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A PROFESSIONAL CORPORATION

LAND, AIR & WATER LAW

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PORTLAND, OR 97214

To: Members of the Land Conservation and Development Commission
Richard Whitman, Director, Dept. of Land Conservation and Development

From: Al Johnson

Date: August 31, 2010

Re: Agenda Item 4, Sept. 1 LCDC Meeting
Transportation Planning Rule Issues

Dear Commissioners and Director Whitman:

I will be retiring at the end of this month, so I thought I would take this opportunity to offer a few parting observations based upon 20 years of experience with the Transportation Planning Rule as a land use attorney for clients in both the public and the private sectors. These are personal observations and do not necessarily represent the views of any, much less all, of the many clients who have navigated the TPR maze in my company over the years. I hope they provide helpful background as you move ahead.

My principal concerns are with elements of the Transportation Planning Rule that fail what might be called the MacPherson Test. As you know, former Senator Hector Macpherson has been called the Father of Senate Bill 100 and Oregon's statewide land use program.

In 1977, just four years after the adoption of SB 100, Senator Macpherson testified in support of removing an unduly-onerous provision of the original Senate Bill 100, which, in his words allowed "the state takeover of local planning and enforcement powers in the event all else fails." His written testimony articulates a principle which might be called the "Macpherson test:"

> "I consider the current provision unduly oppressive on local governments, unworkable at the state level and therefore a paper tiger which fails in its purpose while at the same time infuriating local officials and bringing ridicule to the program."

Testimony of Hector Macpherson on SB 570 (1977 Or Laws Ch. 644), Exhibit G, Feb. 22, 1977 Senate Env. & Energy Committee.

Fortunately for the health of the program in its early years, Senator Macpherson was quick to move past pride of authorship when considering the concerns of local governments. Those concerns are just as relevant today.

In my view, the TPR provisions discussed below fail the Macpherson test and deserve the same fate as the provisions addressed by Senator Macpherson in 1977: They should be repealed by the body that adopted them.

The vmt/alternative measures/woodshedding program:

As experienced by your regional and local partners, the TPR's per-capita vehicle-miles-travelled program can be summarized as follows:

LCDC to local governments: Prove your transportation plans will meet arbitrary targets even though the Commission and DLCD have no basis for expecting you to be able to provide such proof. When that fails, invent and adopt alternative measures. Then prove that those measures will meet other equally-arbitrary targets that the Commission and DLCD have no basis for thinking you can meet. When that fails, appear as summoned for periodic public floggings. Bring stacks of charts and spreadsheets to show that you have done lots of data-gathering and haven't fudged the numbers documenting your failures. Promise to do better.

This situation is a product of the very different burdens of proof borne by local and state planning authorities.

Local governments have to prove, based upon substantial evidence, that their plans and implementing ordinances will meet state standards set forth in state land use goals and rules. As they hear so often at your meetings, they have to "connect the dots."

In contrast, when the Commission established the TPR's per-capita vehicle-miles-travelled reduction requirements, it did so in a state rulemaking process that did not require it to make findings based upon any evidence, much less substantial evidence, that transportation systems planning could achieve those targets. It did not have to connect the dots. Not surprisingly, the dots have never been connected.

Nor could they have been. Shortly before the TPR was adopted, a leading article in the Journal of the American Planning Association pointed out that times were changing: Increases in per-capita-vmt over the previous 20 years had been largely the result of

increases in female labor force participation, increases in single-parent households, increases in auto-ownership rates, and continuing cheap fuel.

These trends were maturing in 1998 and were already viewed by professionals outside of Oregon as unlikely to continue at the same rate. Those professionals were right. As more recent studies have found, those trends have largely played themselves out, and new long-term trends pushing per-capita-vmt down have set in, including an aging population, telecommuting, a commuting workforce that is steadily shrinking as a share of the driving population, the end of cheap fuel, and a stagnating economy. See *Oregon Statewide Congestion Overview*, ODOT 1998, *The Road Less Travelled*, Brookings, 2009, and *Signs of Change*, East-West Gateway COG, 2008.

Not surprisingly, local governments have been never been able to connect the dots with the kinds of facts and modelling that are required of them but not of the Commission or the Department. Local land use authorities have no way of proving that their transportation systems plans will achieve the required results at all, much less on the schedule and at the arbitrary percentages required by the rule. The same is true of the alternative measures and their attendant benchmarks, which have to be "chosen" by local governments in the same sense that errant pupils get to "choose" from bundles of birch rods at Jane Eyre's boarding school.

It should be no surprise that changes in the trends that actually drove the run-up in per-capita-vmt have done what transportation planning could not: As the state's own benchmark reports show, Oregon has done better than projected for more than a decade now:

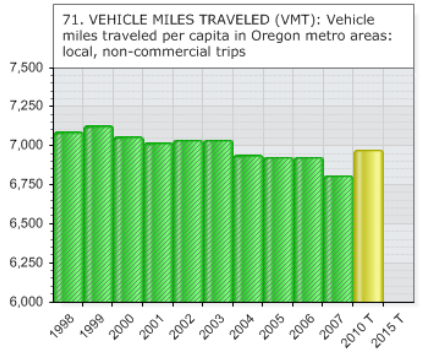
Updated 12/13/2008

Module 1: OREGON'S PROGRESS
71. VEHICLE MILES TRAVELED (VMT)

Making Progress?
Yes

Why this answer The 2007 data suggests a continued decline in vehicle miles traveled per capita in metro areas. However, VMT is correlated to economic activity and the 2007 data may reflect the economic slowdown. Decoupling the connection between VMT and economic growth will be a challenge for Oregon's 21st century economy.

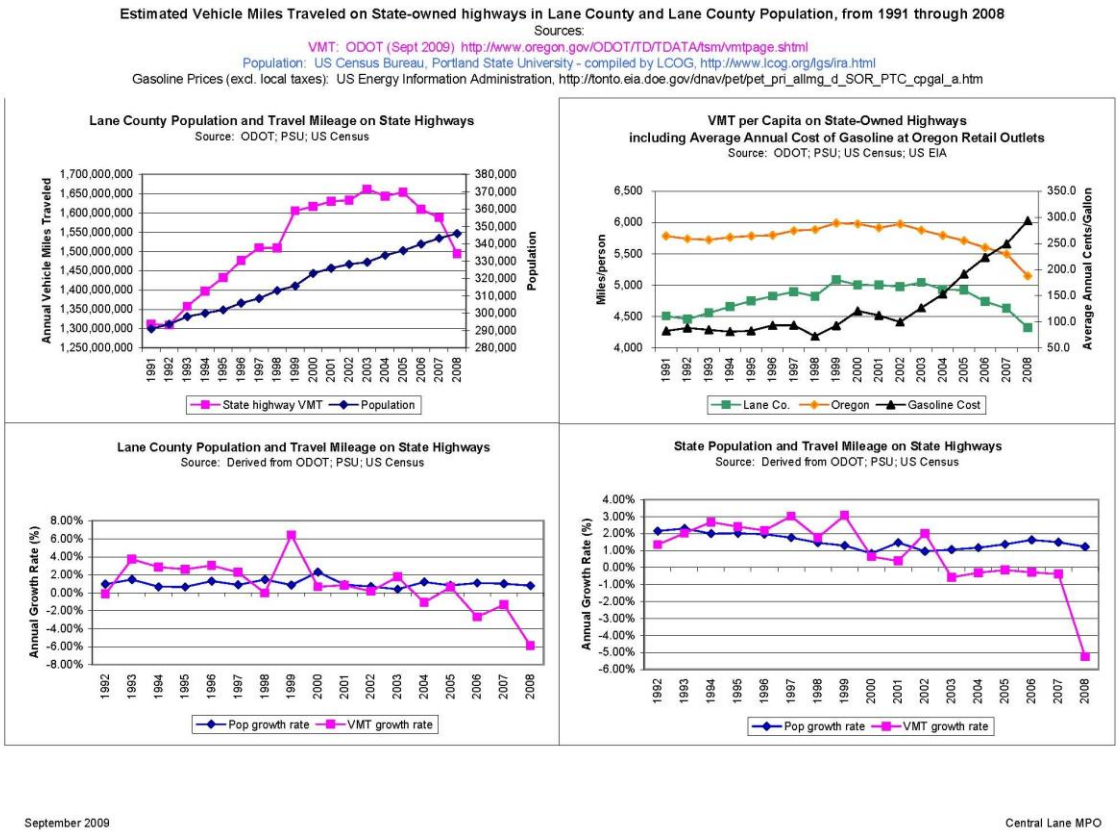
1998	7090
1999	7130
2000	7060
2001	7020
2002	7040
2003[1]	7040
2004	6940
2005	6930
2006	6930
2007	6810
2010 TARGET	6977
2015 TARGET[2]	



Worse
Better

Oregon Department of Transportation

Oregon's MPO regions may have done even better, based on these charts:



Unfortunately, the way the current version of the TPR works, outperforming the per-capita-vmt projections that triggered the alternative measures requirements is not a relevant benchmark. You can beat the projections and still get flogged.

I hope that the state's response to this bright spot in Oregon's otherwise generally dismal statewide benchmarks will not be to deny local governments credit for any vmt-reductions that have causes other than transportation planning. That would only make sense if other factors had been given due credit as primary causes of the big increases in per-capita vmt that led to the adoption of the TPR's vmt-reduction requirements. Denying them credit after wrongfully assigning them blame would surely fail the Macpherson test.

The Regional Transportation Plan amendment trigger:

Section 16 turns the Oregon land use planning process on its head. It should be repealed and replaced with something consistent with statewide citizen participation and coordination requirements, post-acknowledgment statutes, and the Macpherson test.

The Commission added a new Section 16 in 2005 as a way of maintaining consistency between federally-mandated regional transportation plans and state-mandated regional and local transportation plans. This new section has proven to be an end-run around state land use goals as and has reversed the roles of appointed and elected local planning officials.

Section 16 provides that, when a local Metropolitan Planning Organization (MPO) amends the MPO's regional transportation plan, a document addressing federal funding requirements, local elected officials must immediately or soon thereafter amend acknowledged regional transportation plans to bring them into compliance with whatever the MPO has done.

For its part, the MPO, an appointed body, apparently has no obligation to demonstrate that its changes comply with acknowledged transportation plans that have been adopted by elected local land use authorities. This provision reverses the roles of local elected and unelected planning bodies. It also undermines the statutory concept of acknowledgment for local comprehensive plans.

In Eugene-Springfield, for example, a decade-long process of citizen participation, intergovernmental coordination, and intense political activity by local elected officials went into each update of TransPlan, the region's acknowledged transportation system plan. Then, pursuant to Section 16, the unelected MPO board was able to upend all of that work in a single stroke by dropping the planned West Side bypass from the regional plans list of projects proposed for funding. It did so without having to demonstrate continuing compliance with any statewide land use goal or rule, including the citizen participation goal, the planning goal, the economic development goal, and the transportation goal. The effect of that decision, according to DLCD, was to implicitly deacknowledge all of the plan designations and related Goal 9 and 10 inventories that depended upon the existence of the bypass as a planned facility.

All this almost before the ink had dried on the Commission's 2007 final order closing out the region's 13-year periodic review.

As far as I can tell from reviewing the literature on federal statues and MPOs in other states, this kind of planning coup d'etat is not required by federal law. It is made possible

only by the flawed language of Section 16 of the TPR.. No other state, to my knowledge, has anything like Section 16, and other states get their federal funding.

There may be more fundamental problems with Section 16. Insofar as Section 16 enables MPOs to require elected land use authorities to conform their plans to plan changes made by appointed officials of MPOs, which are not among the local land use authorities recognized by Oregon's land use statues, Section 16 may be *ultra vires*: that is, it may exceed the authority of the Commission to change allocations of land use and legislative authority made by state statutes, local charters, and the Oregon constitution.

All-at-once-and-nothing-first:

One of the most troublesome recent changes in the TPR comes from the Court of Appeals, which recently reversed a long-standing consensus that local governments can defer full application of the TPR's Section 60, provided that they assure complete application of the rule before new uses allowed by the amendments can occur.
In *Willamette Oaks, LLC v City of Eugene*, 232 Or App 29 (Nov. 18, 2009), the court ruled that a local government may not defer application of Section 60 of the TPRwhen amending a comprehensive plan or implementing regulation.

As noted in the DLCD Director's Report for the January 20-21 meeting of the LCDC, this decision is potentially a major goalpost change:

> "This [decision] is significant because it would appear to reverse a string of LUBA decisions dating back to 2004 that have effectively allowed local governments to comply with 0060 by adopting limitations or conditions that restrict development as part of the plan or zone change and put in place a TPR-like standard and process for review of subsequent development." January, 2010 Director's Report.

The Department did not take part in the recent case, and it has never indicated any unhappiness with the leading LUBA decision endorsing the previous reading of the TPR. Unfortunately, the Department seems to have decided it likes the new and more stringent reading of the rule. Moreover, the Department apparently wants to apply the new rule not only to quasi-judicial changes such as were involved in the Court's decision, but also to major legislative comprehensive plan updates, including UGB amendments, county-wide destination resort mapping, and general zoning code updates.

The result threatens planning gridlock. No local government can do a meaningful job of assessing the transportation impacts of every legislative amendment to its plans and zoning ordinances. The job is too big, the potential effects are too uncertain, and the danger of preempting meaningful impact analysis when the impacts are more certain are too great.

The result is also unnecessary, and it is one that the Commission could easily change by issuing its own interpretation or clarification of the rule. In so doing, it would simply be reinstating a working reading of the rule that state, local, and private participants in the land use process have been relying on for years.

Here is some tedious but important history:

Until last month, DLCD has, in a variety of ways, treated the LUBA decisions as fully consistent with Section 60 of the TPR. This is especially significant since it has taken the public and the Commission through two extensive rounds of TPR rulemaking since the leading LUBA decision was announced.

The leading LUBA decision is *Citizens for Protection of Neighborhoods v. City of Salem and Sustainable Fairview*, 47 Or LUBA 111 (2004).

Although it was entitled to comment, object, appeal, and file a brief on this issue in both the 2004 case and the 2009 case, DLCD did nothing. As far as we can tell, neither ODOT nor DLCD has objected to deferrals or even raised the issue in any periodic review, LUBA appeal, or appellate court proceeding.

The absence of rulemaking or other corrective response to *Sustainable Fairview* is especially significant because of the dramatic contrast with another case involving the same provisions of the TPR--Section 60, decided the same month.

LUBA issued its decision in *Sustainable Fairview* in June, 2004, the same month that the Court of Appeals issued its decision in *Jaqua v. City of Springfield*, 193 Or App 573, 91 P3d 817 (2004).

In marked contrast to the *Sustainable Fairview* decision, the *Jaqua* decision resulted in the immediate initiation of proposed amendments to Section 60 of the TPR. That response to *Jaqua* resulted in significant "corrections" to the Court of Appeals decision. It also evolved into an intensive two-round comprehensive review and update of the TPR running from 2004 to 2006. See TPR amendments LCDD 3-2005, f. & cert. ef. 4-11-05; LCDD 6-2006, f. 7-13-06, cert. ef. 7-14-06. See also work group materials, staff reports, drafts, minutes, etc. from October, 2004, through August, 2006, on DLCD's website at www.oregon.gov/LCD/transplan.shtml and www.oregon.gov/ODOT/TD/TP/TPR2.shtml.

One way to realign agency practice with the rule is for the agency to back up its practice by continuing that practice and defending it if appealed. If it does that, the Court of Appeals will, it is hoped, appropriately defer as it has done in similar situations in the past. See, e.g., *Newcomer v. Clackamas County*, 92 Or App 174, 758 P2d 369 (1988).

We believe that the Court of Appeals would readily defer to the Commission if it chooses to reinforce the previous workable and generally-accepted interpetation of its rule. An

agency interpretation that is consistent with agency practice and not clearly contrary to the language of the rule would be entitled to considerable deference. See *Don't Waste Oregon Com. v. Energy Facility Siting*, 323 Or 132, 142, 881 P2d 119 (1994).

From a practical standpint, given the longstanding consensus among LUBA, DLCD, ODOT, and LCDC, local governments and applicants for plan and zone changes have felt comfortable relying on LUBA's interpretation of Section 60. This reliance has affected their approach to complying with Section 60 not only as they respond to applications for quasi-judicial plan and zone changes, but also as they legislatively update their comprehensive plans and zoning regulations to comply with the mandates of numerous state land use statutes, goals, and rules.

Good Luck

Local governments have lost most of the flexibility they used to have to adapt and respond to change within urban growth boundaries during the program's first 20 years. As the surpluses built into the first round of acknowledged comprehensive plans disappear and allowed uses of the remaining land supplies are ever-more-strictly constrained by ever-more-demanding state land use planning requirements, planning gridlock threatens to set in, profoundly affecting their ability to address unforeseen changes, whether they be crises or opportunities.

I am grateful to have had a role, however minor, in the development of Oregon's pioneering state land use program. I am concerned, as a land use litigator and an early advocate for formal rulemaking, that the Commission's ever-thickening rulebook and a body of caselaw taller than either of our candidates for governor will hamper its ability to cope with challenges facing it. A good place to start is with a red pencil and the Macpherson test.

Best wishes,

Al Johnson
541-687-1004
alj25@qwestoffice.net

cc: Bob Cortright
Bob Rindy

City of Tualatin

www.ci.tualatin.or.us

September 1, 2010

Chad Jacobs
League of Oregon Cities

Via Email

RE: LCDC hearing on conflicts between the Transportation Planning Rule and other Planning Rules

Dear Chad:

You have asked whether cities have encountered issues in trying to comply with the Statewide Planning Goals and the language in the Transportation Planning Rule. The answer from Tualatin is "yes."

There is a significant conflict. The Land Use Planning rules (including those mandated by Metro) are focused on utilizing areas already within the Urban Growth Boundary to protect valuable farm and forest resource land. This generally means that cities must densify within the UGB. However, the Transportation Planning Rule states that a local government cannot change zoning to allow densification if there will be impacts to the state transportation system or if that system is already failing. This includes the freeway system, which already needs to have improvements in certain areas to handle existing traffic. Because Tualatin sits at the junction of I-5 and I-205, with 99W located on its western edge, we are constantly trying to accommodate mandated growth within our city while minimizing traffic impacts. Cities are not allowed to impose long-term moratoriums to stop growth until the transportation systems catch up and they can't demand that a developer who is adding only a few trips to the system pay millions of dollars to fix the state highway system.

A recent example exists in Tigard, our neighbor to the north. Tigard wants to upzone both its downtown and the Tigard Triangle area. This is consistent with the discussions being held about High Capacity Transit down 99W. There is no question that there has to be a sufficient population for such transit projects to be successful However, Tigard cannot meet the requirements in the Transportation Planning Rule in order to allow the upzoning.

Sincerely,

Brenda L. Braden
Tualatin City Attorney

18880 SW Martinazzi Avenue | Tualatin, Oregon 97062-7092 | 503.692.2000

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DEVELOPMENT SERVICES DEPARTMENT
PUBLIC WORKS DEPARTMENT

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Date: September 1, 2010

Members of the Land Conservation and Development Commission
Richard Whitman, Director
Department of Land Conservation and Development
635 Capitol Street, NE; Suite 200
Salem, Oregon 97301-2540

Subject: Agenda Item 4, Sept. 1 LCDC Meeting; Transportation Planning Rule Issues

Dear Commissioners and Director Whitman,

We appreciate the Commission's awareness of the difficulties many Oregon communities are experiencing as we endeavor to achieve compliance with the diverse and challenging mandates of the Transportation Planning Rule. There are a number of specific requirements in the TPR that present the City of Springfield with what is today an expensive and sometimes unwinnable standard. We will identify and briefly explain these provisions in this letter, however, it is our belief that the most constructive dialogue for improvement will occur during the work undertaken to implement SB 1059, including the role of the state and local government in a planning program that will be expanding its reach to include measures to address climate change, GHG emissions and an economy that must adapt to a world of declining fossil fuels. We look forward to the next 12-16 months with enthusiasm and high expectations for bold, creative and adaptive solutions.

As we partner with our MPO communities, DLCD and ODOT to undertake this new state-wide effort we will focus our strongest interests on the discussions involving federal-state-local transportation planning coordination, standards for creating and measuring successful land use-transportation plans, and each of the attendant requirements that will address the myriad critical issues of jobs, housing and quality of life. To that end, we make note of the following elements of the TPR that would benefit from the SB 1059 makeover.

It's been our experience that we are often caught between the fluidity of the market and the various state mandates embodied in our comprehensive plan. When these conflicts arise, we accept our responsibility to implement our plan, but we also realize that state-mandated plans have well-known limits. Often we find that creative development proposals will better achieve our broad quality community development objectives than concepts reflected in our comprehensive plans; this is what happens when a moving force (the market) meets a stationary object (an Oregon-style comprehensive plan). It is essential to the viability of such a model that such plans can be amended in a timely and efficient way.

Until 2009 there was some flexibility regarding the evidence necessary to sustain such comprehensive plan amendments when addressing the TPR; however, as a result of the Oregon Court of Appeals decision on the case *Willamette Oaks, LLC v City of Eugene*, the court ruled that Section 60 of the TPR could not be set aside until a development application was submitted when amending a comprehensive plan or implementation ordinance. The Court's ruling was based on the text of the rule and what that text meant; not that performing the analysis would result in a better decision therefore it (the determination) could not be delayed. We believe the Commission can address this matter by inclusion of specific language in the Rule that supports what was common practice until *Willamette Oaks*. This will assist local government as they address and consider

applications for quasi-judicial plan and zone changes, and also as they undertake legislative updates to their comprehensive plans, zoning codes and other development standards and processes necessary to comply with the mandates of the statutes, goals, and rules.

Another area of concern is the consequences, we hope unintended, from the addition of Section 16 to the TPR. We acknowledge and endorse the benefits of coordination between all required transportation and land use documents; that endorsement should be self-evident given the chaos that would result if such planning documents were prepared and adopted without regard for geographical similarities and related objectives. However, the federal transportation law does not require federal plans to comply with state land use law and neither should state land use law require local plans to comply with federal transportation law. We believe that most of Section 16 (addition or deletion of regional projects the notable exception) preempts the established mandate for compliance of local plans with state land use goals.

Section 16 also confers de facto land use authority to a Metropolitan Planning Organization (MPO) by requiring local governments to amend local land use plans in compliance with amendments made to the MPO's federal regional transportation plan. Other than METRO, MPOs are not constituted with the authority to amend, or direct the amendment of local government comprehensive plans, including transportation system plans. This provision is a dislocation of the relationship between citizens of a community and their duly elected representatives and a direct challenge to our understanding of the meaning and purpose of acknowledgement.

A related TPR issue is the requirement for MPOs to prepare Regional Transportation System Plans (RTSPs) and the attendant requirement that all MPO member governments adopt the RTSP as part of their comprehensive plans. We're unclear what purpose an RTSP serves for MPO governments that is not already achieved by the required federal Regional Transportation Plan (RTP) and local TSPs and comprehensive plans, assuming that the local TSPs have been adopted in compliance with all state land use goals in combination with the requirement that TSPs must be coordinated with the RTP whenever the RTP is changed. It should be possible for an MPO to have a federal RTP and local TSPs, with a requirement that they be harmonized, not that one is required to conform to the other, either as a result of an RTP update or at periodic review.

The construction, operation and maintenance of the entirety of our transportation infrastructure is the most significant and expensive public investment supporting the planned growth of our communities. Without a balanced approach to access, safety, freight movement and alternative modes that go beyond merely facilitating planned land uses and into direct improvement of the health and well being of the people of Oregon, we will find ourselves overmatched by the entirely new challenges that will face us as we encounter our destiny in the 21st century. Thanks again for this opportunity to comment. We look forward to continuing our outstanding relationship with the Department and the Commission.

Cordially,

Gregory Mott
Planning Manager

Tom Boyatt
Transportation Manager

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Metro | *Memo*

Date: Wednesday, September 1, 2010
To: Land Conservation and Development Commission (LCDC)
From: Councilor Carlotta Collette
Subject: Comments on Transportation Planning Rule

The TPR has many good elements and has helped us better link land use and transportation planning. Examples include building orientation and parking requirements that have been adopted across the Metro region.

I understand from our local partners that the 2005 TPR changes relating to plan amendments have made it more difficult in some areas to implement the 2040 Growth Concept in our region. You will likely hear from cities and counties about their experiences with 0060 today, and you may hear that ODOT perceives those experiences differently. We support the intended purpose of the amendments to protect the state highway system for non-local trips. However, we believe there is a more refined way to apply it that would support sustainable compact development as well as preserve capacity on major facilities.

The 2005 TPR amendments have, in many instances:

- added time and cost when seeking ODOT approval on amendments that are clearly consistent with the 2040 Growth Concept
- discouraged plan amendments that would advance 2040 Growth Concept principles in order to avoid a TPR 0060 issue

When the 2005 TPR amendments were adopted, LCDC asked the Metro region to give it a try, and report back with our recommendations. At this time, we propose the following:

- Revisit the rule as part of the HB 2001 Green House Gas scenarios that Metro will develop and test over the next two years. This will provide an excellent opportunity to fine-tune the rule, and ensure that it reinforces our climate change strategy
- In the interim, recognize that compact development patterns reduce VMT/capita and greenhouse gas emissions with updated trip credits based on Metro's Regional Transportation Plan research.

Thanks for the opportunity to weigh in, and we look forward to working with you to continue improving this important part of our planning framework.

EXHIBIT: 6 AGENDA ITEM: 4
LAND CONSERVATION & DEVELOPMENT COMMISSION
DATE: 9-1-10
PAGES: _____
SUBMITTED BY: Carlotta Collette

City *of* Tigard
Memorandum

To: Land Conservation and Development Commission

From: Mayor Craig Dirksen

Re: Impacts of Transportation Planning Rule on Land Use

Date: September 1, 2010

cc: Councilor Buehner, Councilor Henderson, Councilor Webb, Councilor Wilson, City Manager Craig Prosser

Tigard supports the intent of the Transportation Planning Rule (TPR) – to preserve the function and performance of state transportation facilities. However, the effect of the TPR implementation has been to limit the region's, and by extension the City's, ability to effectively plan for future growth in ways that will achieve Metro's 2040 objectives and the City's aspirations for its Corridor, Town Center and Regional Center: creating places that can be efficiently served by transit, bicycling, and walking.

The City of Tigard aspires to significantly increase residential density in downtown Tigard, a designated town center. This aspiration is hampered by capacity constraints on Pacific Highway 99W. Similarly, large sections of the Tigard Triangle (the area bounded by I-5, Highway 217, and Pacific Highway 99W) are limited to the 0.40 floor area ratio under current zoning due to congestion on these state highways.

Without the ability to accommodate growth in these close-in locations, new single family residential developments are being planned on the west side of the City. Ironically, much of the new traffic generated by these developments will travel along these same congested highways and will be less conducive to multimodal transportation options. As such, one unintended outcome of the TPR, as it is currently implemented, is to create an environment which encourages suburban sprawl type development.

Issues with Current Implementation for Zone Changes

Proposed land use changes must be evaluated for compliance with the TPR according to standards identified in the Oregon Highway Plan (OHP). The standards are expressed in terms of the volume-to-capacity (v/c) ratio, as defined in the Highway Capacity Manual (HCM) to measure performance.

EXHIBIT: 8 AGENDA ITEM: 4
LAND CONSERVATION & DEVELOPMENT COMMISSION
DATE: 9-1-10
PAGES: _____
SUBMITTED BY: Craig Dirksen

We appreciate the many valid reasons to use v/c ratios as a measure of performance; however, exclusive use of v/c ratio has significant limitations. Reliance on v/c ratio as the overriding measure in TPR evaluations results in decisions based entirely on motor vehicle capacity to the exclusion of other mobility measures:

- The OHP does not recognize performance measures for travel by bicycle, pedestrian, or transit travel. In fact, mitigations required to meet v/c ratio standards may negatively affect pedestrian and bicycle conditions. For example, adding a right-turn lane may improve motor vehicle capacity, but it also increases conflict points for bicycles and increases the crossing distance for pedestrians. The OHP does not provide a means of evaluating the off-setting impacts to these modes. This is especially problematic on at-grade highways such as Pacific Highway 99W.

- The OHP performance measures, in the form of v/c ratios, do not recognize and properly credit mitigation of safety deficiencies. In circumstances where potential safety mitigations would improve overall mobility, limiting performance measures to v/c ratios does not provide an opportunity to recognize and encourage safety mitigations.

- The OHP does not adequately consider the reduced impact of mixed-use development. Future development in centers and corridors will utilize mixed use zoning to create complete communities. Such complete neighborhoods where people live, work, shop, and recreate have less impact on surrounding transportation facilities because a large percentage of their activity is internal.

Where v/c ratio must be used to evaluate motor vehicle mobility, it does not provide a realistic assessment of conditions for roadways that are already over capacity.

- A fundamental value used to calculate v/c ratio is the volume of vehicles using an intersection during the peak hour. When an intersection is over-capacity, by definition the demand for travel through an intersection is not satisfied. As such, the v/c analysis will indicate that it is operating below capacity simply because vehicles are tied up in traffic and unable to get through the intersection. Typically, it is known from field experience that an area is over capacity; however, it is inappropriate and limiting for the OHP to require reliance on a measure that is deemed inaccurate in over-capacity conditions.

Alternative Measures & Approaches

ODOT has made efforts to address some of the shortcomings of the current TPR implementation. These include special area designations where higher degrees of congestion may be allowed; additionally, the OHP allows for the identification of alternative mobility standards, including standards in the Portland Metropolitan area. However, performance measures continue to be focused on v/c ratios.

Some alternatives to v/c ratios that could provide a measure of overall mobility include:

- Arterial Level of Service (LOS). Like the v/c ratio, arterial LOS is documented in the Highway Capacity Manual (HCM). This measure is based on travel time along a corridor, appropriately shifting the focus of traffic performance away from a single point (intersection) and toward point-to-point corridor conditions.

- Multi-Modal Level of Service (MMLOS). The MMLOS provides a means of evaluating a transportation facility and providing a performance measure for motor vehicles, pedestrians, bicycles, and transit. It can measure the mutual impacts of changes among different modes on a given roadway segment. For example, a roadway widening may improve conditions for motor vehicles, but could negatively impact pedestrian conditions if it reduces the width of the landscape buffer or sidewalks. This impact would be captured in the MMLOS analysis.

  The MMLOS transportation performance measure is included in the most recent update of the HCM (2010 edition). As such, it is thoroughly vetted by the Transportation Research Board of the National Research Council. However, as a relatively new addition the practical experience is limited. Future consideration of alternative mobility standards by ODOT should include examination of MMLOS.

Other performance measures that should be considered include non-capacity based operational improvements. These might include access management strategies that may not improve the measured performance using v/c analysis, but would improve the flow of traffic and reduce conflict points. Similarly, evaluation of mobility in terms of safety and safety mitigations should be elevated as a factor of highway mobility.

Partnership for a Solution

Preserving the function and performance of our transportation infrastructure will require a partnership of state, regional, and local agencies and governing bodies. We all have a stake in maintaining safe and efficient mobility on our state highways. Tigard is committed to working with our partners to achieve these mobility needs while meeting the Region's 2040 vision and the City's aspirations for the future.

EXHIBIT: 9 AGENDA ITEM: 4
LAND CONSERVATION & DEVELOPMENT COMMISSION
DATE: 9-1-10
PAGES: _____
SUBMITTED BY: Denny Egner

CITY OF LAKE OSWEGO

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August 31, 2010

John VanLandingham, Chair
Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

Dear Chair VanLandingham and Commissioners,

The City of Lake Oswego strongly supports the overall objective of linking transportation planning and land use planning as outlined in the Transportation Planning Rule (TPR). This letter and the accompanying testimony describe an area of concern where the rule, in practice, may fail to achieve what is best for local communities, the Metro region, and the state.

Downtown Lake Oswego, located along State Highway 43 between Portland and West Linn, is designated as a Metro 2040 Town Center. As such, the downtown is planned to be a vibrant, mixed-use center that is highly walkable and well served by transit. Through urban renewal efforts, the City has been successful in encouraging private investment and mixed-use development that has resulted in an increase in property values of over $200 million since 1986.

The City is currently examining the opportunities to further enhance its town center, by redeveloping an existing industrial area (the Foothills area) located adjacent to Highway 43, between the downtown and the Willamette River. In addition, Metro and the City are currently in the process of developing plans to extend the Portland Streetcar to Lake Oswego with streetcar stops located in the Foothills area. The redevelopment opportunities are tremendous.

In 2005, the City completed a study that explored the opportunities and constraints related to redevelopment in Foothills. The study, funded by a Transportation and Growth Management (TGM) grant, examined land use and transportation impacts of three different development scenarios for Foothills.

The most intense scenarios added 1,200 housing units to the area and 70,000 sq. ft. of commercial space. To implement the scenarios, a comprehensive plan and zone change would be required, which would trigger the need to address the Transportation Planning Rule. The study actually found that this level of redevelopment did not result in the need for major improvements to Highway 43. Simple traffic signal timing adjustments could satisfy any problems.

Jack Hoffman, Mayor ■ Roger Hennagin, Councilor ■ Donna Jordan, Councilor
Sally Moncrieff, Councilor ■ Mary Olson, Councilor ■ Bill Tierney, Councilor ■ Dan Vizzini, Councilor

Earlier this year, the City hired a team to create a detailed development plan for the Foothills area. The plan will address transportation, infrastructure, and environmental issues and is intended to make the site development ready. A key question that remains unanswered is the density and intensity that is needed to make the redevelopment feasible. It is highly possible that the final desired densities for Foothills will be as much as two or three times the number of units that were analyzed in the 2005 study. However, based on the results of the 2005 study, this increase in intensity will likely require additional lanes along Highway 43 through the downtown, which would greatly impact existing buildings and the intimate scale and character of the street.

The 2005 study was based on a Metro 2025 traffic model and made the following key findings:

- Traffic on Highway 43 was expected to increase by 35-50% over the 20-year period.
- 10-15% of the increase in traffic on Highway 43 would be generated by the Foothills development.
- 85-90% of the increase in traffic would be generated by background traffic and new development elsewhere including 7,000 units in the Stafford basin.
- The traffic model generated the background traffic in the Stafford basin despite the fact that no acknowledged city or county plan designated the area for development.

To conclude, linking transportation and land use planning is complex. In the case of Lake Oswego's Foothills area, the amount of development that is allowed under the rule is dependent on the amount of background traffic generated by the Metro traffic model. For Foothills, it is entirely possible that increased development intensity in the right place – a walkable Metro 2040 Town Center – will be supplanted by sprawling development at the edge of the urban area. Rather than accommodate dispersed growth, the TPR should be crafted to encourage development in the right places - in centers, corridors and in downtowns. In your work to address problems with the TPR, please assure that methods are developed that give priority to plan amendments that add densities in centers and corridors consistent with local and regional aspirations.

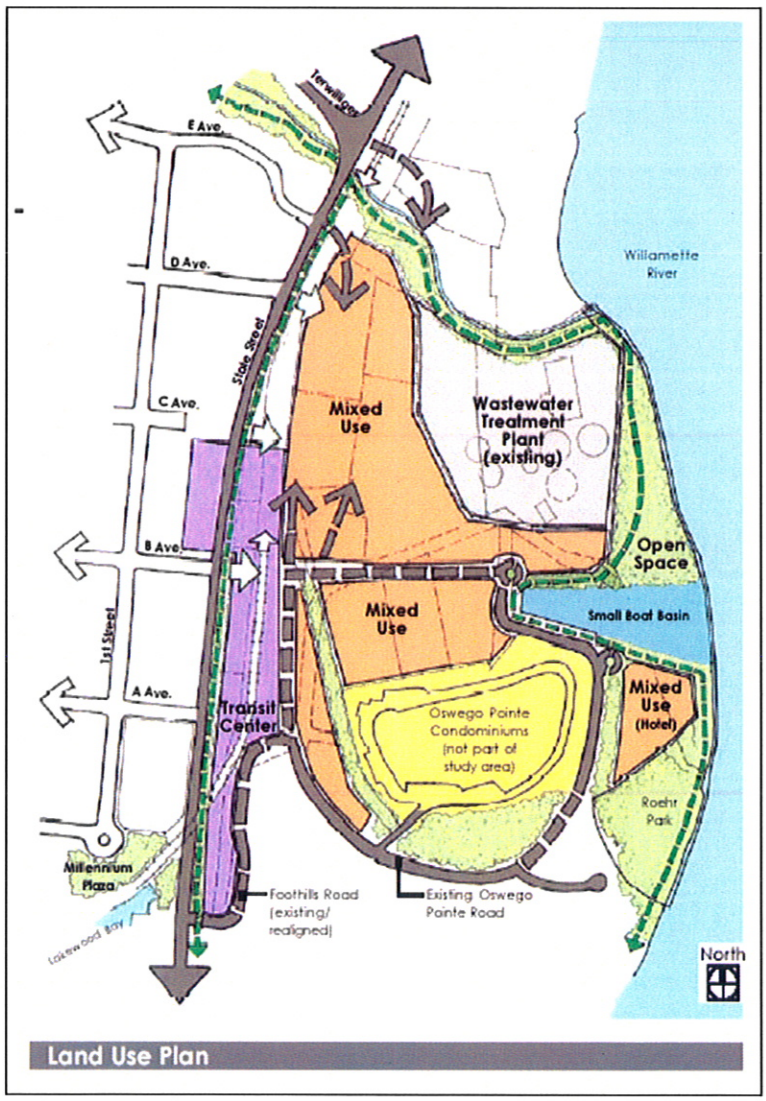
Thank you for the opportunity to comment.

Sincerely,

Dennis Egner
Assistant Planning Director
City of Lake Oswego

Attachment: Foothills Area Map and Concept Plan

Foothills


Terwilliger
E Ave.
D Ave.
C Ave.
B Ave.
A Ave.
State Street
1st Street
Willamette River
Mixed Use
Wastewater Treatment Plant (existing)
Open Space
Small Boat Basin
Mixed Use
Mixed Use (Hotel)
Transit Center
Oswego Pointe Condominiums (not part of study area)
Roehr Park
Millennium Plaza
Lakewood Bay
Foothills Road (existing/ realigned)
Existing Oswego Pointe Road
North
Land Use Plan

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SUBMITTED BY: Tom Armstrong

September 1, 2010

Mr. John Van Landingham, Chair, LCDC
c/o Oregon Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301-2540

RE: City of Portland Comments on the Transportation Planning Rule

Dear Chair Van Landingham,

As Mayor of the City of Portland, I wish to enter the following comments regarding the Transportation Planning Rule (TPR).

In general, the TPR has been a useful tool to help coordinate land use and transportation planning and investment decisions. However, when considering comprehensive plan amendments and zone changes, there has not been a balancing act among goals and objectives as is usually the case with the state goals and planning rules and compliance with the TPR has taken on a primacy that has created conflicts and controversies. The most difficult cases have involved ODOT's strict interpretation of the Oregon Highway Plan (OHP) mobility standards without consideration of larger VMT reduction goals embodied in Regional Transportation Plan (RTP) or long range urban form as described in the 2040 Growth Concept. This narrow focus on preserving the capacity of state facilities has a dampening effect that is inducing sprawl by discouraging high density development in urban centers and corridors that are located on or near a state highway. This in turn causes development capacity to be shifted to the edge of the region where is there is theoretical capacity on state facilities, but will ultimately add to the congestion in the region and undermine our climate change/carbon reduction goals.

Specifically, I would like to highlight the difficulties that we have had with the TPR in implementing our vision for Portland's Central City. With 144,000 employees and 41,000 residents, Portland's Central City is the densest employment and residential area in the city, region and state. As the heart of the Portland metropolitan area, it is the nucleus of a complex multimodal transportation system. The result is that the Central City enjoys the highest non-auto mode split in the region. Surveys indicate that auto trips make up a decreasing percent of Central City trips. For the first time, according to scientific surveys by the Portland Business Alliance, in 2007 and 2008 auto commute trips composed a minority of trips into the downtown and more employees arrived by transit trips alone than by single-occupancy vehicles. The same survey indicated that bicycling continues to gain importance as a means of commuting.

These trends have a direct connection to the TPR. Parking spaces and VMT per capita are decreasing. Modeling estimates done by the City of Portland indicate that the typical Central City resident and worker travels almost 4 miles less than the typical region resident: 13 miles per capita versus 17 miles per capita. Further analysis indicates that the Central City contributes significantly less greenhouse gas (GHG) emissions per capita than the rest of the region. I think we can all agree that these results are what we want to see in Portland and across the metropolitan region.

Yet despite these positive trends that meet the goals of TPR, the City finds the TPR has been a barrier to increasing density and meeting our mode split goals. It is difficult to get ODOT approval for Central City land use changes based on a narrow application of the OHP mobility standards and the potential impact on the through capacity of the highway system that rings the Central City.

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Instead of focusing on a broader policy analysis of TPR compliance, ODOT asks the City for detailed, complex and costly traffic analysis focused solely on whether changes negatively affect ODOT facilities 30 years out on a "worst case scenario." This overly broad "don't make it worse" policy has the effect of misallocating resources as broader TPR objectives are overshadowed by a narrow analysis focused on the number of potential additional trips (using a very strict definition of "significant") added to state highway facilities.

As part of the Central City 2035 planning process, we're aiming to recommend increasing our land use and non auto mode split targets to further reinforce the role of the Central City in the region; enhance it as a place to live, visit and do business; and meet the City's and State's climate action goals. We trust that TPR policy, if reconsidered in its design and application, can be an asset rather than a liability in meeting these objectives.

This is just one example. We have many more cases across our city where we have been discouraged or prohibited from encouraging higher density development in town centers, main streets and station communities all in the name of preserving capacity on state highways.

In closing, I second Metro's call for revisiting the TPR and updating the OHP mobility standards. I am concerned that the rulemaking process to implement HB 3379 will be too narrow in focus. This is an opportunity for the Land Conservation and Development Commission and the Oregon Transportation Commission to clarify the hierarchy of goals embodied the Statewide Planning Goals, and specifically in the TPR and how they relate to the OHP. We need a more balanced approach to ensure that state, regional, and local land use and transportation decisions are focused on creating a compact urban development pattern that enables us to reduce VMT and greenhouse gas emissions.

Sincerely,

Mayor Sam Adams

CC: Susan Anderson, Director, Bureau of Planning and Sustainability
Sue Keil, Director, Bureau of Transportation

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Community Development Department
71 S.E. D Street, Madras, OR, 97741
541-475-3388

September 1, 2010

Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

Subject: Request for additional amendments to Transportation Planning Rule beyond those required by HB 3379.

Dear Commissioners,

The City of Madras (City) supports the proposed draft changes to the Transportation Planning Rule (TPR) required by HB 3379, although they do not address the larger issues with the TPR.

It is important for the LCDC to know that the City is a supporter of the TPR and the very concept it was adopted – to ensure transportation impacts are addressed in various planning processes. Considering the original Rule that was adopted, the changes to the Rule and the case law that has followed, we have incrementally moved away from this core concept by adding additional requirements to the Rule that are cumbersome and over burden cities to their detriment where long-term housing and economic development objectives will be compromised.

As you know, cities are currently in a difficult fiscal position. 84% of all Oregon cities have populations less that 15,000. Moreover, only 9% of those cities are located in a MPO. These two statistics illustrate the fact that most Oregon cities are small and are located in rural areas of the State, have a State highway adjacent or bisecting their city, and do not have the same financial capacity as larger cities to fund large transportation projects that are triggered in small rural cities when administering the TPR.

To address these issues, the City recommends additional amendments to the TPR that are consistent with the current fiscal conditions of the State and local governments. To this extent, the City requests the LCDC acknowledge that the TPR needs to be amended beyond that required by HB 3379. Furthermore, the City specifically requests that TPR be amended to include the following 3 concepts:

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SUBMITTED BY: Nick Snead

1. Amend the TPR to allow transportation improvements to be deferred to the development review stage (i.e. ex post facto of a zone change). With the recent LUBA decision[1], mitigations to transportation impacts cannot be deferred to the development review stage and requires the all of the funding to be in place and or the improvement to be constructed when the property is zoned and the actual vehicle trips are not yet generated and impacting the transportation system. By deferring the mitigations in this manner is respectful of the realities of development while ensuring the precise transportation impacts of a development are mitigated prior to development occurring.

2. Amend the TPR in a manner that provides equity to all stewards of transportation facilities. The TPR should be amended to include *Dolan* test. To illustrate this point, how is it proportional that property owner proposing to change the zoning of their 16 acre parcel from a resource designation to a City residential zoning is required to fund the entire design and construction of 1.5 miles of a 5-lane state highway expansion improvement to mitigate their impacts because a funding source cannot be identified the City or ODOT? By incorporating the *Dolan* test in the TPR it would allow the precise transportation impacts of development to be mitigated and require only the pro-rata share of a larger transportation improvement.

3. Amend the TPR to allow flexibility in timing and funding. The City recommends the TPR be amended to allow a corridor approach to transportation planning which would identify and prioritize projects to be constructed within the planning period amongst several cities that may or may not be in a MPO and use the current funding sources available to cities to construct the prioritized projects within the planning period. This would allow the intent of the TPR to be satisfied and facilitate economic development and housing objectives of each city while using the very limited funding sources in a strategic manner within a region.

In summary, the City is very concerned about the limitations and burdens the TPR and its ability to facilitate economic development and create affordable housing and therefore urges the LCDC to further amend the TPR as discussed above. If you should have any questions, please contact me directly at 541-323-2916.

Respectfully,

Nicholas S. Snead
Community Development Director
City of Madras

[1] Willamette Oaks, LLC v. City of Eugene, 59 Or LUBA 60 (2009)

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September 2, 2010

John VanLandingham, Chair
Land Conservation and Development Commission
635 Capitol St. NE, Suite 150
Salem 97301-2540

Re: Transportation Planning Rule – Need for Amendments

Dear Chair VanLandingham and Commission Members:

This letter is written on behalf of the International Council of Shopping Centers (ICSC) and the Retail Task Force (RTF) regarding the Commission agenda item relating to Oregon's Transportation Planning Rule (TPR). Please make this letter a part of your record of proceedings.

I am a member of the HB 3379 Stakeholders Committee. In addition, I have participated in numerous legislative activities regarding the TPR, including the last amendments in 2005 based on the *Jaqua* case. As some members of the Commission may recall, ICSC and the RTF presented testimony during that last round of amendments and were skeptical of the workability of the "reasonably likely" standard for establishing the certainty of funding for necessary transportation facilities improvements to provide future system capacity. Several years later, those concerns appear to have been well justified. HB 3379 does not present a viable solution to the TPR's "reasonably likely" problems.

It is time to take a fresh look at the TPR. Some of its provisions are detrimental to critical economic growth and development, especially regarding the need to increase densities inside urban grown boundaries, one of the state's primary land use policies. If the capacity of the transportation system cannot be increased correspondingly with the increase in density, then the TPR's concurrency policy will prevent the planned increase in the density of development inside UGBs, at least where the density increase is hinged on plan amendments. Accordingly, the concurrency requirements of the TPR in that context are in a direct policy conflict with the state's primary land use policy.

In addition to the policy conflict above described, the TPR also contains a number of other provisions that could be amended to enhance economic growth and development by avoiding unnecessary cost and delay now created by the following circumstances:

- As interpreted, the TPR now applies to zone changes in conformance with comprehensive plans. In the last round of discussions, I believe that many cities and/or counties testified that such an interpretation was overly burdensome and served no particular use or purpose. In other words, that interpretation of the rule creates process without corresponding benefit. Other interests may disagree but, on balance, the issue needs to be reexamined. It would be very easy to amend the rule to avoid that interpretation.

- As now interpreted, Section 0060 would only allow certain transportation measures to be utilized for mitigation purposes following a TPR analysis and resultant finding of significant affect, rather than allowing those transportation measures to be used to avoid a finding of significant affect. The difference is more than "half full/half empty." Rather, the difference is the addition of considerable cost and delay to a project by requiring a long-range traffic impact study and the time to negotiate, analyze and apply that study, where many studies ultimately propose a "trip cap" for mitigation, where the trips to be generated by the new plan map and zoning map designations will be no greater than the trips originated by the prior plan map and zoning map designations. So, the simple question is why can't a trip cap be used to avoid a finding of significant affect and truncate the system? Some jurisdictions may not favor trip caps, but many others, including the City of Portland, have identified them as useful tools. As above, the relevant provisions of the TPR could easily be amended to provide that streamlining opportunity.

We offer the above comments as illustrations of the need to further address the TPR. Both ICSC and the RTF look forward to the opportunity to participate in amendment proceedings. Thank you for the opportunity to present comments on this important matter.

Very truly yours,

Mark D. Whitlow

MDW:sv
cc: Mr. Bob Cortright
Ms. Linda Ludwig, League of Oregon Cities
Mr. Art Schlack, Association of Oregon Counties
ICSC, Government Relations Committee for Oregon
RTF Participants