

1 Excerpt from Setniker v Polk County,
2 Oregon Court of Appeals

3 <http://www.publications.ojd.state.or.us/A148070.pdf>

4 and reasoning--in a nutshell, the goal-post rule does not apply when the standards that it
5 requires to remain fixed are themselves bound up with the application. Accordingly, we
6 reject CPM's cross-petition and agree that the goal-post rule does not apply to a zone
7 change or permit application that is consolidated with, and dependent upon, a
8 comprehensive plan amendment. Thus, the relevant date for determining whether the
9 county's proposed amendment would significantly affect the intersection is 2030.

10 We now turn to petitioners' assignments of error on judicial review, the first
11 of which challenges LUBA's application of the TPR. Because the county found that
12 respondent's proposed application would "significantly affect" a transportation facility as
13 of 2030, OAR 660-012-0060(1), the county imposed two conditions of approval intended
14 to ensure that traffic from the proposed development would not render the 51/22
15 intersection "[in]consistent with [its] identified function, capacity, and performance
16 standards." The first condition prohibited CPM's employees and contract haulers that
17 travel west on Highway 22 from turning south onto Highway 51 at the intersection
18 between 4:00 and 6:00 p.m. and, instead, required them to use an eight-mile long
19 alternate route. The second condition, intended to discourage haulers from violating the
20 first condition, required CPM to erect a gate or chain across the entrance to the haul road
21 from Highway 51 between 4:00 and 6:00 p.m. The gate or chain would not physically
22 prevent a determined hauler from entering the site, but it would make entry more

1 difficult.

2 To LUBA, petitioners argued, among other things not at issue before us,
3 that the re-routing and chaining conditions did not constitute sufficient or permissible
4 mitigation under the TPR. That rule provides:

5 "(1) Where an amendment to a functional plan, an acknowledged
6 comprehensive plan, or a land use regulation would significantly affect an
7 existing or planned transportation facility, the local government shall put in
8 place measures as provided in section (2) of this rule to assure that allowed
9 land uses are consistent with the identified function, capacity, and
10 performance standards * * * of the facility. * * *

11 "* * * * *

12 "(2) Where a local government determines that there would be a
13 significant effect, compliance with section (1) shall be accomplished
14 through one or a combination of the following:

15 "* * * * *

16 "(e) Providing other measures as a condition of development or
17 through a development agreement or similar funding method, including
18 transportation system management measures, demand management or
19 minor transportation improvements. Local governments shall as part of the
20 amendment specify when measures or improvements provided pursuant to
21 this subsection will be provided.

22 "(3) Notwithstanding sections (1) and (2) of this rule, a local
23 government may approve an amendment that would significantly affect an
24 existing transportation facility without assuring that the allowed land uses
25 are consistent with the function, capacity and performance standards of the
26 facility where:

27 "(a) The facility is already performing below the minimum
28 acceptable performance standard identified in the TSP [Transportation
29 System Plan] or comprehensive plan on the date the amendment application
30 is submitted;

31 "(b) In the absence of the amendment, planned transportation
32 facilities, improvements and services as set forth in section (4) of this rule

1 would not be adequate to achieve consistency with the identified function,
2 capacity or performance standard for that facility by the end of the planning
3 period identified in the adopted TSP;

4 "(c) Development resulting from the amendment will, at a minimum,
5 mitigate the impacts of the amendment in a manner that avoids further
6 degradation to the performance of the facility by the time of the
7 development through one or a combination of transportation improvements
8 or measures[.]"

9 OAR 660-012-0060. Petitioners' argument, if we understand it correctly, begins with the
10 undisputed (at this stage of the case) premise that the amendments sought by CPM will
11 "significantly affect" the 51/22 intersection, presumably by increasing the number of
12 westbound vehicles that would make left turns off of Highway 22 on to Highway 51, and
13 that, therefore, the county can meet the requirements of the TPR rule only by complying
14 with either subsections (1) and (2)(e), or subsection (3). Subsections (1) and (2)(e),
15 petitioners contend, require the county to undertake "measures" that will "assure that [the
16 land uses proposed in CPM's application] are consistent with the identified function,
17 capacity, and performance standards" of the 51/22 intersection. In other words,
18 petitioners argue--and this is the key to their argument--subsections (1) and (2)(e) require
19 the rerouting and entrance blocking to mitigate not only the intersection's failures caused
20 by CPM's proposed site, but also eliminate any failures that the intersection already has
21 or will encounter without the proposed site, that is, failures caused by existing traffic and
22 so-called "background traffic" growth. Therefore, the argument continues, because the
23 rerouting and blocking will at best offset the impacts of CPM's proposed development but
24 will not bring the presently failing or project-to-fail intersection into full consistency with

1 its function, capacity and performance standards, CPM's only option is subsection (3),
2 which *does* permit measures that will mitigate only the failures caused by the proposed
3 site. And, the argument goes, it is undisputed that CPM cannot meet one of the
4 conjunctive requirements in subsection (3), namely, (3)(a) ("The facility is already
5 performing below the minimum acceptable performance standard identified in the TSP or
6 comprehensive plan on the date the amendment application is submitted"), because the
7 51/22 intersection was *not* failing when CPM's application was first submitted in 2001.
8 Thus, petitioners conclude, the county cannot possibly achieve compliance with the TPR
9 without imposing additional mitigation measures that will not only mitigate the effects of
10 CPM's project, but will also mitigate the existing and projected failures that are
11 independent of that project.

12 LUBA rejected petitioners' argument:

13 "Where petitioners go astray is in their apparent understanding that
14 OAR 660-012-0060(2)(e) requires the applicant to provide 'other measures
15 as a condition of development' sufficient to mitigate even failures caused
16 solely by growth in the background traffic. The basic commandment of
17 OAR 660-012-0060(1) and (2) is to ensure that the *proposed amendment* is
18 'consistent with' the function, capacity and performance standards of
19 transportation facilities. If conditions of approval are sufficient to
20 completely mitigate or eliminate impacts from the proposed amendment on
21 a facility that is projected to fail, then the amendments will not 'worsen' the
22 projected failure for purposes of OAR 660-012-0060(1)(c) and the TPR is
23 satisfied, notwithstanding that the facility is failing or will still fail by the
24 end of the planning period due to growth in background traffic. In short,
25 OAR 660-012-0060(2)(e) and (3) work together to provide means to ensure
26 that the proposed amendment is 'consistent with' the function, capacity and
27 performance standards of the facility, and the two provisions are neither
28 mutually exclusive nor subject to some kind of gap in their coverage."

29 (Emphasis in original.) LUBA's rejection of the key part of petitioners' argument ("OAR

1 660-012-0060(2)(e) requires the applicant to provide 'other measures as a condition of
2 development' sufficient to mitigate even failures caused solely by growth in background
3 traffic") is not persuasive. LUBA relies on "the basic command" of the TPR and,
4 apparently, a reluctance to interpret the rule so as to create a "gap": under petitioners'
5 interpretation of the rule, if an amendment will have a significant impact on a facility that
6 was performing at an acceptable level when the application was submitted but becomes
7 unacceptable within the transportation system plan's time frame (here, 2030) due to
8 naturally occurring growth in background traffic, the local government must require
9 conditions that not only mitigate the damage caused by the amendment but also remedy
10 the facility's failures for which the amendment is in no way responsible.

11 Although LUBA's reading may make more sense and may, in fact, correct a
12 flaw that the rule's drafters inadvertently overlooked, the reading simply cannot be
13 reconciled with the rule's unambiguous language. Subsections (1) and (2)(e) require
14 measures that ensure a facility's consistency with its function, capacity, and performance
15 standards, that is, that ensure that the facility will not fail. Subsection (3) creates an
16 exception: "Notwithstanding sections (1) and (2)," the local government does *not* have to
17 require measures ensuring that the facility is in compliance with standards, etc., *if* the
18 facility was already out of compliance when the application was filed, it would be out of
19 compliance by the end of the planning period in the transportation system plan, and the
20 amendment will itself mitigate its own adverse impact.

21 In sum, LUBA erred in ruling that the county could comply with subsection

1 (2)(e) of the TPR by mitigating only CPM's significant adverse effects. As the rule is
2 written, if LUBA decides on remand that (1) the 51/22 intersection was consistent with
3 relevant function, capacity, and performance standards when CPM filed its application,
4 and (2) the intersection will become inconsistent with the relevant function, etc., by 2030,
5 due to the effect of the amendments or due to independent growth or background traffic,
6 then the county must put in place measures that will not only mitigate the inconsistencies
7 caused by the amendments but also the inconsistencies resulting independently.

8 Petitioners argue in their second assignment of error that LUBA's treatment
9 of the rerouting measure failed to address all of the extra trips created by the
10 development, instead addressing only those from CPM's employees and independent
11 contractors, and that, in any event, the rerouting measure was neither feasible nor
12 enforceable. Petitioners cite ORS 197.835(11) for the proposition that LUBA was
13 required to address the argument petitioners made to it, namely, that CPM's rerouting of
14 its trucks does not address the effect of vehicles driven by "suppliers, customers, and
15 visitors." ORS 197.835(11)(a) provides, in part:

16 "Whenever the findings, order and record are sufficient to allow
17 review, and to the extent possible consistent with the time requirements of
18 ORS 197.830(14), the board shall decide all issues presented to it when
19 reversing or remanding a land use decision * * * or limited land use
20 decision * * *."

21 As noted earlier, the county imposed two conditions of approval on CPM to ensure that
22 traffic from the proposed development would not worsen or degrade the functionality of
23 the 51/22 intersection: rerouting CPM's trucks during peak hours and placing a gate to