

Attachment B

Prior Use Determination

The purpose of Attachment B is to provide additional background information on “prior use” for connections that are being reviewed for change of use.

DEFINITIONS OF PRIOR USE

OAR 734-051-1070 defines prior use as follows:

- (54) “Prior use” of an approach means the number of peak hour or average daily trips:*
- (a) Authorized by the Permit to Operate issued by the department; or*
 - (b) Authorized by the department for a grandfathered approach in the documentation recognizing the approach as grandfathered; or*
 - (c) Based on the use of the property on January 1, 2014 for approaches that the department does not rebut as having a presumption of written permission under OAR 734-051-3015.*

Senate Bill 264 (SB 264)

SB 264, signed into law in June 2011, introduced the term “prior use” into ORS 374, the state statute for access management:

From SB 264:

Section 13(4) A new approach permit for a change of use of an approach is required for a private approach if:

- “(a)(A)(i) The number of peak hour trips increases by 50 trips or more from that of the property’s **prior use**; or*
- “(ii) The number of trips on a typical day increases by 500 trips or more from that of the property’s **prior use**; and*
- “(B) The increase described in subparagraph (A)(i) or (ii) of this paragraph represents a 20 percent or greater increase in the number of peak hour trips or the number of trips on a typical day from that of the property’s **prior use**;*

Senate Bill 408 (SB 408)

SB 408 specified for presumed to be permitted approaches the “prior use” is the use of the property on the effective date of the act - January 1, 2014.

From SB408:

Section 2 (4) For approach roads presumed to have written permission under this section, the determination of prior use for the purposes of ORS 374.312 (4) and (5) is the use of the property on the effective date of this 2013 Act.

BACKGROUND INFORMATION

The term “*prior use*” needs to be viewed in the context of other provisions of ORS 374. and the manner in which it is used in the administrative rules for Change of Use (OAR 734-051-3020).

ORS 374.305 requires ODOT’s written permission to build or construct an approach road to a state highway. This statute also requires written permission to “*change the manner of using*” an approach permitted by ODOT.

*ORS374.305 **Necessity of permission to build** on rights of way. (1) A person may not place, **build or construct on the right of way** of any state highway or county road, any **approach road**, structure, pipeline, ditch, cable or wire, or any other facility, thing or appurtenance, or substantially alter any such facility, thing or appurtenance **or change the manner of using** any such approach road **without first obtaining written permission** from the Department of Transportation with respect to state highways or the county court or board of county commissioners with respect to county roads.*

OAR 734-051-3020(1), effective on June 30, 2014, states that a “*Change of Use*” applies to all connections “whether they exists under a permit to operate, are grandfathered under OAR 734-051-1070(29), or are deemed to have written permission under OAR 734-051-3015”. See definitions in Attachment A.

Prior to April 1, 2000, when OAR 734-051 was first adopted, any change required a new permit under the previous rules and statutes. Neither the ORS nor the OAR had specific thresholds for a change of use. ODOT determined when a significant increase in the volume of traffic or a change in the character of the traffic necessitated improvement to ensure the safety of highway users. An earlier version of the rules set an increase of 25 peak hour trips or an increase of 250 average daily trips as thresholds for change of use requiring an application for a new permit. SB 264 raised the thresholds for change of use.

DETERMINING PRIOR USE

Permitted Connections

ODOT’s practice for many years has been to base “*prior use*” for permitted connections on the information about the approach that is documented on the approach permit in CHAMPS, UPermits or etc.

Permit documents have not always clearly recorded what peak hour trips, site ADT or number of heavy trucks was permitted. This has been true over time even as more specific thresholds for a Change of Use were established. It is only recently that the site ADT has been included on approach permits. The only thing on the permit that has been somewhat consistent over time has been along the lines of “*Nature of Business to*

be Served by” (1954), *”Facility Served by approach”* (1981), *”Approach to Serve”* (1983) and descriptions like *”residential, gas station, retail, commercial, hotel, motel and quarry”*. This information is generally insufficient to calculate exact trip numbers. However, if the number and size of buildings on the property at the time the permit was issued can be determined, then it is possible to produce a reasonable estimate of the traffic volumes when the permit was issued.

District or Region paper files may include a site plan that shows buildings at the time the permit was issued. Tax records at the time of permit issuance may also show buildings that were on the property. Statements from the current or prior owner and historical photos have also been used for this purpose. Historical highway video logs available from the ODOT Transportation Development may reveal development on the property at the time the permit was issued.

After gathering as much information as possible about the type of development and use of the property at the time the permit was issued then the Peak Hour and Site ADT can be estimated from the current ITE Trip Generation Manual. It is important to collaborate with the property owner on the basis of the estimate as the property owner may have information that needs to be considered. Trip generation for heavy trucks is not provided in the ITE Manual and would need to be established by other means (i.e. agreement with property owner) if a change in heavy truck volumes are being evaluated as a basis for change of use.

Specific language in a property deed for a reservation of access may also help to establish use of the property. There have been cases where language in a property deed establishing a reservation of access, conflicts with the current authorized land use because of rezoning (i.e. commercial use described in reservation conflicts with current zoning for residential use). When the reservation of access has restrictions that limits use of the access to a specific purpose or use, the use described in the reservations is the legal basis for prior use, unless the restriction has been removed through an indenture process.

Grandfathered Connections

OAR 734-051 defines a grandfathered approach as follows:

(30) “Grandfathered approach” means an approach that the department has recognized in documentation dated prior to January 1, 2014 as having grandfathered status under the rules in effect on the date of the documentation. An approach that is recognized as having grandfathered status is treated in the same manner as a Permit to Operate under Division 51 rules unless otherwise noted.

Prior use for a grandfathered approach is the number of trips recognized by the department for the grandfathered approach at the date the approach was legally established. If a letter was issued or there is documentation available, which indicates the permissible use of the approach then this would serve as the basis for prior use.

Presumed to be Permitted Connections

For presumed to be permitted connections, the prior use is the use of the property on January 1, 2014 (the effective date of SB 408). Information from City/County records, as-constructed plans, field observations, digital video logs, and credible information provided by the property owner can help to establish the use of the connection on January 1, 2014. The RAME should be consulted when establishing prior use for presumed to be permitted connections.