BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SENSIBLE TRANSPORTATION OPTIONS FOR PEOPLE, WILLAMETTE PEDESTRIAN COALITION, and 1000 FRIENDS OF OREGON, Petitioners, vs. WASHINGTON COUNTY, Respondent.	LUBA No. 94-106 FINAL OPINION AND ORDER

Appeal from Washington County.

Keith A. Bartholomew, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Mary Kyle McCurdy.

David C. Noren, County Counsel, Hillsboro, filed the response brief and argued on behalf of respondent.

KELLINGTON Referee; HOLSTUN, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 12/07/94

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an ordinance amending the county's comprehensive plan to conform with the requirements of the pedestrian, bicycle and transit access provisions of the State of Oregon Transportation Planning Rule (TPR).

PRELIMINARY ISSUES

A. Deference

The county argues that we should afford some deference to its interpretation of the TPR. However, the TPR articulates state law standards with which the county must comply. The county's role is to adopt local standards which comply with and implement the TPR. Our role is to review the correctness of the county implementing ordinances. Therefore, we may not defer to the county's interpretation of state law, rather we determine the correctness of the county's interpretation in light of what we interpret the TPR to mean. See Kellog Lake Friends v. Clackamas County, 17 Or LUBA 277, 285 (1988), aff'd 96 Or App 536, rev den 308 Or 197 (1989); McCaw Communications, Inc., v. Marion County, 17 Or LUBA 206, 220 (1988), rev'd on other grounds 96 Or App 552 (1989).

B. Interpretative Weight of Letters from the Department of Land Conservation and Development

The director of the Department of Land Conservation and Development (DLCD) wrote a letter to the county stating:

> "[The Land Conservation and Development Commission's (LCDC's)] intent [with regard to the TPR] is that local governments proceed with development and adoption of ordinances to meet the * * * deadline. While there are some terms in the [TPR] which could be clarified, the [TPR] intentionally does not prescribe a particular way for ordinances to comply with the [TPR]. It is up to local governments to develop standards which meet local needs and circumstances as well as rule requirements." Record 456.

The county states it understood this letter to advise that it was required to interpret ambiguous terms in the TPR, and that great deference would be afforded to such local interpretations once adopted.

We may not assign any particular weight to this letter. The letter is not an acknowledgment order or formal rule interpretation by LCDC or the director of DLCD. See 1000 Friends of Oregon v. LCDC (Lane County), 305 Or 384, 390, 752 P2d 271 (1988); Foland v. Jackson County, 18 Or LUBA 731, aff'd 101 Or App 632, (1990), aff'd 311 Or 167 (1991). The director's letter is not a document prepared during the TPR adoption process and, therefore, is not part of the TPR's administrative history. The post-enactment statements of an agency administrator concerning legislative intent do not constitute administrative history. See Defazio v. WPSS, 296 Or 550, 561, 679 P2d 1316 (1984); Von Lubken v. Hood River County, 19 Or LUBA 404, rev'd on other grounds 104 Or App 684 (1991); Barbee v. Josephine County, 16 Or LUBA 695, 699 (1988).

Petitioners cite a different letter the director wrote

at a later time, to a different local government, in response to questions concerning the TPR, which states in part:

> "[OAR 660-12]-045(b) applies to new retail, office and institutional development which is near existing or planned transit stops. This requirement is intended to affect siting of buildings which are within a reasonable walking distance of a transit stop so that they are conveniently accessible to transit users. Consequently, we interpret 'near' to include sites which are within a reasonable walking distance of a transit stop. Most research shows that a reasonable walking distance is one-quarter of a mile for transit stops and up to one-half mile for light rail stops." Record 929

For the reasons stated above, we do not consider this letter to embrace a formal interpretation of the TPR to which we may, or are required to, defer.

On the other hand, petitioners also cite a document prepared by DLCD staff during the proceedings leading to the adoption of the TPR. This document is legitimate administrative history because it was generated during the rule adoption proceedings and considered by the enacting body, and we may consider it. Foland, supra.

FIRST ASSIGNMENT OF ERROR

> "The county improperly construed OAR 660-12-045(4)(b) when it excluded the following uses and districts from the entrance orientation and building location requirements of the new 'Preferential Access to Transit Overlay District': Westside Light Rail station areas, campus development uses, motor vehicle service stations, and other uses determined by the county planning director to 'not have the potential, to generate a

significant percentage of transit trips.'"

The challenged decision is a legislative decision amending the transportation element of the county's comprehensive plan. Petitioners challenge the ordinance's compliance with TPR provisions governing the orientation of buildings and the entrances to such buildings. In this regard, OAR 660-12-045(4) establishes the following requirements:

> "[L]ocal government shall adopt land use and subdivision regulations to require:
>
> "* * * * *
>
> "(b) New retail, office and institutional buildings <u>at or near</u> existing or planned transit stops <u>to provide preferential access to transit</u> through the following measures:
>
> "(A) Orienting building entrances to the transit stop or station;
>
> "(B) Clustering buildings around transit stops; and,
>
> "(C) Locating buildings <u>as close as possible</u> to transit stops." (Emphases supplied.)

The challenged ordinance adopts a Preferential Access to Transit Overlay District (overlay district) in an effort to implement OAR 660-12-045(4)(b). As relevant here, the overlay district exempts from its requirements (1) parcels governed by another overlay district -- the Interim Light Rail Station Area Overlay District (Interim Light Rail District), (2) campus development uses, (3) motor vehicle

service stations,[1] and (4) other exemptions granted by the planning director.[2] However, the Interim Light Rail District exemption remains at issue only with regard to campus development uses.[3]

Campus development uses are defined by Washington County Community Development Code (CDC) 380-4.2 as uses with the following characteristics:

> "(1) is located on a lot or contiguous lots within the Industrial or Institutional districts that total at least five acres in size; and
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> "(2) includes multiple buildings which are interrelated in a common business or educational activity or process, and share a common infrastructure such as pedestrian ways and spaces, parking and vehicular accessways."

Petitioners state the uses permitted under the exempted county Industrial and Institutional districts include

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[1]CDC 430-123 defines "service station," as follows:

> "[A] commercial establishment primarily involved with sales and service of motor fuels."

[2]Specifically, the overlay district exempts any use where:

> "* * * the [Planning] Director, after consultation with the Transit District, determines the use does not have the potential to generate a significant percentage of transit trips."

[3]At oral argument, petitioners conceded that, except for campus development uses, the Interim Light Rail District exemption is permissible under OAR 660-12-045(4)(b) because the Interim Light Rail District contains its own set of requirements that are consistent with the TPR. However, the Interim Light Rail District exempts campus development uses from these requirements.

retail, institutional and office uses. Petitioners argue those uses are subject to the requirements of OAR 660-12-045, and the county improperly excluded them from the requirements of the overlay district. Petitioners argue OAR 660-12-045(4)(b) does not allow local governments to treat some retail, office or institutional uses differently than others. Petitioners contend OAR 660-12-045(5)[4] lends support to their understanding of OAR 660-12-045(4)(b). In this regard, petitioners point out OAR 660-12-045(5)(d) differentiates between major and other developments, but that OAR 660-12-045(4) contains no such distinction.[5] Petitioners maintain that because the TPR differentiates between major and other developments when a distinction is intended, where the TPR does not so differentiate, no

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[4]OAR 660-12-045(5) requires local governments to adopt land use and other regulations "to reduce reliance on the automobile" and requires:

> "* * * * *
>
> "(d) [A]ll major industrial, institutional, retail and office developments to provide either a transit stop on site or connection to a transit stop along a transit trunk route when the transit operator requires such an improvement." (Emphasis supplied.)

[5]OAR 660-12-005(5) defines "major" development as follows:

> "Major: means, in general, those facilities or developments which, considering the size of the urban or rural area and the range of size, capacity or service level of similar facilities or developments in the area, are either larger than average, serve more than neighborhood needs or have significant land use or traffic impacts on more than the immediate neighborhood.
>
> "* * * * *"

distinctions between major and other developments are allowed.

We agree with petitioners. Nothing in OAR 660-12-045(4)(b) suggests that a local government may exempt any type of retail office or institutional buildings from the building orientation and location requirements contained therein. This includes uses that may be combined in an office or campus type complex and service stations.

Concerning motor vehicle service stations, petitioners argue such a use is by its nature a retail use. Concerning the planning director exemption, petitioners simply argue there is no authority in the TPR for such an exemption. We agree with petitioners that there is no authority in the TPR for the county to exempt uses otherwise covered by the TPR.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

> "The county improperly construed OAR 660-12-045(4)(b), and made a decision not supported by substantial evidence in the whole record, when it adopted a coverage standard for the Preferential Access to Transit Overlay District that does not include properties near (but not directly fronting on) transit streets."

OAR 660-12-045(4)(b), quoted above, imposes certain requirements on new buildings located "at or near existing or planned transit stops." (Emphases supplied.) The overlay district adopted by the challenged ordinance applies only to properties directly fronting on transit streets, and does not apply to properties located near to transit stops,

but not directly fronting on a transit street. The challenged decision includes the following findings:

> "[OAR] 660-12-045(4)(b) requires 'new retail, office and institutional buildings at or near existing or planned transit stops to provide preferential access * * *' There is no [TPR] requirement for providing preferential access along transit streets. [The overlay district] applies to transit streets which are defined as 'all arterials, except freeways or interim facilities.' To optimize the efficiency of transit operations, there may be up to one quarter of a mile between bus stops in suburban locations. Thus, a majority of the properties along a transit street are not at a bus stop, but, instead, near a bus stop." (Emphases deleted.) Record 109.

Petitioners agree that OAR 660-12-045(4)(b) applies to transit stops, and not transit streets. However, petitioners point out property may be located near a transit stop and still not front directly on a transit street. Petitioners cite the following DLCD staff response at the last TPR adoption hearing to a proposal that "near" transit stops be replaced with "within 0.5 mile" of transit stops:

> "* * * The 0.5 mile standard has not been included. the term 'nearby' is used instead to allow local governments to determine whether specific destinations are within a reasonable walking or cycling distance considering topographic and physical constraints, and neighborhood orientation. Topographic and physical constraints include -- unbridged rivers, steep hillsides, freeways without cross streets etc. In sparsely settled areas a neighborhood may have more than a half mile radius, while in an urban area a half mile radius might cross into three or more distinct neighborhoods with distinct activity centers." Petition For Review Appendix 181, DLCD Document entitled "Review of Comments on

> the Transportation Planning Rule," dated April 1991.

Petitioners contend this establishes the use of the term "near" was not intended to draw a bright line along transit streets. Rather, petitioners argue OAR 660-12-045(4)(b) requires that buildings near transit stops, regardless of whether such buildings are located on a transit street, be subject to the requirements of OAR 660-12-045(4)(b). We agree with petitioners.[6]

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

> "The county improperly construed applicable law, and made a decision not supported by substantial evidence in the whole record, when it adopted maximum setback standards as part of the Preferential Access to Transit Overlay District that do not require retail, office, and institutional buildings to be located 'as close as possible to transit stops,' as OAR 660-12-045(4)(b)(C) requires."

As quoted above, OAR 660-12-045(4)(b) requires local governments to adopt regulations implementing the TPR that "provide preferential access to transit." OAR 660-12-045(4)(b)(C), quoted above, requires that certain types of new buildings be located "as close as possible" to transit stops. The TPR does not define what is meant by "as close as possible."

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[6]Because we determine the county's findings reflect an incorrect interpretation of OAR 660-12-045(4)(b), we need not review petitioners' arguments regarding the evidentiary support for those findings.

The challenged decision limits building setbacks from transit streets for buildings subject to its requirements, as follows. For lots greater than one acre, that front on a major transit street, buildings must be situated such that one-half of the building is located on the front-half of the lot.[7] For lots less than one acre, that front on a major transit street, buildings may not be set back from the transit street further than 100 feet.[8]

Petitioners contend both the 50/50 rule and the 100 foot rule fail to require buildings to be "as close as possible" to transit stops, but rather give preferential access to such buildings to automobiles, in violation of OAR 660-12-045(4)(b)(C). Petitioners contend the phrase "as close as possible" means what it says, and neither the 50/50 rule nor the 100 foot rule places new buildings subject to the TPR "as close as possible" to transit stops. We agree with petitioners.

The third assignment of error is sustained.

The county's decision is remanded.

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[7]This is the so-called "50/50 rule."

[8]This is the so-called "100 foot rule."