



Oregon

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TO: Land Conservation and Development Commission

FROM: Robert Cortright, Transportation Planning Coordinator

SUBJECT: **Agenda Item 6, October 4-6, 2006 Commission Meeting**

**REPORT ON JOINT OTC-LCDC TRANSPORTATION SUBCOMMITTEE
MEETING REGARDING TRANSPORTATION PLANNING RULE
AMENDMENTS**

I. AGENDA ITEM SUMMARY

On August 15, the Joint Oregon Transportation Commission – Land Conservation and Development Commission (OTC-LCDC) Transportation Subcommittee met to discuss whether the Commission should consider further amendments to the Transportation Planning Rule (TPR) to clarify requirements related to goal exceptions for transportation facilities on rural lands. This report summarizes the discussion that occurred at that meeting and the Subcommittee's recommendation. The Joint Subcommittee recommends continued monitoring of this issue but that the Commission not consider further rule amendments at this time. Based on this outcome, the department recommends that the Commission conclude the current TPR rulemaking.

For more information about this agenda item contact Robert Cortright at 503.373.0050, ext. 241, or by email at bob.cortright@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

The department recommends that the Commission adopt a motion closing the existing TPR rulemaking.

III. BACKGROUND

Over the last two years, the Commission's Transportation Subcommittee (Commissioners Henri, Jenkins and Worrix) has been working as part of a joint subcommittee with members of the Oregon Transportation Commission (OTC) to review and recommend amendments to the Transportation Planning Rule (TPR). OTC members included OTC Chair Stuart Foster and Commissioner Mike Nelson.

The joint subcommittee provided oversight for an evaluation of the TPR in 2004 that led to adoption of rule amendments in two phases: in March 2005 and in June 2006.

At its December 2005 and February 2006 hearings on the amendments, the Commission asked that the Joint Subcommittee assess the implications of the LUBA and Court of Appeals decisions in *1000 Friends of Oregon v. Yamhill County* and recommend whether the Commission should consider additional rule amendments. The decisions relate to standards for approval of goal exceptions for transportation improvements on rural lands.

Detailed information on the adopted rule amendments, including supporting information for the TPR Work Group and Joint Subcommittee meetings is available on the web at the following link: <http://www.oregon.gov/ODOT/TD/TP/TPR2.shtml>

IV. SUMMARY OF THE AUGUST 15 JOINT SUBCOMMITTEE MEETING

At its August 15 meeting, the Joint Subcommittee received briefing memos from ODOT and DLCDC staff on the potential implications of the Yamhill County case and the desirability of additional rulemaking at this time. The ODOT and DLCDC briefing memos are included as Attachments to this memo.

A. Background on Exceptions Thresholds and the Yamhill County decision

Major new roads on rural lands require reasons exceptions to Goals 3, 4, 11 and 14. The standards for approval of a “reasons” exception require local governments to establish the transportation need for a planned facility and demonstrate that the need cannot reasonably be met by alternatives that would not require a goal exception. Rule 0070 requires that local governments justify and set “thresholds” to guide decisions about whether or not non-exception alternatives can reasonably meet the identified transportation need.

In July 2005, LUBA upheld Yamhill County’s approval of goal exceptions for the Newberg Dundee Bypass¹. On December 21, 2005, the Court of Appeals upheld LUBA’s decision as it relates to the use of OHP standards as thresholds for goal exceptions. The relevant holding in the LUBA and the Court of Appeals decisions was that the county was justified in using the volume-to-capacity (v/c) standards in the Oregon Highway Plan (OHP) as the threshold for deciding what the transportation need is and for judging whether non-exception alternatives are reasonable.

At its February 2006, the Commission asked staff and the Joint Subcommittee to assess implications of the Court of Appeals and LUBA decisions and assess whether or not additional rulemaking was warranted to guide local governments in setting thresholds.

¹ Yamhill County adopted two goal exceptions, one for the bypass itself and a second to allow an intermediate interchange on rural lands between the Dundee and Newberg UGBs.

B. DLCD Perspective

DLCD's analysis of the implications of the Court of Appeals and LUBA decisions is included in the Department's August 8, 2006 memo to the Joint OTC-LCDC subcommittee, included in Attachment A. In general, DLCD staff view the Court of Appeals and LUBA decisions as granting local governments' broad discretion to set thresholds for approval of goal exceptions. The department's view is also that the decisions effectively allow the volume to capacity (v/c) standards in the Oregon Highway Plan (OHP) to be used as a 'safe harbor' threshold for goal exceptions for state highway projects. The department believes that these decisions allow local governments to adopt thresholds that would result in rejecting potentially reasonable alternatives. To address this issue, the department identified possible amendments to Section 0070 to provide additional guidance on setting thresholds to assure that thresholds more accurately define situations where non-exception alternatives are unreasonable.

DLCD staff identified several reasons additional guidance on thresholds is warranted:

- There is significant potential for additional goal exceptions. Many local governments considered projects requiring goal exceptions as part of their TSPs. DLCD identified more than 40 situations where local TSPs proposed or considered a project requiring a goal exception. Local interest in these projects continues and is likely to result in pressure to consider exceptions as TSPs are updated.
- The OHP v/c standards are, in some situations, not a good measure of whether non-exception alternatives "reasonably" meet identified transportation needs.
- While other policies in the Oregon Highway Plan (such as the major improvements policy and the bypass policy) and funding constraints affect planning for goal exceptions, they are in some situations unlikely to prevent inappropriate exceptions from being approved.
- Allowing additional goal exceptions where there are potentially reasonable alternatives would undermine sound land use and transportation planning because it would (1) allow conversion of resource land; (2) discourage or preclude implementation of reasonable alternatives to meet transportation needs; (3) result in pressure for additional land use changes that take advantage of capacity provided by planned exception improvements.

C. ODOT Perspective

ODOT staff does not share DLCD's concerns about potential for inappropriate goal exceptions. ODOT staff believes that the TPR exception standards have worked well to date and will continue to work well in the future. ODOT staff feels that until it is clear that local governments and ODOT are misusing the TPR threshold standards, there is no good reason to amend those standards. ODOT staff provided an extensive review of adopted

exceptions and of the exception for the Newberg-Dundee Bypass to support its views. ODOT also indicated that their belief that the volume-to-capacity standards are an appropriate threshold factor for goal exceptions noting that the standards have been adopted as part of the 1999 Oregon Highway Plan following extensive public review and debate.

ODOT staff also argued that several other factors would work to assure that inappropriate exceptions do not proceed:

- ODOT has opposed a number of projects that require goal exceptions, and would do so in the future as well.
- Existing policies including the Major Improvements Policy (Policy 1G); and the Bypass policy would direct ODOT and local governments to fully consider reasonable alternatives. ODOT also indicated it would consider alternative mobility standards as allowed by the Oregon Highway Plan.
- Fiscal constraints – i.e. the large gap between needs and available funding – would cause ODOT to discourage large expensive projects in favor of other solutions.

ODOT's memo is included in Attachment B.

D. Summary of Subcommittee Discussion

The major points of the subcommittee discussion are summarized below.

- Commissioners had differing views of whether additional rulemaking is needed.

Chair Foster felt that existing ODOT policy, including the Major Improvements Policy, together with fiscal constraints and leadership from the OTC would discourage inappropriate goal exceptions. Commissioner Worrix expressed concern that the volume to capacity (V/C) standards might override other factors and lead to approval of “foregone conclusions”. Commissioner Jenkins felt that the issue will not go away and indicated that local governments would benefit from additional guidance about how to justify thresholds for goal exceptions.

- Commissioners generally agreed that additional amendments to the TPR are not appropriate at this time.

OTC Chair Foster felt that the existing process had worked well and expressed concern that additional rule amendments might create additional and unnecessary barriers to needed transportation projects. Chair Foster also felt that most of the inappropriate projects that might require goal exceptions have already ‘gone by the wayside’. Commissioners Henri and Worrix agreed that rulemaking is not the best course at this time. Commissioner Worrix questioned whether or not additional exceptions were reasonably likely occur and reasoned that the issue is currently a

potential problem. Commissioner Henri agreed and suggested that there was little or no downside to not undertaking additional rulemaking at this time. Commissioner Jenkins expressed support for additional rulemaking to provide necessary guidance to local governments, but agreed with the other commissioners to defer additional rulemaking for now.

- Commissioners agreed that staff should continue to monitor proposed goal exceptions and report the status of proposed goal exceptions to the Joint OTC-LCDC Subcommittee.

The commissioners agreed that the Joint OTC-LCDC Subcommittee should continue to meet on a quarterly or semi-annual basis to coordinate on major policy land use and transportation issues and that through this process staff should brief the Joint Subcommittee about proposed goal exceptions. Through this monitoring the Joint OTC-LCDC Subcommittee can assess whether additional rulemaking is needed. (The Joint Subcommittee would expect to meet again following the conclusion of the 2007 Legislative Session.)

- OTC Chair Foster expressed support for reconsideration of the volume-to-capacity standards in the Oregon Highway Plan to address this issue.

Chair Foster noted that following adoption of the Oregon Transportation Plan this Fall, that the OTC will be considering an update of the Oregon Highway Plan. He indicated his support for reassessing the OHP volume to capacity (V/C) standards and provisions for approval of alternative mobility standards to, in part, address DLCD and LCDC concerns about inappropriate use of the V/C standards. LCDC Commissioners supported this action but Commissioners Worrix and Jenkins felt the underlying policy question related to application and interpretation of goal exceptions requirements rather than the Highway Plan.

VII. OVERALL CONCLUSION AND RECOMMENDATION

The consensus of the Joint OTC-LCDC Transportation Subcommittee is that additional amendments to the Transportation Planning Rule to address the thresholds issue are not appropriate at this time. The department agrees with the outcome of the Joint OTC-LCDC Subcommittee discussion and proposes to monitor consideration of goal exceptions and report to Joint Subcommittee at subsequent meetings. Since the Commission's action at its June meeting was to continue rulemaking to allow consideration of this issue, the department recommends that the Commission approve a motion formally concluding and closing its existing rulemaking process.

Suggested Motion to conclude rulemaking. (Staff Recommendation)

I move that the Commission conclude and close the existing rulemaking related to Division 012 (the Transportation Planning Rule.)

ATTACHMENTS

- A. Memo to the Joint OTC-LCDC Subcommittee from Bob Cortright, Transportation Planning Coordinator, August 8, 2006.
- B. Memo to the Joint OTC-LCDC Subcommittee on Transportation from Craig Greenleaf, TDD Administrator, August 8, 2006.