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DELIVERED VIA ELECTRONIC MAIL

Date: August 14, 2006

From: Rob Zako, Transportation Advocate

To: Joint OTC/LCDC Transportation Subcommittee

Cc: Interested Parties

Re: **Goal Exceptions for Transportation Improvements on Rural Land**

Dear subcommittee members:

We appreciate that LCDC is continuing rulemaking around goal exceptions for transportation improvements on rural lands, in part in response to comments we have offered on the subject.

I regret 1) that I was on vacation last week and have not had time to review the materials for your August 15 meeting in detail and 2) that other commitments Tuesday morning will prevent me from joining you in person at your meeting. Thus here I will offer only brief and general comments and will follow up with more detailed comments later.

First, ORS 197.732(3)(b) directs LCDC to “adopt rules establishing ... [u]nder what circumstances particular reasons may or may not be used to justify [a reasons] exception.”¹

Second, the existing language in the Transportation Planning Rule effectively fails to establish “under what circumstances *particular* reasons may or may not be used to justify” a goal exception for transportation improvements on rural lands (emphasis added). Rather the existing language effectively delegates this responsibility to local governments by authorizing local governments broad discretion in setting thresholds reasonable alternatives must meet.² Thus it is appropriate that LCDC is continuing rulemaking on this issue in order to comply with the direction of ORS 197.732(3)(b).

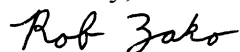
Third, he or she who sets the thresholds to a great extent controls the discussion over alternatives and often determines the nature of the preferred alternative if not necessarily the precise alternative.³ Moreover, the open-ended ability of local governments to set thresholds effectively provides a huge “loop hole” for getting around particular statewide planning goals. For example, if a local government includes cost as a threshold that must be met, most likely this decision “trumps” Goals 3 and 4, as farm and forest lands outside UGBs are almost always less expensive to acquire for right-of-way than lands inside UGBs.

Fourth, the current system is not serving Oregon well. The intent of ORS 197.732 is to provide a “safety valve” when it isn’t possible to meet all goals simultaneously. In such cases, it makes sense that one must balance different goals and arrive at a decision that in some sense best does so. This sort of balancing is appropriate and should be done in a manner that allows for wide public participation in discussing the importance of different goals and how to best balance these. Unfortunately, in too many cases, for example, involving large state highway projects, this

discussion never happens at the local level and is frustrated at the appeals level. He or she who sets the thresholds to a great extent controls the discussion and effectively preempts the kind of discussion about balancing goals that should occur but too often doesn't occur. Rather, alternatives that one would otherwise consider to be "reasonable" are discounted outright if they don't meet the thresholds (which themselves might or might not be "reasonable") adopted by the local government.

Finally, at least a first glance, the sort of approach proposed by DLCD staff in a memo dated August 8, 2006 re "Additional Guidance on Thresholds for Goal Exceptions," in particular, the sort of proposed amendments to OAR 660-012-0070(6), goes a long way towards satisfying the requirement in ORS 197.732(3) that LCDC adopt rules establishing "under what circumstances particular reasons may or may not be used to justify" a goal exception for transportation improvements on rural lands. Once we have had time to review this memo and other documents in greater detail, we will offer more detailed comments.

Sincerely,



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¹ ORS 197.732(1) provides that:

- (1) A local government may adopt an exception to a goal if ...
 - (c) The following standards are met:
 - (A) Reasons justify why the state policy embodied in the applicable goals should not apply;
 - (B) Areas which do not require a new exception cannot reasonably accommodate the use;
 - (C) The long term environmental, economic, social and energy consequences resulting from the use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located in areas requiring a goal exception other than the proposed site; and
 - (D) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

ORS 197.732(3) provides that:

- (3) The commission shall adopt rules establishing:
 - (a) That an exception may be adopted to allow a use authorized by a statewide planning goal that cannot comply with the approval standards for that type of use;
 - (b) Under what circumstances particular reasons may or may not be used to justify an exception under subsection (1)(c)(A) of this section; and
 - (c) Which uses allowed by the applicable goal must be found impracticable under subsection (1) of this section.

² OAR 660-012-0070(6) provides:

- (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.
 - (a) In addressing sections (4) and (5) of this rule, the exception shall identify and address alternative methods and locations that are potentially reasonable to accommodate the identified transportation need.
 - (b) Detailed evaluation of such alternatives is not required when an alternative does not meet an identified threshold.
 - (c) Detailed evaluation of specific alternative methods or locations identified by parties during the local exceptions proceedings is not required unless the parties can specifically describe with supporting facts why such methods or locations can more reasonably accommodate the identified transportation need, taking into consideration the identified thresholds.

³ In *1000 Friends of Oregon v. Yamhill County*, LUBA 2004-169 et seq., July 21, 2005, LUBA opined:

“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 12.)