

January 19, 2005

TO: Land Conservation and Development Commission

FROM: Lane Shetterly, Director

SUBJECT: **Agenda Item 9, February 2-4, LCDC Meeting**

**PUBLIC HEARING ON PROPOSED ADMINISTRATIVE RULE
AMENDMENTS – OAR 660-012 (TRANSPORTATION PLANNING RULE)
REGARDING REVIEW OF PLAN AND LAND USE REGULATION
AMENDMENTS**

I. AGENDA ITEM SUMMARY

This item includes a public hearing to receive testimony on proposed amendments to portions of the Transportation Planning Rule (TPR) (OAR 660-012-0060) that relate to plan amendments. The Commission initiated this rulemaking in response to a request from the Oregon Department of Transportation (ODOT) in July 2004. The proposed rule amendments were developed by a joint subcommittee of the Land Conservation and Development Commission (LCDC) and the Oregon Transportation Commission (OTC).

The department has scheduled a second hearing and possible adoption of the proposed amendments for the Commission's March 16-18 meeting. Based on Commission direction, the department will produce a revised draft of the rule for public review and comment by mid-February.

For more information about this agenda item, contact Bob Cortright, at 503.373.0050 x241 or e-mail at bob.Cortright@state.or.us.

II. SUMMARY OF RECOMMENDED ACTION

The department recommends that the Commission receive testimony from members of the public wishing to comment on the proposed rule amendments. After the close of the public hearing the Commission should discuss the testimony and any related matters and provide additional direction to the department. A final draft incorporating the Commission's suggestions, including recommending changes to the draft rule

amendments will be published prior to the final hearing and adoption scheduled for the March 16, 2005 Commission meeting.

III. BACKGROUND AND PUBLIC PARTICIPATION

A major purpose of the Transportation Planning Rule (TPR) is to promote more careful coordination of land use and transportation planning – to assure that planned land uses are supported by and consistent with planned transportation facilities and improvements. This is primarily accomplished by local governments and ODOT as they prepare transportation system plans (TSPs). TSPs set forth a system of planned transportation facilities and services to support implementation of adopted comprehensive plans.

Section 0060 of the TPR requires that local governments consider whether plan amendments and zone changes would “significantly effect” the planned transportation system. When plan amendments have a significant effect, the rule requires that local governments take steps to assure that planned land uses and planned transportation facilities are in balance and consistent with one another.

In June 2004, the Oregon Court of Appeals upheld a LUBA decision in the case of Jaqua v. City of Springfield. A major holding in the case was that a “significant effect” under Section 0060 occurs if a planned transportation facility would fail to meet adopted performance standards at any point during the planning period – typically extending 15-20 years into the future. The effect of the Court’s ruling was, in essence, that local governments considering plan amendments must estimate the timing of construction of new facilities and future land uses, and evaluate whether or not there would be a failure to meet adopted transportation performance standards.¹ Where a failure is expected to occur, the local government would conclude there is a “significant effect” and would then be obligated under requirements of the TPR, to take steps to put land use and transportation in balance. The corrective remedies set forth in the current rule include adding planned transportation facilities or services, limiting land uses, and adjusting performance standards.

A number of stakeholders – including local governments, the development community, ODOT, and a several legislators – expressed concern that the Jaqua holding resulted in a new, unintended and excessive standard for review of plan amendments. Generally, concerned parties felt that the ruling called for a much more detailed matching of planned

¹ Performance standards measure how well transportation facilities are operating. Local governments typically use roadway “level of service” or LOS standards that grade roadway operation on a scale of A-F. Most adopt LOS D or E as a minimum performance standard for roadway operation. The Oregon Highway Plan adopts volume to capacity or v/c standards for state highways. V/C performance standards set ratios or percentages of traffic volume to capacity as a minimum operating standard. V/C standards vary depending on the importance of the highway and other factors and typically range from .75 to .90.

facilities and improvements with planned land uses than LCDC anticipated when it adopted the TPR in 1991. Several expressed concern that the ruling resulted in a sort of “concurrency” requirement – i.e. requiring that needed transportation facilities be in place before new development could be authorized. Other groups, notably 1000 Friends of Oregon, argued that the ruling was reasonable and required a careful matching of planned facilities with planned land use.

In July 2004, the Commission accepted a request from ODOT to evaluate the Transportation Planning Rule and recommend a response to the Jaqua case and to identify other areas where amendments to the TPR or other measures might be warranted. The consulting firm of Angelo/Eaton was hired and conducted a series of stakeholder interviews that led to preparation of an evaluation report in September. In September, the Commission agreed to convene a joint subcommittee of LCDC and the Oregon Transportation Commission (OTC) to follow up on the issues identified in the evaluation. LCDC members are Commissioners Ron Henri, Hanley Jenkins and Marilyn Worrix,

Between October and January, the joint subcommittee conducted a series of meetings focusing on review of the Jaqua case and preparation of proposed amendments to Section 0060 of the TPR. In December, the department filed notice with Secretary of State to initiate rulemaking. Proposed amendments relate to Section 0060 and related definitions in Section 0005 of the Transportation Planning Rule.

IV. LCDC REVIEW CRITERIA AND PROCEDURES FOR RULEMAKING

The Commission’s procedures for rulemaking derive from ORS Chapter 183 and are specified in procedural rules at OAR 660, Division 001. In general, the Commission must hold a public hearing and provide an opportunity for interested parties to testify on the proposed rules. The Commission must deliberate in public and, if the Commission makes a decision to adopt any or all of the proposals, a majority of the Commission must affirm the motion to adopt. No adoption is proposed for the February meeting, but a public hearing is scheduled.

ORS 197.040 also guides the Commission more generally with regard to rulemaking, as follows:

“197.040 Duties of Commission; rules.

“(1) The Land Conservation and Development Commission shall: . . .

(b) In accordance with the provisions of ORS 183.310 to 183.550, adopt rules that it considers necessary to carry out ORS chapters 195, 196 and 197. Except as provided in subsection (3) of this section, in designing its administrative requirements, the commission shall:

(A) Allow for the diverse administrative and planning capabilities of local governments;

(B) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;

(C) Assess the likely degree of economic impact on identified property and economic interests; and

(D) Assess whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

(c)(A) Adopt by rule in accordance with ORS 183.310 to 183.550 or by goal under ORS chapters 195, 196 and 197 any statewide land use policies that it considers necessary to carry out ORS chapters 195, 196 and 197.

(B) Adopt by rule in accordance with ORS 183.310 to 183.550 any procedures necessary to carry out ORS 215.402 (4)(b) and 227.160 (2)(b). . . .

(3) The requirements of subsection (1)(b) of this section shall not be interpreted as requiring an assessment for each lot or parcel that could be affected by the proposed rule.”

The department has provided written documents, as part of the rule notice, to address requirements listed above (see Attachment C). LCDC legal counsel, Steve Shipsey, will be present at the Commission meeting for further advice on this statute, and on rulemaking procedures and criteria.

The Commission is not required or expected to take any formal action during the February 4th meeting. Based on testimony and discussion, the Commission may instruct the department to amend the draft rule, or to create new or different provisions for the draft that would be reviewed (and possibly adopted) at the March LCDC meeting.

V. SUMMARY OF PROPOSED RULE AMENDMENTS

The proposed rule amendments are included as Attachments A and B to this staff report. The proposed amendments are presented in two different formats: Attachment A presents the text of the proposed amendments showing addition and deletions from the existing rule text. Attachment B includes the proposed rule text and explanatory comments in a two-column format. Major provisions of the proposed amendments are summarized below. Individual sections of the rule have been reordered to present the rule requirements in a more logical sequence.

Section 0060(1)

This section sets forth the overall test in the rule for review of plan amendments. It says that where a plan amendment causes a significant effect on planned transportation facilities, local governments must take steps (as outlined in Section 2) to put land use and transportation in balance. The subsections outline circumstances where a plan or land use amendment would result in a significant effect. The major change in this section of the rule is to clarify that compliance with performance standards is measured at the end of the planning period. (See subsection (1)(c)) This is a shift from the result of the Jaqua v. City of Springfield cases that held that a significant effect occurs if there is a failure to meet performance standards at any point in the planning process.

Section (1)(c)(C) adds a new provision to make it clear that a significant effect also occurs when a plan amendment would affect a facility that is already projected to fail during the planning period. This change responds in part to an earlier LUBA decision² that held a significant effect only occurred if the result of the plan amendment was to cause a facility to fail to meet adopted performance standards. ODOT addressed this in the 1999 Oregon Highway Plan by adopting an additional "performance standard" that applies to failing facilities.

The effect of measuring transportation system performance at the "end of planning period" is to allow plan amendments that would result in long periods of congestion (up to 15 years or more) without consideration of balance between land use and transportation. This change is likely to allow plan amendments that worsen traffic congestion in the short term without requiring that local governments consider options for dealing with the congestion. 1000 Friends has suggested that rule require measurement at two points in time to decide significant effect: one in short term, probably over a five year period, considering funded improvements; as well as the "end of the planning period" look proposed in the rule. The joint subcommittee heard testimony to this effect at its November and December meetings and chose to move forward with the end of the planning period standard.

Section 0060(2)

This section lists the remedies or corrective actions that local governments can take to put land use and transportation in balance where they have determined that a plan amendment or zone change would have a significant effect. This section is substantially the same as the current rule. Two parts of the proposed changes are worth noting:

² ODOT v. Coos County 158 Or App 568 (1999). The Court held that the phrase "would reduce" in the TPR's definition of significant effect was not triggered where a transportation facility was already failing to meet the relevant performance standard.

- Provisions that allow for modification of performance standards – in subsection (d) - have been made more open ended. The current rule authorizes changing performance standards to tolerate additional congestion in areas planned for mixed use, pedestrian friendly development. The proposed changes recognize that there may be a variety of other reasons that local governments (or ODOT for state highways) might choose to modify performance standards.
- Subsection (2)(e) includes a new remedy that allows for minor improvements that are adopted as conditions of approval with the plan amendment to be used to remedy a significant effect. This provision gives applicants and local governments flexibility to add modest improvements, short of a separate amendment of the TSP or comprehensive plan, to add planned improvements or facilities. This provision recognizes that plan amendments for specific developments often include a combination of minor improvements such as traffic signals, turn lanes or ramp improvements that address traffic needs but that do not require TSP amendments.

Section 0060(3)

Section 3 was added to the proposed rule in response to comments from the Retail Task Force. The joint subcommittee asked that this section be included in the rule to allow for further consideration and public review and comment. (A letter of comment from the Retail Task Force is included in Attachment D.)

Section 3 would allow local governments to approve plan amendments in situations where existing facilities are currently over capacity and where planned improvements are not likely to be provided during the planning period if the applicant provides improvements which offset the effects of the proposed development and that make the transportation system operate better.

In essence, Section 3 would provide a remedy, in addition to the remedies that are allowed in Section 2. Section 3 is significantly different than section 2 because it allows local governments to adopt a remedy without amending the relevant TSP. Section 2 would allow for the same result, but would require that either ODOT or local government amend the relevant TSP to change performance standards or take other actions that would put land use and transportation in balance. The need for a TSP amendment creates a broader opportunity for public review, comment and discussion that may be more appropriate given the circumstances (i.e. where a facility is currently failing and improvements to meet adopted performance standards are not likely to be in place by the end of the planning period.) By contrast, Section 3 provides for a narrower, more technical determination of whether the applicant's proposal includes sufficient mitigation of expected traffic.

In practice, the department anticipates applicants will use Section 3 to make modest improvements, such as additional traffic signals, turn lanes, deceleration lanes or access improvements, to allow some additional development to occur. While such improvements would typically be funded by the applicant and would result in a net improvement in operating conditions, this provision may have the unintended effect of using up the most cost-effective solutions that local governments or ODOT might otherwise make to improve overall system operation. This could be significant because Section 3 applies in situations where transportation facility providers have determined that funding for long-term improvements is not in place or not reasonably likely to be provided.

Section 0060(4)

Section 4 lists the set of planned facilities, improvements and services that local governments may rely upon in determining whether or not a planned land use has a significant effect. The proposed amendments would allow local governments to count only those improvements where there is some level of financing in place or where the provider of the facility issues a written statement that the facility is reasonably likely to be constructed during the planning period.

Overall, Section 4 is intended to address the concern that TSPs include many more planned improvements than are likely be constructed in the 20 year planning period. It does this by narrowing the scope of planned improvements that local governments may rely upon to those that are likely to be funded and provided during the planning period. The result should be to trigger additional coordination between local government and transportation facility providers to determine what facilities, improvements and services will be built during the planning period.

The proposed amendments set different standards for what qualifies as a planned facility depending on whether the plan amendment is within ½ mile of a freeway interchange. For plan amendments within ½ mile, planned facilities include facilities that are funded in the State Transportation Improvement Program (STIP), a locally adopted or approved funding plan - typically a local capital improvement program (CIP) or that are part of a metropolitan area's financially constrained regional transportation plan³. Outside of interchange areas, local governments may also count as planned facilities those facilities and improvements where the facility provider (typically ODOT or the local government) provides a written statement that the facilities or improvements are "reasonably likely" to be funded during the planning period.

³ Federal law requires that regional transportation plans for metropolitan areas be based on a financially-constrained estimate of future funding. Metropolitan areas in Oregon include the Portland Metropolitan area, Salem-Keizer, Eugene-Springfield, the Rogue Valley, Corvallis and Bend. (The Corvallis and Bend MPOs are just now being established and have yet to adopt regional plans.)

The more conservative approach to interchanges is intended to recognize the special importance of interchanges to the function of the state highway system and to assure closer coordination between ODOT and local governments on land use and transportation decisions affecting freeway interchanges.

Several specific provisions of Section 4 warrant additional explanation:

"Reasonably likely" test for defining planned improvements

As described above, Subsection (4)(a)(D) and (E) allow local governments to count as "planned" those facilities, improvements and services that the relevant provider determines are "reasonably likely" to be provided during the planning period. This provision of the rule is intended to allow transportation facility providers some discretion in deciding whether or not a facility or improvement is likely to be provided. The draft rule intentionally does not provide a definition of this term. The major purpose of this requirement is to trigger additional dialogue between local governments and ODOT and other facility providers to assess whether or not facilities and improvements called for in TSPs are, in fact, likely to be provided during the planning period. This is necessary and appropriate because, as noted above, many TSPs include planned facilities and improvements that are not likely to be constructed within the planning period. This happens largely because TSPs are based on identified needs and are not financially constrained.

Some local governments have expressed concern about having to make the assessment of whether transportation projects are reasonably likely to be funded. They feel this would be difficult and contentious and make approval of plan amendments more difficult. They proposed that local governments be able to rely upon all of the planned improvements that are included in a local TSP. The joint subcommittee felt this approach would do very little to address the "polite fiction" issue - where TSPs include many more planned projects than are likely to be built.

Staff anticipates that local governments and facility providers (especially ODOT) will respond to the proposed amendment by establishing procedures for deciding what facilities and improvements are reasonably likely to be funded. In addition, we anticipate that the second phase of the TPR amendments would require that during TSP updates, local governments adopt a list of projects that are "reasonably likely" to be funded for purposes of considering plan amendments.

Local funding plans and mechanisms

Subsection (4)(a)(b) lists a series of local funding plans and mechanisms that local governments would be able to rely upon in deciding what local improvements may be considered planned. These include projects for which system development charges are

being collected, where there is a local improvement district or reimbursement district, where there is a development agreement and where conditions of approval to fund an improvement have been adopted. The objective of this section is to allow local governments to count as planned those facilities and improvements where there is some sort of funding plan or mechanism in place that would result in a facility or improvement being constructed. In developing this portion of the rule, it was noted that many local funding plans, such as system development charges (SDCs) provide some but not all of the funding that would be needed to construct planned improvements. This means that the effect of the amendments, as proposed, would be to allow local governments to count as “planned”, improvements for which only a small portion of the needed funding was committed. Since the intent of this provision is to allow local governments to rely on projects that are likely to be funded, the Commission may want to consider language that would require that the funding plan provide a significant portion of the needed funding for the planned improvement.

Written Statement by Transportation Providers

Subsections (4)(a)(D) and (E) allow local governments to count as "planned" those improvements where a transportation facility provider (i.e. ODOT or a local government) provides a written statement that the project is reasonably likely to be provided during the planning period. The purpose of the requirement for a written statement is to allow the local government making the land use decision to rely upon the statement issued by the relevant transportation facility provider, and so that the decision about whether an improvement is reasonably likely to be provided is not at issue in the plan amendment decision or any subsequent appeal. Commentary provided with the rule addresses this intent (See Attachment 2). Some commentors have expressed concern that this may not be sufficient and have recommended that the rule include additional language saying that the provider's statement would be considered conclusive on this issue. The Department of Justice has advised the joint subcommittee that this additional language is unnecessary and would be potentially confusing.

Additional coordination around freeway interchanges

Section 4(b) proposes that a more limited set of improvements be counted as "planned" when a plan amendment is proposed in the vicinity of an interstate freeway interchange. As written, the rule requires that funding commitments, not just a reasonable likelihood of funding, must be in place. The result is that plan amendments within ½ mile of freeway interchanges are more likely to cause a "significant effect" triggering the additional planning remedies set out in Section 2.

Additional consideration around freeway interchanges is warranted for several reasons. Interstate freeway interchanges are a key part of the highway system. Bottlenecks and operational problems at interchanges can create significant safety problems and affect

accessibility to large areas. Maximizing operational life of interchanges is critical to state's economy, to support movement of goods, and to attract and serve new industrial development. Interchanges are the most expensive portions of the state highway system and represent a significant state investment. Upgrading, reconstructing or replacing interchanges is very expensive. Consequently, careful coordination of land use and transportation planning around interchanges is especially important.

Scope of Interchanges subject to additional protection

As proposed the rule applies only to interchanges on interstate freeways, including I-5, I-84, I-205, I-105 (in Eugene) and I-82. OTC members recommended the rule focus on these interchanges (rather than other limited access highways) because of the special importance of the interstate system. Portland Metro representatives and others expressed concern that this was excessive and covered a number of interchanges where additional restrictions on plan amendments may be inappropriate or counterproductive. For example, at interchanges in and around downtown Portland for example, where plan amendments to promote more intense development are desirable.

Determinations by ODOT about when plan amendments have no "adverse effect" on Interchanges

Subsection 4(b) allows local governments to consider a broader range of planned improvements near interchanges in situations where ODOT provides a written statement that the proposed amendment would not have an "adverse effect" on the interchange. This provision effectively allows ODOT to grant waivers to this part of the rule by providing a written statement that a plan amendment will not "adversely effect" an interchange. This provision is intended to allow ODOT to work with applicants and local governments to move forward with plan amendments that have a negligible effect on an interchange. (This might include ODOT agreeing that an applicant has proposed improvements that would offset any adverse effects.) ODOT does not currently have a process or standard for deciding when plan amendments would result in an adverse effect. Consequently it is unclear how ODOT will interpret or apply this standard.

V. CONCLUSION AND RECOMMENDATION

The department recommends that the Commission receive testimony from members of the public wishing to comment on the proposals. After the close of the public hearing the Commission should discuss the testimony and any related matters and provide additional direction to the department, including recommendations as to changes to the proposed rule amendments that will be published prior to the final hearing and adoption scheduled for the March 16-18, 2005 Commission meeting.

Attachments

- A. Proposed Transportation Planning Rule Amendments
- B. Proposed Transportation Planning Rule Amendments with Commentary
- C. Department Rulemaking Notices
- D. Public Comments on Proposed Rule Amendments