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5. Negotiated Mitigation Agreements

5.1. Purpose

This Chapter identifies basic protocols for staff to use during the negotiation of fair, legally defensible and enforceable mitigation agreements with local governments and/or private developers during the development review process. The purpose of this chapter is to support staff understanding of the opportunities and limitations that apply when negotiating such agreements, and to understand the legal framework within which the Agency may negotiate agreements for mitigation by developers and in cooperation with local governments.

5.1.1. Problem Statement

Development projects and land divisions approved by local governments often have adverse impacts or significant effects on state transportation facilities, even when the proposal is technically consistent with existing local plans and ordinances. In addition, comprehensive plan and zoning map amendments may be considered for which future transportation impacts may exceed the capacity of the future planned transportation system.

ODOT's ability to ensure that state transportation facilities either meet the agency's performance standards, or operate at the same performance level post-development as pre-development, is compromised by both the immediate and the cumulative traffic impacts of approved land use development, land subdivisions and partitions, and changes to land use designations. The goal of this Chapter is to provide guidance on consistent practices statewide to negotiate fair, fundable solutions with local governments and private developers to better ensure that investments in state transportation facilities are protected.

Developer contributions to mitigation measures may be made in several ways. The two broadest categories are: 1) a proportional share contribution to an ODOT STIP improvement project, and 2) developer construction of or payment for an improvement that compensates for the impacts of the private development on the highway facility.

Not every development impact on state transportation facilities will be amenable to a negotiated mitigation agreement. Where the impacts on the system can be mitigated by operational measures that can be accomplished incrementally, it is relatively easy to identify fixes that are clearly related to the impacts of the

development project and that can be constructed in a timely manner. And where ODOT already has a project planned and funded that deals with related issues, determining a proportional share cash contribution will be relatively simple. But for all of the different situations that will arise between these two ends of the spectrum, arriving at a reasonable solution will be more complicated. In any case, there needs to be assurance that mitigation measures will be constructed in a timely manner. Where that assurance cannot be established, a negotiated mitigation agreement will not get the desired results.

5.2. Policy Issues That May Apply

5.2.1. 1999 Oregon Highway Plan (OHP)

Goal 1: System Definition: The 1999 Oregon Highway Plan (OHP) provides emphatic support for coordination between ODOT and local government to ensure that state facilities will function consistent with their classification. Several OHP Policies assert that local governments have a responsibility to do land use planning in a manner that protects the public investment in the statewide transportation system.

Policy 1B – Land Use and Transportation

This policy recognizes the role of both State and local governments related to the state highway system:

- State and local government must work together to provide safe and efficient roads for livability and economic viability for all citizens.
- State and local government must share responsibility for the road system.
- State and local government must work collaboratively in planning and decision-making relating to transportation system management.

Action 1B.6

Help protect the state highway function by working with local jurisdictions in developing land use and subdivision ordinances, specifically:

- A process for coordinated review of future land use decisions affecting transportation facilities, corridors or sites;
- A process to apply conditions to development proposals in order to minimize impacts and protect transportation facilities, corridors or sites;
- Regulations assuring that amendments to land use designations, densities and design standards are consistent with the functions, capacities and highway mobility standards of facilities identified in transportation system

plans including the Oregon Highway Plan and adopted highway corridor plans;

- Refinement of zoning and permitted and conditional uses to reflect the effects of various uses on traffic generation;
- Standards to protect future operation of state highways and other roads; and
- Access control measures, for example, driveway and public road spacing, median control and signal spacing standards which are consistent with the functional classification of roads and consistent with limiting development on rural lands to rural uses and densities.

Policy 1F (Highway Mobility Standards) describes the applicability of the mobility standards to protect performance. For the purposes of planning, the mobility standards establish the performance expectations for planning and plan implementation; guide the review of amendments to comprehensive plans and land use regulations; and help maintain consistency between desired highway performance and land use development.

Policy 1G (Major Improvements) states that “it is the policy of the State of Oregon to maintain highway performance and improve safety by improving system efficiency and management before adding capacity. ODOT will work in partnership with regional and local governments to address highway performance and safety needs. The highest priority is to preserve the functionality of the existing highway system.

Goal 2: System Management: Emphasizes the importance of interjurisdictional cooperation to provide a seamless transportation system that meets local, regional, statewide and interstate travel needs.

Policy 2A: Partnerships

It is the policy of the State of Oregon to establish cooperative partnerships to make more efficient and effective use of limited resources to develop, operate, and maintain the highway and road system. These partnerships are relationships among ODOT and state and federal agencies, regional governments, cities, counties, tribal governments, and the private sector.

Action 2A.4 Encourages consultation with local and regional governments in development of major modernization projects. Local governments are expected to contribute to projects consistent with their means, and may contribute cash; in-kind services and materials; and land use decisions and off-system

improvements that help maintain the function and efficiency of the entire transportation system.

Action 2A.5 Encourages “partnerships with the private sector where doing so will provide cost efficiencies to the state and advance state goals.”

Action 2.A.7 Supports negotiation “with the private sector to leverage funds, right-of-way contributions, or off-system improvements when major highway improvements benefit specific properties planned for development...”

Negotiations are appropriate in the course of long range planning, plan and zone amendments, and “where development has occurred or will occur that necessitate(s) major highway improvements.”

Goal 3: Access Management: Recognizes access management measures as effective means to balance local and through traffic needs, a central tenet of any partnership between the ODOT and local government. Access management strategies are major components of the toolbox available to mitigate the impacts of development projects on transportation facilities, both state and local. Access management helps ensure safe and efficient highways consistent with their determined function and enhances local circulation and livability.

Goal 4: Travel Alternatives: Planning for alternative modes of travel is another way local jurisdictions can help preserve the statewide transportation system over time. To support the goal of a seamless transportation system, it is important to require developers to connect with alternate modes, provide clear connections between transit and land uses and appropriately apply principles of transportation demand management where feasible.

In conclusion, any local or regional Transportation System Plan is required by the Transportation Planning Rule to be consistent with the OHP, and should include both plan and ordinance provisions that recognize the responsibility of local government to protect state investment in transportation infrastructure. It is implicit in any acknowledged plan that protection of state facilities is a shared responsibility with local and regional governments. The OHP recognizes that property owners and developers who benefit from the public investment in state transportation facilities also have responsibility for the long term viability of an integrated transportation system.

5.2.2. Access Management Rule (OAR 734-51) or (Division 51)

The access management rule applies in development review when a proposed development requires a new approach to the state highway and/or when the use of an existing approach will be changed in a way that increases traffic volume or

operation in a manner described in 734-051-0045 sections (2) and (3). A land use may change without creating a “change of use” of an approach. However, any time an existing land use will be added to or intensified; it is an important time to consult with a District Permit Specialist or Region Access Management Engineer. They will be able to establish whether a change of use of the approach will occur if the proposal is approved. If it is determined that there will be a change of use of the approach, a new approach permit will be required and mitigation of adverse impacts will be part of that permit. If the impacts are major, a negotiated agreement may result from the permit process.

OAR 734-051-0145: Mitigation Measures may be required on the state highway or the subject property to comply or improve compliance with the division 51 rules for continued operation of an existing approach or construction of a new approach. The cost of mitigation measures is the responsibility of the applicant, permittee, or property owner. That is, where an approach permit is required, developers are responsible for the cost of the impacts of the particular approach on state facilities, as well as mitigation measures, which must be directly proportional to those impacts. This section of Division 51 includes a list of the types of measures appropriate for mitigation of traffic impacts that may be also appropriate for negotiated agreements. Other measures related to access management and operations may also be raised in negotiations, such as restrictions on the use of an approach (e.g. a trip cap based on a reasonable projection of trips for the current proposal, limiting future increases); or donation of right of way and/or access control to the state.

OAR 734-051-0155 provides for the development of Access Management Plans and Interchange Area Management Plans and lists the types of standards expected to be included in such plans. For development proposals that impact a facility for which a plan is in effect, there are agreed upon standards for the long term management of that facility and surrounding land uses for which the local government has taken responsibility as a party to the adopted facility plan.

Transportation Planning Rule (TPR) (OAR-660-012)

The purpose of the TPR, in large part, is to direct transportation planning in coordination with land use planning to protect existing and planned transportation facilities for their identified functions; provide for transportation facilities, improvements and services necessary to support acknowledged comprehensive plans; ensure coordination among affected local governments and transportation service providers; achieve consistency among state, regional and local transportation plans; and ensure that changes to comprehensive plans are supported by adequate planned transportation facilities.

660-012-0045 (Implementation of the Transportation System Plan) requires that local governments adopt land use regulations to protect transportation facilities for their identified functions. Such regulations shall include:

- Access control measures;
- Standards to protect future operation of roads and other transportation facilities and services;
- Process for coordinated review of future land use decisions affecting transportation facilities
- Process to apply conditions to development proposals to minimize impacts and protect transportation facilities; and
- Regulations assuring that amendments to land use designations, densities, and design standards are consistent with the functions, capacities and performance standards of facilities identified in the TSP.

Acknowledged Transportation System Plans, by virtue of being found consistent with the TSP, either implicitly or explicitly establish that the protection of state facilities is a shared responsibility with local and regional governments.

5.2.3. Local Collection of Funds for Transportation Facilities:

Local governments interested in being proactive partners in protecting and improving state highways have some options they can choose to exercise to generate funds for infrastructure. Cities are enabled to collect fees from property owners or developers to pay for capital improvements to public facilities. Two common types of programs fall under the categories of Local Improvement Districts (LIDs) (cities) and System Development Charges (SDCs) (cities and counties).

ORS 223.389 (Local Improvement Districts) establishes a process for making local assessments for local improvements. A district boundary is established defining an area of benefited properties. When the decision is made to construct the improvement, the cost is estimated based upon a contract award or direct cost to the jurisdiction. The costs for the benefited properties are calculated and billing is sent out. A Local Improvement District may include property in other jurisdictions with the cooperation of that other jurisdiction. The law provides for financing methods, both for paying for the improvement and for collecting the individual assessments. This type of funding may not be a potential resource for funding state jurisdiction facilities, but could supplement ODOT investments with, for example, the addition or improvement of pedestrian facilities or improvements to local jurisdiction cross streets.

ORS 223.297 to 223.314 (System Development Charges or SDCs) states that SDCs are assessed based upon a Capital Improvement Plan and are collected at the time of increased usage of a capital improvement or issuance of a development permit, building permit or connection to the capital improvement.

System development charges do not include any fees assessed as part of a local improvement district, or the cost of complying with requirements or conditions imposed upon a land use decision, expedited land division or limited land use decision.

The following discussion of SDCs is included here at the request of ODOT planners to further illustrate what it takes for local jurisdictions to collect developer contributions for mitigation of development impacts on public facilities. Establishing an LID or SDC program requires planning and analysis to identify solutions to be funded, to document the improvements to be financed and the terms of the funding program, and to establish the property owner or developer share of the cost of those solutions.

Establishing Systems Development Charges: Prior to the establishment of a system development charge, which is done by ordinance or resolution, the local government must prepare a capital improvement plan or other public facilities plan that includes a list of capital improvements. These improvements are the ones that the local government intends to fund, in whole or in part, with revenues from the SDCs and the estimated cost, timing and percentage of costs eligible to be funded with revenues from the SDCs for each improvement. It appears that state facilities could be included in local capital improvement plans with the caveat that ODOT has to be on board with any such project in order for it to proceed to construction. Such improvements would also need to be recognized in the local TSP.

As an example of an established process that assesses affected property owner contributions to a public project, the amount of a system development charge has to be based upon:

- A methodology using ratemaking principles as employed to finance publicly owned capital improvements;
- Prior contributions by existing users;
- Gifts or grants from federal or state government or private persons;

- The value of unused capacity available to future system users or the cost of the existing facilities;

Other relevant factors identified by the local government imposing the fee. Justification for the fee must include the projected cost of the capital improvements identified in the plan and project list, and documentation of the need for increased capacity in the system to which the fee is related. The local adopting ordinance may provide for accepting other considerations in lieu of the SDC such as donation of right of way or construction of improvements (not including onsite improvements necessary to develop the private project).

SDC receipts may only be spent on capital improvements associated with the systems for which the fees are assessed. Any capital improvement being funded, wholly or in part, with system development charge revenues must be included in the associated plan and on the project list adopted by the local government pursuant to ORS 223.309.

5.3. Types of Agreements

ODOT enters into a variety of agreement types related to land development that affects the state highway system. These agreements range from permits for relatively minor improvements in the right of way, through agreements and letters that identify and agree to needed mitigation measures, to cooperative improvement agreements (CIAs) that memorialize cost sharing and other shared responsibilities related to major facility projects and improvements in a legally binding agreement. The following are brief descriptions of the types of agreements that may be used in relation to the development review process:

- Permit: For example Road Approach, Utility, or Miscellaneous (e.g., landscape) permits for uses of right of way or for improvements within the public right-of-way, resulting in improvements that will remain in private ownership. (This Chapter does not address permitting issues except for purposes of comparison with the other types of agreements.)
- Letter of Agreement: An informal agreement memorializing an understanding between parties of the nature of a problem and the need to work together for a solution.
- Memorandum of Understanding (MOU): A more formal recognition of a development impact on the state system and preliminary, (usually) nonbinding agreement as to who will be responsible for identifying, funding, constructing or otherwise providing a solution.

- Intergovernmental Agreement (IGA): A binding agreement between ODOT, local jurisdiction(s), and sometimes other state or federal agencies, assigning roles and responsibilities to address a known or anticipated problem with respect to implementing a proposed solution. May establish a special fund and assign responsibility for collecting and administering funds.
- Cooperative Improvement Agreement (CIA): A binding agreement between ODOT and local government entities and/or a private developer, one of whom is going to construct improvements to a state facility. A CIA assigns roles and responsibilities for the development of a highway construction project, including but not limited to, preliminary planning and engineering, funding, contract administration, construction, inspection, and maintenance.

5.4. Legal Considerations That Influence The Choice Of Type Of Agreement

Letters of Agreement, Letters of Understanding and Memoranda of Understanding (MOU) are all normally non-binding statements of intent or commitment to use best efforts. They are not necessarily legal contracts. But, it is what is in them that determines their force and effect and whether they are legally binding. All parties should sign, even if they aren't binding because the signatures establish a record of the intent of the parties to follow a certain course of action.

Note: When federal agencies use a Memorandum of Agreement, they do consider it a binding agreement. If the federal government is a party to an agreement it is important to choose the correct type of agreement for the task at hand.

The most important agreement for getting mitigation improvements constructed is the Cooperative Improvement Agreement. This will obligate the developer and/or the City or County to provide funds and/or improvements to mitigate the impacts of proposed private development on state highway facilities in a legally binding contract.

One factor limiting the utility of standardized agreements will be the requirements of local jurisdictions. Local government involvement and cooperation, and requirements for the contents of an agreement will vary greatly from jurisdiction to jurisdiction.

The different types of agreements apply to different situations and/or to different stages in the process of mitigating impacts. Typically there are two stages of agreements. The first is an agreement in principle identifying a problem, proposing a solution, and agreeing to roles and responsibilities in delivering the solution (e.g., an MOU, Letter of Agreement or Letter of Understanding). The second is a binding contract establishing specific roles and contributions (e.g., an IGA or CIA), and also establishing the legal status of the parties and legal remedies related to the agreement. General rules of thumb for choosing the appropriate agreement type include the following:

1. Permit: Typically used for something to be built or placed in the right-of-way, such as a utility line, that remains in the private party's ownership and that will not be transferred to public ownership (e.g. not a public improvement) or for establishing a short or long term use of the right of way. However, a permit can be used in instances where there is a public improvement to be constructed by a developer that will be transferred to ODOT. This decision to use permitting can be used if the value of the improvement is less than \$100,000,, the permit includes provisions concerning compliance with ORS276.071 (including paying prevailing wage rate, and compliance with applicable provisions of the public contracting code), and there is a mechanism for ODOT acceptance for the completed improvement and transfer of ownership.
2. Formal Agreement: Under any of the following circumstances, a permit is not sufficient:
 - When ODOT applies state or federal monies toward some facility to be constructed;
 - When ODOT is doing the construction under its own procurement process, with developer contributions toward improvements (i.e., the developer is contributing all or partial funding);
 - When the improvement cost is \$100,000 or greater and the facility being built is, or will become, a public improvement; or
 - When continued maintenance is an issue, an agreement is needed to establish long term commitments and obligations for maintenance and sometimes responsibility to pay for electricity.

3. Review for Legal Sufficiency by the Department of Justice: Under OAR 137-045-0010(23), a "public contract" means "any contract, including any amendments, entered into by an Agency for the acquisition, disposition, purchase, lease, sale or transfer of rights of real or personal property, public improvements, or services, including any contract for repair or maintenance. An Intergovernmental Agreement entered into for any of the foregoing actions is a Public Contract. . ." So, negotiated mitigation agreements for improvements that will be part of the highway system are considered "public contracts" and also subject to ORS 291.047 which requires a review for legal sufficiency by DOJ when the value of the public contract exceeds \$100,000. If the commitment of the developer to construct such public improvement exceeds \$100,000 or the value of the improvement itself exceeds \$100,000, the Cooperative Improvement Agreement would require legal sufficiency review as discussed further in Section 5.7, below.

5.5. Reviewing the Developer's Impacts and Contribution to Solutions

The purpose of this section is to help the development review planner understand the range of issues that relate to determining the cost of mitigation of development effects. It is not intended to imply that development review planners will be calculating developers' contributions, but the information should help anyone who responds to land use notices and/or reviews Transportation Impact Studies (TISs) to understand the ways estimated contributions can be calculated. It is intended that this understanding will be used to make good recommendations for conditions of local approvals and to aid in the development of enforceable negotiated agreements.

Each of the three central parties to the mitigation agreement has an important role in establishing the developer's proportional share contribution. The developers' responsibility is to provide factual and thorough information upon which an informed decision with appropriate conditions can be based. The local government's role is to apply their local code and exercise appropriate discretion to apply conditions to any development approval so that the outcome protects public investment in infrastructure. ODOT has the responsibility to protect state transportation facilities by thorough review of the facts presented, the analysis process used, and the conclusions reached in the local planning process. It is also ODOT's responsibility to provide timely response and clear direction on how best to protect the state system.

5.5.1. Nexus and Proportionality:

While negotiated mitigation agreements are, generally speaking, voluntary agreements, they should be documented in a way that demonstrates alignment with the same constitutional benchmarks that apply to local application conditions of approval: nexus and proportionality.

Nexus: Mitigation measures need to be directly related to (have a nexus with) the impacts of the development (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)). Traffic Impact Analysis (TIA) identifies the potential impacts of development projects. Where an approach road permit is required, the Permit Specialist and/or Region Access Management Engineer will be looking at proposed approaches to the highway with respect to their impacts on the state facility, whether or not the project is at a scale that will require a TIA. A good traffic study is the best tool for determining the relationship between development project impacts and state transportation facility needs, but in some cases, the nexus question will need to be answered without the benefit of a thorough TIA.

Rough Proportionality: To require a mitigation measure it also needs to be roughly proportional to the impacts of the development (*Dolan v. City of Tigard*, 512 US 374, 114 S CT 2309, 129 L Ed 2nd 304 (1994)). The rest of this section considers ways “rough proportionality” can be assessed. In the best case, the developer’s share is determined by the local government based upon a TIA provided by the developer. But any mitigation within state right of way or affecting public or private access to a state facility has to meet ODOT standards, so the actual terms of any agreement to mitigate impacts on a state facility have to be negotiated with ODOT. ODOT’s interests in the proportionate share question are 1) arriving at a reasonable total improvement cost for the mitigation or improvement project, and 2) effectively presenting the cost and funding needs issues within the development review process in a timely manner so that ODOT’s input supports the local decision making process to the extent possible.

5.5.2. Developer’s Contribution:

A developer’s contribution to the mitigation of adverse traffic impacts on a state facility must be roughly proportional to the adverse impacts of the development on affected state facilities. In most situations, the conditions to be addressed occur in the area local to the development project, but through trip impacts may exist on the state highway system far from the development location. For example, a large development in an area with a predominantly rural highway system could have measurable traffic impacts a hundred miles away. Determining the extent of an impact area is an important step in establishing

impacts. Establishing an impact area for a traffic study is discussed in more detail in Chapter 3.3 of these Guidelines.

To establish proportionality, in most cases the largest impact will be the focus of the analysis, typically the critical movement through an intersection or total entering vehicle (TEV) impacts on capacity and mobility. The following factors should be considered:

Capacity and the Distribution of Trips on the System: To determine the impacts of an individual development project on a state transportation facility it is necessary to establish both how the facility is being used and how much capacity is needed to provide adequate capacity for all users over time.

- **Through Trips:** The classification of a highway denotes expectations for how it will be used and the preponderance of through trips on the particular facility. Population trends and other trends such as job growth or growth in annual vehicle miles traveled per person help to establish reasonable assumptions about future needs for the facility. Where there is a transportation model available, the preliminary work for estimating future conditions has already been done.
- **Local Trips:** Background local trips and projected local trips based upon population forecasts, annual VMT/capita, transportation modeling, etc.
- **Excess Capacity / Needed Capacity:** Given local and through trips, now and on the planning horizon, is there available capacity to serve new local users? What share of this capacity would reasonably be assigned to the proposed development? Is there already a shortage, or projected shortage of capacity to serve uses already existing or planned? Note that deficiencies already in existence at the time of development do not meet the nexus test because they are clearly not caused by subsequent development. Consequently, correcting pre-existing problems are not the responsibility of the current developer, as established in the courts, and so cannot be required to be mitigated. This does not preclude such mitigation from being included in a voluntary negotiated agreement.
- **Land Use and Zoning Influences:** Consider available development sites, lot sizes, zoning, and expectations about how fast development or redevelopment may occur. What will transportation facility needs be when planned development is fully built out? As development occurs

presumably all new development will use a share of existing and planned transportation facility capacity.

- Projected trips (total entering vehicles or TEV) produced by the proposed private development project (minus any allocated share of available capacity, if applicable).
- Transportation facility construction projects that are planned, funded, scheduled. What capacity will planned improvements provide?

Example Methodologies Based on Capacity:

In Florida, the state has established that a proportional share for a single development project with a local or regionally significant impact must, at a minimum, provide funds sufficient to complete construction or improvement of at least one required improvement. The amount is calculated based upon the cumulative number of trips from the proposed development expected to reach roadways during the peak hour after complete buildout of the stage or phase being approved. That projected number of trips is divided by the increase in the peak hour maximum service volume of roadways resulting from construction of an improvement necessary to maintain the adopted level of service, then multiplied by the construction cost, at the time of developer payment, of the improvement necessary to maintain the adopted level of service. As used here, construction cost includes all associated costs of the improvement:

$$\frac{\text{Net Peak Trips Generated by Development}}{\text{Increased Capacity from Improvements}} \times \text{Cost of Improvement} = \text{Developer Share}$$

In Montana, the calculation weighs the state's share for through trips and a local government share seen as sufficient to protect the local interest in serving citizens and existing developments. Then the economic development value for a benefited developer is assessed, with consideration of future development potential in the area.

Operations and Safety: While it is difficult to quantify safety problems other than by crash data, safety and operations impacts are often relatively easy to mitigate with minor improvements to state facilities. Safety and operations impacts will often occur in conjunction with developments requiring approach permit applications, and the practices associated with approach road permitting will support identification of appropriate mitigation measures. Where the proposed development will create a new safety problem, the entire cost of the mitigation will usually be justified as a proportional share.

In an area that is not yet fully developed, future users of the facility may have a measurable stake in the improvements made by an earlier developer, and the

local government could require reimbursement to the developer as additional land is developed or redeveloped. This approach requires a local decision to establish a funding mechanism to assess and collect the share of the value of the improvement from subsequent benefited developers.

A developer's proportional share to address operational issues will typically be based upon consideration of one or more critical traffic movements. So the necessary mitigation may include the addition of turn lanes, an upgrade of traffic controls at an affected intersection, nontraversable medians, etc.

In a negotiated agreement, literal application of "proportional share" is not required because negotiations are entered into voluntarily. Beyond conditions of approval required by local codes or the Access Management Rule, agreements are presumed voluntary and developers often enter into larger commitments. Where impacts from proposed development are on a facility that, for example, already meets signal warrants or warrants for a left turn lane, getting that improvement constructed by the day of opening of the proposed development may be a critical need. In this situation the developer and local government should share ODOT's interest in a safe and efficient facility, and ODOT may have a basis for an appeal of the local decision if voluntary agreement cannot be reached.

5.5.3. Example of a Simple Calculation Upheld in Oregon Court:

In addition to the US Supreme Court Nollan and Dolan cases, Oregon has a subsequent Court of Appeals case that affirms the City of Springfield's methodology basing a proportional share determination upon measurable or otherwise quantifiable factors that can be compared as before and after conditions. This case provides a nice example of a method based on the site conditions and adequate documentation of the logic used to calculate the developer's proportional share.

In *McClure v. City of Springfield*, 175 Or App 425, 435 n 6, 28 P3d 1222 (2001), the city:

- Compared the number of conflict points (driveways) on the roadway before and after a development proposal to demonstrate safety impacts and required that the developer restore the area to the prior condition (i.e. the prior number of conflict points) to mitigate the safety issue.
- Compared the ADT of the through street with a conservatively estimated level of trip generation for the proposed new uses to demonstrate capacity

impacts and calculated a percentage of ADT attributable to the proposed development.

- Calculated the number of square feet of travel area necessary to accommodate the total trips on the road and the number of square feet attributable to the development's trips using the percentage calculated above, and then required that number of square feet of right of way to be dedicated for public ways.

The Oregon Court of Appeals affirmed the LUBA decision finding that these calculations were sufficient to establish that the conditions were "roughly proportional" to the impacts of the development. While the Dolan case found that "no precise mathematical calculation" is required, the more objective and quantifiable the basis for the determination, the more defensible the condition will be.

5.5.4. Quantifiable Factors:

The following chart lists quantifiable factors that may be used as bases of comparison to determine proportional share. Note that for any development proposal there may be a number of recommended or required mitigation measures, so there may be different proportional share factors used for each of them. For example, the need for a right turn lane could be based on through traffic volumes (v/c) and an analysis of critical movements, while the need for a redesigned intersection could be based upon safety issues (the number of conflict points).

5-1

Quantifiable Factors Related to Proportional Share

Factor	Capacity	Critical Movement
Impacts that can be Measured and Compared to Background Conditions		
Daily Trips	<ul style="list-style-type: none"> • How many trips will the proposal generate daily? 	<ul style="list-style-type: none"> • How many critical movements will the proposed development add per day? During peak periods? • What will be the measurable effect on delay times?
Peak Hour Trips	<ul style="list-style-type: none"> • How many trips will the proposal generate at the 30th highest hour? • After determining the development's share of available capacity, how many net trips need to be mitigated? 	<ul style="list-style-type: none"> • How many critical movements will the proposed development add in the peak hour? • What will be the effect on delay times at existing intersections? • How will new intersections affect system delay times?
Types of Vehicles	<ul style="list-style-type: none"> • Proportion/Number of proposal-generated truck trips • Impact on facility design, e.g. queuing needs 	<ul style="list-style-type: none"> • Will the geometry of existing intersections be adequate for the type of traffic to be generated?
Approach(es) on Highway	<ul style="list-style-type: none"> • Number requested, locations, relationships to existing permitted approaches • Opportunities to reduce net number of approaches in the project area • Opportunities to move in the direction of the approach spacing standards 	<ul style="list-style-type: none"> • Effect of existing approach spacing on the intersection • Effect of proposed new approaches on the intersection

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Area Conflict Points	<ul style="list-style-type: none"> Number of conflict points before and after proposal is constructed 	<ul style="list-style-type: none"> Existing and proposed conflict points that will affect the function of the intersection
Sight Distance(s)	<ul style="list-style-type: none"> Measured sight distances before and after development and any mitigation project related to existing and new approach roads 	<ul style="list-style-type: none"> Measured sight distances before and after development and any mitigation project for critical movements
Current Conditions		
Peak Hour Trips ADT	<ul style="list-style-type: none"> Numbers from counts in the immediate area of the proposed development 	<ul style="list-style-type: none"> Numbers from counts in the immediate area of the proposed development
Daily Through Trips Daily Local Trips	<ul style="list-style-type: none"> Numbers related to expectations for the facility (classification), models, counts 	<ul style="list-style-type: none"> Numbers related to expectations for the facility (classification), models, counts
Delay at Intersection(s)	<ul style="list-style-type: none"> Time from traffic analysis, LOS, capacity implications 	<ul style="list-style-type: none"> Time from traffic analysis, LOS, capacity implications
Future Conditions		
Peak Hour Trips ADT	<ul style="list-style-type: none"> Based on TIS/TIA, models, population projections for future year identified in TIS scope, year of opening (15 years for any plan amendment) 	<ul style="list-style-type: none"> Based on TIS/TIA, models, population projections for future year identified in TIS scope, year of opening (15 years for any plan amendment)
Daily Through Trips Daily Local Trips	<ul style="list-style-type: none"> Based on models, future year identified in TISTIA scope, year of opening (15 years for any plan amendment) 	<ul style="list-style-type: none"> Based on models, future year identified in TIS/TIA scope, year of opening (15 years for any plan amendment)
Delay	<ul style="list-style-type: none"> System Delay based on models 	<ul style="list-style-type: none"> Critical Movement Delay based on models
Documenting Proportional Share Determination		

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Mitigation Project Description	<ul style="list-style-type: none"> • Features and locations of improvements that will mitigate development impacts • Quantified increase in capacity 	<ul style="list-style-type: none"> • Features and locations of improvements that will mitigate development impacts • How changes will affect critical movement(s)
Scale of Project	<ul style="list-style-type: none"> • Major: Developer will participate in STIP project • Minor: Developer will construct or pay for incremental improvements 	<ul style="list-style-type: none"> • Major: Developer will participate in STIP project • Minor: Developer will construct or pay for incremental improvements
Cost to Construct	<ul style="list-style-type: none"> • Major: Total Project Cost • Minor: Individual project costs for improvements that can be done incrementally 	<ul style="list-style-type: none"> • Major: Total Project Cost • Minor: Individual project costs for improvements that can be done incrementally
Percent of Available Existing or Constrained Capacity that Developer can Use	<ul style="list-style-type: none"> • If the development is consistent with the comprehensive plan for the site, some of any existing capacity is presumed to be allocated to site 	<ul style="list-style-type: none"> • If the development is consistent with the comprehensive plan for the site, a share of available intersection / interchange capacity is presumed to be allocated to the site
Percent of New Capacity that will Benefit Developer	<ul style="list-style-type: none"> • If a STIP Modernization project is scheduled, some of the planned new capacity will be available to the site 	<ul style="list-style-type: none"> • If a STIP project is scheduled, some of the planned new capacity will be available to the site.

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<p>Percent of Cost to Offset Adverse Impacts</p>	<ul style="list-style-type: none"> • Example: Trips generated by development, adjusted for capacity available, divided by new capacity added by highway project = percentage share of project costs • Example: Right turn lane will provide adequate capacity to offset development impact = 100% responsibility for project cost. 	<ul style="list-style-type: none"> • Example: Peak hour development trips added to Critical Movement divided by project increase in intersection peak hour capacity = percentage share of project costs. • Example: Development impacts create the need for intersection upgrade = 100% responsibility for project cost.
<p>Feasibility</p>		
<p>Jurisdiction of Affected Roadways</p>	<ul style="list-style-type: none"> • Does roadway authority agree to mitigation project? • Is roadway authority willing to negotiate availability of its ROW, if needed? 	<ul style="list-style-type: none"> • Does intersection jurisdiction agree to mitigation approach?
<p>Is Private ROW Needed?</p>	<ul style="list-style-type: none"> • If third party private ROW is required to build mitigation project, is there assurance that owner is a willing seller? 	<ul style="list-style-type: none"> • If private ROW is required to build mitigation project, is there assurance that owner is a willing seller?
<p>Readiness:</p> <ul style="list-style-type: none"> • Is Project in the STIP? (Funded) • Is Project in the Local TSP? • Has Preliminary Engineering been done? 	<p>Yes/No</p>	<p>Yes/No</p>

5.5.5. Documenting the Method of Calculating the Developer's Share

Descriptions of developer contributions need to include enough information to demonstrate that the amount of financial contribution or the scale of facility improvement is at a level that mitigates the development's impacts without being excessive. Whether or not a formula is developed for assessing the developer's share, the method used to arrive at the amount should be documented in the public record. The method used could be memorialized in the IGA/CIA/contract, the local conditions of approval or, preferably, both.

Note that developers of large projects may make contributions in excess of what is strictly a "proportional share" in order to remove obstacles to approval of their projects. Because they have entered into negotiations voluntarily, the "nexus" and "proportional share" constitutional tests are not legally applicable. However, documenting how the agreement was arrived at and the logic that went into the agreement are still important for a durable and defensible agreement that will hold up even if the development project were to change hands or there are other changes in circumstance.

In a case that agreement cannot be reached on the basis of a voluntary agreement, a legal settlement agreement may become necessary. This is beyond the scope of this discussion.

5.6. Content of Agreements By Type

A review and comparison of agreements developed by ODOT to address the impacts of private development on the highway system was conducted in support of this chapter. That review showed that agreements vary widely as to the details included. However, there were clear patterns regarding the essential elements of agreements by type. While there is broad latitude in deciding what an agreement should include to cover the specific circumstances being addressed, the following summaries suggest a general framework for each type of agreement. The individual elements related to legal sufficiency that are applicable to all ODOT contracts are discussed in further detail in Section 5.6.0, below. Region Contract Specialists should be included in negotiating mitigation agreements early in the process and will be of great help determining what should be included in a particular agreement.

5.6.1. Letter of Agreement

While similar in function to an MOU, a letter of agreement is typically used where there is a single or simple set of clearly defined issue(s) to be addressed. The letter memorializes the understanding between the parties. The review of sample documents showed only the following elements in letters of agreement:

- Identification of the Parties to the Agreement;
- Description of the location, private development proposal and/or highway project that is the subject of the agreement;
- Reference to any prior agreements between the parties or related to the subject location/property/project;
- Statement that the private parties are willing to contribute funds proportionate to their impacts on the state facility;
- Statement how those funds will be used; and
- Citation to the Delegation Authority for the ODOT signatory to the agreement.

5.6.2. Memorandum of Understanding

A memorandum of understanding (MOU) is similar to a letter of agreement in terms of legal weight, but is more formal and typically sets out issues and solutions in more detail. The following elements of an MOU should be included, as applicable to the circumstances of the agreement:

- Identifies all parties and proxies participating in the agreement;
- May identify a STIP project scheduled for the facility that is affected by the private development project, and that will be modified by solutions identified in the agreement, and/or be paid for, all or in part, by the developer;
- May identify project management responsibilities for contract administration, project development, environmental and construction phases;
- Recitals:
 - May include a purpose statement;
 - Descriptions of Project Area:

- Highway Classification and other distinguishing characteristics;
- Description of the private development project and relationship to the state facility;
- May include other information about the project area such as topography, resource issues, other lands in public ownership, a need for right of way or easements;
- Status of the local land use proposal:
 - Land use approval and permit status;
 - Local conditions of approval related to the highway facility.
- Citations to Applicable Enabling Law and Regulations:
 - Statute and Administrative Rules enabling the agreement;
 - Statute and Administrative Rules pertinent to specific issues in the agreement (e.g. regulations regarding signalization)
 - Applicable Local Regulations;
 - Applicable State Goals and land use regulations;
 - Applicable OHP standards.
- Statements of current and future conditions:
 - General agreement regarding the impact of the private development on state facilities;
 - General agreement describing the specific problem(s) to be addressed;
 - General agreement regarding solutions.
- Private Developer willingness to contribute money or other consideration:
 - Method used to determine private developer's share of improvement costs or other contributions;
 - Willingness to construct capacity or operations improvements.
- Willingness of state, city and or developer to negotiate with third-party property owners, agencies for easements, etc.
 - Description of the relationship of any needed right of way or easement to the development project, including property location and why it is needed;
 - Description of any needed agreements to be entered into with those third parties;
- Statement that the MOU agreement is not binding;
- Statement of agreement as to next steps.
- ODOT Commitments may include but are not limited to:

- Agreement to provide support or assistance in local land use and/or access permitting processes;
- Agreement to provide funding for parts of project not directly related to subject development impacts, which could be considered the state's "proportional share";
- Review of plans for agency approval when construction plans are developed and provided by the private party;
- Administrative responsibilities where right of way will be obtained.
- Private Developer Commitments may include but are not limited to:
 - Provision of Funds and Other Contributions:
 - Description of reasons for the contribution which will include a description of the method for determining developer share;
 - Timing of and/or events triggering payment(s);
 - Advance Deposit and/or Letter of Credit (including time limits on letter of credit) required;
 - Provision of right-of-way and terms and conditions of right-of-way transfer;
 - for right-of-way purchase;
 - Funds for construction;
 - Construction of Improvements:
 - Description of improvements including type and location;
 - Timing of and/or events triggering construction;
 - If public improvements in state right of way will be constructed by the developer or their contractor, it is important to make it clear that Fair Labor Standards ¹apply just as they would for an ODOT project;
 - Responsibilities reserved by ODOT or the local government:
 - Insurance Required;
 - Provision for Indemnity;
 - Provision for ODOT entry onto private property for inspections, etc. related to the subject agreement;
 - Open books and accounting practices;
 - Terms for the use of a third-party contractor;
- Local Government Commitments may include collection of funds, contribution of matching funds.

¹ Work done in the state right of way and/or using federal funds may be subject to Bureau of Labor and Industries (BOLI), Davis-Bacon, and/or other applicable Fair Labor Standards including prevailing wage rates. For more information on prevailing wage rates for public works see: ORS 276.071 and: http://arcweb.sos.state.or.us/rules/OARS_800/OAR_839/839_025.html

- Terms upon which there is mutual agreement:
 - Timing and triggering events for fund contributions;
 - Timing and triggering events for construction of improvements;
 - Anticipated future improvements beyond those currently agreed to;
 - Acceptable and unacceptable mitigation measures for issues not resolved in the subject MOU;
 - Mutual review and coordination of project plans;
 - Consideration of Relocation Assistance related to the acquisition of right-of-way;
 - Compliance with local, state and federal requirements;
 - Compliance with state and federal labor laws.
- Contingencies
 - Final local land use approval;
 - Final ODOT permits, where applicable;
 - Completion of any additional agreements needed:
 - Easements,
 - Agreements with third-parties,
 - Improvement Agreement,
 - Any additional agreements with ODOT that must be completed prior to occupancy permit, final plat approval or other contingency;
 - Acquisition of all needed easements.
 - Responsibility for cost overruns.
- Terms and Conditions
 - Effective upon signing by all parties (typical);
 - Term of agreement such as “until construction is complete,” or “until subsequent agreement is in effect;”
 - Termination of agreement:
 - Subject to mutual consent and/or written notice within stated time period;
 - Due to change in state or federal law;
 - By default or failure to perform as agreed;
 - Does not prejudice the rights of the parties.
 - Amendment is subject to mutual agreement;
 - Conditions under which parties’ contributions may change and responsibility for cost overruns;
 - Disputes will be handled through collaboration/mediation;
- Legal Considerations
 - Delegation statement regarding ODOT signatories

- Hold Harmless statement;
- Equal authority of the parties to the agreements;
- Fair Labor statement including citations to applicable state and federal regulations;
- Indemnification requirements;
- Statement that this is a complete and final agreement.

5.6.3. Intergovernmental Agreements

Intergovernmental agreements (IGA) are not the most likely type of agreement to be used where the subject of the agreement is mitigation of private development impacts on state highway facilities. However, in some circumstances an IGA will be appropriate, for example:

- A local government may assume administrative responsibility for the construction of mitigation measures, including collecting private funds and administering contracts.
- A local government may participate in a Major Improvement being considered for inclusion in the State Transportation Improvement Program (STIP) in conjunction with trying to allow a land use that would otherwise cause adverse impacts on the state facility. Participation may include but is not limited to contributions to funding, in-kind services and materials, improvements to local street circulation that support the state highway, benefits to non-auto modes, land use actions, and other enhancements. Also referred to as OHP Action 2A.4 agreements, an IGA may be used to memorialize the commitment of the local government and the state to assigned roles to get the project constructed.

In these cases, an IGA may be appropriate, resulting in an agreement that is binding on ODOT and the other parties to the agreement. A subsequent CIA may also be required before any construction within the state right of way can be started.

5.6.4. Cooperative Improvement Agreements

All of the elements of an MOU may also be included in a Cooperative Improvement Agreement (CIA), but the CIA gets beyond identification of the problem and focuses on solutions. Agreements are primarily about funding, timing, project development and construction. Outcomes are being formally

agreed to, roles may be more clearly defined and agreement parts are binding unless qualified otherwise.

Contents:

- All of the elements of the MOU that are applicable, useful as background or necessary legal considerations;
- Identification of the STIP project number, if any;
- Citation to any earlier MOU or IGA that is still in effect;
- Statement that this is a Binding Agreement.
- ODOT Commitments beyond those listed above
 - Commitment to pursue additional funding; ○ Specific provisions for handling funds:
 - Set up a separate fund for the private contributions,
 - Specify accounting practices;
 - Provision of ODOT right-of-way for deceleration or turn lanes, etc.
 - Technical Responsibilities
 - Preliminary Design responsibilities;
 - Review of Plans
 - Cost Estimates;
 - Environmental studies
 - Transfer of right of way
 - Transfer of Improvements
 - Inspections and Certifications
 - Materials Testing and Quality Documents
 - Changes of Grade
 - Signal warrants
 - Maintenance Responsibilities:
 - Pavement and other road improvements;
 - Interchange structures;
 - Signals;
 - Remedies if there is a failure to maintain facilities;
 - Electricity costs for signals, street lighting, cameras, vehicle detector loops, etc.
- Developer Commitments Same as Above.
- Local Government Commitments Beyond those Specified Above:
 - Contribution of Matching Funds;
 - Specified level of project management responsibilities.
- Terms upon which there is Mutual Agreement:
 - Consideration of the disposition of Surplus property.
 - Contingencies Same as Above.

- Terms and Conditions:
 - Disposition of funds in excess of expenditures;
 - Responsibility for any funding shortfall;
 - Liability Release Statements;
 - Lawsuits: Rights of prevailing parties.
- Consideration of additional regulations and responsibilities if a traffic signal is part of the project.
- Considerations required when federal funds are used, or funds are used as part of a “federal action”.
- Budget Statement.
- Definitions of Terms.
- Indication whether the agreement is a one time performance or payment agreement or if will obligate future parties. Some agreements may “run with the land” and not simply be the obligation of the developer. For example, a current owner may be responsible for getting approvals and agreements in place while the conditions of the agreement will be the obligation of future purchaser/developer of the subject property.

5.7. Legal Sufficiency

ORS 291.047 requires review and approval for legal sufficiency by the Attorney General's office of all personal service contracts (including engineering and architectural services) that provide for payment or project value in excess of \$100,000. OAR Chapter 137, Division 45, outlines the requirements for legal sufficiency review, including that the contract is written, contains all essential elements of a legally binding contract, on its face complies with all federal and state statutes and rules regulating the contract, contains provisions and terms which are sufficiently clear and definite as to be enforceable, and provides for the ability to terminate the contract. OAR 137-045-0015(4).

5.7.1. Public Contracting Requirements

Developers often think they can make improvements to state facilities more cheaply than the state can, but they don't realize that ORS 276.071 requires them to do the work the same way ODOT would have to do it, including paying prevailing wage rates. It is important to get the ORS 276.071 requirements into all permits and agreements.

5.7.2. Construction Standards

Anyone performing work on ODOT right of way that will result in a public improvement, that will eventually be owned and operated by ODOT, will be required to be pre-qualified to perform that type of construction under OAR Ch. 734, Division 10, and will be required to be registered with the Construction Contractors Board. In other words, the same requirements will be in place for construction work by the developer as would be required if ODOT were contracting for the public improvement.

5.7.3. Contract Language

At a minimum, a contract needs to establish the benefits each party expects from the agreement, as well as the burdens each agrees to bear. The consideration each party is to receive should be clearly stated to make the agreement enforceable. It is especially important to state the expected benefits to the government parties in a manner consistent with the requirements of the police power (i.e. Nollan, Dolan, etc.). Agreement language should stress the relationship of the public benefits that will come out of the agreement to the requirement that ODOT maintain a safe and efficient highway system.

5.7.4. Who Can Sign a Binding Contract for ODOT?

OTC is the entity that has statutory authority to enter into contracts and agreements for ODOT. Authority has been delegated to various managers through delegation orders, and sub-delegation orders, which may further delegate that authority.

For most purposes, including IGAs and CIAs, the delegated authority to the Director, Deputy Director and Region Managers is limited to \$75,000, unless the project is included in the STIP or included in a line item in the biennial budget approved by the OTC. If not in the STIP and not in the approved budget, and over \$75,000 (and that includes money going out from ODOT and money or value of asset coming in - not necessarily the "cost") then the OTC has to approve the contract. For example, see Delegation Orders #2 and #4².

In Negotiated Agreements, where the local government or a developer is going to construct or pay for something that is not in the STIP to mitigate the impact of a development, the binding contract will need to go to the OTC. The OTC can also directly delegate authority when it takes action on something. For example, when the OTC approved the *ConnectOregon* grants and the OTIA III local bridge

² <http://intranet.odot.state.or.us/ssb/bss/del/index.htm>

projects, they authorized the Director or Deputy Director to enter into the agreements, so those don't have to go back to the OTC.

When the ODOT Procurement Office (OPO) reviews IGAs and CIAs one of their considerations is who can sign and bind ODOT, based on the appropriate delegation order. Determining who can sign is specifically excluded from the legal sufficiency review, pursuant to DOJ rules. If a particular CIA does not fall into a category for which there is a delegated authority, Oregon Transportation Commission approval is necessary.

A Region Manager has authority to sign some agreements, pursuant to the applicable delegation and sub-delegation orders. However, if the value of the assets is in excess of \$75,000 and the subject project is not either in the STIP or included in a line item in the OTC approved biennial budget, the agreement will have to be approved by the OTC.