Oregon's Transportation Planning Rule

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I. Introduction

Oregon's Transportation Planning Rule (TPR), Oregon Administrative Rule 660-012-000, was enacted to support Oregon's Goal 12 (The Transportation Goal). Goal 12 seeks to "promote the development of safe, convenient and economic transportation systems" designed to reduce reliance on the automobile. The TPR serves to explain how local governments and state agencies are responsible for transportation planning. Section 0060 directs cities and counties to assess whether proposed plan amendments or zone changes will have a significant effect on the transportation system. Over the years, land use professionals, private developers, environmental advocates and other groups have argued that Section 0060 has presented unintended consequences for communities throughout Oregon. In particular, many argued that the most recent iteration of the TPR prohibited compact urban development and limited economic development. In response to the dissatisfaction with the Rule, the Oregon Legislature passed Senate Bill 795, requiring the Land Conservation and Development Commission to adopt revisions to the rule prior to January 1, 2012.

This paper explores the implications of the recent modifications of Transportation Planning Rule according to a range of professionals. Part I provides a background on Oregon's Transportation Goal, Goal 12, and the Transportation Planning Rule. In Part II, I explore concurrency planning. Concurrency planning occurs when public facilities, such as transportation corridors, are required to be in place to serve any new development at the time the development is ready to be occupied. This part briefly describes concurrency planning in Washington and Florida, the only two states with state-mandated concurrency requirements, and then explains Oregon's "concurrency planning" that occurs through Section 0060 of the TPR. Part III provides the methodology employed in collecting data and analyzing the recent changes. Parts III presents the findings from various professional regarding both of the most recent iteration of the rule and the new changes. The findings are divided to consider the former TPR Section 0060 as well as some of the recent changes. Finally, in Part V, the paper presents my conclusions of the implications of the TPR.

Oregon Statewide Planning

Like most states, Oregon's land use and local transportation planning was historically in the province of cities and counties. In 1973, the legislature enacted a strong statewide land use-planning program. The program is founded in a set of 19 Statewide Planning Goals. The goals express the state's policies on land use and related topics, such as citizen involvement, housing and natural resources. Many of the goals are accompanied by non-mandatory guidelines as to how to apply the goal.

The Land Conservation and Development Commission (LCDC) directs and coordinates the State's land use planning program.[1] The Commission is composed of seven unpaid citizen members appointed by the governor subject to senate confirmation. LCDC generally convenes every six weeks to fulfill its statutory responsibilities, which include, among other things: adopting rules necessary to carry out land use planning, assuring local plan compliance with statewide planning goals, reporting periodically to the legislature, appointing advisory committees, and ensuring widespread citizen involvement.[2]

The Department of Land Conservation and Development (DLCD) is the state agency that administers the state's land use planning program. DLCD works under and provides support for the LCDC. The statewide planning goals are achieved through local comprehensive planning at the city and county level. State law requires local jurisdictions to adopt a comprehensive plan and the necessary zoning and land-division ordinances to support the plan. The local comprehensive plans must be consistent with the Statewide Planning Goals. LCDC reviews the plans for consistency with the goals. Once the plan is official approved by LCDC, the plan is "acknowledged" and serves as the controlling document for land use within that jurisdiction.

In addition to its role in the acknowledgment and periodic review process, LCDC has broad power to adopt administrative rules or state land use policies to implement the certain land use statutes. LCDC's most broadly applicable rules interpret the statewide planning goals—interpreted in Oregon Administrative Rules (OAR) chapter 660, divisions 004 through 045.

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[1] Comprehensive Land Use Planning Coordination, Or. Rev. Stat. § 197.030 - 197.070 (2012)
[2] Or. Rev. Stat. § 197.040.

LCDC is not the only commission that administers the State's land use planning functions. The Oregon Transportation Commission (OTC) establishes state transportation policy. The OTC is compromised of five commissioners, appointed by the governor. The OTC guides planning, development and management of a statewide integrated transportation network. OTC oversees the Department of Transportation's (ODOT) activities relating to highways, public transportation, rail, transportation safety, motor carrier transportation, drivers and motor vehicles. Oregon Department of Transportation (ODOT) also has unique land use planning functions. The Oregon Highway Plan (OHP) establishes long-range policies and investment strategies for the State Highway System. Several OHP policies establish general mobility objectives and approaches for maintaining mobility on the state highway system. Mobility OHP Policy 1F, Highway Mobility Standards, identifies the state highway mobility performance expectations to be used in the development of transportation system plans and highway facility plans and guides state highway operation decisions.

Oregon's Goal 12: Transportation

Goal 12, the Transportation Goal, was adopted in 1974 as part of the original group of 14 statewide planning goals. Goal 12 seeks to "provide safe, convenient and economic transportation system." Amongst other things, Goal 12 states that a transportation plan should "consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian…be based upon an inventory of local, regional and state transportation needs… avoid principal reliance upon any one mode of transportation."[3] Goal 12, like the other Statewide Planning Goals, was a "product of the environmental and political progressivism that characterized Oregon in the 1970's."[4] The general atmosphere of consensus among the policy actors resulted in the broad, nonspecific land use goals that reflected "a shared understanding of what many Oregonians wanted during this "Don't Californiacate Oregon" era."[5]

Transportation Planning Rule

In 1991, seventeen years after Goal 12 was adopted, the State adopted the Transportation Planning Rule "TPR" (OAR Chapter 660-012) to implement the Goal. The purpose of the TPR was to guide jurisdictions through meeting the broad objectives of Goal 12. The original TPR was representative of the State's land use planning vision—providing mechanisms for reduction of urban sprawl, preservation of farmland and integrated land use planning efforts. However, Alder and Bianco argue that the Rule arose in an atmosphere of conflict and dissension. "One of the immediate precursors to the adoption of the Rule was a 1987 lawsuit by 1000 Friends of Oregon… alleging that one of the Portland area's suburban counties had violated the state's land use law by attempting to build a freeway outside of the urban growth boundary."[6] While the county abandoned the freeway plan, the lawsuit pushed the DLCD to develop an administrative rule to guide the decision-making process.[7]

The TPR divides transportation planning into two phases—transportation system planning and transportation project development. Transportation system planning establishes the Transportation System Plan (TSP). The TPR requires the Oregon Department of Transportation (ODOT), Metropolitan Planning Organizations (MPO), cities and counties to adopt state, regional and local transportation system plans respectively. The TSP provides land use controls and a network of facilities and services to meet overall transportation needs. The TSP is the plan for one or more transportation facilities that are planned, development, operated and maintained in a coordinated manner to supply continuity of movement between modes, and within and between geographic and jurisdictional areas.[8] Transportation project development implements the TSP by determining the precise location, alignment and preliminary design of improvements included in the TSP.

Ultimately, the TPR seeks to better connect land use plans and transportation plans. When the TPR was enacted, each local government was required to amend its land use regulations to implement a TSP. The

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[3] Oregon Statewide Planning Goals: Goal 12, Or. Admin. R. 660-012-0000(12) (2012).
[4] Martha Bianco & Sy Alder, *The Politics of Implementation: Oregon's Statewide Transportation Planning Rule—What's been Accomplished and How* (Ctr. for Urban Studies, Discussion Paper, 1998).
[5] Martha Bianco & Sy Alder
[6] Martha Bianco & Sy Alder
[7] Martha Bianco & Sy Alder
[8] Or. Admin. R. 660-12-0005(38) (2012).

TPR requires that a minimum 20-year-needs analysis is conducted for long-range transportation plans. The TPR provides regulations on determining transportation needs, evaluating transportation alternatives and financing transportation—all components of transportation system planning or transportation project development. Each TRP must include the following as needed to meet the state, regional or local transportation needs:

- A road plan for arterials and collectors;
- A public transportation plan, including plans for transit for communities with transit or *capable* of developing a feasible transit system within the planning period;
- A bicycle and pedestrian plan;
- An air, rail, water, and pipeline plan;
- In urban areas with a population greater than 25,000 people, a transportation system management and demand management plan[9]; and
- Within MPOs, a parking plan.[10]

A key requirement of the TPR is Section 0060.[11] Section 0060 requires local governments to evaluate proposed plan amendments and zone changes to consider whether they are consistent with adopted land use and transportation plans. "If an amendment to a functional plan, an acknowledged comprehensive plan, or a land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place [specific] measures [provided by the Rule]."[12] According to the DLCD, Section 0060 is designed to address the following important objectives:

- Assure that local governments consider transportation impacts of changes to land use plans,
- Keep land use and transportation plans in balance with one another by assuring that the planned transportation system is adequate to support planned land use,
- Address how needed transportation improvements will be funded, and
- Accommodate new development in a way that minimizes its traffic impact.[13]

Many have argued that Section 0060 has resulted in the unintended consequences of limiting a communities' economic development potential and prohibiting compact urban development. In a letter to DLCD, the City of Eugene Planning Director stated that "potential projects along certain ODOT affected corridors have essentially been stifled at the prospect of addressing cost prohibitive mitigation measures."[14] On more than one occasion, small property/ business owners ultimately withdrew their application for residential or commercial development because of the prospect of TPR mitigation. To avoid the cost prohibitive mitigation, applications that do proceed, scale back or limit their development to avoid requirement for mitigation, resulting in low intensity development. For example, on a 23-acre parcel in Eugene, designated for high-density residential development by the City's Metro Plan and neighborhood plan, the developer reduced the proposed density by over 300 dwelling units after realizing the mitigation costs necessary to satisfy the TPR. As a result, the density on the parcel is now slightly above the minimum required for high density designation *and* the loss of the 300 units will eventually need to be made up elsewhere.[15]

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[9] 1 Land Use §12.69 (OSB Legal Pubs 2010). "To increase the efficiency, capacity or performance standard of existing facilities without increasing size, and to reduce the need for additional road capacity."
[10] Or. Admin. R. 660-012-0020(2), 660-012-0030(1)
[11] While the TPR includes many sections that address numerous requirements, when professionals discuss "the TPR" they are often referring to Section 0060. For the purposes of clarity, however, I will refer to the requirement as Section 0060.
[12] Or. Admin. R. 660-012-0060
[13] "About TPR Section 0060." Oregon.gov Home Page. Oregon Department of Land Conservation and Development. Web. 27 Apr. 2012. <http://www.oregon.gov/LCD/about_tpr_section_0060.shtml>.
[14] Letter from Lisa A. Gardner, City of Eugene Planning Director, for Department of Land Conservation and Development (May 28, 2010) (on file with author).
[15] Letter from Lisa A. Gardner

In January 2011, based on stakeholder concerns, LCDC and the OTC convened a Joint Subcommittee. The Subcommittee held three meetings and heard testimony with concerns related to TPR Section 0060 and the OHP mobility standards. The Subcommittee reported "one theme often discussed was that economic development, transportation and land use objectives should be better balanced."[16] Transportation requirements were taking precedence over other objectives, making it difficult to increase development intensities or attract economic development to the area.

Accordingly, Senate Bill 795 called for changes that would "streamline, simplify and clarify the [TPR] requirements" and "better balance economic development and the efficiency of urban development with consideration of development of the transportation infrastructure."[17]
Accordingly, LCDC directed the DLCD to initiate an administrative rulemaking project to review Section 0060 of the Transportation Planning Rule (Oregon Administrative Rule 660-012-0060). LCDC appointed a rulemaking advisory committee to consider the issues and make a recommendation on rule amendments. For the purposes of this paper I will focus on Section 0060, first explaining how the rule operates and then presenting various professional opinions of the former rule and potential implications of the changes.

II. Concurrency Planning

Like sewers, water supply, and schools, transportation is a vital urban-planning service. Moreover, the transportation system serves as the framework upon which the city is built. And while the transportation system is essential for metropolitan areas to function, transportation is a service, not an end in itself. The system provides the means by which people move about to live, work and play. The system should support the collective mobility goals of the people in the area served. [18]

Historically, transportation planning focused on overall metropolitan issues, the extent of the transit system, the highway system, the location of airports and the railroad system. Today, many of these large-scale transportation facilities are complete and there is public resistance to additional facilities. Transportation planning efforts, therefore, often concentrate on managing the transportation system, particularly at the community level. "This has paralleled the desire of many people to be involved in the decision-making process, which is most effective at a "micro-scale" where citizens can more readily understand the issues." [19] In Oregon, around the same time that transportation planning became more "local," the process became linked with land use planning. The adoption of a TSP is a land use decision.[20] Accordingly, when a jurisdiction adopts or amends a TSP, it must develop findings of compliance with the goals, acknowledged comprehensive plans and land use regulations.[21]

Concurrency is a planning policy and regulatory requirement, implemented on a state or local level, that requires that adequate public facilities, services or strategies are in place to serve any new development at the time the development is ready to be occupied.[22] Concurrency requirements "seek to prevent new development from outpacing local government's ability to provide system improvements needed to serve the new development including streets, public transportation, sidewalks, parks, schools, and utilities."[23] Concurrency planning is based on the theory that if improvements are not made in time, the additional demand from the new development could result in congestion or overcrowding of existing facilities that will impact both new and existing residents. Florida was the first state to enact a statewide concurrency requirement. Washington followed although limited its requirement to certain jurisdictions and only required concurrency with the transportation facilities. Oregon's Section 0060 of the TPR is a form of concurrency planning by requiring the local jurisdiction to consider and prepare for the impact of traffic from zone changes or comprehensive plan amendments. However, it is important to note that Oregon does

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[16] "Report to the Oregon Legislative Assembly." Http://www.oregon.gov/LCD/docs/rulemaking/2009-11/TPR/TPR_Amendments-Legislative_Report.pdf. Oregon Land Conservation and Development Commission, 1 Feb. 2012. Web. 27 Apr. 2012.
[17] Senate Bill 795, 76th Leg. (Or. 2011)
[18] *The Practice of Local Government Planning*, 214 (Frank S. So et al. eds., 1979).
[19] *Id.*
[20] Or. Admin. R. 660-012-0025(1).
[21] This is particularly significant with Section 0060 of the TPR. Neighborhood groups who were opposed to development used the TPR requirements in the land use process to block projects from going forward.
[22] "Concurrency in Plain English," Municipal Services and Research Center of Washington http://www.mrsc.org/subjects/planning/lu/concurrency.aspx
[23] *Id.*

not consider Section 0060 a concurrency requirement because the transportation facility is not required to be "concurrent" with the land until the end of the planning period (20 years). The following provides a brief background to Florida and Washington's requirements and then explores Oregon's rule in detail.

Florida: Growth Management Act

In 1985, Florida passed the innovative Growth Management Act.[24] A key component of Florida's growth management legislation was the concept of concurrency. At its core, the state's concurrency requirement prohibited development from proceeding unless infrastructure capacity and specific urban services were in place to service the new development. "Concurrency was intended to help address major infrastructure problems facing the state, especially increasing road congestion. As the state ha[d] added approximately 300,000 net new residents per year since 1970, local and state road infrastructure ha[d] become increasingly plagued by congestion."[25] The mandate was intended to either force governments to provide infrastructure necessary to support growth or to provide a state-sponsored mechanism to allow governments to slow development permitting until infrastructure was in place to service new development.

Although the legislation was ambitious in scope and at the vanguard of state planning and growth management legislation, concurrency did not solve Florida's infrastructure problems, nor did it slow growth in the state.[26] In 2011, the Florida legislature passed House Bill 7202 (349 pages long) to revise multiple sections of Florida's Growth Management statutes. While growth management still exists in Florida, the stated purpose to the changes is to *manage* growth as opposed to *control*. The new legislation is understood to be more streamlined, with fewer levels of review and less costly to both the state and property owners and developers.[27] The changes in legislation provide local governments with more control over what happens in their jurisdiction when only the local community is impacted.

Significantly, under the recent House Bill, concurrency underwent major changes. Only sanitary sewer, solid waste, drainage and potable water are required on a statewide basis. Parks and recreation, schools and *transportation* are no longer statewide concurrency requirements. Local governments may extend concurrency requirements to additional public facilities within their jurisdictions, however, the comprehensive plans must provide "the principles, guidelines, standards, and strategies, including adopted levels of service, to guide its application." Additionally, both the optional and required concurrency elements of the local government comprehensive plans must demonstrate that the adopted levels of service can *reasonably* be met. Meaning, the infrastructure needed to insure that the adopted level of service standards are achieved must be specifically identified. Future research should explore a comparison of Oregon and Florida's concurrency requirement, considering why Florida decided to rollback the transportation portion of the law and what lessons were learned.

Washington: Growth Management Act

In 1990, Washington followed Florida's lead. The Washington Legislature passed its own Growth Management Act that mandated most, but not all, cities and counties adopt comprehensive plans with 20-year planning horizons.[28] Washington's Act has transportation concurrency provisions "that were modeled in part on Florida's statewide growth management legislation and was primarily a response to the public outcry arising from extensive urban sprawl that has threatened rural, agricultural, and environmentally sensitive lands."[29] Unlike Florida's original growth management act, Washington's mandate only required concurrency for transportation facilities.

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[24] Fla. Stat. § 163 (1985).
[25] Chapin, Tim. "Rethinking the Florida Transportation Concurrency Mandate." Aug. 2007. Web. 27 Apr. 2012. <http://fsu.academia.edu/TimChapin/Papers/848600/Rethinking_the_Florida_Transportation_Concurrency_Mandate>.
[26] Chapin, Tim.
[27] Gunster Florida's Law Firm for Business, *Growth management in Florida* (White Paper *available at*: http://www.gunster.com/wp-content/uploads/Growth-Management-White-Paper-20111.pdf)
[28] Wash. Rev. Code §36.70A
[29] Comeau, Chris, "Case Study Moving Beyond the Automobile, Multimodal transportation planning in Bellingham" *available at*: http://www.mrsc.org/artdocmisc/b45beyauto.pdf

The Act requires that transportation improvements or strategies to accommodate development impacts need to be *made concurrently* with land development.[30] "Concurrent with the development" is defined to mean that any needed "improvements or strategies are in place at the time of development, *or that a financial commitment is in place to complete the improvements or strategies within six years*."[31] Local governments are provided with flexibility as to how to apply concurrency within their plans, regulations and permit systems. However, as part of the requirement to develop a comprehensive plan, jurisdictions must establish a level-of-service standard (LOS) for arterials, transit service and other facilities.[32] LOS is a standard used by traffic engineers to determine to the flow of an intersection. After the jurisdiction sets an LOS, that standard is used to determine whether the impacts of a proposed development can be met through existing capacity and/or to decide what level of additional facilities will be required. If the new development would impact the LOS for the facility, the development must be denied. Local jurisdictions are required to have a program to correct existing deficiencies and bring existing transportation facilities and services up to the adopted standard, however, a developer may not be *required* to pay for improvements to correct existing deficiencies.

Oregon: Section 0060

Section 0060 is one part of the TPR. Section 0060 is a statewide planning requirement that directs cities and counties to assess whether proposed plan amendments and zone changes will have a significant effect on the transportation facility; change the functional classification of an existing or planned transportation facility; or change standards implementing a functional classification system.

The Section is typically triggered when a plan or zone change will impact the transportation facility by reducing or worsening the performance of the facility, or allowing levels of access that are inconsistent with the classification of the facility. Cities and counties must determine whether existing and planned transportation facilities will provide adequate capacity to support the new development that would be allowed by the proposed land use changes. If there is not adequate planned capacity, a "significant effect" occurs. When a city or county finds there is a significant effect, it must take steps to put land use and transportation in balance—"ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured at the end of the planning period identified in the adopted TSP."[33]

In 2004, in *Jaqua v City of Springfield*, 193 Or App 573, the Court of Appeals interpreted the 2004 TPR as requiring mitigation measures to resolve anticipated transportation failure *prior to the end of the planning period* for development of a regional hospital. In that case the City, Peacehealth Hospital and the League of Oregon Cities (in Amicis) argued that such an interpretation imposes a concurrency requirement that would result in piece-meal transportation planning. The Court of Appeals disagreed. As a result, there were some major changes made to the TPR in 2005 intended, in part, to address the Court of Appeals decision.

It is important to note that the DLCD does not consider the TPR, or Section 0060, as a concurrency requirement.[34] Rather, the TPR requires local governments to assess whether planned facilities, those that are expected to be constructed over the planning period, will be adequate to meet the needs *at the end of the planning period.* Therefore, development is permitted to occur in advance of needed transportation improvements construction and need not be "concurrent." Local governments, however, are permitted to adopt their own concurrency requirements or other standards that are stricter than 0060.

When 0060 Applies

Section 0060 applies to local plan and land use regulation *amendments*. These include plan and zoning map changes as well as changes to the list of allowed land uses in a zone or other provisions of a zoning

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[30] Wash. Rev. Code §36.70A.070(6)(b)
[31] Wash. Rev. Code §36.70A.070(6)(b)
[32] Wash. Rev. Code § 36.70A.070(6)(a)
[33] Or. Admin. R. 660-012-0060(2). *This is amended language from the 2012 changes. The language was moved from 0060(1) to 0060(2), it is not a new requirement.*
[34] DLCD, "Frequently Asked Questions about Section 0060 of the Transportation Planning Rule" *available at:* http://www.oregon.gov/LCD/docs/transportation/660-012-0060_faq_121508.pdf

district. While many changes to zoning or development codes do not affect the transportation system, some relatively minor changes may allow new or expanded uses that would have a significant effect.[35] Local governments need to evaluate each land use regulation amendment and assess whether or not it would allow uses that would generate more traffic than that generated by uses currently allowed in the zone. Section 0060 does not apply to building permits, subdivisions or conditional use permits or similar authorizations. Approvals that are made under the terms of existing city and county plans and zoning ordinances are not subject to Section 0060.

Determining Significant Effect

The standards for determining whether or not a plan or land use regulation amendment has a significant effect are set out in OAR 660-012-0060(1).[36] How a significant effect is determined, in part, on the specifics of the proposed amendment. However, in most cases, whether or not there is a significant effect requires a comparison between the uses allowed under the current zone and the uses allowed under the proposed zone.

DLCD states that in most situations, an 0060 "significant effect" occurs because the plan amendment or zone change would allow uses that would result in a level of traffic that exceeds the adopted performance standards for a local street or state highway. The evaluation of significant effect is not based on the applicants proposed use but rather the range of uses allowed by the proposed plan or zone change. Additionally, there are other requirements that must be assessed—such as whether the planned facilities will drop below LOS and whether already failing facilities will be made worse.

Existing or Planned Facilities

The impact of the increased traffic is measured on both the current and any planned facilities. Generally, TSPs include planned facilities that are adequate to serve uses anticipated based on existing planning and zoning. Changes to comprehensive plans and zoning can create the need for additional street or roadway improvements. Section 0060 requires cities and counties to assess whether a plan amendment or zone change would create more traffic than the plan anticipates or that facilities called for in the plan are designed to handle. Additionally, the recent amendments provide that when determining whether or not there is a significant effect, transportation demand management or any other enforceable, ongoing condition of approval that would reduce the amount of traffic generated can be factored in to eliminate or diminish the significant effect. According to the DLCD, in many cases, "local governments find that improvements called for in TSPs will be adequate to support the planned land use change."[37] In such cases, the requirements of 0060 are met. However, where expected new traffic would exceed the capacity of planned facilities, additional planning must be done to figure out how the traffic will be handled. This is done through an amendment to the TSP to account for the additional traffic, authorization of the improvement *and* identified funding plan or mechanism in place or approved.[38]

Local governments can consider improvements to state highways that are included as planned improvements in a regional or local TSP or comprehensive plan, when ODOT provides a written statement that the improvements are "*reasonably likely" to be provided by the end of the planning period.*[39] When an amendment could impact a state highway facility, the local government must notify ODOT of land use development applications. ODOT will then inform the local government what state transportation facilities

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[35] For example, adding "sales of building materials" as an allowed use in an industrial zoning district could have the effect of allowing a large format retail use into an industrial zoning district that would generate much more traffic than allowed industrial development.
[36] There are three other circumstances where a plan amendment could trigger a "significant effect": Changing the functional classification of an existing or planned transportation facility (an example would be where a local plan designation for a planned street is changed from a "minor arterial" to a "major collector"); Changing standards implementing a functional classification system (examples of this type of change would include amendments to driveway or street spacing requirements); and allowing types or levels of uses which would result in levels of travel or access that are inconsistent with the functional classification of a transportation facility.
[37] DLCD, "Frequently Asked Questions about Section 0060 of the Transportation Planning Rule" *available at:* http://www.oregon.gov/LCD/docs/transportation/660-012-0060_faq_121508.pdf
[38] Or. Admin. R. 0060(4)(b)(B).
[39] Or. Admin. R. 660-012-0060.

and improvements the local government can rely on as "being available" for use by the end of the planning period.[40]

Mitigating Significant Effect

Prior to the recent 2012 changes, ways to remedy the significant effect included: adding planned transportation facilities or improvements; limiting land use; or modifying performance standards to tolerate additional congestion. In addition to the former remedies, the recent amendments allow local jurisdictions to remedy an effect by "providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations." To do so, the provider of the significantly affected facility must show that the *system-wide benefits are sufficient to balance the significant effect*, even though the improvements would not result in consistency for all performance standards.[41] Additionally, local governments are now permitted to approve an amendment to an acknowledged comprehensive plan or land use regulation with a partial mitigation if the amendment qualifies as "economic development." Generally, industrial or traded-sector jobs created or retained are considered economic development.[42] However, smaller communities with a population of less than 10,000, outside of a Metropolitan Planning Organization and outside of the Willamette Valley, can use a broader definition for economic development to include land uses for "other employment use" or "prime industrial land" as defined by OAR 660-009-0005.[43]

Standards Used to Measure Impact

The Oregon Highway Plan (OHP) covers a number of policy areas for the planning and management of the state highway system. Specifically, the OHP Mobility Policy (Policy 1F) establishes how the state measures mobility and establishes objectives that are consistent with the direction of the Oregon Transportation Plan (OTP) and other OHP policies. OHP mobility targets (or standards) are used to identify performance expectations for transportation system planning and are used to review plan amendments that impact the state highway system in compliance with TPR Section 0060.[44]

For state highways, mobility standards are expressed as acceptable "volume-to-capacity" ratios for traffic. Local governments and Oregon Transportation Commission (OTC) set the standard for capacity and transportation system performance through their adopted transportation system plans (TSPs). Most local governments use a system comparable to the OHP— with letter grades to define acceptable "level of service" or LOS. The system rates service from "A", light traffic and free flow conditions to "F" heavily congested, with significant delays at traffic lights or to make turn movements. Most local governments set "D" or "E" as the acceptable performance standard. Local governments are permitted to lower their performance standards to accept greater levels of congestion.

When a planned development would exceed the applicable performance standard, the TPR authorizes local governments to amend their TSPs to modify the performance standards to accept greater motor vehicle congestion.[45] However, where state highways are affected, local governments need to get OTC to agree to change its performance standards as well. When a plan or zone change occurs within 1/4[46] mile of the

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[40] ODOT, "Transportation Planning Rule Reviews: Guidelines for Implementing Section 660-012-0060, *available at*: http://www.oregon.gov/ODOT/TD/TP/docs/Plans/TPRGuide.pdf?ga=t

[41] Or. Admin. R. 660-012-0060(2). *This is new language from the 2012 changes.*

[42] Or. Admin. R. 660-012-0060 (11) provides that: "Industrial" means employment activities generating income from the production, handling or distribution of goods including, but not limited to, manufacturing, assembly, fabrication, processing, storage, logistics, warehousing, importation, distribution and transshipment and research and development. "Traded-sector" means industries in which firms sell their goods or services into markets for which national or international competition exists.

[43] "Prime Industrial Land" means land suited for traded-sector industries as well as other industrial uses providing support to traded-sector industries. Prime industrial lands possess site characteristics that are difficult or impossible to replicate in the planning area or region. Prime industrial lands have necessary access to transportation and freight infrastructure, including, but not limited to, rail, marine ports and airports, multimodal freight or transshipment facilities, and major transportation routes. Traded-sector has the meaning provided in ORS 285B.280.

"Other Employment Use" means all non-industrial employment activities including the widest range of retail, wholesale, service, non-profit, business headquarters, administrative and governmental employment activities that are accommodated in retail, office and flexible building types. Other employment uses also include employment activities of an entity or organization that serves the medical, educational, social service, recreation and security needs of the community typically in large buildings or multi-building campuses.

[44] ODOT, "Report to the 2012 Oregon Legislature" *available at*: http://www.oregon.gov/ODOT/TD/TP/docs/OHP11/LegRpt.pdf

[45] Or. Admin. R. 660□ 012□0060(2)(d)

[46] Changed in 2012—from one-half mile of an existing or planned interchange as measured from the center point of the interchange.

ramp terminal intersection on interstate freeways, including interchanges on I-5, I-82, I-84, as well as interchanges on I-205, I-405 (in the Portland Metropolitan area) and I-105 in the Eugene-Springfield area, additional review was required.

While the TPR was undergoing revisions, the OTC adopted OHP Policy 1F revisions at in December 2011.[47] According to ODOT's Report to the Legislature, a primary concern in making the revisions was that economic development, transportation and land use objectives are not balanced. Additionally, transportation requirements were making it more difficult to increase development densities, especially within urban centers, contrary to statewide planning goals and many community objectives. As the paper indicates below in the interview findings, these are the two main issues that interviewees overwhelming expressed with the TPR prior to the recent changes. The following are the recent amendments to Policy 1F:

- Exempt proposals with small increase in traffic
- Use average trip generation, not reasonable worst case
- Streamline alternate mobility standard development
- Corridor or area mobility standards
- Standardize a policy framework for considering measures other than volume to capacity ratios (v/c)

III. Methodology

This paper seeks to understand the implications of the recent changes through interviewing professionals from around the state. In 2010, LCDC was receiving requests from cities and counties expressing concern that Section 0060 was having unintended consequences and the Commission should consider the Administrative Rule. In January 2011, LCDC and the OTC convened a Joint Subcommittee based on stakeholder concerns that the TPR and OHP were having unintended consequences for balancing transportation mobility with community and economic development objectives. During Joint Subcommittee meetings two themes were often discussed. First, economic development, transportation and land use objectives should be better balanced. In practice, transportation mobility was taking precedence over these objectives. Second, stakeholders indicated that transportation requirements made it difficult to increase development densities—particularly in urban centers. Subsequently, the Oregon Legislature passed Senate Bill 795, requiring the Oregon Transportation Commission (OTC) and the Land Conservation and Development Commission (LCDC) to amend both the Oregon Highway Plan (OHP) and the Transportation Planning Rule (TPR). SB 795 called for changes that would "streamline, simplify and clarify the requirements" and "better balance economic development and the efficiency of urban development with consideration of development of the transportation infrastructure." In accordance with the mandate, LCDC directed DLCD to initiate the rulemaking process. The Rulemaking Advisory Committee (RAC) included 22 professionals from around the state. In December 2011, LCDC adopted the amendments described below.

This paper considers the implications of the 2012 Amendments. The paper seeks to identify whether the changes address the goal to better balance transportation mobility with economic and urban development. Through interviewing professionals from around the state from a range of professions, the paper seeks to capture whether the implications are universally perceived or vary based on location or profession.

Research Approach

This paper relies on qualitative research. Qualitative research is useful to gain an "in-depth understanding of purposively selected participants from their perspective."[48] I asked exploratory and descriptive questions that will provide "experiential" understanding of the data. My research relies on in-depth semi-structured interviews. Additionally, I conducted document analysis of case law, administrative rules and legislative reports relating to the TPR.

[47] ODOT, "Report to the 2012 Oregon Legislature"
[48] Patten, Mildred L. Purposing Empirical Research: A Guide to the Fundamentals, 29. Print.

The use of purposively selected participants requires the researcher to have access to particular types of participants who are especially likely to help in gaining an understanding of a phenomenon.[49] Snowball sampling is a non-probability sampling technique where existing subjects identify future subjects based on personal knowledge that future subject is familiar with the topic. Through snowball sampling, I connected with individuals that have professional experience working with the former TPR and understanding of the recent changes. I began with two attorneys from the Eugene City Attorney's Office. These attorneys have been actively involved in litigation and the rulemaking process and were known to be very familiar with the TPR. From there I was able to identify future subjects. The individuals served as "experts" and helped me identify issues and implications of the changes. Twenty individuals were interviewed. The interviewees represented a range of professions, including planners, lobbyist, elected officials and attorneys. Additionally, the interviewees represented both the public and private sectors. Based on the number of people that are familiar with the Rule, it is probable that I not only captured a cross-section of the experts on the Rule but also the majority of the people in the state that can actually be considered experts. When I began to find no new themes or arguments I stopped soliciting suggestions for new interviewees.

To avoid influencing the participant's response, the interview questions were semi-structured and open-ended. Some questions were developed in advance with follow-up questions developed on the spot in light of participants' responses. Generally, the interviewee was first asked about the former rule. In particular, the interviewee was asked to identify what worked well and what did not work well with the TPR prior to the recent changes. Next, the interviewee was asked about the recent changes. Because the interviewees were collected through snowball sampling and identified as individuals who are familiar with the recent changes, it was not necessary to explain what amendments were recently added. The interviewees were asked if they felt that the changes addressed the issues they described with the former rule. Additionally, each interviewee was asked to describe what he perceives as the implications of the specific changes they identified. Lastly, interviewees were asked to identify any additional individuals that I should discuss the recent changes with.

Analysis

After completing all the interviews, all names were removed from the interviews and analyzed based on the individual's profession, size of community or level of government in which they work. The content was analyzed to identify themes that emerged. The former rule was analyzed to generally consider the strengths and weaknesses. The new rule adopted 6 major changes, including three new subsections and 3 changes to former sections. Each amendment is explained and then followed by a summary of the interviewees responses to the change.

III. Interview Findings

This section provides the findings based on interviews with professionals from around the state. The first part considers the former TPR, Section 0060, prior to the January 2012 Amendments. That part is divided into the strengths and weaknesses. The second part explores each of the six major amendments. The amendments are first explained and followed by the reactions, if any, from the interviewees.

The Former TPR, Section 0060

Strengths

Generally, individuals who worked on the state level, either as lobbyist, elected officials, or government employees, felt that in the big picture, the TPR works well. Land use and transportation are planned together. When LCDC adopted its 19 statewide goals, land use and transportation were not truly linked. It really was not until the TPR was adopted that land use and transportation were considered together. Prior to that, and still in most states, land use would get out ahead of the transportation system. Formerly there were "separate spheres" of planning—transportation and land use. Then the transportation system would play catch-up, trying to service those uses. The TPR links transportation and land use planning so that they would be done in coordination and would be consistent with one another. Additionally, the Rule, through

[49] *Id.*

the Transportation System Plan requirements, encourages communities to think about what kind of development they want and where and what kind of transportation system to service the development.

Section 0060 supported the TPR by recognizing that there is often an imbalance in land use and transportation planning. A state-level planner explained that it was clear that most cities were going to experience congestion down the road. However, when the TPR was adopted, the Commission made a policy decision that they would not require every city to rewrite their recently acknowledged Comprehensive Plans. Rather, when zone changes or other amendments are made then Section 0060 is triggered and the impact on the transportation system would need to be considered.

A DLCD staff member described Section 0060 as a means to prevent cities from "mak[ing] the imbalance any worse. When you are in a hole. Stop digging." Section 0060 required the land use system to be coordinated with the investment in transportation infrastructure. An elected official stated that without Section 0060 "we would have open season for local governments to do things that may make sense for their community but burden the state highway system or regional provider." Local jurisdictions were forced to consider the effects of their decision on the infrastructure. One state-level planner, commented that often "development could not move forward because the developers could not afford the traffic mitigation." That planner saw this as a good thing because it would prevent congestion on our transportation facilities.

Even many professionals who work on the local level agreed that the TPR as a whole serves an important function by coordinating land use decisions with transportation infrastructure. In particular, the requirement for all local governments to develop TSPs was very useful and helped create planning documents that made sense.

Weaknesses

Nonetheless, virtually everyone agreed that there were unintended consequences of Section 0060. In particular, Section 0060 limited economic development and compact urbanism. Communities were unable to welcome opportunities for development because of the impact on the transportation corridor. And while the local jurisdiction or the developer could pay to remedy the "significant effect," this was often cost prohibitive thereby limiting the communities' economic development potential. One individual argued that the TPR allowed ODOT to extract the amounts of money that the taxes in Oregon generally are not willing to put into the system from developers. In particular, several interviewees stated that Section 0060 effectively required one developer to be responsible for more infrastructure than his development required or impacted. "The last developer was penalized for the sins of the people that came before them."

At the same time, communities were unable to up-zone, to more compact development, because of the potential impact on the transportation corridor. And while certain higher densities, along with the increased congestion, may be appropriate for the location, the black and white rules of Section 0060 prohibited the zone or comprehensive plan amendment. By preventing the compact land use policies from going forward "within cities where there happens to be a state highway, the policy goal of getting more compact development so that we do not have as much need for auto transportation was disregarded." In some cases, development was pushed to the edges of cities or the metro area because that is where the system was not yet in failure. TPR unintentionally got in the way of doing good development. Many agreed that congestion is a good thing in some places. In particular, in downtown-areas where you want people walking at all hours, congestion forces traffic to slowdown and becomes a friend to neighborhoods.

A transportation planning professional stated that Section 0060 ultimately amounted to a moratorium, due to the rule's inflexibility. Specifically, the interviewee felt that the OHP standards that are used to measure the impact on the facility are the problem. The interviewee explained that there is a tremendous amount of uncertainty and "educated guesses" (about future growth, future growth mode split and future trip generation) that go into explaining the future transportation impact. Despite the number of educated guesses, performance measures are then calculated on a very precise level. The performance measures do not take into account the amount of variety that exists on any given day. Because of all the variability, both on a given day and into the future, there is a lot of uncertainty in our methodology and, consequently, error.

Although the interviewee understands that the traffic engineer profession uses a complex, peer-reviewed methodology (and these standards are accepted and universally agreed upon), there are *other goals* besides traffic management—such as a safe environment or economic development. However, because we do not have precise measuring tools for these other goals, we do not evaluate them in the same way. In planning practice, we consider the other goals but there is not a methodology to give us a specific measure to meet but yet we still have to meet the capacity one at the very refined level. Additionally, the transportation planning professional expressed concern that Section 0060 requires local jurisdictions to measure capacity at intersections while in reality they should be planning for the entire system.

One planning professional, who works on a local government level, stated that "cities are very dynamic, comprehensive plans with zones attached don't always get the zones right the first time." However, to make changes the TPR required local jurisdictions to conduct a very difficult analysis. The Section 0060 requirement was difficult for agencies and cities to deal with. This seemed unnecessarily burdensome as cities evolve—certain designations do not work or opportunities are presented to develop parcels in an unanticipated way. The interviewee argued that when cities and communities change and different opportunities or kinds of uses are presented, the community should be allowed to come up with these changes and not be so dependent on the state to tell them no that is wrong or right. The best planning, the interviewee argued, comes from when the community develops the project ideas and solutions.

2012 Amendments

Overall, while some felt that specific amendments went too far and others felt that specific changes did not go far enough, the interviewees *generally* agreed that the changes were an appropriate response to many of the issues. One interviewee stated that "the former rule was a brick wall and now we have doors and windows in the brick wall." While many commented that the changes were often politically motivated and were "Portland-centric," they still felt satisfied in the state's willingness to be open and address the issues. The following sections consider specific changes or additions and what the interviewees described as potential implications.

Transportation Demand Management – Subsection (1)(c)

When determining whether or not there is a "significant effect," transportation demand management – or any other enforceable, ongoing condition of approval that would reduce the amount of traffic generated – can be factored in to *completely eliminate or diminish* the significant effect. Almost no interviewees discussed this amendment. A staff-person from DLCD explained that it was the practice of the agency to consider transportation demand management or other requirements to limit traffic generation when calculating the significant effect. The amendment simply codified the practice. The amendment is consistent with the intent of Section 0060, if new trips are not generated then it would be unnecessary to calculate them as a part of the significant effect.

Other Modes, Facilities or Locations – Subsection (2)(e)

The 2012 Amendments added three new options for addressing a "significant effect," including improvements to:

- Other *modes* (for example: the significant effect is motor vehicle traffic congestion, the mitigation could be adding sidewalks and bicycle lanes),
- Other *facilities* (for example: the significant effect occurs along one street, the mitigation could be on another parallel street),
- Other *locations* (for example: the significant effect occurs at one intersection, the mitigation could be at other intersections along the same highway).

The provider of the significantly affected facility must provide a written statement that the *system-wide benefits are sufficient to balance the significant effect*, despite the fact that the alternative improvements would not necessarily make all performance standards consistent. That is to say, if the significant effect occurs on a state highway, then these options are only allowed with ODOT concurrence that the benefits on the system are sufficient to balance the effect at an intersection even if the improvements do not improve the effect on the affected intersection.

Virtually all interviewees agreed that this was a positive change in Section 0060. One planning professional stated that this change "opens a big window." Now local jurisdictions have the opportunity to at least identify alternative policy and measures. Several interviewees mentioned that the change will encourage "out-of-the-box" thinking. Interviewees from all professions commented that mitigation on the corridor-level, as opposed to focusing exclusively on the intersection, is logical. For example, a local government might want to create economic development at a certain location and they can mitigate traffic at another place on the corridor but the overall level of service of mobility is maintained. Prior to the amendment, there was only one way out of significant effect—essentially to build more capacity for automobiles. There was little any jurisdiction could do to get around this. Even when streets were at full build out, all a jurisdiction could do was add left-turn lanes.

However, several interviewees expressed concern with the balancing test. A city attorney expressed concern that the test is subjective. Whether the proposed improvement in the form of "another mode" creates benefits that are sufficient to balance the system-wide effects will likely become an issue for the courts to decide. Neighborhood groups and other entities opposing new develop can easily challenge the conclusions reached and force the courts to interpret the balancing test.

Failing Facilities – Subsection (3)(a)

If a facility is projected to fail to meet the performance standards at the planning horizon, and if there are no funded improvements that would fix this, then a proposed rezoning must avoid further degradation at the time of development, but is not required to provide mitigation to meet the performance standards. This section was not discussed in any of the interviews.

Rezoning Consistent with Comprehensive Plan Map – Section (9)

Section (9) is an entirely new addition to Section 0060. Now when a local government may find that an amendment to the zoning map does not significantly affect an existing or planned transportation facility if:

- The proposed zoning is *consistent with* the comprehensive plan map designation and does not change the comprehensive plan map;
- The local government has an acknowledged TSP and the proposed zoning is *consistent* with the TSP; and
- The area subject to the zoning map amendment was not exempted from the TPR at the time of an urban growth boundary amendment or the area was exempted form this rule but the local government has a subsequently acknowledged TSP amendment that accounted for urbanization of the area.

Almost no interviewees mentioned this section. A staff-member from DLCD stated that this was not a huge policy shift but more a clarification of how many have always interpreted the rule. The DLCD staff person indicated that the term consistent is a term of art and it was assumed that "consistent with" would be interpreted accordingly.

Compact Urban Development – Section (10): Multi-Modal Areas (MMA)

Section (10) was added to address the concern that Section 0060 was interfering with compact urban development. Section 10 permits local governments to create Multi-Modal Areas (MMA). MMAs are designated areas where traffic congestion (e.g., volume to capacity ratio) does not have to be considered when rezoning property, amending comprehensive plan designations or amending development regulations. To qualify as an MMA, the area must allow a range of uses such as residential (allowing at least 12 units per acre), offices, retail, services, restaurants, parks, plazas, civic and cultural uses. Furthermore, the development regulations for the area must be appropriate to an urban center. The zoning cannot allow (or must at least limit) low-intensity uses such as industrial, automobile sales, automobile services and drive-throughs.[50]

[50] http://www.oregon.gov/LCD/docs/rulemaking/2009-11/TPR/TPR_Amendments-Legislative_Report.pdf

If a local government proposes an MMA near a freeway interchange, then the local government must get approval from ODOT. If there is the potential for backups on the off-ramps, the local government and ODOT must reach an agreement about how they would be addressed. These additional requirements only apply during the designation process. *Once the MMA is designated, it exempts the local government from having to consider congestion, even near the interchange.*

Many interviewees agreed that this was a very desirable addition and will solve the issue of Section 0060 limiting compact development. MMAs are helpful to the regional system by controlling the congestion to one area while creating significant local impacts by permitting high densities. A state-level planner explained that while the government cannot control the quantity of development, at minimum they can control where the development occurs and how much or little it impacts the regional system. Through creating "urban centers," the belief is that fewer regional trips are generated from the new development.

However, interviewees that were interested in discussing the specifics of the amendment were more critical. In particular, some interviewees expressed concern that the designation of an MMA takes ODOT "off the hook." Once an area is designated as an MMA, there is little chance that ODOT will do anything to address congestion.[51] Accordingly, one local-level planner stated that the amendment went too far since the amendment allows communities to develop without considering the impact on the transportation system and ODOT is relieved of responsibility to address any future congestion.

Additionally, professionals who worked with rural communities felt that the amendment is only beneficial to Portland. One interviewee suggested it would make more sense to allow the local jurisdiction define what an MMA is for their community. For example, medium-sized cities could likely get about 10 units per acre (as opposed to 12) and still create a viable mixed-use area. Although it is important to note that interviewees from the City of Eugene did not believe this density would be difficult for them to achieve.

Economic Development – Section (11)

Section (11) was added to allow for greater flexibility when rezoning land to facilitate economic development. This section permits a local government to approve a rezoning for economic development with *only partial mitigation of traffic impacts*. Economic development has two definitions. One applies to the entire state while the other applies to smaller cities. The statewide definition states that a proposed rezoning is for economic development if it allows (and is limited to) uses that are "industrial or traded-sector." "Industrial" means employment activities generating income from the production, handling or distribution of goods including, but not limited to, manufacturing, assembly, fabrication, processing, storage, logistics, warehousing, importation, distribution and transshipment and research and development. "Traded-sector" means industries in which member firms sell their goods or services into markets for which national or international competition exists.

Small cities with populations below 10,000, outside of a metropolitan area and outside the Willamette Valley, are provided a broader definition for economic development. Specifically, the smaller cities can include "prime industrial land" and "other employment uses " as economic development. The broader definition allows for a wide range of employment activities. Retail is an important example of a use that is allowed under the broader definition, but restricted in the statewide definition.

This section requires coordination with a broad range of state, regional and other local governments that would be affected by the decision. The coordination requirement does not, however, give other agencies authority to block a local rezoning decision. Approval authority belongs only to governments that have direct jurisdiction over the transportation network that would be affected (e.g., ODOT if a state highway is affected, the county if a county road is affected and the city of a city street is affected).

If a proposed rezoning qualifies as economic development, then it can be approved without mitigating the full effect on traffic (i.e. partial mitigation is permitted). Subsection (b) allows "partial mitigation" but does not define how much mitigation is required because it will be different in every case based on the

[51] Section (2) provides that a "local government using subsection 2(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion."

balance of economic benefit and traffic impacts. Local government determines if benefits outweigh negative effects on the local system. ODOT, coordinating with Business Oregon, then makes the determination for the state system.

Sentiments regarding this amendment varied significantly. A planning professional felt that the change goes too far. New development "is now exempt to deal with traffic congestion and provided with a subsidy but it is a subsidy that everyone will have to pay for." The interviewee stated that this was not the best method to promote economic development.

Many interviewees discussed the separate definition provided for small cities. One elected official was satisfied that small, rural communities were permitted to look beyond the "traded-sector" businesses. The interviewee argued that small, rural communities will never have the opportunity to deal with traded-sector businesses, however, a Fred Meyer could be very important job creator to the community. Another elected official, however, felt that this was a way for communities that are outside of the I-5 corridor (where, he argued, much of the State's employment centers and economic drivers exist) to capture big retail projects. This official felt that national retailers and shopping center developers would take advantage of smaller communities and result in projects that ultimately had negative consequences and only created temporary jobs.

Planners were divided in their support of the broader definition for small cities. For example, a state-level planner stated that: "building a store is not economic development. A locality has the market that it has, if you are meeting the demand all you are doing is taking money from some place else and moving it around." He went on to explain that neighborhood commercial development does not run into problems with Section 0060 of the TPR, rather it is regional malls and big box stores that cannot go forward because of the impact on the transportation corridor. Other planners expressed that retail served as economic development for their community and would limit the impact of transportation on the regional system.

V. Implications

Ultimately, there was a strong consensus that the 2012 Amendments were a move in the right direction—addressing the major barriers to compact urban growth and economic development. Still, the changes will likely generate new unintended consequences. Prior to the recent changes, Section 0060 was onerous *but* seemed to provide "black and white" rules. The 2012 Amendment seem have resulted in a major shift to "gray." Several of the recent changes are dependent on subjective tests or vague requirements. In this section, I provide what I perceive to be the implications of the amendments. While the six major changes were discussed above, I only discussed five here as one change—Subsection (1)(c) Transportation Demand Manage measures—was only a codification of prior practice and does not seem likely to generate any new implications.

Other Modes, Facilities or Locations – Subsection (2)(e)

The amendments provide for three new options for addressing a significant effect. Local governments can make improvements to other modes; other facilities; or other locations. While this amendment allows communities to think creatively about new ways to shape their transportation system, the amendment still demands approval from the affected facility—if the significant effect occurs on a state highway, then these options are only allowed with ODOT concurrence or if on a county road within a city, then county concurrence is required. ODOT would have to agree that the system-wide benefits to the alternative mitigation is sufficient to impact the significant effect, even if the actual facility is not improved by the alternative mitigation. This is an entirely subjective test. It remains to be seen whether the amendment will in practice allow for creative planning on the state or country level. Success with this amendment will require good partnership and dialogue between the facility owner and the local jurisdiction.

Local jurisdiction *can* be creative and authorize any mitigation that they determine benefits the entire system sufficiently to outweigh the impact on the local facility. However, the test remains subjective and can easily be disputed by groups in opposition to the development. Ultimately, it seems that the subjective balancing test will result in litigation.

Rezoning Consistent with Comprehensive Plan Map – Section (9)

If a proposed rezoning is *consistent with* the existing comprehensive plan map designation, and *consistent with* the acknowledged transportation system plan, then it can be approved without considering the effect on the transportation system. While the state-level planner stated that "consistent with" is a term of art and DLCD will apply it according to case law, the term is used when requiring comprehensive plans of cities and counties to be "consistent" with the zoning maps. Section 9, however, also requires that the proposed rezoning is *consistent with* the TSP. Unlike zoning maps, TSPs provide varying level of detail. In particular, small communities often do not provide detailed traffic modeling or even the assumptions used to develop the TSP. Therefore, to find that a rezoning is consistent with the TSP will not be as straightforward as finding whether the comprehensive plans of two or more cities and counties are consistent with regard to who exercises jurisdiction in a territory.

Compact Urban Development – Section (10)

Local governments can designate Multi-Modal Areas—areas where traffic congestion does not have to be considered when rezoning property, amending comprehensive plan designations or amending development regulations. The MMAs *must* allow for a range of uses; have particular development standards; limit or prohibit low-intensity uses; and be entirely within a UGB.

The new section does not require the local jurisdiction to have the above conditions at the time of MMA-designation but rather requires only that the conditions are in place for future development to occur in accordance with the standards. However, if the city goes through the process to establish an MMA and then later removes any of the design regulation standards, there is no clear obligation to de-designate the MMA. Certainly, a zone change to take away the various requirements would be subject to the TPR, however, design standards or other requirements will not trigger the TPR.

Economic Development – Section (11)

If a proposed rezoning qualifies as economic development, then it can be approved with *partial mitigation* of the traffic effect. As described above, there are two definitions for what qualifies as economic development depending on the size of the jurisdiction. Ultimately, if the purpose of the amendment is to encourage economic growth, the definitions are too restrictive. There are many businesses that would not fit into the traded-sector or industry definitions.

If the development qualifies as economic development, *partial mitigation* is permitted. The section does not define what qualifies as partial mitigation but rather allows each individual case to be based on the balance of economic benefit and traffic impacts. Local government determines if benefits outweigh negative effects on the local system. For the state system, ODOT, coordinating with Business Oregon, makes the determination of the balance of economic benefits with traffic impacts. Like Section (2)(e), the effectiveness depends on a subjective test and whether ODOT is willing to agree with non-traditional schemes. Additionally, Business Oregon is in a unique position to quantify the economic benefit of the development. It is not clear that Business Oregon has ever been involved in a similar scheme.

Lastly, subsection (c) requires coordination with state, regional and other local governments. "Coordinate" is a term of art with LUBA. Under ORS 197.015(5), comprehensive plans are "coordinated" when the needs of all levels of government have been considered and accommodated as much as possible, and the local government has balanced the needs of all affected governmental units and selected a particular course of action from among the competing proposed courses of action. *Santiam Water Control District v. City of Stayton*, 62 Or LUBA 149 (2010). Therefore, if the intent of the Commission was to apply the term coordinate in accordance with case law, even if the proposed use satisfies the definition for economic development *and* partial mitigation is weighed and approved, the local jurisdiction will still need to "balance[] the needs of all affected governmental units." It seems that the amendment contains three high hurdles and potentially will not provide much room for economic development to actually occur.

Conclusion

The changes certainly demonstrate an effort to address the major issues of prohibiting compact urban development and limiting economic development. However, the amendments resulted in a shift from a "black and white" rule to a "gray" rule. The changes will now require DLCD and ODOT to take a different

approach in applying Section 0060. Implementation of several of the amendments requires "balancing tests" making litigation more likely. Accordingly, decisions will need to be at a higher level of management and will require careful thinking.

Additionally, future research should consider why Florida abandoned their concurrency requirement. Although the approaches were distinct, in that Florida required concurrency to happen in coordination with the development while Oregon required in within the planning horizon, there are potentially lessons learned from Florida's decision that the approach was no longer appropriate.