

Attachment 6



Ralph Bloemers
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October 8, 2015

**Via Email to legal@newbergoregon.gov
and Hand Delivery**

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**Re: Type of Decision on Oregon Department of Transportation's
Newberg Dundee Bypass Transportation System
Type IV Application (the "Application")**

Dear Ladies and Gentlemen:

This office represents the Ladd Hill Neighborhood Association. My colleague Maura Fahey has spoken to the attorney for the City of Newberg and asked for clarification as to whether the City of Newberg intends to follow the procedures necessary for rendering a quasi-judicial decision and issue the necessary findings of fact and conclusions of law with respect to the application entitled "Newberg Dundee Bypass Transportation System Type IV Application." This application was submitted by the Oregon Department of Transportation to the City of Newberg for its review and approval.

The Newberg City Attorney has informed us that the City intends to treat the matter as a legislative decision, not as a quasi-judicial decision. On behalf of the Ladd Hill Neighborhood Association, I write to ask that the City of Newberg reconsider its position and follow the proper procedures.

As you know, the Application details solutions to traffic and safety issues that have been identified through public participation. The Application was submitted by the Oregon Department of Transportation to meet its obligations under the federal law (the National Environmental Policy Act) and mitigate significant negative impacts that would result from the Phase 1 terminus. Specifically, the Phase 1 eastern terminus was found to increase traffic and decrease safety on Wilsonville Road where the temporary configuration of the eastern terminus of the Bypass feeds into local roads.

To address the safety concerns and as mitigation for the potentially significant negative impacts of the temporary configuration, the Oregon Department of Transportation has proposed that the City of Newberg adopt this second amendment to its Transportation System Plan. State law governing amendment to the TSP requires that Newberg follow a specific process and that Newberg substantively determine that the amendment is consistent with State land use laws and goals.

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Oregon courts use a three-part test to determine whether a county's decision is quasi-judicial, considering: 1) whether the process is bound to result in a decision, 2) whether the decision is bound to apply pre-existing criteria to concrete facts, and 3) whether the action is directed at a closely circumscribed factual situation or a relatively small number of people. Newberg must apply pre-existing land use laws and goals to a proposal to make small modifications to an intersection and the lane configuration in a manner that protects public health and safety, as cited in the Comprehensive Plans and TSPs of all affected cities, counties and the State. The Application seeks closely circumscribed changes to a single intersection and a small segment of the terminus, neither of which requires an amendment to the existing TSP map or right-of-way footprint.

Legal Background.

In *Strawberry Hill 4 Wheelers v. Benton County Board of Commissioners*, 287 Or 591, 601 P2d 769 (1979), the Supreme Court stated the general test to be used in determining whether a local government action is quasi-judicial or legislative for purposes of judicial review pursuant to ORS 34.040. Courts look at: (1) whether the process is bound to result in a decision; (2) whether the decision is bound to apply preexisting criteria to concrete facts; and (3) whether the action is directed at a closely circumscribed factual situation or a relatively small number of persons. *Strawberry Hill 4 Wheelers*, 287 Or at 602-603, 601 P2d at 775. In a subsequent decision, this Court emphasized that quasi-judicial decisions involve application of pre-existing criteria to a discrete set of facts. See *Estate of Gold v. City of Portland*, 87 Or App 45, 51, 740 P2d 812, 815 (1987) (action need not result in decision to be quasi-judicial).

Strawberry Hill involved a decision to vacate a road pursuant to ORS 368.580. ORS 368.580 sets forth specific procedures for the county to follow, including the requirements that the county hold a public hearing and prepare a report in support of the determination that the vacation would benefit the public. *Strawberry Hill*, 287 Or at 605. ORS 368.580 did not, however, set forth any specific substantive criteria other than the criteria that the vacation should benefit the public. The State Supreme Court issued the fundamental opinion governing this determination under Oregon law:

Generally, to characterize a process as an adjudication presupposes that the process is bound to result in a decision and that the decision is bound to apply preexisting criteria to concrete facts. The latter test alone proves too much; there are many laws that authorize the pursuit of one or more objectives stated in general terms without turning the choice of action into an adjudication. Thus a further consideration has been whether the action, even when the governing criteria leave much room for policy discretion, is directed at a closely circumscribed factual situation or a relatively small number of persons.

Id. at 602-02. In its decision, the Supreme Court focused upon whether the decision applies preexisting criteria to a discrete set of facts. The State Supreme Court held that

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the statute at issue in *Strawberry Hill* was “a hybrid.” *Id.* at 606. The Court held that the statute channels the decision “by fact finding procedures and broadly stated criteria” and is therefore “a ‘quasi-judicial’ function for the purposes of the writ of review.” *Id.* The question here is whether either the substantive requirements or the procedural requirements at play here require the City of Newberg to render the decision quasi-judicial for purposes of judicial review. As set forth below, the substantive requirements provide specific statutory criteria that must be met and the procedural requirements in this case demand public involvement and a fact-finding procedure to support the decision.

Legal Analysis.

Factor 1: Newberg is bound to make a decision in this case. The proposed TSP amendment application was submitted by ODOT, rather than initiated by the City of Newberg itself. ODOT has stated very plainly that these changes are needed to ensure the safety of Wilsonville Road and to meet land use goals for transportation. Newberg may not simply ignore ODOT’s request. Newberg must issue a decision, unless ODOT withdraws the request or ODOT determines that the City approval is not required.

Factor 2: Here ODOT has set forth a suggested application of statewide planning goals and comprehensive plan provisions. The City of Newberg must investigate these and render a decision in light of these criteria. This decision is not a policy decision that will affect future land use decisions. The application presents a decision to change a temporary configuration of the highway to ensure that ODOT meets federal requirements of the National Environmental Policy Act and state land use requirements to ensure safe transportation. As ODOT explains in the proposal, the change does not require any TSP map (as in right-of-way footprint) or text amendments.

Factor 3: The two proposed changes are both confined changes to a small segment of the intersection at the east end of the proposed bypass. The proposed action is directed at a closely circumscribed factual situation related to a temporary configuration of the east end of the bypass and is designed to ensure safety and functionality of the temporary terminus.

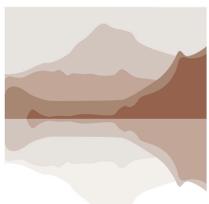
All three of these factors are met here. Newberg must review these proposed technical changes requested by ODOT and ensure they meet the criteria in state land use law and render a quasi-judicial decision.

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Conclusion.

The City of Newberg cannot simply label this decision a “legislative” action when it is plainly is a quasi-judicial decision matter that meets all the above tests. Ladd Hill Neighborhood Association requests that the City of Newberg reconsider its position, confirm the above interpretation and provide the public with a legally compliant process for rendering a determination on the quasi-judicial determination that is before it, which includes a hearing and decision by a neutral body of decision-makers and the issuance of findings of fact and conclusions of law. Please feel free to contact me if you have any questions, and we look forward to hearing from you.

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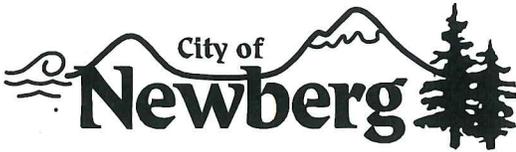
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Sincerely,

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Community Development Department

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October 26, 2015

Ralph Bloemers
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Re: Type of decision for ODOT Type IV application for a Comprehensive Plan amendment

Ralph,

We received your letter regarding whether the city's review process should be quasi-judicial or legislative for the Oregon Department of Transportation (ODOT) application for a Type IV Comprehensive Plan amendment. This is a process authorized in Newberg Municipal Code (NMC) 15.100.060, which plainly states that Type IV Actions are Legislative. The City will follow the requirements of the municipal code.

I appreciate your analysis on the issue; however, the three-pronged analysis laid out by the courts for a quasi-judicial decision has not been met. As you note, the three prongs are:

- 1) *Is the process bound to result in a decision?* The answer to this is "yes," the NMC requires that an application be processed and a decision rendered.
- 2) *Is the decision bound to apply preexisting criteria to concrete facts?* The answer to this is not as clear cut. Oregon Administrative Rule 660 Division 12 governs TSPs, and does not specifically spell out criteria for amendments. The applicable portions of OAR 660 Division 12 to this matter are the following:
 - 660-012-0015(4): Cities and counties shall adopt regional and local TSPs required by this division as part of their comprehensive plans. Transportation financing programs required by OAR 660-012-0040 may be adopted as a supporting document to the comprehensive plan.
 - 660-012-0045(1)(c): In the event that a transportation facility, service or improvement is determined to have a significant impact on land use or to concern the application of a comprehensive plan or land use regulation and to be subject to standards that require interpretation or the exercise of factual, policy or legal judgment, the local government shall provide a review and approval process that is consistent with OAR 660-012-0050. To facilitate implementation of the TSP, each local government shall amend its land use regulations to provide for consolidated review of land use decisions required to permit a transportation project.
 - 660-012-0050(5): If a local government decides not to build a project authorized by the TSP, it must evaluate whether the needs that the project would serve could otherwise be satisfied in a manner consistent with the TSP. If identified needs cannot be met consistent with the TSP, the local government shall initiate a plan amendment to change the TSP or

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the comprehensive plan to assure that there is an adequate transportation system to meet transportation needs.

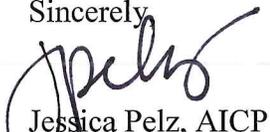
You state in your letter that "State law governing amendment to the TSP requires that Newberg follow a specific process and that Newberg substantively determine that the amendment is consistent with State land use laws and goals." The state law clearly says that the city may determine the approval process for the TSP/comprehensive plan amendment. There are not clear and objective criteria for a comprehensive plan amendment; rather, the amendment must meet comprehensive plan goals and policies and statewide planning goals, which are more aspirational in nature than clear and objective criteria tailored to concrete findings of fact. Your letter additionally states that "The application presents a decision ... to ensure that ODOT meets federal requirements of the National Environmental Policy Act and state land use requirements to ensure safe transportation"; however, you do not list any applicable fact based criteria the city would be required to use for a decision. If you have additional information on this subject that you believe the City should consider, please provide that immediately.

- 3) *Is the action directed at a closely circumscribed factual situation or a relatively small number of persons?* The answer to this question is clearly "no," for several reasons. First, the situation is an intersection in the city's transportation network, and changes to the framework of the intersection have ripple effects throughout the transportation network in that region of the city. Second, due to the ripple effect of the potential transportation network, hundreds of city residents may be impacted by increased traffic through their neighborhoods. Third, the Ladd Hill Neighborhood Association themselves often reference their coalition, which includes Clackamas County, City of Wilsonville, and West-Linn Wilsonville School District, as well as their assertion that the intersection design will impact the 12-plus miles of road in multiple jurisdictions, all the way up to the I-5 interchange in Wilsonville. Fourth, as described in number 2 above, there is not a closely circumscribed factual situation that is easily addressed with clear and objective criteria, but rather a situation requiring analysis of data using professional judgment.

It is clear that any decision made on the intersection potentially impacts a large cross-section of people as well as the regional transportation network, exceeding the bounds for a quasi-judicial decision. In addition, there are not clear and objective criteria tailored to concrete facts that can be relied upon for a quasi-judicial decision. For these reasons, the decision must follow the city's legislative process for a decision on the TSP/Comprehensive Plan amendment.

Please contact me with any questions or if you have additional information you would like to share. We will continue to keep you informed of any actions taken with this application.

Sincerely,



Jessica Pelz, AICP
Associate Planner

cc: Truman Stone, City Attorney; Doug Rux, Community Development Director; Kelly Amador, ODOT Project Manager