

## **CHAPTER 2: Coordinating Review & Response**

### **2.1.00 Local Land Use Process**

In order to effectively carry out the ODOT development review program it is critical to understand the different types of local land use reviews and procedures. The land use procedures used by local government are similar, but because no two local codes are the same, it is important to become familiar with local zoning codes in your region. Many local zoning codes may be accessed via the Internet. Local government information can be found online in the Oregon Blue Book, which includes links to local web sites, where available.

### **2.1.01 Role of Long Range Planning in the Development Review Process**

This section identifies the long-range plans upon which development review decisions should be based. While development review occurs at the end of the planning process, it is influenced by decisions made much earlier. Under the TPR, transportation system plans:

- Provide long-range direction for the development of local transportation facilities and services for all modes.
- Integrate transportation and land use.
- Provide a rationale for transportation investments and land use decisions.
- Provide a link to the State Transportation Improvement Program (STIP), which is ODOT's process to identify projects for development and construction and set funding levels and timelines. Additional Information regarding the STIP process is available on the STIP Development intranet site.

Transportation system plans are required for the following:

- Oregon Department of Transportation;
- Metropolitan Planning Organizations;
- Counties with populations greater than 25,000 (Counties smaller than 25,000 population may qualify for a whole or partial exemption from the TSP requirement);
- Cities with populations greater than 10,000 (Cities smaller than 10,000 population may qualify for a whole or partial exemption from the TSP requirement).

Many jurisdictions below these population thresholds already have, or are working on, transportation system plans for their areas.

The Oregon Transportation Plan (OTP) is the State TSP. It provides overall policy direction for the development of transportation facilities and services in Oregon. The OTP was adopted by the Oregon Transportation Commission in 1992 and is in the process of being updated, with adoption of the update anticipated in 2006.

The OTP also includes the various mode and topic plans identified below. Of these, the 1999 Oregon Highway Plan may have the most impact on the development review process.

Elements of the Oregon Transportation Plan include:

- Oregon Aviation Plan (2000)
- Oregon Highway Plan (1999)
- Oregon Public Transportation Plan (1997)
- Oregon Bicycle/Pedestrian Plan (1995)
- Oregon Rail Plan (1994)
- Transportation Safety Action Plan (1995)
- Willamette Valley Transportation Strategy (1995)
- Corridor Plans (differing dates for each corridor).

### **2.1.02 Periodic Review**

Periodic review is an important but often underutilized tool to work with local governments in bringing their comprehensive plans up to date. It is important for ODOT planners to work with local governments to ensure that local plans are consistent with state transportation and land use plans, policies and regulations. Periodic review is the method used to bring local comprehensive plans up to date with current land use statutes and rules. ORS 197.628 states that periodic review is required:

“ . . . to ensure that the plans and regulations remain in compliance with the statewide planning goals adopted pursuant to ORS 197.230, and to ensure that the plans and regulations make adequate provision for needed housing, employment, transportation and public facilities and services”.

Periodic review is an opportune time to address local code deficiencies.

If the local code has not been updated consistent with the Transportation Planning Rule (Goal 12), the TPR can be implemented in two ways:

1. Recommend to both the local government and DLCD that the deficiencies be addressed as part of their next Periodic Review work program; and/or
2. Apply the state TPR directly to local land use and development proposals.

### **2.1.03 Planning Resources for Specific Highway Sections**

There may already be established guidance for the approach to take to develop conditions and mitigations on particular highway sections. In and near urban areas there is often more than one plan or research data source that can be relied upon.

Most cities and counties in Oregon have adopted or are currently working on a Transportation System Plan (TSP). The current list of TSPs under development for all Oregon jurisdictions is included in Appendix 2. Many of these TSPs are funded through the ODOT/DLCD Transportation Growth Management Program (TGM). In addition, the Regions can sometimes pay for TSPs and updates with SPR planning funds.

Local governments also frequently have transportation related Mode and Area Plans. Downtown Redevelopment Plans, Local Street Network Plans, Parking Plans and Bike, Pedestrian and Transit Plans are a few examples of plans that may articulate street design preferences and enable certain conditions of approval relevant to development Review.

Cities and Counties inside Metropolitan Planning Organizations (MPOs) are also subject to Regional Transportation Plans (RTPs). RTPs are subject to federal standards that require projects recognized in the plans to be “fiscally constrained” which means it is reasonable to expect that such projects will be funded for construction. RTPs may also contain land use and transportation elements and alternative mobility standards. When an MPO’s alternative mobility standards are approved by the Oregon Transportation Commission (OTC) they supersede the mobility standards in Table 6 of the OHP.

In addition, ODOT does facility planning at a local or sub-regional level. In conjunction with local governments and other stakeholders, ODOT develops Interchange Area Management Plans (IAMPs), and has in the past developed several Corridor Plans. ODOT also coordinates with local government to develop Highway Segment Management Plans for special transportation areas (STAs), urban business areas (UBAs) and Commercial Centers. These documents set forth strategies and long-term management priorities for the subject corridors. Confer with ODOT Region planners to ascertain whether a facility plan is available for any particular area under review.

#### **2.1.04 ODOT Guidance on Long Range Plans**

To provide a framework for ODOT system and corridor planning, The Corridor Planning Guidelines were prepared in 1995 and Transportation System Planning Guidelines were updated in 2001. Revisions of the TPR are under way at this writing, and new TSP Guidelines are anticipated in 2006. New TSPs and TSP updates should rely upon the most recent guidelines available.

ODOT also provides guidance and support for local transportation planning through Refinement Planning, Interchange Area Management Planning (new IAMP guidelines to be completed in late 2005), Highway Classification (new classification/reclassification procedure to be completed late 2005), Highway Segment Designations and Existing Conditions Reports. Much of the Department's technical guidance for project development is found in the AASHTO Policy on Geometric Design and the ODOT Highway Design Manual (HDM).

As a precursor to corridor or other facility planning, ODOT has begun to prepare Transportation Conditions Reports for Oregon Highways. Currently, these reports have been prepared for I-5, US 101, and Oregon 58. These reports are not plans. However, they provide a wealth of background and forecast information, including "no build" information for their subject corridor. This information includes operational, geometric, and safety analysis, access locations, environmental data, management system data, land use data, topographical and geologic data, and a full set of air photos in static and customizable map sets (map customization is only available for US 101 and Oregon 58 which are produced as a geographic information systems product-- these will be available on the ODOT intranet by Fall of 2005). While not providing planning solutions, these reports can be very valuable tools to aid plan preparation, project prospectus development, or development review activities.

#### **2.1.05 Linking Plans, Projects and Funding**

ODOT is increasingly looking to system plans as a source to identify fundable transportation projects. For example, project criteria developed for the 2001 Oregon Transportation Investment Act (OTIA) establish a linkage between plans, projects and funding. The Transportation Commission may be heading in the same direction in its review of the STIP process, and, in the future, STIP projects may need to come from adopted and acknowledged transportation system plans. Including needed projects in fully developed TSPs is the best tool a local jurisdiction can have to make their case to get projects elevated into the STIP. And participating in the local TSP process is the best opportunity ODOT has to ensure that local priorities are consistent with the needs of state facilities. For a

more detailed discussion on how long-range provisions are implemented, see Chapter 3, sections 3.1.08 through 3.1.10.

### **2.1.06 Local Decision-Making Authority**

Under Oregon's land use program, the local government makes local land use decisions. The local decision-making authority is delegated to a series of decision makers, based primarily upon the amount of discretion allowed for each type of decision. Authorities can include local or regional planning staff members, a hearings officer, planning commission, city council or board of commissioners or an administrative body such as a Variance Committee or Design Commission. Each type of land use action has prescribed procedures. Different kinds of procedures are subject to different requirements regarding public notice, participation, approval criteria, hearings and appeal deadlines.

### **2.1.07 Types of Local Land Use Applications/Actions**

Oregon's land use statutes create four types of decisions: a land use decision [ORS 197.015(10)]; a limited land use decision [ORS 197.015(12)]; a ministerial decision [ORS 197.015(10)(b)(A)]; and an expedited land division [ORS 197.360-197.380]. Many jurisdictions in Oregon classify land use applications into four categories or procedure types. Each type of decision has different procedural requirements, including notice, hearing and decision-making.

- Type I: (Ministerial decisions) This procedure is applied where the approval criteria are clear and objective and the decision does not require the exercise of policy or legal judgment. Often, no public notice is provided and there is no opportunity for an appeal. Lot line adjustments and minor setback adjustments are often classified as Type I reviews.
- Type II: (Ministerial decisions or quasi-judicial, depending upon the local code.) This procedure is applied where the approval criteria require minimal discretion by the decision-maker and the development impacts are minor. Type II decisions are generally made without a public hearing, but public notice is provided with an opportunity to appeal. Applications for partitions and site/development plan review are often classified as Type II procedures.
- Type III: (Quasi-judicial decisions) This procedure is applied where the approval criteria involve substantial discretion by the decision-maker. Type III procedures involve notice, a public hearing, and an opportunity for appeal. Zone changes that are consistent with the underlying comprehensive plan designation, subdivisions and conditional use permits are typically classified as Type III procedures.

- Type IV: (Legislative decisions) This procedure is used for “legislative” decisions that generally affect large areas. The notice requirements are usually broader than a quasi-judicial review and allow more time for comment, often including public hearings before more than one decision body. Comprehensive plan map amendments and related zone changes, plan and zoning code text amendments, urban growth boundary amendments and some annexations are processed through Type IV procedures.

### **2.1.08 ODOT’s Role in Local Development Review**

ODOT is considered a service provider in the local development review process similar to the local water, sewer, or fire protection providers. As the service provider of the state transportation system, ODOT adopts policies and standards that define facility function and performance. These standards and policies are applied to the applicant’s proposal and local approval criteria to form ODOT’s recommendation to the local government. The responsibility for a local land use decision is with the local governing body. Like other interested parties who participate in the local decision process, ODOT has the opportunity to appeal the local land use decision. (See Chapter 4 for additional information on appeals).

### **2.1.09 Notice of Proposal**

Several provisions of State law and Oregon Administrative Rule require local government to provide public notice of land use proposals to ODOT. It is through these notices that ODOT becomes advised of the proposed action and involved in the development review comment process. Under the TPR (OAR 660-12-0045(2)(f)), local governments are required to have:

“Regulations to provide notice to public agencies providing transportation facilities and services, MPOs, and ODOT of:

- (A) Land use applications that require public hearings;
- (B) Subdivision and partition applications;
- (C) Other applications which affect private access to roads; and
- (D) Other applications within airport noise corridors and imaginary surfaces which affect airport operations.”

Local governments are also required to notify DLCD of proposed plan and land use ordinance amendments. DLCD provides copies of these notices to ODOT.

Oregon Revised Statute (ORS) 215.402 (County) and 227.160 (City) contain statutory requirements for public notice of land use reviews.

Pre-application conferences are not required by statute. However, many jurisdictions require pre-application conferences for certain types of land use and development applications. ODOT staff should coordinate with local jurisdictions to ensure that ODOT is notified of pre-application conferences, particularly for larger land use and development applications. The pre-application conferences provide the opportunity for ODOT to help determine whether a traffic study is needed, the scope of the traffic study, the appropriate methodology and standards to use in the analysis and other issues related to the impact of the proposal on state facilities.

#### **2.1.10 Determine Whether ODOT Has an Interest in the Proposal**

When an application or notice is first received by ODOT it is reviewed to determine whether the proposal will impact ODOT's facilities. Region staff need to utilize their local knowledge about problematic sections of highway that may have high crash rates, substandard geometrics or other operational issues.

The following types of local land use proposals are generally of interest to ODOT:

1. Plan amendments and zone changes (includes map and text amendments affecting transportation).
2. Sites adjacent to a state highway.
3. Any proposal that includes proposed access to a state highway.
4. Development site off the highway that sends significant trips to the highway.
5. Land division or lot line adjustment for property with highway frontage or proposed access.
6. Sites located in the footprint of a future highway alignment.
7. Proposed noise sensitive land uses adjacent to state highways.
8. Sites located adjacent to a rail right of way or that could affect a rail crossing.
9. Airport expansions.
10. Land use/development proposals that could affect state airport expansions such as cell towers, or noise sensitive land uses in the vicinity of public use airports.
11. Aggregate resource sites.
12. ODOT surplus property sales.
13. Off premise signs (billboards).
14. Any proposal that is within 500 ft of a rail line or rail crossing.

### **2.1.11 Evaluating a Local Land Use/Development Proposal**

To assist in evaluating whether ODOT has any interest in the proposal, answer the following five questions. Keep in mind; this is a first cut review. Chapter 3 contains a detailed discussion of how to evaluate a proposal.

1. Is a comprehensive plan amendment or zone change proposed that could have a “significant effect” on a transportation facility as defined by the TPR, OAR 660-12-0060? See Chapter 3.2 and OAR 660-012-0060.
2. Could a proposal that does not trigger the TPR, as above, significantly impact a state highway in some other way? For example, will it trigger signal or left turn warrants, increase AM, PM or average daily traffic (ADT) on the highway, or add traffic to an already dangerous intersection or one where mobility standards are not met?
3. Does the proposal site plan include any new or additional approaches to the highway?
4. Will the proposal as designed change the use of an existing state highway approach in a way that will adversely impact the state highway?
5. Does the site drainage plan discharge into a state highway drainage facility or into a local facility that discharges into the state facility?
6. Is the proposed land use action/development proposal within 500 ft of a railroad track?

If the answer is NO to ALL of the above questions, then there is probably no impact to a state facility and no further ODOT analysis or response is required. The agency may wish to submit a letter to the local jurisdiction stating: “ODOT has no objection to the proposal as submitted”. This confirms to the local government that ODOT received notification and conducted a review. In the case that the proposal changes significantly before it is adopted, and the changes create impacts that could not have been anticipated in the above assessment, the letter also establishes standing for ODOT to participate in review of any proposed changes and to appeal the decision if necessary.

If the answer is YES to ANY of the above questions then further review is warranted as discussed below.



## **Development Application Without Access to a State Highway**

Questions to consider include:

1. Has a traffic impact study been prepared and is it available? If a TIS has not yet been prepared, is there an opportunity to work with the developer on the TIS? For more detailed guidance on working with applicants on TIS documents, see Chapter 3.3.
2. Are there segments of the highway that already exceed the highway mobility standards (volume/capacity ratios), or that will exceed those standards as a result of the development?
3. Will the development overwhelm the local street network, causing traffic to reroute to the state highway? Does the development anticipate future local streets connecting to the state highway? Will the development provide for local streets, particularly those that would offer a parallel route that creates an alternative to using the state highway for local trips?
4. Are there sections of the state highway with safety issues or will the development trigger turn lane or signal warrants and require highway improvements?
5. Are there legal or policy issues such as consistency with the Land Use and Transportation Policy 1B of the Oregon Highway Plan?
6. Is the proposed land use action within 500 ft of a railroad track?
7. Will the proposed land use action alter or construct sidewalks, bike lanes, bike paths or roadway within 500 ft of a public rail road crossing?
8. Will the proposed land use action involve the relocation, construction of closure of any railroad grade crossings?
9. Will the proposed land use action increase or decrease vehicle traffic at a grade crossing?
10. Will the proposed land use action encroach on the railroad's right of way? The typical r/w for a railroad is 50 ft on each side of the centerline of the tracks.
11. Will the proposed land use action involve installation of new vehicle traffic signals or changes to existing traffic signals within 500 ft of a grade crossing?

If the answer is YES to ANY of questions 6 through 11, the ODOT review should be coordinated with the ODOT Crossing Safety Section.

## **Development Application with Access to a State Highway**

In addition to the questions above, also consider:

1. Access Management compliance: How does spacing of the approach roads on the subject and adjacent properties conform to the standard applicable to the highway classification set by the OHP and Division 51?
2. The number of proposed approaches to the highway and to local streets, and their locations: Can the development function without a highway approach? If not, can a single approach road be shared by adjoining uses? If a new approach is necessary, can it be located along a property line, etc?
3. State Highway Approach Permit: If there are any existing approaches to the property, are they being operated under valid permits? Grandfathered? If not, is there a legal right of access to the property?
4. Alternative approaches: Are there other ways to provide access to the property besides the highway, such as using local streets?

Also, refer to Chapter 4 of Volume 1 of the Access Management Manual for detailed instructions about applying Division 51.

### **2.1.12 Types of ODOT Responses**

ODOT comments to local governments on land use/development applications are made in the form of recommendations. It is the local government decision-making body that makes the decision. In written and oral comments to the local jurisdiction, make clear whether the ODOT recommendation is simply a good practice being recommended or whether compliance is necessary to be consistent with local code/or state law. It is sometimes useful to distinguish comments and proposed conditions of approval based upon the weight of law backing them up.

- Mandatory/required by law (local development code, OAR 734 Division 51, permits to connect to ODOT drainage system, miscellaneous permits to work in the state right of way, TPR 060, Rail Crossing Order ORS 823/824).
- Recommended/Supported by law (TPR, TSP, Comprehensive Plan Policies, and case law).
- Informational only (potential future issue, permit coordination/contacts).

Potential ODOT Recommendations:

- No objection to the development as proposed.
- Support the proposal as submitted.

- Support the proposal if certain conditions of approval are applied.
- Object to the proposal as submitted unless certain conditions are met. If possible, recommend the course of action that would make the proposal acceptable to ODOT. For example, the applicant may be responsible for installing a traffic signal or working with the local government to amend their TSP to identify needed intersection improvement(s). Funding mechanisms and a timeline for improvement(s) would be components of the amendment.
- Object to the proposal with sufficient findings of fact addressing the local decision criteria to justify a recommendation to deny.

### **2.1.13 ODOT Response Letters**

In order for ODOT's input to local governments to become part of the official decision record, ODOT submits response letters. The response letters should be formal and be written in terms of the applicable approval criteria. The letters should be written in a way that will help the local decision-makers understand how the ODOT standards and practices relate to the local approval criteria. If ODOT's authority is in doubt, ODOT staff should include direct references to:

- OAR 660-012-0060(3)
- OAR 734-051
- ORS 823
- ORS 824
- OAR 741-20
- OHP Land Use and Transportation Policy 1B and Action 1B.4 (Goal 1) in the response letters. See also ODOT Review Authority section in Chapter One.

ODOT's comments are based on the materials submitted by the applicant and relevant state and local plans, policies, practices and administrative rules. ODOT comments include findings of fact, conclusions and a recommendation. Because the local government has the authority to interpret its own ordinance, ODOT staff may want to state "It is ODOT's understanding that this requirement means that..." to help support ODOT's position. Examples of ODOT letters to local governments in Appendix 3 show how different types of recommendations may be supported and conveyed.

Chapter 3 of these Guidelines outlines the analysis that is necessary to form ODOT's position on a proposal. This includes a determination of whether the proposal will result in a significant effect to a state facility. All modes are considered in determining a significant effect.

ODOT's most common response to the local land use proposal is to recommend approval subject to certain conditions. The conditions allow the applicant the opportunity to modify their plans to meet local and state standards. The most

common condition of approval proposed by ODOT is a requirement that the applicant obtain a State Highway Approach Permit prior to final development approval (e.g. issuance of the building permit). This helps ensure that ODOT-related conditions of approval pertaining to access are satisfied before the building permit is issued. In this manner, the local and state regulations are coordinated. In some situations ODOT may condition a State Highway Approach Permit approval on later demonstration that the local land use application has been approved. Prior approval of an approach location can ensure a site plan will be designed consistent with the State Highway Approach Permit application and conditions of approval (OAR 734-51-0070(10)).

Include the following information in ODOT letters to local governments to help communicate and to establish a legally defensible position:

1. Local file number, project address or general location, project name if any, and applicant's name.
2. Include a brief description of the proposal from the official land use notice. Be clear that the review is for the proposal for which the public notice was sent versus a re-submittal by the applicant. If brevity is appropriate, it may suffice to state the general nature of the development and add, ". . . as described in the public notice dated mo/day/yr."
3. Identify the applicable local approval criteria. This information is supposed to be a part of the land use notice, or a local planner can help provide this information if it is not apparent or included in the public notice. If TPR section 060 applies, say so and why. Quote the regulations as appropriate. The code or policy citation number is likely adequate for a hearings officer who will have familiarity with the local regulations. It may be beneficial to quote the code or policy language for a lay commission.
4. Provide findings of fact that pertain to the approval criteria. Example: The applicable mobility standard for Highway X is .90 volume to capacity (note the applicable Oregon Highway Plan Table 6 with effective date of plan). The existing operation functions at .95 mobility standard. The proposed number of new trips during the a.m. peak hour is 500. Build-out of the development is expected to occur in the year 2004. Note that these are all facts with no conclusion. For more information about writing findings see Appendix 4.
5. Provide conclusions that are clearly distinguished from the findings. You may wish to have a section in the letter titled "Conclusions", or you may wish to state the conclusion in the opening paragraph followed by the findings that support the conclusion. In this way the decision-makers can more quickly understand the content of the letter. Example: Based on our analysis the applicable mobility standards of Highway X can support the additional traffic that will be generated by the proposed zone change. ODOT has no objection to the proposal.

6. Attach the traffic analyst's comments, particularly if it is a contentious case. When this is done, the cover letter can focus the reader on the impacts of the traffic analysis and the recommended course of action. The attached facts can support the conclusion and recommendation. Attaching the traffic analyst's comments also demonstrates that professional analysis and considered judgment were involved
7. Recommend a course of action. Offer options when appropriate. Example: "ODOT recommends the City Council do one of the following:..."
8. Provide the ODOT contacts. Example: I can be reached at (phone number) if you have any questions. Preferably there is one spokesperson to whom questions can be directed, as appropriate. Or you may wish to include a list of ODOT contacts as a standard part of comment letters.
9. If you intend to be present at the hearing, say so in the letter. This is done primarily as a courtesy to local staff. Example: I intend to give oral testimony at the October 3rd hearing before the Planning Commission and look forward to helping answer any transportation related questions.
10. Request that the ODOT letter be included in the record. This is important. Most jurisdictions routinely add comments directly related to a notice of a land use/development application to their decision record, but to avoid any ambiguity regarding the intent of the letter, it is good to include a written request that it be included to ensure legal standing to appeal when necessary.
11. Request a copy of the written decision. Once again, eliminate any ambiguity about the reason for your letter to ensure timely notice of the decision in case there is a reason to consider an appeal.
12. Copy the letter to the applicant and others as appropriate. Typically, it is an important courtesy to inform the applicant in advance of release of the ODOT staff response. List staff members who receive the letter to identify whom the applicant should contact to resolve concerns. If this practice is not followed, the applicant may contact another ODOT person who may be unaware of the staff work that has already been done.

#### **2.1.14 Findings: What Are They and Why are They Important?**

Oregon law requires that a local government decision be supported by substantial evidence in the whole record (ORS 197-835(9)(a)(C)). Substantial evidence is evidence upon which a reasonable, prudent person could rely in reaching a decision, *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 119, 690 P2d 475 (1984). One way to provide the required substantial evidence is through development of "findings."

Findings are required by Oregon law to accompany administrative decisions to explain why a decision is made. "Findings ensure that applicable legal standards

have been addressed and show that the decision complies with the applicable law. This protects participants in the land use process from arbitrary government action.” (Land Use CLE S10.78.)

“Approval or denial of a permit...shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.” ORS 227.173(3) (cities) and 215.416(9) (counties).

ODOT's findings should identify:

1. The applicable local ordinance provision(s) and any other applicable regulations.
2. The facts of the case related to each regulation.
3. Discussion whether or not the facts support a conclusion that the proposal complies with the subject regulation.

Where our findings are included in testimony submitted in a local decision process, the submittal should usually include a written request that the findings be adopted into the local decision document.

Findings are applicable in two stages of local decision making:

1. Any time a decision is made by ODOT staff in the area of permitting, including a decision to make recommendations on a local land use proposal, the file should contain a set of findings to substantiate the basis for the decision.
2. Findings are required to be prepared by the local government staff to support the local decision. ODOT staff can sometimes improve the departments' legal position in a local land use action by preparing findings for the local planner to use in developing their staff report and the final decision document. This is especially helpful for small jurisdictions with limited staff. Assuring that the findings you submit are always properly drafted and legally supportable will help establish and maintain a relationship of trust and credibility. Note that the tone of recommendations and findings to support them needs to be considerate of local sensibilities to the extent practicable, and may be the determining factor whether they are actually included in the staff report and decision.

### 2.1.15 Preparing Findings

The local jurisdiction, as the decision-making body, has responsibility to prepare the findings supporting a local decision. Typically, findings are drafted in a staff report that is submitted to the planning commission (or other decision authority) to explain the relationship of the facts to the decision criteria. Based upon the deliberations and decision of the decision body, the findings may be revised in the final decision document, establishing the rationale for the decision. ODOT, as a service provider, prepares findings relative to the state transportation system. Ideally, the ODOT comments are incorporated into the staff report and final decision document findings.

The ODOT findings must speak to the local approval criteria. For plan amendments and zone changes, the local approval criteria will have to address the TPR, reference the appropriate portions of the local government's development ordinances and tie their approval criteria to the OHP and OAR Division 51 as appropriate. In the case of TPR reviews, provide details explaining whether and, if so, how the proposed land use is inconsistent with the jurisdiction's adopted comprehensive plan and/or transportation system plan. As a matter of practice, the bar is set higher for plan amendments/zone changes and conditional uses than for uses permitted outright. For uses permitted outright it is adequate to refer to the pertinent local zoning code criteria without making reference to the local comprehensive plan policy.

- The findings need to be concise;
- Keep as neutral (or, where appropriate, supportive) a tone as possible in the submitted correspondence, focusing on the function of the roadway;
- The Department of Justice can be a resource to help you include citations to any applicable LUBA cases that would buttress ODOT's position;
- Explain how the applicant has not met the burden of proof where applicable. The burden of proof has not been met if a reasonable person would not conclude that the applicable criteria are met based upon the facts of the case and the information provided by the applicant; and
- Include in the letter references to specific examples from the application materials that demonstrate failure to meet the burden of proof, describing what is missing or inaccurate.

For example, most local codes have sections that require that adequate public infrastructure be available to serve proposed new development. Adequacy of the state highway facility includes mobility, safety, etc. Stress the mobility standards of the OHP and how the development will cause those standards to be exceeded where applicable. Offer suggested conditions of approval to either meet those standards or to keep the volume to capacity (v/c) ratio at its current level after the development occurs. Identify the mitigation necessary to achieve the standards.

### **2.1.16 Mitigation in the Form of Conditions of Approval**

Local governments are required to adopt regulations that include: “A process to apply conditions to development proposals in order to minimize impacts and protect transportation facilities, corridors or sites;...” as a part of implementation of the Transportation Planning Rule, under OAR 660-012-0045(2)(e).

Typically, the applicant’s Traffic Impact Study (TIS) includes recommended mitigation or ODOT staff recommends mitigation. As a courtesy to the local government, the state should gain the local government’s concurrence on the proposed mitigation.

It is important to identify a mechanism to ensure the applicant is responsible for the identified mitigation. This is usually done through conditions of approval, either initiated by local planners or proposed as part of the applicant’s submittal. Conditions of approval are stated in the record of decision. If the mitigation is substantial or exceeds the proportionate share of the applicant’s impact and the applicant is not willing to make the improvements, other TPR-identified remedies or denial may be appropriate. Section 3.2.14 of these Guidelines discusses mitigation in more detail.

### **2.1.17 Ways to Work Effectively with Local Partners**

The following strategies can help ODOT work with local partners on land use/development reviews:

1. Work with local governments to get them to notify ODOT Regions/Districts of major development proposals on a pre-application basis.
2. Attend pre-application conferences.
  - Identify information that needs to be included in the land use application in order for the applicant to address the approval criteria.
  - Provide written comments either at the pre-application meeting or as soon as possible following the meeting.
  - Provide the best information available.
  - Try to resolve conflicts.
  - Provide ODOT contact information.
3. Know the local approval criteria. This is essential because it forms the primary basis for the decision. The local approval criteria are the regulations in place at the time of the application submittal (not at the time the application is deemed complete). Note that comments do not have to be limited to the criteria identified by the local planning department. State policy, plans and standards are applicable to ODOT facilities and should



- be included as part of the ODOT analysis. The approval criteria may include previous conditions of approval that apply to the site. For example, the site may be part of a planned unit development (PUD) that has specific approval criteria that apply at the time of development.
4. Know the review process: timelines, decision-making body and appeal process.
  5. Provide timely responses. Respond to the local government in time to get the ODOT comments included in the staff report and recommendation. You may wish to provide the local staff with an electronic version of your letter so they can easily incorporate the ODOT findings into the staff report.
  6. Provide the local staff with the recommended condition of approval language written clearly and completely. This provides clarity and helps the local staff. The condition language should address when the condition is to be performed. Stating that the condition is to be performed prior to the issuance of the primary building permit works well when it is feasible. It may be helpful to discuss the language of the condition with the local staff to see if there are ways the condition can be written to best fit with their development and/or building permit review process. The local staff is able to make their own recommendations and offer modified language following the receipt of the ODOT comments. Having a uniform position with the local staff helps eliminate confusion and enhances our chances of gaining agreement from the decision-making body.
  7. When a proposal goes to a public hearing, request the hearing record be kept open if necessary to allow time to address unanswered questions. This request must be made before the conclusion of the first evidentiary hearing. If requested, the record for a hearing must be kept open for seven additional days (ORS 197-763(6)).

### **2.1.18 Ways to Participate Effectively in the Hearings Process**

The following tips are intended to help ODOT participate in the local land use hearings process:

1. To prepare for a hearing, become familiar with the following:
  - All materials filed by the applicant.
  - Relevant ordinances (Development Code).
  - Traffic Analysis, if any.
  - Staff report(s).
  - Previous proposals on the property.
  - Local comprehensive plan text and map.

- Other studies, plans and minutes relating to the proposal.
  - The Transportation Planning Rule (TPR).
  - Statewide Planning Goals – Land Use.
2. Discuss the proposal with the local staff. Try to get a feel for their position on the proposal and whether it promotes local priorities. Use the opportunity to increase local understanding of highway facility issues and be persuasive about mitigation needs.
  3. View the property.
  4. Be familiar with the procedural rules such as the order of presentation, local jurisdiction's appeal requirements and review procedure. For example, would an appeal be heard de novo (new hearing) or on the record (hearing is based on the record, with no new introduction of evidence)? If appeals are heard on the record it is even more important to submit thorough and accurate comments at the first level of review.
  5. Know all deadlines for submission of evidence and appeal requests.
  6. Know your audience. Try to find out the interests and inclinations of the local body hearing the case.
  7. The ODOT staff presentation can be either in writing or oral. You will have a better opportunity to persuade the local hearings body if you are present and can respond to questions. If an oral presentation is given, it should also be submitted in writing.
  8. Carefully listen and take notes on the other testimony in order to be prepared to rebut any evidence submitted by the others that detracts from ODOT's testimony, whether ODOT is the proponent or opponent. Note that opponents do not usually get the opportunity to rebut during the public hearing. If rebuttal is needed it will be necessary to request that either 1) the record be kept open for a specific period of time, or 2) the hearing be continued to a certain future date, typically the next scheduled meeting of the hearings body. The hearings body is required to keep the record open when requested by a party with legal standing, but will often only keep it open for a week or two, and continue deliberations at a future meeting. Typically, the hearings body may continue the hearing at its discretion. (See also discussion on burden of proof below.)
  9. If ODOT is the proponent of a local land use action, listen carefully for any additional criteria raised by the opposition. If additional criteria are raised, staff may need to explain why those criteria are not applicable and/or submit evidence to show why the proposed change complies with the criteria. Proponents do get a chance to rebut, but in some communities only the applicant may do so. If that is the case, and ODOT is not the applicant, ODOT may be allowed to rebut at the request of the applicant. In the case where new evidence or new criteria are raised, a request to keep the record open and/or continue the hearing may be the best course.

10. If ODOT is an opponent to the local land use decision, do not rely on the local government to identify all applicable criteria. If you believe certain decision criteria apply but have not been identified by the local jurisdiction, discuss the matter with the local government staff, and be prepared to identify those criteria and defend their applicability to the subject application in testimony. Also be prepared to address the facts of the case and whether it can be demonstrated that the claimed additional criteria are not met.
11. Identify whether the proposal amends a functional plan, acknowledged comprehensive plan or land use regulation, then identify whether the proposal will have a significant impact on transportation facilities per OAR 660-12-060 or the TPR.
12. Use charts, maps and other graphics to illustrate your position. If oversize graphics are used, be sure to supply a legible, smaller format version with identical content that can be placed in the application file. Everything relied upon as a basis for the decision needs to be part of the record, particularly if there are resulting appeals, and large maps on foam core, for instance, do not stay with the file.
13. Identify, by reference to number and name, all applicable statutes, administrative rules, plan provisions and ordinances that are applicable to the subject local land use decision.

### **2.1.19 Burden of Proof**

The proponent(s) of the local land use/development application has the burden of proof to demonstrate that the application meets all applicable review criteria. This applies to the applicant initially and then to the local government whenever a decision approving the proposal is made in full or in part. The burden of proof is met if a reasonable person would conclude that the decision criteria are met, based upon the facts of the matter and the materials submitted by the applicant. Professionally prepared traffic impact studies are often submitted as part of the local land use application to address the burden of proof.

### **2.1.20 Substantial Evidence**

Substantial evidence that the proposal complies with the applicable criteria must be contained in the record of decision. "Substantial evidence" is evidence a reasonable person would accept as adequate to support a conclusion. The proponent must provide evidence to show that the applicable criteria have been met. The burden then shifts to the opposition to show why this evidence is not substantial, i.e., it does not address the criteria, it does not answer the question raised by the criteria, it is not technically correct, or the person presenting the evidence is not qualified, etc. If the opposition provides evidence that detracts from the proponent's evidence, the burden shifts back to the proponent to bolster

their evidence. The bottom line is, if you are the opponent, you cannot simply mention applicable criteria and rest. You need to see whether the proponent then provides evidence to show why those criteria are not applicable or have been met. If they do so, you should try to rebut their testimony. Opponents do not usually get an opportunity to rebut.

The usual sequence for giving testimony at a land use hearing is:

- Applicant
- Other Proponents
- Opponent
- Applicant's Rebuttal

Parties with legal standing in the subject hearing, both proponents and opponents, have a right to ask that the record remain open for a specific period of time to allow a response to any new evidence or criteria that have been raised in the hearing. The local body conducting the hearing will typically specify a date after which the record will be closed, and deliberations will resume at a later date based upon the timely evidence in the closed record.

Parties may also request a continuance of the hearing, which means that the hearings body would agree to allow further testimony at a future "date certain." Whether or not to continue the public hearing is a decision made at the discretion of the local hearings body.

### **2.1.21 Internal Coordination**

For the agency to successfully participate in the local land use process, the responding ODOT planner must ensure that the agency speaks with one voice. This means contacting other units of ODOT as well as managers prior to submitting a comment letter. The specifics of the local land use proposal will dictate which of the parties listed below should be brought into the review. At a minimum, the ODOT planner needs to inform the Planning Manager and must contact District staff for their input before submitting the agency's response. The managers and units discussed below are the primary resources to use when analyzing a local land use proposal.

### **2.1.22 Coordination with ODOT Managers**

**Planning Manager:** Is responsible for the development review program in the Region and supervises the current and long-range planners. The Statewide Transportation Improvement Program (STIP) usually resides in the Planning unit and thus the manager would know of any upcoming or distant ODOT projects in

the vicinity of the development. The STIP coordinator is another source of information about when projects will be delivered. The Planning Manager is responsible for keeping other managers in the region informed about development review issues.

**District Manager:** Legal authority for issuing approach road permits lies with the District Manager. The District Manager may refer you to the Region Access Management Engineer on access management issues. The District Manager supervises staff that is involved in the daily maintenance and operation of the state's highway system and all features on the right of way (signs, signal poles, fences, etc.). This includes non-ODOT signs on state right of way.

**Traffic Manager:** Has legal authority for the placement of official ODOT signs (regulatory, warning, guide) and certain informational signs on the highway. Other responsibilities include the location, timing and other operations of traffic signals, striping the highway and conducting speed zone studies.

**Area Manager:** Oversees the project development process when ODOT constructs a project. Examples would be building passing lanes, new alignments, general widening, etc. The Area Manager also serves as ODOT's liaison to the Area Commission on Transportation, a consortium of local jurisdictions. There can be a degree of overlap between the Planning Manager and the Area Manager on the long-term goals for ODOT's facilities.

**Region Right of Way Manager:** Oversees the acquisition, management and disposal of state-owned property. Salem Right of Way researches properties to determine whether ODOT has purchased access control, identify the location of reservations of access and research other property deed information related to the highway.

**Region Manager:** Oversees all managers within the region with the exception of Right of Way. The Region Manager normally does not get directly involved in development review except in unusual circumstances. It is prudent to brief the Region Manager about applications that may become politically sensitive, particularly when it may be pertinent to appeal a local decision. That briefing is coordinated through the Planning Manager.

**Crossing Safety Section Manager:** Is responsible for the railroad crossing safety program. The Crossing Safety Section is responsible for managing the application process for constructing, altering or closing public rail crossings; mediating agreements between public authorities in interest (road authorities) and railroads; preparing final Crossing Orders authorizing improvements; and participating in the review of land use actions as needed.

### 2.1.23 Coordination with Other ODOT Units

ODOT is one of the most complex state agencies in terms of roles, responsibilities and regulations. It is preferable to begin with staff at the Region or District level. Below are examples of units that may need to be contacted for input or just to discuss problems and possible solutions to the application at hand.

- **Bicycle and Pedestrian Program:** This program provides technical assistance and grants to local officials regarding bicycle and pedestrian issues.
- **Geo/Environmental Section:** The Geo/Environmental Section has staff in both the Regions and in Salem. The section can assist in assessing drainage issues. ODOT Drainage Permits, however, are handled through the Districts. Environmental issues can range from threatened and endangered species and wetlands to historic buildings.
- **Long Range Planning:** The Regions have long-range planners who are expected to be familiar with the local governments' TSPs and Comprehensive Plans. Salem's Transportation Development Division (TDD) also has specialized long-range planners for various travel modes. Where a local government's plans for an area on the highway are at odds with the classification of the highway, a Highway Segment Designation per OHP Policy 1B may be a viable approach to propose as a long-range solution. Read OHP Policy 1B and contact TDD to develop this idea further.
- **Rail Division:** The division, which is based in Salem, has exclusive legal authority over public grade crossings and provides coordination with the railroads for affected private rail crossings.
- **Signs:** Authority to regulate signs depends on the type of sign and its location. Signs on state right of way are the province of the District Maintenance office. Signs on private property, but visible from the state highway, are handled by the Outdoor Advertising Sign Program in Salem. The Travel Information Council deals with logo signs for gas, food and lodging as well as tourist-oriented directional signs.

### 2.1.24 Coordination with Other State Agencies

**Department of Land Conservation and Development:** DLCDC, through its Commission, adopts statewide planning goals and reviews local jurisdictions' comprehensive plans for compliance with those goals. DLCDC acknowledges local governments' comprehensive plans and TSPs. The department also reviews proposed amendments to those plans for compliance with state planning goals and associated administrative rules. Interpretations and implementation of the

Transportation Planning Rule and other rules and statutes in their purview should be coordinated with DLCD.

**Oregon Department of Aviation:** The department reviews local land use applications for their effects upon airport operations. These can include noise-sensitive uses locating near airports, cell towers, waterfowl attractions in flight paths and development in runway protection zones.

### 2.1.25 Coordination with Other Groups

ODOT has increased its outreach to local governments and the general public. This can result in the agency's development review responses extending beyond submitting letters to the local government. Larger projects with sensitive issues can require ODOT staff coordination and interaction with the following groups:

- **Area Commissions on Transportation (ACT):** The ACTs are advisory bodies chartered by the OTC. Representatives from cities, counties and Indian nations comprise the ACTs, which are organized geographically and typically include a decision making body of local government officials and a technical advisory body of planning, transportation and public works staff.
- **Economic Revitalization Team (ERT):** ODOT is one of eight state agencies participating in ERT. Formerly the Community Solutions Team (CST), the ERT assists local communities with economic and community development issues that involve multiple state agencies through regional ERT teams. Coordinated through the Governor's office, the effort now includes the following agencies:
  - Oregon Economic and Community Development Department (OECDD)
  - Oregon Department of Transportation (ODOT)
  - Department of Land Conservation and Development (DLCD)
  - Department of Environmental Quality (DEQ)
  - Department of State Lands (DSL)
  - Oregon Department of Agriculture (ODA)
  - Oregon Housing and Community Services (OHCS)
  - Department of Consumer and Business Services (DCBS)
- **Local Planning and/or Public Works Departments:** Local departments offer a wealth of information regarding local plans, policies, land use ordinances, street standards, drainage issues and existing stormwater facilities. ODOT and local staff can work cooperatively to craft conditions

of land use approval that meet the requirements of the state and local governments.

### **2.1.26 Coordinating Local Development Approval with State Highway Approach Permit Approval**

Both local and state approvals are required to develop a parcel of land with access to a state highway. The state approval is in the form of an ODOT state highway approach road permit regulated by OAR 734-051 and administered through the ODOT District office. The local approval is the result of the city or county's land use and development review process.

The questions and answers below help explain how the two processes can be coordinated to provide flexibility in the sequence of events leading to application approval.

1. Can the local land use approval be obtained prior to state highway approach approval?

Yes, however the applicant runs the risk of having the state deny the approach, requiring the applicant to either revise the site plan through the local review amendment process or to appeal ODOT's decision to deny the approach road. Some flexibility is established in OAR 734-051-0080(5).

2. Does the applicant get to choose whether he or she obtains the state approval prior to the local land use approval?

Yes. Based on OAR 734-051-0080(5) a property owner may apply for an ODOT State Highway Approach Permit before, after or during the local land use review. This flexibility allows the applicants to decide for themselves the best course of action

To allow applicant's some flexibility in terms of the timing of their applications, section 0070(10)(a) allows approval of an approach permit pending verification of local land use approval. In addition, in the 2004 amendments to Division 51, section 0070(10)(a) was added to allow a construction permit for a highway approach (driveway) to be issued while a land use action is pending, with a bonding requirement to cover the cost of removal if the land use is ultimately denied. The final Permit to Operate Maintain and Use an Approach will only be issued upon the applicant receiving local land use approval and the completion of construction of the approach to state standards. In this manner, the state and local governments coordinate their reviews and have assurances that the same set of site plans are being approved by both agencies.



3. Does ODOT recommend applicants obtain state approach approval prior to local approval?

In cases where the local land use action includes site plan approval, obtaining ODOT approach permit approval prior to the local approval is typically the best course of action. Agency staff can identify approaches the agency can support or would oppose. ODOT staff may advise the applicant to get a state approach permit prior to the local approval but cannot require it (OAR 734-051-0070(10)). ODOT recommends the applicant know both the local and state rules pertaining to access prior to designing their project and submitting either the state or local application.

4. What happens if the state approves an approach location and the local government objects?

The applicant must take steps to address the local government's issues. ODOT will only allow an approach when the provisions of OAR 734-051 are satisfied.

5. What happens if the local government approves an approach location and ODOT objects?

ODOT staff needs to decide the most effective means to get the approach in the best feasible location. ODOT: 1) May object through the local appeal process; and 2) Will withhold issuing the approach permit until the provisions of OAR 734-051 are satisfied. The applicant may have to submit an amended site plan or other application to the local government to modify the approach location. OAR 734-051 includes an appeal process; however, it is separate and distinct from the local land use appeal process.

6. What happens if more time is needed to work through the local or state issues?

If more time is needed to work through issues, the time lines for review of an approach permit may be extended by mutual consent of ODOT and the applicant. The applicant may also submit a letter to the local jurisdiction to suspend the "120-day rule" to allow more time for the local land use process.