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From: Rob Zako [rob@friends.org]
Sent: Monday, August 29, 2005 3:50 PM
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Subject: TPR - Concerns with 0070 amendments re goal exceptions

Dear members of the Joint LCDC/OTC Transportation Subcommittee and TPR Work Group (and staff, consultants and other interested parties),

At the recent TPR Work Group meeting on August 2 (the first such meeting we were able to participate in), we flagged that we have concerns with the proposed amendments to Section 0070 of the TPR and to Division 4 concerning goal exceptions for transportation improvements on rural lands.

Our attached memo details our concerns and argues for revising the proposed amendments further before proceeding to formal rulemaking.

We hope that we can discuss the issues we raise in our memo in greater detail at the next TPR Work Group meeting on September 9.

We look forward to working with the subcommittee and the work group to develop rules that faithfully implement the intent of statute and goal.

(Note to staff: Please include the attached memo in the packet for the September 9 meeting. We would appreciate including time in the agenda to discuss the issues we raise here.)

Sincerely,
 Rob

P.S. And if you are feeling like we have been raising a lot of concerns of late, it is because the proposed amendments to the TPR are not merely "housekeeping" amendments but raise important policy issues for the State of Oregon. Such issues deserve a thorough review and discussion by interested parties. 1000 Friends of Oregon looks forward to continuing to engage in such discussions around the TPR and the state's approach to transportation planning.

—
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On Saturday, October 15th, 1000 Friends of Oregon will celebrate its 30th Anniversary with a gala dinner at the Oregon Convention

8/30/2005



Date: August 29, 2005

From: Rob Zako, Transportation Advocate

To: Joint LCDC/OTC Transportation Subcommittee
TPR Work Group

Cc: DLCD and ODOT staff and consultants
Other interested parties

Re: **Proposed amendments to TPR and Division 4 concerning goal exceptions for transportation improvements on rural lands**

Executive Summary

In adopting rules to implement ORS 197.732 and Goal 2, Part II for goal exceptions for transportation improvements on rural lands, LCDC should ensure that the Legislature's (and LCDC's own) preference for goal compliance is upheld. The proposed amendments to Section 0070 of the TPR and Division 4 (as well as some provisions of the existing rules) do not encourage goal compliance, as required by statute and goal, but rather appear to be designed to *facilitate exceptions* for transportation improvements on rural lands, and thus should be rejected. We look forward to working with the subcommittee and the work group to develop rules that faithfully implement the intent of statute and goal.

Dear members of the Joint LCDC/OTC Transportation Subcommittee and TPR Work Group,

We regret that other commitments during the legislative session prevented us from making detailed comments earlier on the proposed amendments to the Transportation Planning Rule and OAR Chapter 660, Division 4 concerning goal exceptions for transportation improvements on rural lands. We recognize you have since moved on to other issues with the TPR.

Nevertheless, as we have serious concerns about these proposed amendments, we want to offer them now for your consideration—when there is a better opportunity to discuss our concerns—rather than wait for formal rulemaking hearings before LCDC.

We hope that at your meetings on September 9 and 23 you will discuss the issues we raise here.

In summary, we support the effort to clarify the rules concerning goal exceptions for transportation improvements on rural lands.

We also agree that goal exceptions for transportation and other linear facilities are different from goal exceptions for site-specific developments and deserve special consideration.

But we are concerned that the proposed amendments to the TPR and OAR Chapter 660, Division 4 fail to faithfully implement the public policy embodied in statute and statewide planning goals, in particular, ORS 197.732 and Goal 2, Part II.

Strong preference for goal compliance

It is the clear desire of the Legislature that *all* state and local land use plans, regulations and programs comply with *all* statewide planning goals.¹

Nevertheless, the Legislature allows a local government to adopt an exception to a statewide planning goal when, *inter alia*, “reasons justify why the state policy embodied in the applicable goals should not apply.”²

LCDC echoed the Legislature in adopting Goal 2, Part II concerning exceptions.³

¹ ORS 197.250 (“Compliance with goals required”) provides:

Except as otherwise provided in ORS 197.245, all comprehensive plans and land use regulations adopted by a local government to carry out those comprehensive plans and all plans, programs, rules or regulations affecting land use adopted by a state agency or special district shall be in compliance with the goals within one year after the date those goals are approved by the Land Conservation and Development Commission.

² ORS 197.732 (“Goal exceptions; criteria; rules; review”), subsection (1) provides:

A local government may adopt an exception to a goal if:

- (a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;
- (b) The land subject to the exception is irrevocably committed as described by Land Conservation and Development Commission rule to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or
- (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.

(Emphasis added.)

³ Echoing ORS 197.732(1), Goal 2, Part II (“Exceptions”) provides:

A local government may adopt an exception to a goal when:

- (a) The land subject to the exception is physically developed to the extent that it is no longer available for uses allowed by the applicable goal;
- (b) The land subject to the exception is irrevocably committed to uses not allowed by the applicable goal because existing adjacent uses and other relevant factors make uses allowed by the applicable goal impracticable; or
- (c) The following standards are met:

But the strong preference is for complying with *all* statewide planning goals. An exception to a goal may be taken, but only when there is *compelling reason* why some other identified public aim outweighs the public aims embodied in the adopted statewide planning goals. Exceptions should be a “last resort” when it is otherwise not possible to comply with *all* statewide planning goals and at the same time achieve other essential public aims.

It is the long-established and well-settled law of this state that the standards for goal exceptions should be demanding.⁴

In adopting rules to implement ORS 197.732 and Goal 2, Part II for goal exceptions for transportation improvements on rural lands, LCDC should ensure that the Legislature’s (and LCDC’s own) preference for goal compliance is upheld.

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- (1) Reasons justify why the state policy embodied in the applicable goals should not apply;
 - (2) **Areas which do not require a new exception cannot reasonably accommodate the use;**
 - (3) The long-term environmental, economic, social and energy consequences resulting from the use of 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
 - (4) The proposed uses are compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts.

(Emphasis added.)

⁴ For example:

“Overall, the statutory standards are difficult to satisfy and, therefore, favor compliance with the goals, rather than approval of exceptions to the goals. Further, the standards for reasons exception treat alternative sites that require a goal exception and alternative sites that do not require a goal exception quite differently. The standards favor the chosen exception site over other sites that also require a goal exception. On the other hand, we believe the standards express a preference for using an alternative site that does not require a goal exception. If such a site is a reasonable alternative for the proposed use, a goal exception is not justified.”

Pacific Rivers Council, Inc. v. Lane County, 26 Or LUBA 323, 344 (1993) (footnotes and citations omitted).

For example:

“Goal 2, Part II provides a procedure and standards by which goal exceptions may be taken by local governments. The process serves as a safety valve when ‘it is not possible to apply the appropriate goal to the specific properties or situations.’ LCDC Publication, Common Questions About the Exceptions Process, at 1 (March 10, 1978; amended May 3, 1979). However, this mechanism for conflict resolution may not be used as a means by which to substitute local policy for the policies embodied in the statewide planning goals. See *Teamsters v. Hood River Cty.*, 2 LCDC 83, 107 (1979). Accordingly, an exception is authorized only on a showing that need, alternatives, consequences and compatibility have been considered and that ‘compelling reasons and facts’ demonstrate that goal compliance is practically impossible. *Still v. Board of County Comm’rs*, 42 Or App 115, 600 P2d 433 (1979), *rev. den.* (1980).”

Shadybrook Environ. Protect. Assn. v. Wash. Co., 61 Or App 474, 481 (1983).

But the proposed amendments to Section 0070 of the TPR and Division 4 (as well as some provisions of the existing rules) do not encourage goal compliance, as required by statute and goal, but rather appear to be designed to *facilitate exceptions* for transportation facilities on rural lands:

- **Deem compliance with statute and goal:** The proposed amendments declare that compliance with the revised Section 0070 of the TPR is “deemed” to be equal to compliance with ORS 197.732 and Goal 2, Part II. See proposed amendments to OAR 660-012-0070(2).
- **Limit applicable rules:** The proposed amendments limit the rules applicable to transportation improvements on rural lands to just Section 0070 of the TPR. See proposed amendments to OAR 660-012-0070(2).
- **Substituting policy by setting thresholds:** Proponents of a particular exception are allowed to define “reasonable” for the purposes of evaluating alternatives by setting thresholds that must be met by any acceptable alternative. The proposed rule does not include specific language that ensures that the thresholds are not merely a means for the proponent of a particular improvement to substitute their own policy aims for those embodied in the statewide planning goals. See proposed amendments to OAR 660-012-0070(6).
- **Standard of review for non-exception alternatives:** A “detailed evaluation” of non-exception alternatives is not required unless such alternatives have been demonstrated to “more reasonably accommodate the identified transportation need” than the proposed alternative. Such a standard obviously gives the proposed exception alternative an advantage over non-exception alternatives, which is *directly contrary* to the clear requirement of the statute (ORS 197.732) and goal (Goal 2, Part II). Moreover, this standard for evaluating non-exception alternatives transfers to the opponent of the proposed exception alternative the burden to show non-compliance of the proposed exception alternative with the standard, rather than placing the burden of demonstrating compliance of the proposed exception alternative with the standard on the proponent and the decision maker. See proposed amendments to OAR 660-012-0070(6).
- **Standard of review for other exception alternatives:** A “detailed evaluation” of other exception alternatives is not required unless such alternatives have been demonstrated to have significantly fewer adverse effects than the proposed exception alternative. This standard for evaluating other exception alternatives transfers to the opponent of the proposed exception alternative the burden to show non-compliance of the proposed exception alternative with the standard, rather than placing the burden of demonstrating compliance of the proposed exception alternative with the standard on the proponent and the decision maker. See proposed amendments to OAR 660-012-0070(7).
- **Conflict of interest:** Proponents for exceptions for transportation improvements on rural lands have been involved in writing the proposed rules—a clear conflict of interest.

For all these reasons, the proposed amendments to Section 0070 of the TPR and Division 4 are *contrary* to the applicable statute and goal and should be rejected by LCDC.

We are happy to work with members of the subcommittee and work group to craft amendments that are consistent with the applicable statute and goal. We look forward to a full discussion of these issues at the September 9 TPR Work Group meeting before endeavoring to propose specific language.

Linear facilities

One of the stated reasons for considering amendments to the rules for goal exceptions for transportation improvements on rural lands is that “stakeholders indicated that the very broad standards in Division 4, which were developed for site-specific uses, often do not apply in a logical or relevant manner to linear facilities like transportation facilities, and they suggested that the TPR exception standards be rewritten to be self-contained and stand alone.” (Memo from Frank Angelo, November 30, 2004.)

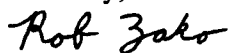
We agree that the linear nature of transportation improvements warrants special rules, but we disagree with the direction the proposed rule changes have taken.

First, a transportation improvement such as a bypass can be 5, 10 or even more miles long. What happens at one end of the improvement might or might not have much effect on what happens at the other end of the improvement. Thus it is possible that a goal exception might be necessary for one portion of the facility but not necessarily for other portions of the facility. For example, it may be possible to place an interchange serving an urban area within the UGB for that urban area but not possible to place a segment between interchanges entirely within the UGB. Such considerations suggest that special rules for transportation improvements should address their linear nature and the possibility thus afforded for better goal compliance than might be possible with a site-specific use.

Second, in some cases the “need” to take an exception for a transportation improvement on rural lands reflects a failure to plan for that facility (or more broadly for meeting the transportation need) in a manner that does not require goal exceptions. As one looks to “clarify” the rules for taking goal exceptions for transportation improvements on rural lands, LCDC would do well to also clarify rules intended to reduce the likelihood that such exceptions will actually be needed. For example, LCDC should strengthen portions of the TPR related to coordinating land use and transportation planning to ensure that transportation needs within urban areas can be met by transportation facilities within those urban areas.

We raise these broader concerns now, but look forward to the ensuing discussion before pursuing such concerns in detail.

Sincerely,



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