning for bypasses and other major highway improvements (and a lack of funding for major improvements) will cause other exceptions that rely on v/c standards as a threshold not to be approved.

Effect of the Court Case

The effect of the LUBA and Court of Appeals decisions is that local governments may use the volume to capacity (v/c) standards in the Oregon Highway Plan (OHP) as a screen for determining whether non-exception alternatives reasonably meet transportation needs. While local governments will have to justify their decision to use the v/c standards, the LUBA and Court of Appeals decisions rely upon provisions in the TPR and OHP that will be generally applicable to other communities considering goal exceptions for bypasses or new interchanges. In essence, the Courts decision makes use of ODOT's v/c standards something close to a safe harbor for evaluating whether non-exception alternatives reasonably meet transportation needs. The effect may be broader, but this case relates specifically to v/c standards included in the Oregon Highway Plan.

Implications for Future Goal Exceptions

The effect of using the OHP v/c standards will vary depending on circumstances and the specific proposal under consideration. In some cases, future travel demand will be so great that non-exception alternatives cannot meet the expected need under any reasonable performance standard. In other situations, future traffic may only slightly exceed the OHP v/c standards. In those situations, i.e., where the exceedance is small, the v/c standards would screen out an option that would otherwise reasonably meet expected transportation needs.

The goal exceptions taken by Yamhill County for the Newberg-Dundee Bypass illustrate the range of possible outcomes. The Newberg Dundee bypass involved two goal exceptions: one exception for the bypass itself and a second exception to allow an intermediate interchange on rural land between Newberg and Dundee - the East Dundee

Interchange. The non-exception alternatives to the bypass involved widening Highway 99W and other measures that would significantly exceed v/c standards.⁷

By contrast, the non-exception alternatives to the East Dundee interchange were much closer to meeting the OHP v/c standards. With the bypass, the existing 3-lane section on Highway 99W through Dundee would meet the OHP v/c standard for the next 10-15 years. If an alternative mobility standard had been used as the threshold, the existing 3-lane section may have been found reasonable to meet needs throughout the planning period.⁸

The department believes that it will be easier to approve an exception in situations where non-exception alternatives come close to but do not quite meet v/c standards. Where local governments choose to use the OHP v/c standards as threshold criteria, they will be able to categorically reject alternatives that do not meet the v/c standards. This will narrow the scope of alternatives that must be considered during the exceptions process. In particular, local governments would not have to consider the following options as alternatives for a goal exception⁹:

- Adoption of alternative mobility standards as provided in the Oregon Highway Plan (i.e. allowing for somewhat lower highway performance than standards listed in Table 6 and 7 in the OHP)¹⁰ or ,

⁷ The exception for the bypass considered a transportation management alternative (TMA) that would make a series of TDM, transit, access management and local street improvements to address transportation needs in Newberg and Dundee. The TMA alternative would result in a 2025 v/c of .90 in Newberg and 1.25 in Dundee. Meeting the .75 v/c standard in the OHP would have required providing 8 lanes on 99W through Newberg and 7 lanes through Dundee.

⁸ The County and ODOT considered a Special Transportation Area (STA) alternative for 99W through Dundee with the bypass. The STA permits a lower v/c threshold of 0.95. The exception concluded that an STA was "not reasonable" because 0.95 v/c standard on 99W would be exceeded by the end of the planning period – the year 2025. For this reason, the exception evaluated widening of 99W through Dundee from 2 to 4 travel lanes. Thresholds other than complying with v/c standards were used to eliminate alternatives to the East Dundee interchange.

⁹ As noted below, OHP policies allow for adoption of alternative mobility standards and require ODOT to consider a range of minor improvements or other measures before proposing major improvements or new bypasses.

¹⁰ An ODOT study of possible highway improvements north of Bend illustrates this point. At the request of the OTC, ODOT Region 4 staff are evaluating possible alternatives to a planned interchange at Cooley Road, located at the north end of the Bend Parkway. Two of the alternatives under consideration are new bypasses connecting Highway 20 and Highway 97 on the north side of Bend across rural lands. Both would require goal exceptions. Either alternative is estimated to cost between \$100 and 200 million. In the supporting report to the OTC, ODOT dismissed consideration of lower mobility standards as an option for addressing needs in this area:

“Alternatives Considered But Dismissed

The four concepts outlined above are being carried through the alternatives evaluation process. However, in addition to these concepts, there were additional alternatives considered by the PMT but dismissed after preliminary screening due to infeasibility from a cost, construction, and/or compatibility standpoint. The dismissed alternatives included:

- Adoption of non-exception improvements or measures that would address most but not all of the expected transportation demand - even where the alternative improvements would be more cost-effective than the proposed exception.

In addition, non-exception alternatives that are evaluated will generally have significant community impacts. The major effect of having to meet the v/c standards is that road capacity must be added in sufficient quantity so that projected peak hour congestion 20 to 25 years into the future is avoided. In many communities, meeting these standards without an exception will require some combination of additional lanes on major streets or new streets within the urban area. An example would be the widening of an existing five-lane highway to seven lanes (i.e. by adding a new travel lane in each direction.) The cost and community impact of these alternatives is often considerable, and local governments typically consider them to be unacceptable.¹¹

Over the last 10 years a number of communities around the state have considered or made proposals for highway bypasses, new interchanges or some other major highway improvement requiring a goal exception. The department believes that use of the v/c standards as a screening criterion could allow many of these communities to successfully justify a goal exception.

Effect of Oregon Highway Plan Policies

ODOT staff question whether use of v/c standards would necessarily result in additional interchanges or bypasses being included in local plans. They note that ODOT has not supported bypasses in several communities that have proposed them (Seaside and Lincoln City, and Bend¹² for example.)

ODOT staff also note that the TPR requires that local governments must coordinate planning for highway improvements with ODOT. The Oregon Highway Plan (OHP) includes policies that guide ODOT decisions about planning for bypasses and other major improvements.

..... Lower mobility standards - dismissed because of inability to address transportation mobility and safety needs and provide sufficient capacity over the planning horizon.”

(Memo to the Project Management Team from Sonia Hennem et al., Kittelson & Associates, November 21, 2005, page 9)

¹¹ As noted in the previous footnote, meeting the .75 v/c standard in the OHP would require widening 99W to 8 lanes in Newberg and 7 lanes in Dundee.

¹² At its December 13, 2005 meeting, OTC received a status report on long-term options to deal with traffic issues in Bend, at the northern end of the Bend Parkway. Staff advised that there was strong local interest in an eastside bypass as a solution to the area's transportation needs and asked for Commission guidance. The OTC explicitly directed that an eastside bypass not be considered and that the area should instead plan to make do with improvements to the existing roadway system for at least the next 20 years.

When ODOT applies for a goal exception in order to construct a new road or interchange, it must show that the improvement is consistent with the Oregon Highway Plan (OHP). OHP policies applicable to major highway improvements include:

- Policy F- Highway Mobility Policy. ODOT must apply its highway mobility standards over a 20-year planning horizon when engaged in system planning.
- Policy G -Major Improvements. Directs ODOT to improve system efficiency before adding more capacity or new facilities.
- Policy H - Bypass Policy. This policy requires that new bypasses be constructed as limited access freeways or expressways with full access control. Bypasses must also be consistent with Policy G, the major improvement policy, and must include management plans for interchanges and local jurisdictions must adopt land use measures that protect the regional and statewide mobility function of the bypass and interchanges.

ODOT staff believes that application of these policies would, in many situations, prevent local governments from including bypasses or new interchanges in their plans, even where they might be able to justify a goal exception using the OHP v/c standard as a threshold.

Options

As noted above, LUBA and the Court of Appeal's decisions and the issue of appropriate thresholds for reasonable alternatives were not discussed by either the Joint Subcommittee or the Work Group. Since this issue is significant and of interest to a number of stakeholders, the department would recommend seeking additional public review and input if the Commission is interested in addressing this issue.

The proposed amendments to Rule 0070 do not change portions of the rule related to specifying thresholds and could therefore reasonably be adopted at this time.

The department has identified five options for Commission action on this issue:

Option 1: Take no action.

The effect of this option would be to leave the LUBA ruling in place as the principal guidance to local governments on appropriate thresholds for goal exceptions. The department has described the implications of this option above.

Option 2: Continue the existing rule hearing and process to consider this issue further.

This option would involve continuing the rule hearing to the Commission's March meeting to decide whether to address the thresholds issue further. If at the March meeting the Commission decides that additional amendments should be considered, the department would recommend reconvening the Work Group and that the Joint Subcommittee discuss the issue and suggest possible rule amendments. Reconvening the

Joint Subcommittee would require agreement from the OTC to undertake this additional work.

Option 3: Conclude current rulemaking and defer to a future meeting of the Joint OTC-LCDC Subcommittee

The Joint Subcommittee is scheduled to meet again in 9 to 12 months to review progress in implementing the Rule 0060 amendments. The Commission could direct that the Joint Subcommittee review the issue and provide a recommendation at that time.

Option 4: Conclude current rulemaking and request the department to provide a separate recommendation on this issue.

This option would direct the department to do further analysis of this issue outside of the current rulemaking process and present an additional analysis of the issue and possible options to the Commission for its consideration at a later date.

Option 5: Conclude current rulemaking and schedule a joint OTC/LCDC meeting to review and discuss the OHP mobility standards and their relationship to land use decisions.

This option would defer further discussion of this issue and possible rulemaking to a broader discussion between the Commission and the Transportation Commission about mobility standards and their use in land use and transportation planning decisions.

Recommendation

The department recommends the Commission proceed with Option 2.

The department believes that additional time is needed to present a complete analysis of the likely implications of the Court and LUBA decisions. Option 2 would allow the Commission to proceed with adoption of current amendments and give the Commission additional time to more fully understand implications of the LUBA and Court of Appeals decisions and decide on an appropriate course of action. The Commission could, based on additional analysis, either adopt further rule amendments or close the rulemaking process.

Continuing the existing rulemaking process would save time and resources that would otherwise be required to start a new rulemaking. The department notes that the Commission has limited resources to address important policy issues and is concerned that starting a new rulemaking process, under newly adopted rulemaking requirements would detract from the department and Commission's ability to deal with other issues.