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January 10, 2010

Land Conservation and Development Commission  
635 Capitol Street NE, Suite 150  
Salem, OR 97301-2540

Re: January 12 Commission Meeting; Agenda Item 1; Public Comment  
LCDC should Disengage after decision in *Rudell v. City of Bandon* (LUBA 2010-037)

Dear Commissioners:

This LUBA opinion is discussed at page 2 of the Director's Report. With our May 27, 2010 letter (copy attached), we asked the Commission not to intervene in this LUBA appeal. The Commission intervened anyway. That was a mistake. It wasted a lot of public resources; it is time to end the waste. We ask the Commission to direct the DLCD to disengage.

Bandon denied my clients' application for a house behind the foredune. The denial was for about a dozen reasons, with support from the DLCD. LUBA remanded, saying none of the reasons was adequate for a denial. See attached LUBA opinion. The DLCD carried the LUBA briefing load on the key issue – location of the foredune. DLCD has provided the horsepower for the city's erroneous position thus far.

This matter is about locating the foredune. Our May 27 letter explained that the proposal respects the foredune and is based on previous statements by the DLCD and the city's own experts about the location of the foredune. We said there is no evidence to support the new City/DLCD position that the foredune is being impacted. LUBA agreed. “[W]e agree with petitioners that its [the city's] finding that the entire property is located on a foredune is inadequate and is not supported by substantial evidence in the record \* \* \* \*” LUBA decision at 8, line 13.

The DLCD's misguided involvement in this matter, before and during the LUBA litigation, has cost my clients tens of thousands of dollars. The DLCD has give the city staff bad advice about the state program, by encouraging the city to rely on “newer and better” information about the foredune, rather than acknowledged plans and regulations. The DLCD really should be supporting my clients' position on this application. Failing that, the agency should step aside, rather than once again being part of the gauntlet my clients have to run in the process before the city.

Sincerely,

Bill Kloos

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May 27, 2010

Land Conservation and Development Commission  
635 Capitol Street NE, Suite 150  
Salem, OR 97301-2540

Re: Applicant's Testimony Regarding Agenda Item 4. Review of director's decision to intervene in *Rudell v. City of Bandon* (LUBA 2010-037)

Dear Commissioners:

This testimony is submitted on behalf of Robert and William Rudell, the applicants and petitioners in *Rudell v. City of Bandon* (LUBA 2010-037). The applicants recommend that the commission **deny** the director's request for the department to continue as an intervenor in the LUBA appeal.

Simply put, this is a terrible decision for the commission to waste scarce state resources defending. While the application concerns LCDC Goal 18 (Beaches and Dunes) and other land use provisions, the positions and interpretations made by the city in its decision are contrary to the express language of the Goal and implementing code language, contrary to established case law, and are unsupported by evidence in the record. This is not the type of decision LCDC should put its reputation on the line defending.

The remainder of this testimony will address specific appeal factors the commission must consider under OAR 660-001-0230(3), using examples drawn from the issues identified in the DLCD staff report.

**(a) Whether the case will require interpretation of a statewide planning statute, goal or rule.**

While staff is correct that the case involves Goal 18 (Beaches and Dunes), Goal 10 (Housing) and other relevant statutes and rules, it does not involve the type of detailed interpretation of provisions that would benefit from DLCD participation. Most of the issues on appeal will go to the adequacy of the findings, the evidence in the record and the application of established case law, not on groundbreaking interpretations of goals or statutes.

LCDC should not authorize DLCD participation in the appeal.

**(b) Whether a ruling in the case will serve to clarify state planning law.**

A ruling in this case will not serve to clarify state planning law on the issues DLCD staff

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contends are implicated by this appeal. The reason for that is that the positions taken by the city on key issues are not the positions DLCD should be taking regarding the relevant state planning law. Here are a few examples:

Throughout the proceeding city staff has contended that the foredune was established by the boundaries of a Local Improvement District that follows orthogonal street and property lines. The Planning Commission agreed with that interpretation. The City Council agreed with the Planning Commission's interpretation, but then also said that the elevation of the toe of the foredune is established at the 16 foot elevation mark. There is no evidence in the record of any expert saying that the toe of the foredune is at the 16 foot elevation.

The applicants examined four different foredune delineations for the dune along the property and used the most conservative delineation, the one with the broadest footprint in its proposal. That delineation is shown on the attached site plan, Exhibit A. Three of those delineations were prepared for the city, not commissioned by the applicants. DLCD has indicated that one of those delineations represents the best delineation of the foredune (the Millennium Consulting delineation). The preparer of that delineation testified in the proceedings for this application that the proposed dwelling is not on the foredune. Another of the delineations discusses vegetation that cannot exist on a foredune being located in the area where the house is proposed to be located. Yet the decision does not address that issue.

If DLCD is to defend the city's decision it must refute a delineation the department has stated is accurate, and it must either take the position that the toe of the foredune can be established with no evidence in the record (the 16 foot elevation) to support that conclusion, or that a foredune can be determined through an LID process that takes no consideration of Goal 18 in establishing its boundaries. Does Goal 18 justify either of the later positions? Does LCDC want DLCD to get in the middle of this mess? The answer should be no.

As another example, the city has chosen to utilize a study as evidence of potential ocean hazards in the South Jetty Area, effectively ignoring the acknowledged planning documents that identify the entire South Jetty Area as a coastal high hazard area and that proscribe how to deal with it. That position is contrary to LUBA's decision in *Southern Oregon Pipeline Information Project v. Coos County*, 57 Or LUBA 44 (2008)(*SOPIP I*), which addressed the issue of the proper weight to be given to new evidence of ocean hazards that is submitted during a review of a land use permit application. LUBA's response was that coastal hazards is a Goal 7 issue and that when new hazard inventory information becomes available, DLCD must review the information and, if appropriate, notify the local government with instructions to amend their plan and code. Thus, the ultimate response to new "evidence" of coastal hazards is to change the plan and code before imposing new standards on applications, not to directly apply that new "evidence" as the city did in this instance. The commission should not be authorizing the department to defend decisions that are flatly contrary to established caselaw.

I could continue because there are many more examples, but the point is already made. This is

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not the type of decision the department should expend its resources defending.

**(f) Whether there is a better way to accomplish the objective of the appeal, such as dispute resolution, enforcement proceedings or technical assistance.**

There is a better way to accomplish the objective of the appeal, that is for the department to provide technical assistance to the city to amend its plan and code, in the manner prescribed in *SOPIP I*, to take into account any "new information" the department believes should influence the city's Goal 18 implementing regulations. The city has already started this process. In the meantime, the decision at LUBA is not going to establish any major Goal 18 precedent. At best, LUBA will remand the decision for the city to revisit the evidence and its Goal 18 analysis.

As is demonstrated above, this is not the type of decision that DLCD should be defending. While the issues involved seem facially compelling, the manner in which the decision addresses those issues is indefensible. The city realizes this and has come to you asking for your help in defending positions that the Department should be ashamed to support. You should politely say, "No thank you." and let the city defend its own decision. We urge you to deny the director's request to continue as an intervenor in LUBA 2010-037.

Thank you for your consideration.

Sincerely,

Dan Terrell

cc: clients



1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision by the city denying an application for a conditional use  
4 permit to site a single family dwelling.

5 **FACTS**

6 Petitioners applied for site plan and conditional use approval to construct a 2,490  
7 square foot single family dwelling on their two contiguous lots that together total  
8 approximately 8,850 square feet. The property is zoned Controlled Development 2 (CD-2)  
9 and is within the city's Shoreland Overlay (SO) zone. The CD-2 zone allows single family  
10 dwellings as permitted uses, while the SO zone allows dwellings as conditional uses.

11 The subject property is located north of Sixth Street at its western terminus. Sixth  
12 Street is unimproved for most of the subject property's street frontage along Sixth Street,  
13 except for a 15-foot section improved at the southeastern corner. The eastern boundary line  
14 of the subject property abuts the western boundary of the South Jetty Sewer Improvement  
15 District (LID). The property slopes upward from east to west from a low elevation of 13 feet  
16 above mean sea level at the eastern boundary to a high elevation of 17.5 feet at the western  
17 boundary, on the slopes of a dune. The western boundary of the property abuts property that  
18 is zoned Natural Resource/Open Space, and the beach and Pacific Ocean lie to the west of  
19 that property. The property is located outside of the 100-year floodplain based on a Letter of  
20 Map Amendment (LOMA) issued by the Federal Emergency Management Agency (FEMA).  
21 The soils on the property are fine surface sand over a stable-base sand, and the property  
22 contains dune grass, a lodge pole pine tree, and shrub plants.

23 Petitioners proposed to construct the dwelling on an elevated pile foundation, with a  
24 flow through area beneath the dwelling, engineered to FEMA standards for breaking wave  
25 and debris impact forces on the piles. The planning commission denied the application, and  
26 petitioners appealed the denial to the city council. The city council affirmed the planning

1 commission's denial of the application and adopted supplemental findings in support of the  
2 denial. This appeal followed.

3 **FIRST, TWELFTH, AND FOURTEENTH ASSIGNMENTS OF ERROR**

4 **A. Introduction**

5 The petition for review is confusingly organized, with repetitive assignments of error  
6 and arguments scattered throughout its 75 pages. We attempt to resolve several related  
7 assignments of error in this section by addressing the central question presented in those  
8 assignments of error and repeated elsewhere in the petition for review: whether the city  
9 correctly determined that petitioners' property and the section of Sixth Street that abuts  
10 petitioners' property are located on a "foredune." That is because applicable provisions of  
11 the Bandon Municipal Code (BMC) prohibit structures from being located on a foredune.  
12 The answer to the question of the location of the foredune resolves or partially resolves the  
13 first, twelfth, and fourteenth assignments of error.

14 **B. Location of the Foredune (BMC 17.24.040(D))**

15 BMC 17.24.040(D) provides in relevant part that "[n]o structures shall be located on  
16 identified foredunes." Statewide Planning Goal 18 (Beaches and Dunes) contains similar  
17 language prohibiting structures on a foredune.<sup>1</sup> BMC 16.42.010 defines "foredune" as "the  
18 dune closest to the high tide line that extends parallel to the beach. The foredune can be  
19 divided into three sections: the frontal area (closest to water); the top surface; and the lee or  
20 reverse slope (backside)." The Statewide Planning Goals do not contain a specific definition  
21 of "foredune," although the Goals define "active foredunes," "conditionally stable  
22 foredunes," and "older foredunes."<sup>2</sup> Neither the BMC nor the Statewide Planning Goals

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<sup>1</sup> BMC 17.24.040(D) implements Statewide Planning Goal 18 (Beaches and Dunes). Goal 18 prohibits residential development on "\* \* \* foredunes which are conditionally stable and that are subject to ocean undercutting or wave overtopping \* \* \*."

<sup>2</sup> The Statewide Planning Goals contain the following definitions:

1 specify how the boundaries of a foredune are to be identified, and nothing in the Bandon  
2 Comprehensive Plan (BCP) or the BMC purport to contain an inventory or other  
3 identification of the location of foredunes within the city. The city determines the location of  
4 “identified foredunes” as used in BMC 17.24.040(D) on a case by case basis.

5 Five separate studies addressing the location of the foredune were introduced into the  
6 record. Record 295-96. According to petitioners, in preparing the necessary application  
7 materials, including site plans and elevation maps, petitioners relied on one of those studies,  
8 the New Millennium Consulting study, to identify the location of the foredune and to  
9 calculate the necessary setbacks from the foredune on their submitted drawings.<sup>3</sup> Petitioners  
10 also hired a surveyor to prepare a survey of the entire property, identify the location of the  
11 foredune on the survey, and to locate that foredune with stakes.

12 Both the planning commission and the city council denied the application in part  
13 based on their conclusion that the entire property and that portion of Sixth Street adjacent to  
14 the property is located on an “identified foredune.” The city council adopted the following  
15 findings:

16 **“THE PLANNING COMMISSION FOUND:** The applicant has submitted a  
17 written report delineating the toe of the foredune. This report was completed  
18 by [New Millennium Consulting] for the City of Bandon. \* \* \*

19 “[New Millennium Consulting] mapped the toe of the foredune as being  
20 located on the subject property at an elevation of 15.75’ (approximately) on

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“FOREDUNE, ACTIVE. An unstable barrier ridge of sand paralleling the beach and subject to wind erosion, water erosion, and growth from new sand deposits. Active foredunes may include areas with beach grass, and occur in sand spits and at river mouths as well as elsewhere.

“FOREDUNE, CONDITIONALLY STABLE. An active foredune that has ceased growing in height and that has become conditionally stable with regard to wind erosion.

“FOREDUNE, OLDER. A conditionally stable foredune that has become wind stabilized by diverse vegetation and soil development.”

<sup>3</sup> The parties sometimes refer to the New Millennium Consulting study as the “Scalici Report” apparently because Michael Scalici, the author of the study, is a principal in New Millennium Consulting.

1 the north side and 16' on the southside. This is not consistent with the map  
2 submitted within this same report shown as Figure 10 which shows the back  
3 edge of the foredune as being 10' west of the 16' contour line. The report  
4 written by [New Millennium Consulting] also indicates the 'toe' of the  
5 foredune is at an elevation of 16'; the applicant has consistently stated  
6 throughout written testimony the structure would be setback 15' from the  
7 'toe' of the foredune. However, when reviewing the maps submitted by the  
8 applicant (A02, A03, A04, and A05 (where the roofline extends past the 16'  
9 elevation)) it appears the deck would actually be located on the 16' elevation  
10 mark, thus no setback is being proposed.

11 "As previously stated in the original staff report, the City maintains the entire  
12 property is located on a foredune, and therefore the **Planning Commission**  
13 **found** this criterion has not been met.

14 "**THE CITY COUNCIL FURTHER FINDS:** The submitted delineated toe  
15 of the foredune is located at the 16' elevation mark. The applicants' own  
16 submission shows no setback from the 16' elevation mark as evidenced on the  
17 drawings.

18 "The applicant submitted two separate delineations, each with their own idea  
19 of where the location of the 'toe' of the foredune was located. [New  
20 Millennium Consulting] stated on the record the delineation was an 'educated  
21 guess' and 'subject to interpretation'.

22 "The Planning Commission has determined the foredune is west of the Local  
23 Improvement District. The City Council agrees with this interpretation of the  
24 Planning commission and therefore the City Council finds all of the subject  
25 property is located on a foredune subject to overtopping and undercutting and  
26 therefore approval of this application cannot be granted." Record 13  
27 (emphases in original.)

28 Petitioners argue that the city's findings are inadequate because they do not explain why the  
29 city concluded that the entire property is located on a foredune, and that the findings are not  
30 supported by any evidence in the record. According to petitioners, there is some indication  
31 in the planning commission decision that planning staff concluded that the entire property is  
32 located on a foredune based on the location of the boundaries of the LID that was formed in  
33 2003 and the planning commission relied on that conclusion in its findings.<sup>4</sup> However,

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<sup>4</sup> The planning commission's decision, which the city council decision incorporated, also contains the following language in the "Findings of Fact" section:

1 petitioners point out that the record of the proceedings regarding the LID formation is not  
2 included in the record of this appeal and that there is no evidence in this record to support  
3 tying the location of the foredune to the LID boundary.

4         Petitioners also maintain that if the city concluded that the entire property is located  
5 on a foredune based on some other evidence in the record, the conclusion is not supported by  
6 any evidence in the record. According to petitioners, the only evidence in the record  
7 demonstrates that a small portion of the foredune is located on the property between the 16.5  
8 foot and 17 foot elevation line, that the proposed dwelling meets all setback requirements  
9 from the foredune, and that almost the entirety of the property is a younger stabilized dune,  
10 where residential development is not expressly prohibited. Finally, petitioners argue that to  
11 the extent the city concluded in the first paragraph of the findings quoted above that the  
12 eastern edge of the foredune (referred to as the “toe” of the foredune) is located at the 16 foot  
13 elevation mark, that finding is not supported by the evidence in the record.

14         The city takes the position that it determined that the entire property is located on a  
15 foredune based on FEMA’s direction that “the inland limit of the [foredune] occurs at the  
16 point where there is a distinct change from a relatively steep slope to a relatively mild slope.”  
17 Response Brief for City of Bandon 6. The city explains that, relying on the “2002  
18 Background Report, Chronic Coastal Natural Hazards” that is also referred to by the city as  
19 the “Shoreland Solutions Report” that is located at Record 313 – 343, the city concluded that  
20 the entire property is located on a foredune because the city determined that there is a  
21 substantial change in the grade of the property at the 13 foot elevation contour line.<sup>5</sup> The

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“Previously, the City has determined the east edge of the foredune starts at the west side of  
the local sewer district boundary for the Jetty. The City still concludes the foredune starts at  
this determined location.” Record 180.

<sup>5</sup> As alluded to in footnote 3, the parties frustratingly refer to some of the same evidentiary reports by two  
or three different names. For example, the parties refer to the “2002 Background Report, Chronic Coastal  
Hazards” as the “Shoreland Solutions Report” and also refer to it as the “Marra Report.” When briefing an  
appeal to LUBA, it is in all parties’ best interest to use a single, easily recognizable title for an evidentiary

1 city and DLCD (respondents) also point to the maps located at Record 920-37, which  
2 respondents maintain show that over approximately 104 feet the property's elevation changes  
3 from 17.5 feet to 13 feet from west to east across the property. Finally, respondents also  
4 argue that even if the findings are inadequate, LUBA should affirm the city's decision under  
5 ORS 197.835(11)(b), because the evidence in the record clearly supports the city's finding  
6 that the property is located on a foredune.<sup>6</sup>

7 We agree with petitioners that the city's findings are inadequate to explain the city's  
8 decision that the entire property is located on a foredune. First, if the city determined the  
9 location of the foredune based on the LID boundary, nothing in the record to which we have  
10 been directed explains or supports that determination. Second, we do not find anything in  
11 the Shoreland Solutions Report that supports the city's conclusion that there is a substantial  
12 change in elevation on the property at or near the eastern boundary. The Shoreland Solutions  
13 Report assesses the "potential risks to life and property [that chronic hazards] present along  
14 the City of Bandon shoreline \* \* \*." Record 313. That report does not purport to identify  
15 the precise or even general location of any foredunes within the city, let alone a foredune on  
16 petitioners' property. Third, we agree with petitioners that the maps cited by respondents at  
17 Record 920-37 do not demonstrate that there is a change in elevation at or near the eastern  
18 boundary. The cited maps show that the eastern boundary line of the property is located at  
19 approximately the 13 foot elevation line, but do not show elevations of adjacent properties.

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report consistently throughout the briefs because LUBA is almost always less familiar with the record and the proceedings below and could be confused to the parties' detriment if they use multiple names for the same reports.

<sup>6</sup> ORS 197.835(11)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1 Finally, the city does not explain why, even if the elevation of the area changes at the 13 foot  
2 elevation line, it considers any such change a “distinct” change in elevation (using FEMA’s  
3 definition) or a “substantial” change in elevation (using the definition in the City’s brief), or  
4 otherwise explain why that change in elevation means that the property is located on a  
5 foredune. We also disagree with respondents that the evidence that is cited to us “clearly  
6 support[s]” the city’s decision.

7 Finally, the response brief of intervenors-respondents Biro *et al* (Biro) appears to take  
8 the position that the western boundary of the LID also defines the eastern boundary of the  
9 foredune, and that environmental studies prepared during the proceedings that led to  
10 formation of the LID confirm this. The problem with that argument and Biro’s response  
11 brief in general is that none of the evidence cited in Biro’s response brief is part of the record  
12 of the present appeal.

13 Because we agree with petitioners that its finding that the entire property is located  
14 on a foredune is inadequate and is not supported by substantial evidence in the record, we  
15 need not address petitioners’ alternative assignment of error that the city erred in concluding  
16 that the toe of the foredune is located at the 16 foot elevation line. On remand, if the city  
17 again determines that the entire property is located on a foredune, or locates the eastern edge  
18 of the foredune elsewhere on the property, the city must explain the basis for its conclusion  
19 and identify evidence in the record that supports that conclusion.

20 The first, twelfth and fourteenth assignments of error are sustained.

21 **THIRD, FOURTH, FIFTH, AND EIGHTH ASSIGNMENTS OF ERROR**

22 BMC 17.24.040(C) specifies certain limitations on uses in the CD-2 zone and  
23 provides in relevant part:

24 “Plans shall be reviewed to assess the possible presence of any geologic  
25 hazard. If any part of the subject lot is in an area designated as a moderate or  
26 severe hazard area on the Bandon Bluff Inventory Natural Hazards Map or if  
27 any geologic hazard is suspected, the planning commission shall require a  
28 report to be supplied by the developer which satisfactorily evaluates the

1 degree of hazard present and recommends appropriate precautions to avoid  
2 endangering life and property and minimize erosion. *The burden of proof is*  
3 *on the landowner to show that it is safe to build.*<sup>7</sup> (Emphasis added.)

4 Due in part to its conclusion that the entire property is located on a foredune, the city  
5 concluded that the petitioners had failed to demonstrate that the dwelling is “safe to build” as  
6 required by BMC 17.24.040(C). Record 11-12. However, the city also found independent  
7 bases for determining that petitioners had failed to satisfy BMC 17.24.040(C), and we  
8 address those bases and petitioners’ challenges to those bases below.

9 **A. Fourth Assignment of Error**

10 In the fourth assignment of error, petitioners argue that the application is an  
11 application for “needed housing” as defined in ORS 197.303, that BMC 17.24.040(C)’s  
12 requirement that the owner show that “it is safe to build” the dwelling is a standard that is not  
13 “clear and objective” as required by ORS 197.307(6), and that the BMC 17.24.040(C)

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<sup>7</sup> The remainder of BMC 17.24.040(C) provides:

“1. The following identifies the reports which may be required:

“a. Soils Report. This report shall include data regarding the nature, distribution and strength of existing soils, conclusions and recommendations for grading, design criteria for corrective measures, and options and recommendations covering the carrying capabilities of the sites to be developed in a manner imposing the minimum variance from the natural conditions. The investigation and report shall be prepared by a professional civil engineer currently registered in the state of Oregon.

“b. Geology Report. This report shall include an adequate description, as defined by the city manager or designate, of the geology of the site, conclusions and recommendations regarding the effect of geologic conditions in the proposed development, and opinions and recommendations as to the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional geologist currently registered in the state of Oregon.

“c. Hydrology Report. This report shall include an adequate description, as defined by the city manager or designate, of the hydrology of the site, conclusions and recommendations regarding the effect of hydrologic conditions on the proposed development, and options and recommendations covering the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional civil engineer currently registered in the state of Oregon.”

“2. The planning commission may waive any of these reports if it decides that they are irrelevant to the site.” (Emphases in original.)

1 standard may not be applied to deny the application. According to petitioners, the BCP  
2 identifies a need for single family dwellings.<sup>8</sup> The city does not dispute that point, and we  
3 assume for purposes of our analysis that the proposed dwelling is “needed housing.”

4 ORS 197.307(6) provides:

5 “Any approval standards, special conditions and the procedures for approval  
6 adopted by a local government shall be clear and objective and may not have  
7 the effect, either in themselves or cumulatively, of discouraging needed  
8 housing through unreasonable cost or delay.”

9 Petitioners submitted a soils report, a geology report and a hydrology report as required  
10 under BMC 17.24.040(C)(1)(a) – (c). *See* n 7. The city concluded that those reports did not  
11 include the required information needed to determine that the dwelling is “safe to build.”

12 Petitioners argue that the requirement set forth in BMC 17.24.040(C)(1)(b) and (c)  
13 that an applicant provide a geology report and a hydrology report that “shall include an  
14 adequate description, as defined by the city manager or designate,” of the geology or  
15 hydrology of the site, respectively, is not “clear and objective” and does not give an  
16 applicant an idea of what is required in order to satisfy the criterion to demonstrate that “it is  
17 safe to build.” Moreover, petitioners argue, they provided the required reports that describe  
18 the geology and hydrology of the site, both of which concluded that “[the dwelling] is safe to  
19 build” using appropriate building techniques, and yet the city concluded that BMC  
20 17.24.040(C) was not satisfied. We understand petitioners to argue that where a standard

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<sup>8</sup> ORS 197.303(1) defines “needed housing:”

“(1) As used in ORS 197.307, until the beginning of the first periodic review of a local government’s acknowledged comprehensive plan, ‘needed housing’ means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government’s acknowledged comprehensive plan, ‘needed housing’ also means:

“(a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy[.]”

1 requires an applicant to provide certain information, but the standard does not indicate how  
2 that information will be used to satisfy an approval criterion that in turn requires an applicant  
3 to show that a structure is “safe to build,” that informational standard and the approval  
4 criterion violate the needed housing statute’s requirement for “clear and objective” “approval  
5 standards.”

6 We agree with petitioners that the requirement in BMC 17.24.040(C) that a property  
7 owner demonstrate that “[the dwelling] is safe to build” is not clear and objective. As we  
8 explained in *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158  
9 (1998), *aff’d* 158 Or App 1, 970 P2d 685 (1999):

10 “‘Needed housing’ is not to be subjected to standards, conditions or  
11 procedures that involve subjective, value-laden analyses that are designed to  
12 balance or mitigate impacts of the development on (1) the property to be  
13 developed or (2) the adjoining properties or community. Such standards,  
14 conditions or procedures are not clear and objective and could have the effect  
15 ‘of discouraging needed housing through unreasonable cost or delay.’”

16 First, it is not clear from the text of BMC 17.24.040(C) how a property owner wishing to  
17 build needed housing on property subject to that code section would go about demonstrating  
18 that “it is safe to build” or what additional information that property owner would need to  
19 supply in order to convince the city that “it is safe to build.” In addition, it is not clear how  
20 the information contained in soils, geology, and hydrology reports that an applicant can be  
21 required to furnish under BMC 17.24.040(C)(1)(a) – (c) will be used by the city to determine  
22 whether an application has satisfied the requirement that “it is safe to build.” According to  
23 the language of the code section, an applicant must show that the structure will “minimize  
24 erosion” and “avoid endangering life and property.” That language requires subjective  
25 analyses that, if applied to needed housing, are prohibited by ORS 197.307(6). For those  
26 reasons, BMC 17.24.040(C) is unclear and subjective and may not be applied to the  
27 application. *See also Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 402 (2002)  
28 (ordinance provision that requires that new dwellings must be within 4 or 5 minutes of

1 emergency services is unclear and subjective where it is not clear how the response time is  
2 measured.)

3 **B. Third, Fifth, and Eighth Assignments of Error**

4 Apparently in determining that petitioners had not satisfied the BMC 17.24.040(C)  
5 requirement to demonstrate that the dwelling is “safe to build,” the city went a step further  
6 and proclaimed that the property is “unbuildable.” Record 30. In the third assignment of  
7 error, petitioners argue that the city erred in concluding that the property is “unbuildable”  
8 because the city’s buildable lands study that is a part of the BCP identifies the area in which  
9 the subject property is located as potentially suitable for development (*i.e.* buildable), and the  
10 city erred in relying on the Shoreland Solutions Report, which is not contained in the BCP, to  
11 conclude otherwise. In the fifth assignment of error, petitioners similarly challenge the city’s  
12 determination that the property is “unbuildable” as not supported by substantial evidence in  
13 the record. In the eighth assignment of error, petitioners challenge the city’s rejection of the  
14 soils report, the geology report, and the hydrology report furnished by petitioners under  
15 BMC 17.24.040(C)(1)(a) – (c). *See* n 7. Our disposition of the fourth assignment of error  
16 requires that we sustain these assignments of error that challenge alternative bases or theories  
17 for the city’s conclusion that the dwelling is not “safe to build.”

18 The third, fourth, fifth and eighth assignments of error are sustained.

19 **SIXTH AND SEVENTH ASSIGNMENTS OF ERROR**

20 In the sixth assignment of error, petitioners challenge the city’s conclusion that the  
21 application failed to satisfy BMC 17.24.010, which provides:

22 “The purpose of the CD-2 zone is to protect and enhance the unique character,  
23 natural resources and habitat characteristics of the Bandon Jetty and its bluff  
24 area, to provide for the development of a coastal village atmosphere, and to  
25 exclude those uses which would be inconsistent with the area’s character.”

26 Petitioners argue that BMC 17.24.010 is not an approval criterion because it is aspirational  
27 and is a generally worded expression of motivation for adopting a regulation. We do not

1 understand the city's response to dispute petitioners' contention that BMC 17.24.010 is not  
2 an approval criterion, and we agree with petitioners that it is not an approval criterion that  
3 can provide a basis for denial of the application at issue in this appeal. The city erred in  
4 relying on BMC 17.24.010 to deny the application.

5 In the seventh assignment of error, petitioners challenge the city's determination that  
6 the application failed to comply with BMC 17.24.020, which allows single family dwellings  
7 as permitted uses in the CD-2 zone. The city council concluded that "all other requirements  
8 of this title have not been met and therefore the City Council found this criteria has not been  
9 met." Record 8. BMC 17.24.020 allows single family dwellings as long as the other  
10 requirements of BMC Chapter 17.24 are met and as long as the dwelling promotes the  
11 purpose of the zone. BMC 17.24.020 does not appear to be an independent approval  
12 criterion and does not provide an independent basis for the city to deny the application.  
13 Because we sustain petitioners' challenges to the city's findings that other provisions of  
14 BMC Chapter 17.24 have not been met, we sustain petitioners' challenge under the seventh  
15 assignment of error as well.

16 The sixth and seventh assignments of error are sustained

17 **NINTH ASSIGNMENT OF ERROR**

18 The city denied the application because it determined that petitioners failed to satisfy  
19 BMC 17.24.060(B), which provides that "[l]ots shall have a minimum of forty (40) feet of  
20 physically accessible street frontage." In the ninth assignment of error, petitioners argue that  
21 the property has over 103 feet of street frontage, with 15 feet along the existing developed  
22 portion of Sixth Street. The city concluded that because the entire property and the portion  
23 of Sixth Street in front of petitioners' property is located on a foredune, BMC 17.24.040(D)  
24 prohibits Sixth Street from ever being extended to provide the required 40 feet of street  
25 frontage that is physically accessible. Because the city's determination that BMC 17.24.060  
26 is not met is based on its conclusion that the property and Sixth Street are located on a

1 foredone, our resolution of the first assignment of error in favor of petitioners dictates that  
2 the ninth assignment of error be resolved in favor of petitioners.

3 The ninth assignment of error is sustained.

4 **TENTH AND SECOND ASSIGNMENTS OF ERROR**

5 In the tenth assignment of error, petitioners argue that the city erred in determining  
6 that the proposed yard setbacks fail to meet the required specifications of BMC 17.24.070,  
7 which provides minimum depths for front, side, and rear yards.<sup>9</sup> In the second assignment  
8 of error, petitioners challenge the city's conclusion that the plans submitted at the January  
9 28, 2010 planning commission hearing were not to scale and could not be considered. We  
10 understand petitioners to argue that those plans constitute substantial evidence that the  
11 proposed yard sizes are sufficient to comply with BMC 17.24.070, and that the city erred in  
12 determining otherwise.

13 The city found in relevant part:

14 **“THE PLANNING COMMISSION FOUND:** \* \* \* the applicant has  
15 submitted a plot plan showing the foundation line (A02), a main floor plan  
16 showing the setbacks for decks, porches and bay window (A04), and a plan  
17 showing the roofline (A05). While A02 and A04 show the setbacks, A05

---

<sup>9</sup> BMC 17.24.070 provides:

“Except as provided in Section 17.104.060, in the CD-2 zone, yards shall be as follows:

“A. The front yard shall be at least twenty (20) feet.

“B. Each side yard shall be a minimum of five feet, and the total of both side yards shall be a minimum of thirteen (13) feet, except that for corner lots, a side yard abutting a street shall be at least fifteen (15) feet.

“C. The rear yard shall be at least ten (10) feet, except that in such a required rear yard, storage structures (less than fifty (50) square feet), and other non-habitable structures may be built within five feet of the rear property line, provided that they are detached from the residence and the side yard setbacks are maintained. Such structures shall not be used as or converted for habitation, shall not be connected to any sewer system and shall not exceed sixteen (16) feet in height.

“D. Where a side yard of a new commercial structure or bed and breakfast inn abuts a residential use, that yard shall be a minimum of fifteen (15) feet.”

1 does not. *After reviewing these three plans, it appears the roofline extends*  
2 *beyond the decks and baywindow and therefore is extended within the*  
3 *required setbacks. Eaves are allowed to encroach the setbacks 18”.*

4 “Criterion A has not been met as the roofline (as measured by the scale  
5 submitted) encroaches into the required front setback by 2’. The roofline for  
6 the east and west property lines appears to meet Criterion B. *The roofline*  
7 *from the north property line encroaches into the setback by 2’ and therefore*  
8 *Criterion C has not been met. \* \* \**

9 “\* \* \* \* \*

10 “**THE CITY COUNCIL FURTHER FOUND:** The City Council determined  
11 the plans submitted at the January 28, 2010 Public Hearing was not to scale  
12 and could not be considered. The original plans submitted for review with the  
13 application were to scale and showed the roofline encroached into the  
14 required front and rear setback by 2’. The **City Council** agreed with the  
15 Planning Commission and **found** Criteria A and C had not been met \* \* \*.”  
16 Record 15-16 (Bold in original, italics added.)

17 Petitioners argue that the revised plan it submitted that is located at Record 581 shows that  
18 the proposed yard sizes comply with BMC 17.24.070, and that the roof eaves project into the  
19 yard a maximum of 18 inches. Petitioners further argue that, in any event, a different section  
20 of the BMC, BMC 17.104.030, governs projections of roof eaves of dwellings into yards and  
21 has nothing to do with the BMC 17.24.070 yard requirements. According to petitioners,  
22 BMC 17.104.030 confirms that roof eaves are allowed to project into a required yard to a  
23 maximum of 18 inches.

24 The city responds that it properly determined that the plans submitted at the January  
25 28, 2010 hearing at Record 580 to 582 were “not to scale” and chose not to rely on them as  
26 evidence to determine whether BMC 17.24.070 was satisfied. However, the city does not  
27 explain why scaled plans are necessary to determine whether the eaves project more than 18  
28 inches into the yard setback.<sup>10</sup> Unlike the original plan, which did not provide measurements  
29 for the eave projections, and which therefore required extrapolation to determine the extent

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<sup>10</sup> In any case, the plans at Record 580-582 state that they are drawn to a scale of one inch equals 10 feet. We do not understand what the city meant by finding that the plans are “not to scale.”

1 of the projection, the revised plan at Record 581 explicitly states that the eaves will project  
2 one foot, six inches. If there is some legitimate basis to reject the revised plan, the city does  
3 not identify it. If the revised plan is considered, there does not appear to be any reasonable  
4 dispute that BMC 17.24.070 yard setback is not violated, given that BMC 17.104.130  
5 expressly allows eaves to project 18 inches into yards. Although the interrelationship, if any,  
6 between the section of the BMC governing projections from dwellings into yards and BMC  
7 17.24.070 specifying yard setbacks is not clear to us or explained in the city's decision, on  
8 remand, if the city considers projections from eaves to decrease the amount of yard setback  
9 available to satisfy BMC 17.24.070, the city should explain its understanding of the  
10 interrelationship between BMC 17.24.070 and BMC 17.104.130 and inform petitioners what  
11 steps are necessary to obtain approval under the relevant criteria. *Bridge Street Partners v.*  
12 *City of Lafayette*, 56 Or LUBA 387 (2008).

13 These assignments of error are sustained.

#### 14 **ELEVENTH ASSIGNMENT OF ERROR**

15 The city also concluded that petitioners failed to satisfy applicable criteria governing  
16 maximum allowed building height, which is 28 feet in the CD-2 zone.<sup>11</sup> The city concluded:

17 “The applicant has stated that the maximum height of the structure will be 26  
18 feet from grade (A06). However, the applicant notes this is a ‘minimum’  
19 grade. The City requires the applicant to show the highest point of the  
20 structure from *the lowest point of native grade*. *Without knowing what native*  
21 *grade is*, the **Planning Commission found** this criterion had not been met.

22 “\* \* \* The **City Council** agreed with the Planning Commission and **found**  
23 this criterion had not been met.” Record 16 (Bold in original, italics added).

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<sup>11</sup> BMC 17.24.080 provides:

“In the CD-2 zone, no building shall exceed a height of twenty-eighty (28) feet, except that additional height above twenty-eighty (28) feet but not exceeding thirty-five (35) feet shall be considered a conditional use. Conditional use permits above twenty-eight (28) feet for any use shall be allowed only if the planning commission finds that the increased height does not adversely affect the ocean or river views of existing structures on abutting lots.”

1 BMC 16.42.010 defines “native grade” as “the level of the ground prior to alteration.”  
2 Given that definition, petitioners argue, the city’s findings are inadequate to explain why the  
3 city concluded that “native grade” was not known. According to petitioners, no alterations  
4 have been performed on the property and the existing contours shown on the plans at Record  
5 581 are identical to the topographical survey contours at Record 992, so that the existing  
6 contours demonstrate “native grade,” i.e. “the level of the ground prior to alteration.” The  
7 city responds that the revised drawings at Record 581 and 582 refer to “average grade,”  
8 while the drawings at Record 935 refer to “minimum grade,” but neither refers to “native  
9 grade.” Given this omission, the city argues, it was not required to rely on the oral testimony  
10 of petitioners at the January 28, 2010 hearing that explained what the “native grade” of the  
11 property is.

12 Petitioners also dispute the city’s conclusion that in order to satisfy BMC 17.24.080,  
13 applicants must show the highest point of the building based on the “*lowest point* of native  
14 grade.” BMC 16.42.010 describes how building heights on sloping properties are to be  
15 measured:

16 “‘Height of Building or Structure:’ means the vertical distance *from the native*  
17 *grade* to the highest point of the roof. On slopes, the height of the structure  
18 shall be determined by taking the height of each side of the building *measured*  
19 *from grade at the center of the wall* to the highest point of the roof and  
20 divided by the number of measured sides.” (Emphases added.)

21 Under the definitions set forth above, petitioners appear to be correct that the city is incorrect  
22 in requiring the building height to be measured from the single *lowest point* of the “ground  
23 prior to alteration.” Petitioners also argue that if the city’s findings are intended to conclude  
24 that the building’s height was not calculated in accordance with BMC 16.42.010, those  
25 findings are inadequate. As noted above, BMC 16.42.010 “Height of Building or Structure”  
26 tells an applicant how to measure the height of a structure on sloped property. Petitioners  
27 argue that, consistent with the definition of “[h]eight of building or structure” quoted above,  
28 the plans at Record 581 and 582 show that the height of each wall was calculated starting

1 from “the existing level of the ground” below the middle of that wall, i.e. “native grade.”  
2 According to petitioners, their testimony at the January 28, 2010 planning commission  
3 hearing clarified that the building’s height was calculated in accordance with BMC  
4 16.42.010.

5 We agree with petitioners that the city’s findings are inadequate to explain its  
6 conclusion that the “native grade” of the property is not known and that BMC 17.24.080 is  
7 not met. Given the definitions set forth in BMC 16.42.010, petitioners’ written explanation  
8 at Record 578, the revised plans at Record 581 and 582, as well as the topographic map at  
9 Record 992, and their testimony at the January 28, 2010 planning commission hearing, it  
10 appears that the native grade of the property is known and that the building’s height was  
11 calculated in accordance with BMC 16.42.010’s definition of “Height of building or  
12 structure.” On remand, if the city continues to conclude that the height of the building does  
13 not satisfy BMC 17.24.080, the city must better explain its reasons for such a conclusion.

14 This assignment of error is sustained.

15 **THIRTEENTH ASSIGNMENT OF ERROR**

16 In the thirteenth assignment of error, petitioners challenge the city’s conclusion  
17 regarding BMC 17.92.020, which allows the city to impose conditions of approval on  
18 conditional uses. The city concedes that BMC 17.92.020 is not an approval criterion and  
19 could not be relied on to deny the application. This assignment of error provides no basis for  
20 reversal or remand of the decision.

21 The city’s decision is remanded.

E-Mail/Letter

January 10, 2011

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Web: <http://www.oregon.gov.LCD/lcdc-shtml>

References -1 January 12-13, 2011 LCDC Meeting – Agenda Item 12. Transportation Planning rule (TPR) 0060  
2 December 29, 2010 Transportation Planning Rule 0060-Joint Subcommittee Memorandum-  
3 December 29, 2010 House Bill 3379 Memorandum from Richard Whitman, Director/Matt Crall,  
Land Use- Transportation Planning Specialist, DLCD to LCDC: Subject Agenda Item 12, January 12-13,  
2011 LCDC Meeting

Dear LCDC:

Thanks you for considering these comments on “Agenda Item 12 Transportation Planning Rule (TPR) 0060” for your scheduled January 12-13 meeting. As a Board member of the Lower Applegate Citizens Advisory Committee and Rogue Advocates we are part of the large citizen support for the basic principle in TPR section 0060:

“Local governments should consider and address the transportation impacts of plan and zone changes at the time they are making decision about what types of land uses to allow in an area.”

Members of the Lower Applegate Citizens Advisory Committee live in the southwest area of Josephine County and Grants Pass areas. The majority of members use the Redwood Highway, Route 199, transportation corridor and connecting roadways. The Redwood Highway corridor has received extensive ODOT consultation and meetings to help resolve the significant traffic congestion and safety problems. Improvements have been made, but to date have not been able to keep pace with the extensive development of the area. In addition this highway, Route 199, is used as the main arterial for travel through Grants Pass to the Oregon coast. This Redwood transportation corridor is currently not able to adequately handle the carrying capacity, & so concern is expressed about any changes which would further delay and erode our transportation system.

Deferring of detailed transportation analysis and identification of mitigation measures to a later time will result in more degradation of this and other transportation systems and will not solve the transportation or economic problems. Delay and counting improvements as “planned” when included in a local TSP, but not funded, has contributed to this current inefficient transportation system. Developments approved in advance of infrastructure through multiple types of “conditions” create more impact problems and do not fix them. Delays can also lead to increased costs rather than “economic benefit”.

The argument is in question as to whether approving transportation systems without meeting all the performance standards or deferring funding will result in “economic growth” for our community and for Oregon. The results often are quite the opposite as the quality of life is impacted with traffic congestion, accidents and often increased traffic deaths. Well planned transportation services and infrastructure are needed before approval of business and private developments.

The proposed changes, Concern 6 & others, by the League of Oregon Cities are not sufficiently backed by supportive data. Making changes by not considering all impacts of plan and zone changes may help the real estate business, but prove harmful and decrease the economic development in other business sectors.

Concern 2- Local governments need to consider the larger community and in Josephine and Jackson counties it is essential to consider the agriculture, recreation and tourism industries. Metro and other communities are working hard to develop needed alternative transportation. Concern is whether ODOT’s standards for highway performance are consistent with state and local land use objectives to promote mixed-use development in urban areas. The broader directives in the TPR are also important to promote land use patterns that reduce reliance on the automobile as we look to “smart growth” and sustainable communities.

Changes are not needed in TPR section 0060

Concern 1—

\* the economic problems of cities will not be remedied by deferring and not addressing all transportation deficiencies.

Concern 2 –

\*need is to plan land for more intense uses that carry out broader directives in the TPR to promote land use patterns that reduce reliance on the automobile.

Concern 3 –

\*governments should not be able to defer detailed transportation analysis and identification of mitigation measures to the time of review of specific development proposals.

Concern 4-

\* governments should not be able to count improvements as “planned” when the improvement is included in its TSP, regardless of whether the project is funded.

Concern 5-

\*Zone changes and comprehensive plan changes **should be subject** to section 0060 requirements

Concern -6

\*standards for transportation performance, especially for state highways in urban areas, should be financially realistic and attainable given likely future transportation funding

Concern 7

\*TPR requirements do not place an unfair burden on plan amendment applicants as “the last one in” to address transportation deficiencies that are also the result of traffic from other development.

Addressing our current transportation deficiencies in our communities, addressing critical choke points and improving the surface transportation system is essential to maintaining a high quality of life and economic competitiveness in Oregon. Reducing delays, addressing funding upfront, and all impacts of the TSP will support and maintain our communities and quality of life. The short term gains of poor planning and delay of transportation infrastructure will result in increased cumulative costs and an inadequate transportation system.

Thank you for consideration of these comments.

Sincerely,

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Board member Rogue Advocates  
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## Hugo Neighborhood Association & Historical Society



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Email/Letter

January 3, 2011

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### References

**Reference 1** January 12-13, 2011 LCDC Meeting On Agenda Item 12. Transportation Planning Rule (TPR) 0060

**Reference 2** December 29, 2010 Transportation Planning Rule 0060 - Joint Subcommittee Memorandum from Richard Whitman, Director/Matt Crall, Land Use - Transportation Planning Specialist, Department Land Conservation and Development (DLCD) to the LCDC; Subject: Agenda Item 12, January 12-13, 2011 LCDC Meeting

**Reference 3** December 29, 2010 House Bill 3379 Memorandum from Richard Whitman, Director/Matt Crall, Land Use - Transportation Planning Specialist, DLCD to the LCDC; Subject: Agenda Item 12, January 12-13, 2011 LCDC Meeting

Dear LCDC:

Thank you for this opportunity to provide comments on "Agenda Item 12 Transportation Planning Rule (TPR) 0060" for your scheduled January 12-13 meeting. We are part of the broad support for the basic principle in TPR section 0060:

*"Local governments should consider and address the transportation impacts of plan and zone changes at the time they are making decisions about what types of land uses to allow in an area."*

Our members live in the Merlin travel shed in northern Josephine County, and we are impacted by the level of service provided by the public transportation services at the failing I-5 Louse Creek Interchange 61. We are concerned per the May 2010 TRIP report, *Oregon's Transportation Chokepoints: The Top 50 Chokepoints and Remedies for Relief*, and that per the TRIP report the \$5,000,000.00 or more in funding needed is not secured for the Louse Creek Interchange, and has no completion date identified. According to the TRIP report the Louse Creek Interchange is the 45<sup>th</sup> worst choke point in Oregon. The TRIP report identifies the 50 worst surface transportation choke points statewide and the status of projects needed to relieve these choke points. Addressing these choke points will be critical in maintaining the high quality of life in the state by

improving mobility, reducing delays, enhancing environmental quality, and supporting economic growth (Appendix A).

Our comments will center around the League of Oregon Cities' (LOC's) identified needs supporting a request for rule making on *TPR 0060* (see Appendix B). However, our interest is the application of the *TPR* in rural areas. First of all, we empathize with the concerns of the LOC "*to help serve the citizens of Oregon and provide sustainable communities that offer family wage jobs, affordable homes, quality schools/infrastructure, adequate public safety and recreational opportunities.*"

We would like our statewide transportation infrastructure problem fixed. We would be happy to have an adequate transportation infrastructure versus a quality infrastructure. Not adequately addressing the problem will continue to impede routine travel and/or commerce, or limit economic development opportunities because of a lack of interchange capacity. This constraint on reliable transportation at interchanges harms business productivity and reduces access to housing, employment, recreation, entertainment and other social functions.

Historically, the cumulative impacts of approving incremental development projects were the consumption of the transportation facilities' capacities contributing to the incremental cost of improvements, and placing greater pressures on the political system for the funding of the development projects unfunded share of improvements. These incremental development approvals have created a major problem at state transportation facilities now way behind in their needed capacities to serve the people of the state. We finally formally recognized the problem in 1991 when the LCDC, with support from the Oregon Department of Transportation (ODOT), adopted the *TPR*. The rule created a partnership program between DLCD and ODOT to enable the integration of land use and transportation planning.

We are in disagreement with the LOC's belief that "*the Transportation Planning Rule (TPR) creates unnecessary impediments to state and local objectives that guide economic development opportunities and other planning requirements.*" We believe everyone agrees that the real issue is secure funding (*Oregon's TPR Goes into the Shop for Repairs, Including the Funding Fiction* at <http://web.utk.edu/~tnmug08/TRB/oregon.pdf>). We appreciate the honesty, but the frank and open discussion of the "polite fiction" of planned but unfunded projects throughout Oregon scares us. Local governments have always had several options to put land use and transportation in balance (i.e., address the secure funding issue and solve the problem) where planned improvements are not adequate to support the planned land use:

1. They can limit the allowed land uses to match available transportation capacity, or
2. They can amend their transportation system plan (TSP) to expand transportation capacity through secured funding, or
3. They can amend their TSP to change performance standards to accept increased congestion.

We agree with LOC's Concern 6 (Appendix B), in the sense that the real problem has always been paying for the necessary transportation facilities needed for growth and development, and that we should assess the likely future transportation funding for needed facilities. Per the above number 3, changing transportation performance standards to accept increased congestion is a legal option, but in the long-run that old strategy of deferring the provision of adequate transportation services will continue to make Oregon less competitive in fostering economic growth, not more competitive. There is nothing new here, we continue to spin the old arguments: less taxes and less services and more job opportunities.

We are frightened with LOC's Concern 3 and Concern 4. Deferring detailed transportation analysis and identification of mitigation measures to a future time uncertain, and counting aspirational improvements as "planned" when the improvements were included in the of a local TSP, regardless of whether the projects were funded, is how we got to 1991 and tried to solve our problem with the *TPR*. Jobs and economic growth come from, in part, an adequate transportation system, not by providing less efficient transportation services to businesses and industry. We agree with LOC's Concern 7 (Appendix B) that TSP requirements place an unfair burden on plan amendment applicants that are the "last ones in" to address transportation deficiencies that are also the result of traffic from other development. This concern is legitimate and also how we arrived at the problem, by catering to it.

We are concerned that the continued erosion of the *TPR*'s effectiveness will result in Oregon's quality of life and its economic productivity being reduced by increasing the number and severity of the choke points in the state's surface transportation system. These choke points include major roads, highways and public transit routes that impede routine travel, commuting or commerce, or that place limits on economic development opportunities because of deficient design or a lack of adequate capacity. For example, the 2005 amendment to the *TPR* at OAR 660-012-006(3) already allows state transportation facility choke points to continue failing while allowing continuing development. Just as critical, or perhaps more critical, is that the *TPR* 006(3) rule allows the intensity of the failing system to increase because it does not address the cumulative effects of development that are not amendments to a local comprehensive plan, nor those developments that do not have a significant effect. Therefore, under *TPR* 006(3) the failing facility continues to increasingly degrade in its ability to provide an adequate service. The fiction that the facility's cumulative performance is not worsened over time does not stand. Our new House Bill 3379 already compromises the *TPR* with its waivers to the infrastructure needs of economic development projects as defined by OAR 731-017-0010(4)). Surely this legislation supersedes the *TPR* requirements with its waivers.

In summary, Oregon's system of roads, highways and public transit plays a critical role in supporting the high quality of life in the state by providing sustainable communities through reliable mobility to the state's residents, visitors and businesses. Even while the state has enjoyed significant population and economic growth over the past two decades, its transportation system has not been able to keep up with the growing demand for access. Increasingly, Oregonians are finding their mobility constrained by congested and crowded roads, buses and rail cars, increasing personal delays and diminishing their access to recreation, social activities, employment and

housing. Businesses in Oregon are also seeing their productivity and goal of providing sustainable communities threatened by increasing traffic congestion and constrained freight routes, which increases the cost and reduces the reliability of transport, harming their competitiveness.

Maintaining the high quality of life in Oregon and insuring future business competitiveness will require that Oregon make further improvements to its surface transportation system. Numerous surface transportation choke points in the state impede routine travel, commuting or commerce. Addressing these choke points will be critical in maintaining the high quality of life and providing sustainable communities in Oregon by improving mobility, reducing delays, enhancing environmental quality and supporting economic growth. The short term gains of providing poorly planned opportunities for economic growth will not counteract the long-term loss of jobs statewide if we continue to defer paying for the cumulative costs of an adequate transportation infrastructure.

Thank you for any consideration you can give to our comments.

Mike :)

/s/ Mike Walker

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## Appendix A. MAJOR FINDINGS OF TRIP REPORT

TRIP. May 2010. Oregon's Transportation Chokepoints: The Top 50 Chokepoints and Remedies for Relief. Washington, DC ([http://www.tripnet.org/Oregon\\_Chokepoints\\_Report\\_051310.pdf](http://www.tripnet.org/Oregon_Chokepoints_Report_051310.pdf)).

The major findings of the TRIP report are:

Oregon's quality of life and economic productivity are being reduced by chokepoints in the state's surface transportation system. These chokepoints include major roads, highways and public transit routes that impede routine travel, commuting or commerce, or that place limits on economic development opportunities because of deficient design or a lack of adequate capacity.

- Two recent reports found that the state's businesses, particularly in the Portland area, were responding to increasing traffic congestion by increasing inventories, decentralizing operations to serve the same market, increasing the number of deliveries and drivers because of longer travel times and starting production shifts earlier in the day to avoid peak congestion periods.
- Oregon's top 50 surface transportation chokepoints include urban interchanges and highway segments, public transit routes and sections of rural highways that are unable to meet a region's need for adequate mobility. This constraint on reliable transportation harms business productivity and reduces access to housing, employment, recreation, entertainment and other social functions.
- The top five surface transportation chokepoints in Oregon are located in Portland and include the I-5 Columbia River Crossing, the I-5/I-84/I-405 Interchange, the OR 212/224 Corridor, the I-205/I-5 Interchange and the OR 217/I-5 Interchange. The following chart provides more details on these five chokepoints. Intermodal (roadway and transit) chokepoints are shaded in green, roadway chokepoints are shaded in yellow and transit chokepoints are shaded in purple.

## Appendix B. LEAGUE OF OREGON CITIES' CONCERNS

(Reference 2, Pages 3-4)

**Stakeholder Interests and Concerns** The provisions of OAR 660-012-0060 have received close attention by the commission over the last several years. The current provisions of the rule were adopted by the commission in March 2005, following an extensive evaluation of the TPR and work by a previous joint subcommittee of LCDC and OTC. **Overall, there is broad support for the basic principle in TPR section 0060: that local governments should consider and address the transportation impacts of plan and zone changes at the time they are making decisions about what types of land uses to allow in an area.** At the same time, disagreement remains about whether additional changes to the TPR or the OHP are needed to accomplish this objective, and the tension between this objective and other important land use and transportation planning objectives. (emphasis added)

Local governments and other stakeholders have raised several interrelated concerns about the TPR and related provisions of the OHP:

- |           |  |
|-----------|--|
| Concern 1 | Whether TPR requirements in combination with ODOT highway performance standards interfere with local efforts to accommodate important <b>economic development opportunities</b> , especially efforts to attract family wage jobs and traded-sector development. (emphasis added)   |
| Concern 2 | Whether ODOT's standards for highway performance are consistent with state and local land use objectives to promote compact, mixed-use development in urban areas. (Metro and several other communities have expressed concern that OHP mobility standards create a barrier to local efforts <b>to plan land for more intense uses</b> that carry out broader directives in the TPR to promote land use patterns that reduce reliance on the automobile.) (emphasis added) |

- Concern 3 Whether local governments should be able to **defer** detailed transportation analysis and identification of mitigation measures to the time of review of specific development proposals. (emphasis added)
- Concern 4 Whether local governments should be able to count improvements as “planned” when the improvement is included in its TSP, **regardless of whether the project is funded.** (emphasis added)
- Concern 5 Whether zone changes that are consistent with and carry out terms of an adopted comprehensive plan should be subject to section 0060 requirements.
- Concern 6 Whether standards for transportation performance, especially for state highways in urban areas, are **financially realistic or attainable given likely future transportation funding.** (emphasis added)
- Concern 7 Whether TPR requirements place an unfair burden on plan amendment applicants as “the last one in” to address **transportation deficiencies that are also the result of traffic from other development.** (emphasis added)

Email copies:

- Hugo/Quartz Roads Group
- Hugo Neighborhood Association & Historical Society
- Rogue Advocates
- Goal One Coalition
- 1000 Friends of Oregon
- William Wilkins, Executive Director, TRIP
- Matthew Garrett, Director  
Oregon Department of Transportation
- Matthew Crall, TGM Program Coordinator  
Oregon Department of Land Conservation and Development