



Oregon

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TO: Joint OTC-LCDC Transportation Subcommittee

FROM: Robert Cortright, Transportation Planning Coordinator

SUBJECT: ADDITIONAL GUIDANCE ON THRESHOLDS FOR GOAL EXCEPTIONS

Summary

The recent Court of Appeals and LUBA decisions regarding the Newberg Dundee Bypass interpret Section 0070 of the TPR to give local governments' broad discretion to set thresholds. They also effectively allow the volume to capacity (v/c) standards in the Oregon Highway Plan (OHP) to be used as a 'safe harbor' threshold for goal exceptions for state highway projects. The department believes that these decisions allow local governments to adopt thresholds that would result in rejecting potentially reasonable alternatives. Consequently, the department recommends that Section 0070 be amended to provide additional guidance on setting thresholds to assure that thresholds more accurately define situations where non-exception alternatives are unreasonable.

Additional amendments to the TPR to address this issue are warranted for several reasons:

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

Background Information

Background information on this issue is included in two attachments to this memo.

Attachment 1 is relevant portions of the department's staff report on proposed TPR amendments for the February 2006 meeting. The report responds to a request from the Commission at its December 2005 meeting asking that the department assess the implications of the LUBA and Court of Appeals decisions in *1000 Friends of Oregon v. Yamhill County*. Key points about the exceptions process, thresholds and the court decisions are summarized in this memo.

Attachment 2 is a summary and listing of adopted and proposed goal exceptions for transportation facilities compiled by the department. The department conducted a review of draft and adopted transportation system plans, and post-acknowledgement plan amendments to identify situations where exceptions for transportation improvements have been either adopted or considered for adoption.

Key Points on the Exceptions Process, Thresholds, and *Yamhill County* Decisions

Goal 2 Exceptions Process

- The exceptions process is intended as a balancing test to guide decisions to authorize uses that are not otherwise allowed by the applicable statewide planning goals. For exceptions for transportation improvements on rural lands, an exception involves weighing transportation needs against state policies in Goals 3, 4, 11 and 14 to protect resource land and promote efficient urban development.
- A key test in the exceptions process is to demonstrate that non-exception options for meeting the identified transportation need are unreasonable.
- In general, the "reasonableness" standard recognizes that non-exception alternatives may not perform as well or may cost more than alternatives that require exceptions. Consequently, the test is not whether or not a non-exception alternative costs more or performs worse, but whether or not it "reasonably" meets the identified need.
- Applied to transportation projects, the reasonableness test recognizes that meeting transportation needs by building roads and other improvements in urban areas will be more expensive than building new roads on farmland and that the resulting improvements may perform less well but nonetheless "reasonably" meet the identified transportation need.

Exceptions Thresholds

- Thresholds are yardsticks for measuring whether non-exception alternatives are reasonable or unreasonable.
- The TPR calls for setting thresholds for three factors: operational feasibility, cost and economic dislocation. Local governments may also set thresholds for other relevant

factors.

- Failure to meet any adopted threshold allows an alternative to be considered "unreasonable". For example, if an alternative meets two thresholds but fails a third, it may be rejected as unreasonable.
- While local governments must "justify" thresholds, the rule provides little if any guidance on how local governments are to justify thresholds.

LUBA and Court of Appeals Decisions

- The outcome of the LUBA and Court cases is that local governments have broad discretion to set thresholds. While thresholds must be "justified", there are no clear limits or standards on what level of justification is required.
- In particular, the LUBA and court decisions upheld use of the OHP v/c standards as a threshold. DOJ's advice is that local governments will fairly interpret these decisions as making use of OHP v/c standards essentially a safe harbor threshold for goal exceptions for improvements to state highways.

Possible Additional Guidance on Justifying Goal Exception Thresholds

DLCD suggests that the TPR be amended to clarify how goal exception thresholds should be justified. As noted above, thresholds are, in essence, used to measure whether a transportation solution is reasonable or unreasonable. Additional guidance in the rule would more clearly tie setting of thresholds to the reasonableness standard in Goal 2 and describe factors to be considered as thresholds are justified. Possible rule amendments to accomplish this objective are outlined below.

Amend 0070(6) as follows:

- (6) To determine the reasonableness of alternatives to an exception under sections (4) and (5) of this rule, cost, operational feasibility, economic dislocation and other relevant factors shall be addressed. The thresholds chosen to judge whether an alternative method or location cannot reasonably accommodate the proposed transportation need or facility must be justified in the exception. The purpose of thresholds required by this section is to define levels of performance or impact that make a non-exception alternative "unreasonable" for purposes of Goal 2 and 197.712.

Add a new Subsection 0070(6)(d) as follows:

- (d) In justifying thresholds local governments shall:
 - (A) recognize that the exceptions process is intended to give preference to non-exception alternatives that would reasonably meet identified transportation needs and that such alternatives generally include a combination of measures not requiring goal exceptions,

including improvements to existing roads and streets, new roadways not requiring a goal exception and other measures including transportation demand management and transportation system management measures;

- (B) recognize that non-exception transportation solutions that perform less well and cost more or have greater impacts than exception alternatives are nonetheless reasonable except where the difference in performance, cost or other impact is clearly excessive or disproportionate to the long-term impacts of the proposed exception on farm and forest lands and compact urban development;
- (C) recognize that anticipated funding for transportation improvements falls significantly short of needs identified in TSPs and, that projected transportation needs in many areas of the state will not be fully met, and consequently, that alternatives that do not fully meet adopted performance or operational standards will be necessary and reasonable to address transportation needs for many communities for the foreseeable future;
- (D) consider as “potentially reasonable”, non-exception alternatives that are allowable under the Oregon Highway Plan, including adoption of alternative mobility standards and approval of deviations to adopted design or operational standards;
- (E) consider as "reasonable" levels of cost, economic dislocation and other factors that have been incurred in comparable situations and for comparable projects in other communities in the state;
- (F) give preference to implementation of cost-effective minor improvements and other improvements not requiring a goal exception consistent with the Oregon Highway Plan major improvement policy; and,
- (G) for projects in the vicinity of metropolitan areas, give preference to non-exception alternatives that include integrated land use and transportation plans that support compact mixed use development patterns.

Reasons Additional Guidance is Needed

DLCD believes additional guidance is needed for several reasons:

1. There is significant potential for additional goal exceptions.

There are a large number of projects where local governments have in the past expressed interest in goal exceptions. DLCD identified more than 40 projects that were considered in TSPs but not adopted that would require goal exceptions. (See Attachment 2). Several factors make it likely local governments will reconsider these or similar projects:

- *Communities will be updating their TSPs.* Local governments that adopted TSPs before 2000 will be extending the planning period out another 5 to 10 years – i.e. to 2025 or 2030. As TSPs are updated more roadway and highway segments will be projected to approach or exceed v/c standards, rekindling interest in projects requiring goal exceptions.

- *Projects requiring exceptions often have significant local support.* For the affected communities, major roadway improvements are seen as effective ways to increase economic development opportunities or to remedy growing traffic congestion or safety problems. And, as traffic volumes grow and congestion worsens, interest in pursuing these projects is likely to increase.
 - *There is a perception that major highway improvements will be paid for by state or federal funds, for example, through Congressional earmarks.* This creates pressure for exceptions because getting a project “in the plan” is a key step in getting in line for funding for both detailed environmental studies and project construction.
 - *Non-exception options are often difficult or controversial.* Options to a new road or highway across rural land generally involve a combination of smaller actions such as widening existing roads, extending or connecting local streets, changing land use, and in larger communities, promoting alternatives through land use changes, transit, and transportation demand management measures. These measures are often controversial because of neighborhood or community impacts or because they must be paid for by local taxpayers.
2. In some situations, the v/c standards in the Oregon Highway Plan OHP are not a good measure of whether non-exception alternatives are unreasonable

As noted above, the LUBA and court decisions effectively make the OHP v/c standards a ‘safe harbor’ threshold for goal exceptions. For several reasons, the OHP v/c standards are not always a good measure of whether non-exception alternatives are unreasonable.

- *Use of the OHP v/c standards as a threshold allows solutions that come close but do not quite meet v/c standards to be rejected as unreasonable.* Non-exception alternatives to major highway improvements usually involve a combination of lesser improvements within urban growth boundaries –such as widening existing highways and streets, improved traffic management, land use, transit and alternative modes, etc.) The nature of these solutions is that they meet some but not all of the identified transportation need.
- *In many situations it won’t be possible to meet the OHP v/c standards because we won’t have sufficient funding to build needed improvements.* In short, funding constraints will make it increasingly necessary to accept as “reasonable” solutions that don’t fully meet the OHP v/c standards.¹ This is especially likely in and around metropolitan and other large urban areas where there is also pressure for bypasses, new roads and new interchanges.
- *The OHP mobility policy allows for solutions that do not meet v/c standards.* The v/c standards are part of the OHP mobility policy. The policy recognizes that v/c standards are not always attainable and should be compromised when there are other valid public

¹ A major concern expressed by stakeholders in the TPR evaluation was that v/c standards in the OHP are not attainable, have unintended and undesired effects on land use planning and need to be changed to be made more realistic. (See Attachment 1, February 2006 LCDC Report, page 16-17)

policy considerations.² In effect, the OHP recognizes that there are situations where v/c standards are not an appropriate minimum standard for defining whether transportation needs are reasonably met. It seems logical that state land use policies to avoid impacts on farmland or urban growth containment should receive the same consideration. ODOT has in some situations adopted solutions that do not meet the mobility standards in the OHP.³

3. Other policies, including the Oregon Highway Plan major improvements policy and the bypass policy and funding constraints, are unlikely to prevent inappropriate projects from moving forward.

ODOT staff have suggested that amendments to the TPR are unnecessary because other policies in the OHP, funding constraints, and other factors make it unlikely that unjustified exceptions will move forward. The table below outlines other policies that apply to transportation projects

Other Policies that would Potentially Limit Goal Exceptions	
<i>Other Policies</i>	<i>DLCD Comment</i>
1. In 2005, the OTC relaxed its OHP mobility standards for most urban highway segments with speeds of 35 mph or less.	This is a positive change. However, it is not clear that this would make a significant difference in whether non-exception alternatives are more likely to be considered. (Reviewed in Attachment 1)
2. OHP mobility standards include provisions for designation of Special Transportation Areas (STA) that operate at higher congestion levels.	These provisions <u>allow</u> STA designations.
3. The OHP includes provisions for local governments to ask the Oregon Transportation Commission for alternative mobility standards. The OTC has approved these alternative mobility standards in the Portland Metro area and in Medford. They have also been discussed as an option in the Eugene/Springfield area, though no formal request has been made to the OTC.	DLCD agrees that adoption of alternative mobility standards should be considered as potentially reasonable alternative to a goal exception. However, the OHP does not local government to consider or use alternative standards. Local governments are often unsupportive, especially where they perceive that alternative standards would reduce the likelihood that a desired major improvement will be planned. In the setting criteria for evaluating alternatives for the Highway 97/20 project in Bend, ODOT staff declined to consider alternative mobility standards as a possible threshold for meeting needs.
4. Even where local governments might justify an exception using OHP mobility standards, and even where funding was potentially available, other OHP policies may prevent local governments from including bypasses or new interchanges in their TSPs. a. OHP Policy G directs ODOT to improve system efficiency before adding more capacity or new facilities. b. OHP Policy H requires that new bypasses be consistent with Policy G and include management	DLCD supports the identified policies. Fundamentally department does not believe either policy is intended as a substitute for the goal exception process to assess whether there are “reasonable” alternatives. Our experience is that neither the Major Improvements Policy (1G) nor the Bypass policy (1H) have been applied in a way to preclude or dissuade a local government from pursuing or approving a goal exception. In planning for the Highway 97/20 project in Bend ODOT staff have applied neither the major

² For example, Action 1F.3 of the OHP mobility policy specifically allows for solutions that do not meet its identified standards - where cost, environmental impact or community impact would be too great.

³ For example, ODOT is currently planning major improvements to I-5 in the Delta Park area in Portland. Meeting v/c standards is not a minimum standard for meeting transportation needs. In that situation, a solution that does not meet v/c standards will presumably otherwise “reasonably” meet transportation needs. ODOT policy and practice also allow for exceptions to other adopted standards for operational feasibility - such as interchange spacing standards.

plans for interchange areas that include land use measures to protect the regional and statewide mobility function of the bypass and interchanges.	improvements policy nor the bypass policy in developing or evaluating possible alternatives.
5. ODOT has not supported bypasses in several communities.	ODOT's lack of support does not prevent locals from proposing bypass or adopting a goal exception. ODOT needs policy basis in plans for opposing bypasses. Current policy in form of v/c standards appears to allow locals to justify exceptions.
6. Lack of funding for major improvements also would cause exceptions relying on OHP mobility standards not to be approved.	This should be the case, but has not been to date. Funding limitations have not been a factor in justifying exceptions. Most planning efforts consider funding an implementation issue to be addressed after a decision about the needed project has been determined.
7. ODOT and DLCD participate in the development and adoption of local Transportation System Plans and have the opportunity to object to or appeal facility decisions that do not comply with state planning goals at the system planning stage.	ODOT and DLCD can and do participate, but objections must be based on goal compliance issues. Without rules clarifying how thresholds are to be set, ODOT and DLCD would generally not have a basis for arguing an exception does not comply with the statewide planning goals.

4. Allowing additional goal exceptions where there are potentially reasonable alternatives would have undesirable effects on land use and transportation planning in Oregon.

The direct impact of a lower standard for approval of goal exceptions is that more farm land and other resource land will be converted to non-resource use.

Additional exceptions will also have adverse effects on land use and transportation planning:

- More planning efforts and resources will be invested in projects that require goal exceptions. Resources devoted to these projects will be diverted from other important planning work.
- Reasonable and potentially reasonable alternatives to meet transportation needs will be rejected or not implemented. In particular, non-exception alternatives that would substantially but not completely meet projected transportation needs – including improvements to local streets, changes to land use plans, transportation demand management measures, transportation system management and other measures, will not be implemented.
- Adopted exceptions will result in pressure for additional plan and zone changes to take advantage of the capacity and accessibility that would be provided by the planned improvement.
- Additional goal exceptions would further widen the gap between planned projects and available funding. Adopted TSPs already include planned projects that significantly exceed likely transportation funding. Goal exceptions tend to be for larger, more expensive projects.

Attachments

1. DLCD Staff Report to LCDC for the February 2, 2006 LCDC Meeting, pp 16-25
2. DLCD Memo, August 8, 2006, Summary of Proposed and Adopted Goal Exceptions