

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,

10 *Respondent,*

11
12 and

13
14 OREGON DEPARTMENT OF STATE LANDS,

15 and CITY OF REDMOND,

16 *Intervenors-Respondents.*

17
18 LUBA No. 2010-042

19
20 FINAL OPINION

21 AND ORDER

22
23 Appeal from Deschutes County.

24
25 Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

26
27 Laurie E. Craghead, Assistant County Counsel, Bend, filed a response brief and
28 argued on behalf of respondent.

29
30 Lisa D. T. Klemp, Redmond, filed a response brief and argued on behalf of
31 intervenor-respondent City of Redmond. With her on the brief was Bryant Emerson & Fitch.
32 LLP.

33
34 Diane Lloyd, Assistant Attorney General, Salem, filed a response brief and argued on
35 behalf of intervenor-respondent Oregon Department of State Lands. With her on the brief
36 was John Kroger, Attorney General.

37
38 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
39 participated in the decision.

40
41 REMANDED

12/09/2010

42
43 You are entitled to judicial review of this Order. Judicial review is governed by the
44 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision that approves a Transportation System Plan (TSP) map amendment and an exception to Statewide Planning Goal 3 (Agricultural Lands) to authorize a new county arterial across rural exclusive farm use (EFU) zoned property.

FACTS

Highway 97 runs south through the City of Redmond to the City of Bend and continues south to California. Highway 97 between the cities of Redmond and Bend is a four-lane principal arterial state highway. The Burlington Northern Santa Fe (BNSF) Railroad tracks also run south through the cities of Redmond to Bend and beyond. Those tracks are located a short distance east of Highway 97 and run roughly parallel to Highway 97. The county proposes to extend 19th Street south from its current terminus on the south edge of the City of Redmond approximately six miles to connect with Deschutes Market Road, a short distance east of the current Deschutes Market Road/Highway 97 intersection. Deschutes Market Road continues south to the City of Bend. The proposed 19th Street extension would be located immediately east of the BNSF railroad tracks and would travel through EFU-zoned property, much of it owned by the federal Bureau of Land Management (BLM). However, some of that EFU-zoned property is owned by the Department of State Lands and by several private land owners.

There is an existing grade-separated interchange at the south end of the City of Redmond—the Yew Avenue/Highway 97 interchange. As it travels east from Highway 97, Yew Avenue becomes Airport Way, which provides access to the Deschutes County Fair and Expo Center in the vicinity of the current terminus of 19th Street. Airport Way continues north past the City of Redmond Airport and ultimately connects to Veterans Way, which in turn connects with Highway 97 to the north in the City of Redmond central business district.

1 **FIRST, FIFTH, SIXTH AND EIGHTH ASSIGNMENT OF ERROR**

2 When approving an exception to permit construction of a transportation facility on
3 rural agricultural land, OAR 660-012-0070(4) requires that a county identify reasons that
4 justify not applying state policies that require preservation of farm land for farm use and
5 demonstrate that the exception is required to satisfy a transportation need that is identified in
6 the county's TSP and cannot be accommodated through measures that do not require an
7 exception. We set out and discuss the text of OAR 660-012-0070(4) below. In its first, fifth,
8 sixth and eighth assignments of error, petitioner argues the county's findings regarding OAR
9 660-012-0070(4) are inadequate and are not supported by substantial evidence.

10 **A. Introduction**

11 The statewide planning goal exception process is notoriously complex. The standards
12 that govern approval of exceptions appear in almost identical terms in state statute at ORS
13 197.732(2)) and in Statewide Planning Goal 2, Part II. The Land Conservation and
14 Development Commission (LCDC) has elaborated significantly on the statutory and Goal 2,
15 Part II exception standards in its administrative rules. See OAR chapter 660, division 4
16 (Interpretation of the Goal 2 Exception Process); 660-012-0070 (Exceptions for
17 Transportation Improvements on Rural Land); OAR chapter 660, division 14 (Exceptions to
18 Goal 14 to Allow Urban Development on Rural Land). As explained below, in this case the
19 standards that govern the disputed exception are set out exclusively at OAR 660-012-0070.
20 Although the county also adopted findings addressing the statutory, Goal 2, Part II and OAR
21 chapter 660, division 4 exception standards, those exception standards do not apply directly
22 in this matter.

23 In *1000 Friends of Oregon v. Yamhill County*, 203 Or App 323, 332-33, 126 P3d 684
24 (2005), the Court of Appeals concluded that the exception standards set out at OAR chapter
25 660, division 4, which refine and elaborate significantly on the ORS 197.732 and Goal 2,
26 Part II exception standards, must be applied *in addition* to the OAR 660-012-0070 exception

1 standards, when approving an exception to allow transportation improvement on rural lands.
2 However, following that Court of Appeals’ decision, LCDC amended its administrative rules
3 to make it reasonably clear that if an exception is required to approve a transportation
4 improvement on rural resource land, the exclusive exception standards governing such
5 exceptions are set out at OAR 660-012-0070.¹

6 Petitioner’s first, fifth, sixth and eighth assignments of error largely concern OAR
7 660-012-0070(4) and we generally limit our discussion of these assignments of error to OAR
8 660-012-0070(4).² OAR 660-012-0070(4) is set out below:

9 *“To address Goal 2, Part II(c)(1) the exception shall provide reasons*
10 *justifying why the state policy in the applicable goals should not apply.*
11 Further, the exception shall demonstrate that there is a transportation need
12 identified consistent with the requirements of OAR 660-012-0030 which
13 cannot reasonably be accommodated through one or a combination of the
14 following measures not requiring an exception:

15 “(a) Alternative modes of transportation;

16 “(b) Traffic management measures; and

17 “(c) Improvements to existing transportation facilities.” (Emphases
18 added.)

19 We understand the language of OAR 660-012-0070(4) that is italicized above to
20 obligate the county to supply reasons why state policy in the applicable goals should not
21 apply (in this case the state policy to protect agricultural land for farm uses). Further, the
22 county must demonstrate that there are transportation needs identified in the county’s TSP

¹ For example, OAR 660-012-0070(2) now provides:

“When an exception to Goals 3, 4, 11, or 14 is required to locate a transportation improvement on rural lands, the exception shall be taken pursuant to ORS 197.732(1)(c), Goal 2, and this division. The exceptions standards in OAR chapter 660, division 4 and OAR chapter 660, division 14 shall not apply. Exceptions adopted pursuant to this division shall be deemed to fulfill the requirements for goal exceptions required under ORS 197.732(1)(c) and Goal 2.”

² Petitioner’s sixth assignment of error also alleges error regarding OAR 660-012-0070(5) and (6).

1 (the underlined language) that cannot be satisfied by measures that do not require an
2 exception (the double underlined language).³ In its eighth assignment of error, petitioner
3 contends the county failed to provide the reasons required by OAR 660-012-0070(4). In its
4 first assignment of error, petitioner challenges the county’s “transportation need” findings.
5 In its fifth and sixth assignments of error, petitioner challenges the county’s findings
6 addressing non-exception alternatives to meet transportation needs and non-exception
7 alternative locations for the proposed transportation facility.

8 Petitioner’s decision to fracture its arguments concerning OAR 660-012-0070(4) into
9 four noncontiguous assignments of error has complicated our review. The parties’ decision
10 to base their arguments in significant part on findings that are scattered throughout the
11 decision and address other, inapplicable, albeit similarly worded exception criteria has
12 further complicated our review. In this decision we will remain focused on OAR 660-012-
13 0070, which sets out the relevant exception criteria. We turn first to petitioner’s first
14 assignment of error.

15 **B. Identified Transportation Need (First Assignment of Error)**

16 In addressing OAR 660-012-0070(3) and 660-012-0070(4), we summarize below the
17 four transportation needs the county identified:

- 18 1. A need to be consistent with state transportation needs identified in the
19 Oregon Transportation Plan (OTP) and Oregon Highway Plan (OHP).
- 20 2. An expected shortage of traffic carrying capacity on Highway 97 in
21 2030.
- 22 3. Congestion on the Highway 97/Yew Avenue Interchange.

³ OAR 660-012-0005(32) provides the following definition of “transportation needs:”

“Transportation Needs’ means estimates of the movement of people and goods consistent with acknowledged comprehensive plan and the requirements of this rule. Needs are typically based on projections of future travel demand resulting from a continuation of current trends as modified by policy objectives, including those expressed in Goal 12 and this rule, especially those for avoiding principal reliance on any one mode of transportation.”

1 4. A need for “a potential detour should an incident close [Highway] 97.”
2 Record 83.

3 The requirement in OAR 660-012-0070(4) that the “transportation need [be]
4 identified consistent with the requirements of OAR 660-012-0030” makes it reasonably clear
5 that the transportation need that justifies the exception must be identified in the county’s
6 TSP.⁴ The fatal problem with the transportation needs identified by the county in this case is
7 that none of them is identified as a transportation need in the county’s TSP. While the
8 exception and the many findings that the county adopted in support of that exception are
9 adopted as part of the county’s comprehensive plan, the only amendment to the TSP that is
10 adopted by the ordinance on appeal is an amendment of the Transportation Plan Map to show

⁴ OAR 660-012-0030 provides:

- “(1) The TSP shall identify transportation needs relevant to the planning area and the scale of the transportation network being planned including:
 - “(a) State, regional, and local transportation needs;
 - “(b) Needs of the transportation disadvantaged;
 - “(c) Needs for movement of goods and services to support industrial and commercial development planned for pursuant to OAR 660-009 and Goal 9 (Economic Development).
- “(2) Counties or MPO’s preparing regional TSPs shall rely on the analysis of state transportation needs in adopted elements of the state TSP. Local governments preparing local TSPs shall rely on the analyses of state and regional transportation needs in adopted elements of the state TSP and adopted regional TSPs.
- “(3) Within urban growth boundaries, the determination of local and regional transportation needs shall be based upon:
 - “(a) Population and employment forecasts and distributions that are consistent with the acknowledged comprehensive plan, including those policies that implement Goal 14. Forecasts and distributions shall be for 20 years and, if desired, for longer periods; and
 - “(b) Measures adopted pursuant to OAR 660-012-0045 to encourage reduced reliance on the automobile.
- “(4) In MPO areas, calculation of local and regional transportation needs also shall be based upon accomplishment of the requirement in OAR 660-012-0035(4) to reduce reliance on the automobile.”

1 the disputed extension of 19th Street. As petitioner points out, the unamended portions of the
2 TSP do not identify the proposed extension of 19th Street as a transportation need. Neither is
3 a projected lack of capacity for Highway 97, congestion at the Highway 97/Yew Avenue
4 interchange nor a detour route for possible closures of Highway 97 identified as a
5 transportation need in the county’s TSP. The county TSP states that “the County road
6 network currently in place, except for several specific road segments, should be adequate to
7 serve the County needs over the next twenty years.” Deschutes County Code (DCC)
8 23.64.030. The TSP includes a long list of needed projects, and the extension of 19th Street
9 is not on the project list.

10 The county attempts to rely on the City of Redmond’s TSP, and attaches excerpts of
11 that TSP to its brief as Appendix B. The City of Redmond’s TSP does identify a lack of
12 north-south arterial capacity, a lack of access to the airport and fairground, lists the 19th
13 Street extension as a project, and shows the Highway 97/Yew Avenue interchange will
14 operate at an unacceptable level of service in 2030. City of Redmond TSP pages 1-16, 1-18,
15 4-10, 9-20, 9-21. However, the county has not amended *the county’s TSP* to (1) identify any
16 of those City of Redmond TSP transportation needs as county transportation needs or (2)
17 identify any separate county transportation needs that support the disputed extension.
18 Simply listing the 19th Street extension as a project in the city TSP is not sufficient to
19 establish a public need to extend 19th Street through six miles of county EFU-zoned land.
20 Similarly, the other City of Redmond TSP language the county cites may well suffice to
21 establish a public need to extend 19th Street within the City of Redmond, but they do not
22 suffice, in and of themselves, to establish a transportation need to extend 19th Street through
23 six miles of county EFU-zoned land. As things stand following the county decision that is
24 before LUBA in this appeal, the county’s TSP, fairly read, takes the position that no
25 additional transportation facility is needed in the area of the proposed 19th Street extension.

1 In amending the county TSP map the county has rendered the county TSP map inconsistent
2 with the county TSP text.

3 The proposed six-mile extension of 19th Street would be located almost entirely
4 outside the City of Redmond on county EFU-zoned land. It is the county that must adopt an
5 exception to permit that extension under OAR 660-012-0070. While it appears to be the case
6 that the proposed extension would be *consistent* with the City of Redmond TSP that is not
7 necessarily sufficient to establish a county transportation need that would justify extending
8 19th Street through six miles of county EFU-zoned land. The county is certainly free to
9 amend the county TSP to identify the same transportation needs that it cites from the City of
10 Redmond TSP, so long as it can support that amendment with an adequate factual base at the
11 time of the amendment. Those transportation needs may or may not be sufficient to justify
12 an exception to extend 19th Street through six miles of county EFU-zoned lands. However,
13 until the county does so, it may not rely on those City of Redmond TSP identified
14 transportation needs to comply with OAR 660-012-0070(4).

15 With regard to the OHP and OTP, both the OHP and the OTP have policies that favor
16 parallel local street systems to carry local traffic that does not need to travel on state arterials
17 like Highway 97.⁵ However, those policies do not establish a need for the proposed 19th

⁵ The county cites the following from the OHP and OTP at County's Response Brief 7:

"Support plans, strategies, and local ordinances that include: Parallel and interconnected local roadway networks to encourage local automobile trips off the state highway." OHP, Policy Action 1B.5, page 59, first bullet.

"Develop an adequate local network of arterials, collectors, and local streets to limit the use of the state highway or interchanges for local trips." OHP, Policy Action 1B.8, page 60, first bullet.

"It is the policy of the State of Oregon to provide state financial assistance to local jurisdictions to develop, enhance, and maintain improvements on local transportation systems when they are a cost-effective way to improve the operation of the state highway system[.] OHP, Policy 2B, page 104-05.

"ODOT should also consider off-system improvements as a means of enhancing the state/regional transportation system. Off-system improvements may provide cost-effective

1 street extension to serve local traffic. There is already one parallel county arterial located
2 west of Highway 97, and the record is simply inadequate to demonstrate that there is a
3 current or even a future need to construct a parallel arterial on the east side of Highway 97 to
4 serve local traffic that now must use Highway 97 to make local trips that compete with state
5 or regional trips for capacity on Highway 97.

6 Petitioner disputes a large number of additional findings of need that might lend some
7 support for the proposed extension of 19th Street if supported by an adequate factual base.⁶
8 Some of those findings identify policies with which the proposed extension might be
9 consistent, but are not findings of transportation need themselves.⁷ Others arguably identify
10 a transportation need; however, as with the findings discussed above, they do not identify a
11 transportation need that is identified in the county's TSP.

12 We understand petitioner to contend that it is not sufficient for the county to
13 randomly identify transportation needs that singly or collectively might justify an exception
14 to extend 19th Street to Deschutes Market Road. Petitioner contends that under OAR 660-
15 012-0070(4) the county's decision must (1) identify transportation needs that are already
16 included in the county's TSP and justify extending 19th Street or (2) amend the TSP to
17 include the transportation needs that justify extending 19th Street to Deschutes Market Road.
18 If the county amends the TSP to identify additional transportation needs that might justify the

alternative to increasing the capacity of the state highway system, while helping to meet both
state and local needs. * * * OHP, page 102.

“It is the policy of the State of Oregon to provide intercity mobility through and near urban
areas in a manner which minimizes adverse effects on urban land use and travel patterns and
provides for efficient long distance travel.” OTP, Policy 1.3, page 49.

⁶ Some of those findings take the position that there is a need to provide additional access and connectivity
in the City of Redmond to the south toward the City of Bend for the airport, exposition center, and anticipated
future development on the east side of Highway 97 in the vicinity of the Highway 97/Yew Avenue interchange.
Other findings take the position that there is a need for an alternate arterial route between the cities of Bend and
Redmond east of Highway 97.

⁷ For example the proposed extension would be consistent with a transportation corridor that BLM
included in the Upper Deschutes Resource Management Plan (UDRMP) at the county's request.

1 disputed extension of 19th Street, we understand petitioner to contend the county must supply
2 an adequate factual base for the identified transportation needs. We agree with petitioner’s
3 understanding of this portion of OAR 660-012-0070(4), and we agree with petitioner that the
4 county failed to carry its burden in this regard.

5 Finally, we note that petitioner also characterizes many of the needs the county
6 identifies as mere wishes or preferences. Petitioner also faults the county for relying on
7 opinion testimony to support its findings of transportation needs and failing to provide any
8 data to support those alleged needs. We need not and do not try to sort out whether all of the
9 alleged transportation needs are bona fide “needs” or mere “wishes” or “preferences.” We
10 also do not try here to describe what kind of evidence the county must have to support any
11 transportation needs it may ultimately include in its TSP and rely on to approve an exception
12 for the disputed facility. We note, however, that petitioner is likely correct that if the county
13 ultimately amends its TSP to identify transportation needs such as a need to increase
14 Highway 97 and Highway 97/Yew Avenue capacity or a need to provide an additional
15 arterial connection between the cities of Bend and Redmond, it will need more than
16 undocumented expression of opinion by state or local planning staff to carry its evidentiary
17 burden to provide an adequate factual basis for such transportation needs.

18 The first assignment of error is sustained.

19 **C. Lack of Reasonable Alternatives (Fifth and Sixth Assignments of Error)**

20 Once the county has identified transportation needs in its TSP or amended the TSP to
21 identify transportation needs that might support the proposed extension, the last part of OAR
22 660-012-0070(4) and OAR 660-012-0070(5) and (6) apply in concert to require an
23 examination of alternatives. Petitioner’s arguments under the fifth and sixth assignments of
24 error challenge the county’s findings regarding alternatives. Those assignments of error,
25 particularly the sixth assignment of error, are poorly developed and are barely adequate to
26 state a basis for review. As we explain below, the county apparently did not understand how

1 to go about applying the alternatives analysis required by OAR 660-012-0070(4), (5) and (6)
2 and its arguments on appeal in defense of the county’s findings are not particularly helpful.
3 Because this matter must be remanded in any event, rather than discuss the parties’
4 arguments in any detail, we explain how the rules are to be applied, point out some of the
5 more significant shortcomings in the county’s findings and remand for the county to reapply
6 the required alternatives analysis.

7 **1. Alternative Measures to Satisfy the Identified Transportation**
8 **Need. (OAR 660-012-0070(4))**

9 As relevant, OAR 660-012-0070(4) requires that the county demonstrate that the
10 transportation need:

11 “cannot *reasonably* be accommodated through one or a combination of the
12 following measures not requiring an exception:

13 “(a) Alternative modes of transportation;

14 “(b) Traffic management measures; and

15 “(c) Improvements to existing transportation facilities.” (Emphasis added.)

16 The above language of OAR 660-012-0070(4) requires that the county determine whether
17 there are reasonable alternative measures to satisfy the identified transportation need. In our
18 discussion of these assignments of error we will refer to this as the alternative measures
19 analysis.

20 **2. Alternative Locations for the Proposed Transportation Facility**
21 **that do not Require an Exception (OAR 660-012-0070(5))**

22 The text of OAR 660-012-0070(5) is set out below:

23 “(5) To address Goal 2, Part II(c)(2) the exception shall demonstrate that
24 non-exception locations cannot *reasonably* accommodate the proposed
25 transportation improvement or facility. The exception shall set forth
26 the facts and assumptions used as the basis for determining why the
27 use requires a location on resource land subject to Goals 3 or 4.”
28 (Emphasis added.)

1 OAR 660-012-0070(5) imposes an additional requirement to consider whether the proposed
2 transportation facility could be sited in alternative locations that would not require an
3 exception. In our discussion of this assignment of error we will refer to this as the alternative
4 locations analysis.

5 **3. Factors and Thresholds to Determine Reasonableness of**
6 **Alternatives (OAR 660-012-0070(6))**

7 Finally, OAR 660-012-0070(6) sets out how the county must go about determining
8 whether any identified alternative measures and alternative locations are *reasonable* under
9 OAR 660-012-0070(4) and OAR 660-012-0070(5). OAR 660-012-0070(6) requires that
10 certain specified factors and “other relevant factors” be considered and that “thresholds” be
11 identified and applied in rejecting any alternatives as unreasonable:

12 “To determine the reasonableness of alternatives to an exception under
13 sections (4) and (5) of this rule, cost, operational feasibility, economic
14 dislocation and other relevant factors shall be addressed. The thresholds
15 chosen to judge whether an alternative method or location cannot reasonably
16 accommodate the proposed transportation need or facility must be justified in
17 the exception.”

18 **4. The County’s Findings Concerning Alternatives**

19 To summarize, OAR 660-012-0070(4) and (5) require the county to determine
20 whether any identified alternative measures to meet the identified transportation need are
21 reasonable and whether any identified alternative locations for the proposed facility are
22 reasonable. In both cases, in determining whether any identified alternative measures or
23 alternative locations are *reasonable*, the county must address the *factors* identified in OAR
24 660-012-0070(6) and in doing so the county must choose and justify *thresholds* that are
25 applied to reject any alternatives.

26 The county’s findings regarding the last part of OAR 660-012-0070(4) and OAR 660-
27 012-0070(5) and (6) appear at Record 84-86. There are a number of problems with those
28 findings. The most significant problem is that the county’s findings applying the OAR 660-
29 012-0070(4) alternative measures and OAR 660-012-0070(5) alternative locations analyses

1 do not apply the factors required by OAR 660-012-0070(6) and do not identify or justify any
2 thresholds under those factors. The county did adopt findings that separately address OAR
3 660-012-0070(6). But those findings only address alternative locations and do not address
4 alternative measures. In addition, those findings neither identify nor justify any thresholds.

5 The fifth and sixth assignments of error are sustained.

6 **D. Identification of Reasons that Justify the Exception (Eighth Assignment**
7 **of Error)**

8 In this assignment of error, petitioner relies on the language in OAR 660-012-0070(4)
9 that is emphasized below:

10 *To address Goal 2, Part II(c)(1) the exception shall provide reasons justifying*
11 *why the state policy in the applicable goals should not apply. Further, the*
12 *exception shall demonstrate that there is a transportation need identified*
13 *consistent with the requirements of OAR 660-012-0030 which cannot*
14 *reasonably be accommodated through one or a combination of * * * measures*
15 *not requiring an exception[.]”*

16 In addressing OAR 660-012-0070(4), the county did not adopt findings addressing
17 the italicized sentence above. In *1000 Friends of Oregon v. Yamhill County*, 49 Or LUBA
18 640, 647 (2005), we concluded that under the version of OAR 660-012-0070(4) in effect at
19 that time, the county did not have to separately “provide reasons justifying why the state
20 policy in the applicable goals should not apply” so long as it identified transportation needs
21 for the exception. However, as we explained earlier in this opinion, LCDC subsequently
22 amended OAR 660-012-0070. In those amendments, LCDC added the first sentence that is
23 set out in the italicized language quoted above. In other words, at the same time it was
24 amending OAR 660-012-0070 to make it clearer that OAR 660-012-0070 set out the
25 exclusive exception criteria for exceptions for transportation facilities on rural lands, LCDC
26 carried forward the requirement in ORS 197.732(2)(c)(A), Goal II, Part II(c)(1), and OAR
27 660-004-0020(2)(A) that an exception provide “reasons justifying why the state policy in the
28 applicable goals should not apply” and made the requirement that transportation needs be
29 identified as a “further” requirement. Given the language of that amendment, it is clear that

1 under OAR 660-012-0070(4) the county must “provide reasons justifying why the state
2 policy in the applicable goals should not apply” and, as a “further” obligation, identify a
3 transportation need in its TSP that cannot be accommodated through measures that do not
4 require an exception. It may be that in particular cases the transportation need identified
5 under OAR 660-012-0070(4) is also the reason why a local government believes an
6 exception is justified. However, in that circumstance, the county will need to explain why
7 that is the case. As OAR 660-012-0070(4) is currently written, it cannot be assumed that in
8 all cases an identified transportation need is necessarily sufficient to justify “why the state
9 policy in the applicable goals should not apply.”

10 This eighth assignment of error is sustained.

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioner contends the disputed TSP map amendment is inconsistent with TSP and
13 therefore violates Goal 2 and DCC 23.64.030(1)(b)(2).

14 **A. Goal 2.**

15 Under Statewide Planning Goal 2, when a plan such as the TSP is amended, it must
16 remain internally consistent after the amendment. *NWDA v. City of Portland*, 47 Or LUBA
17 533, 550 (2004). Petitioner contends the disputed TSP map amendment to add the 19th Street
18 extension is inconsistent with the TSP, because the TSP does not identify the extension as a
19 transportation need, and for that reason the amendment violates Goal 2 as well as OAR 660-
20 012-0070(4).

21 For the reasons explained in our discussion of the first assignment of error above, we
22 agree with petitioner that the disputed amendment violates OAR 660-012-0070(4) by adding
23 the 19th Street extension to the TSP map, because the TSP does not identify a transportation
24 need that justifies the extension, and the challenged decision did not amend the TSP to
25 identify such a transportation need. We agree that that shortcoming also violates Goal 2.

26 This subassignment of error is sustained.

1 **B. DCC 23.64.030(1)(b)(2)**

2 DCC 23.64.030(1)(b)(2) provides:

3 “Deschutes County shall not add any miles of new road to the system unless
4 the following issues are satisfied:

5 “a. The need for the road can be clearly demonstrated;

6 “b. The County can financially absorb the additional maintenance
7 requirements;

8 “* * * * *

9 “e. An overall increase in efficiency in the County road network can be
10 demonstrated.”

11 DCC 23.64.030(1)(b)(2)(a) similarly requires a showing of “need,” but unlike OAR
12 660-012-0070(4) does not expressly require that the need be adopted as part of the county’s
13 TSP. Regarding the financial consideration set out at DCC 23.64.030(1)(b)(2)(b), we agree
14 with the county that the required showing that it will be possible for the county to
15 “financially absorb the additional maintenance requirements” that would be required for the
16 19th Street extension is properly made at the time the county seeks land use permit approval
17 to construct the extension, rather than at the time it is added to the TSP map. Finally, the
18 DCC 23.64.030(1)(b)(2)(e) requirement that the county demonstrate that the disputed
19 extension would result in an “overall increase in efficiency in the County road network” is
20 extremely subjective. The county found that adding an arterial parallel to Highway 97 to the
21 east to go along with the existing county arterial connection to the west of Highway 97 will
22 result in a more efficient county road network. Record 94. Given the subjectivity of the TSP
23 standard, petitioner’s disagreement with that finding provides no basis for reversal or
24 remand.

25 This subassignment of error is denied.

26 The second assignment of error is sustained in part.

1 **THIRD ASSIGNMENT OF ERROR**

2 The TSP is part of the county’s comprehensive plan and therefore an amendment of
3 the TSP is an amendment of the county’s comprehensive plan. OAR 660-012-0060(1) sets
4 out the county’s obligation in addressing the transportation impacts of comprehensive plan
5 amendments:

6 “Where an amendment to * * * an acknowledged comprehensive plan * * *
7 would significantly affect an existing or planned transportation facility, the
8 local government shall put in place measures * * * to assure that allowed land
9 uses are consistent with the identified function, capacity, and performance
10 standards (e.g. level of service, volume to capacity ratio, etc.) of the facility.
11 A plan or land use regulation amendment significantly affects a transportation
12 facility if it would:

13 “* * * * *

14 “(c) *As measured at the end of the planning period* identified in the
15 adopted transportation system plan:

16 “* * * * *

17 “(B) Reduce the performance of an existing or planned
18 transportation facility below the minimum acceptable
19 performance standard identified in the TSP or comprehensive
20 plan; or

21 “(C) Worsen the performance of an existing or planned
22 transportation facility that is otherwise projected to perform
23 below the minimum acceptable performance standard
24 identified in the TSP or comprehensive plan.” (Emphasis
25 added.)

26 The county’s decision finds that the extension of 19th Street itself would operate at an
27 acceptable level of service, and we do not understand petitioner to challenge that finding.
28 The county’s decision did not expressly address whether the proposed 19th Street extension,
29 which will connect with Deschutes Market Road, may cause that street to operate below the
30 minimum acceptable performance standard identified in the county’s TSP at the end of the
31 planning period.

1 The county argues that while the challenged decision does not expressly address
2 whether the proposed extension will cause Deschutes Market Road to operate below the
3 minimum acceptable performance standard at the end of the planning period, the record
4 establishes that it will not. According to the county the level of service (LOS) performance
5 standard for existing county roads is LOS D, which equates to 5,700 to 9,600 average daily
6 trips (ADTs). The county found that the most heavily travelled section of Deschutes Market
7 Road now carries 5,592 ADTs, based on “most recent traffic counts.” Because the 19th Street
8 extension is only projected to carry 1,100 ADTs in 2030, the county argues the record
9 establishes that the 19th Street extension will not “significantly affect” Deschutes Market
10 Road, within the meaning of OAR 660-012-0060(1)(c)(B) and (C).

11 There is no dispute that the proposed 19th Street extension would carry only 1,100
12 ADTs in 2030. If that traffic were added to Deschutes Market Road, it apparently would not
13 cause Deschutes Market Road to operate below LOS D today. However, OAR 660-012-
14 0060(1)(c)(B) and (C) require that the impact of the proposed 19th Street extension be
15 measured “at the end of the planning period identified in the adopted transportation system
16 plan.” The county has not identified the projected ADTs for Deschutes Market Road at the
17 end of the TSP planning period. We understand that the county TSP either has recently been
18 updated or soon will be. If the end of the planning period is 2030 and if the projected ADTs
19 for Deschutes Market Road in 2030 including traffic from the 19th Street extension is not
20 significantly higher than the current 5,592, then the proposed 19th Street extension would not
21 “significantly affect” Deschutes Market Road, within the meaning of OAR 660-012-
22 0060(1)(c)(B) and (C). However, because we do not know how many ADTs are projected
23 for Deschutes Market Road at the end of the planning period, we cannot tell from the record
24 whether the proposed 19th Street extension will significantly affect Deschutes Market Road.

25 The third assignment of error is sustained.

1 **FOURTH ASSIGNMENT OF ERROR**

2 The county found that although it was required to adopt an exception to Goal 3
3 because the proposed 19th Street extension would cross state and privately owned properties
4 that are subject to Goal 3 and zoned for exclusive farm use, it did not have to justify an
5 exception for the EFU-zoned BLM-owned property that the proposed extension would cross.
6 Petitioner argues that while it might be that BLM could construct or authorize construction of
7 a road across BLM-owned property without regard to the county’s comprehensive plan and
8 land use regulations as a matter of federal preemption, the disputed amendment amends the
9 TSP to grant an exception for all of the property that the extension would cross (without
10 regard to ownership) and amends the TSP map to display the extension. Petitioner contends
11 that the exception that authorizes such an amendment must also apply the exception approval
12 criteria to the BLM-owned land.

13 We agree with petitioners. Respondent and intervenors-respondents cite no authority
14 for the proposition that the TSP may be amended to authorize a road extension that would be
15 located in large part on federally owned land and that would not be permitted under the
16 relevant statewide planning goals, without justifying an exception for all of the land that the
17 road extension would cover, including the federally owned land. We are aware of none.

18 The closer question is whether the county’s error provides any reason to believe the
19 exception the county approved is inadequate, simply because it failed to explicitly justify an
20 exception for the BLM-owned land. Respondent and intervenors-respondents contend that
21 the exception the county approved is adequate to address the OAR 660-012-0070 exception
22 criteria, even if the county erroneously found that an exception is unnecessary for the BLM-
23 owned land the extension would cross. The county’s decision must be remanded for other
24 reasons, and we decline to consider whether the county’s error in concluding that it need not
25 consider BLM land was harmless error. If on remand the county believes its error regarding
26 its obligation to justify an exception for the BLM-owned property was harmless error, it is

1 free to adopt that position. Alternatively, in the course of correcting the deficiencies noted
2 above the county could simply adopt additional findings on remand setting out its
3 justifications for an exception to the BLM land.

4 The fourth assignment of error is sustained.

5 **SEVENTH ASSIGNMENT OF ERROR**

6 In its seventh assignment of error, petitioner challenges the county's findings
7 regarding OAR 660-012-0070(8). Goal 2, Part II(c)(4) requires that the county demonstrate
8 that the road extension that is authorized by the disputed exception will be compatible with
9 adjacent uses. OAR 660-012-0070(8) sets out how the county is to comply with that
10 requirement:

11 “(8) To address Goal 2, Part II(c)(4), the exception shall:

12 “(a) Describe the adverse effects that the proposed transportation
13 improvement is likely to have on the surrounding rural lands
14 and land uses, including increased traffic and pressure for
15 nonfarm or highway oriented development on areas made more
16 accessible by the transportation improvement;

17 “(b) Demonstrate how the proposed transportation improvement is
18 compatible with other adjacent uses or will be so rendered
19 through measures designed to reduce adverse impacts.
20 Compatible is not intended as an absolute term meaning no
21 interference or adverse impacts of any type with adjacent uses;
22 and

23 “(c) Adopt as part of the exception, facility design and land use
24 measures which minimize accessibility of rural lands from the
25 proposed transportation facility or improvement and support
26 continued rural use of surrounding lands.”

27 In addressing the first paragraph set out above, OAR 660-012-0070(8)(a), the county
28 adopted the following findings:

29 “As explained above, the exception will not have an adverse effect on
30 surrounding rural lands and land uses. The land adjoining the exception area
31 is used for agricultural use and this road alignment will still allow for a viable
32 use of those private land[s] for agricultural uses. The land in federal

1 ownership has been identified in the UDRMP for preservation of natural
2 resources and this road will not interfere with that preservation purpose.

3 “As part of the county’s ongoing update of the comprehensive plan, the
4 county is drafting a subarea plan for Deschutes Junction. The area residents
5 and property owners on the east side of [Highway] 97 have stated they desire
6 to preserve the rural environment and oppose any commercial development.

7 “The 19th Street alignment has the BNSF on the western border of the road’s
8 right of way. No development pressure can occur there as there is no physical
9 room to development.

10 “Adding the route to the map will not directly result in any increased traffic.”
11 Record 88-89.

12 Petitioner challenges the above findings. However, those findings recognize that the
13 proposed extension will occupy both private and federal land that is now zoned EFU, some
14 of which is put to farm use. The findings emphasize that the proposal only removes a very
15 small amount of privately owned farm land that is currently in farm use and emphasize the
16 fact that the proposed alignment adjoins the BNSF railroad line, which means the proposal
17 essentially widens an existing transportation corridor rather than extending a new
18 transportation corridor into an EFU-zoned area that is free from transportation facility
19 impacts. Given that the obligation imposed under OAR 660-012-0070(8)(a) is only to
20 “[d]escribe the adverse effects that the proposed transportation improvement is likely to have
21 on the surrounding rural lands and land uses,” we believe the county’s findings concerning
22 OAR 660-012-0070(8)(a) are adequate.

23 OAR 660-012-0070(8)(b) requires the county to go further and demonstrate how the
24 proposed facility will be compatible with adjacent uses and OAR 660-012-0070(8)(c)
25 requires that the county adopt measures to minimize accessibility to adjoining rural lands.
26 The county adopted findings addressing both of those requirements, which are not
27 challenged by petitioner.

28 The seventh assignment of error is denied.

29 The county’s decision is remanded.