■ GOAL-POST RULE DOES NOT APPLY TO ZONE CHANGES OR PERMIT APPLICATIONS CONSOLIDATED WITH A COMPREHENSIVE PLAN AMENDMENT

In *Setniker v. Polk County*, 244 Or. App. 618, 260 P.3d 800 (2011), the Oregon Court of Appeals affirmed LUBA's latest decision in part, reversed it in part, and remanded it for reconsideration of the Transportation Planning Rule's (TPR) mitigation requirements. The case stems from CPM Development Corporation's (CPM) 2001 application to Polk County for a sand and gravel extraction and processing facility, as well as a cement- and asphalt-processing plant, on part of a parcel zoned exclusive farm use (EFU). The application involved a comprehensive plan amendment to add the site to the county's inventory of significant mineral and aggregate resources; a zoning map amendment to add a mineral and aggregate overlay to the mining site; and a conditional use permit to mine the site. The Setnikers own property adjacent to the site.

The transportation facility at issue in this case is the intersection of Oregon State Highway 51, which runs north to south, with Oregon State Highway 22, which runs east and west.

Polk County approved the application in 2006. That approval was appealed to LUBA, which remanded the decision to the county for failure to apply county procedures and code standards applicable to the comprehensive plan text amendment and failure to comply with the TPR set forth in OAR 660-012-0060. *Rickreall Community Water Assoc. v. Polk County*, 53 Or. LUBA 76 (2006). On remand the applications were revised and the county board approved them. The Setnikers again appealed to LUBA, which rejected all of their assignments of error except misapplication of the TPR, which LUBA sustained in part. The Setnikers and CPM both sought judicial review.

CPM argued that LUBA erred in evaluating its application based on laws and rules that were in effect at the time the county ruled on the application, instead of when it originally submitted its application. This argument deals with the interaction between the TPR and the goal-post rule under ORS 215.427(3)(a). Under the TPR, if an amendment to a comprehensive plan or land use regulation would "significantly affect" a transportation facility, the local government may only approve if it adopts one or more mitigation measures under the TPR. OAR 660-012-0060(1). An amendment would "significantly affect" a transportation facility if it would degrade the facility "as measured at the end of the planning period

identified in the adopted transportation system plan . . . ." *Id.* § (1)(c). In essence, the goal-post rule provides that the rules in existence when an application is complete are the rules that govern the approval or rejection of the application. ORS 215.427(3)(a).

The county concluded that the goal-post rule applied to CPM's application and applied the 2020 planning horizon. On appeal to LUBA, the Setnikers had argued that the goal-post rule does not apply to a zone change that is consolidated with and dependent on a simultaneous comprehensive plan amendment. LUBA agreed, concluding the county was required to determine whether the plan and zoning amendments significantly affect transportation facilities as measured at the end of the planning period in the adopted 2009 TSP, which has a planning period of 2030.

The court agreed with LUBA, citing *Rutigliano v. Jackson County*, 40 Or. LUBA 565, 572 (2002), in which LUBA discussed how the goal-post rule applies to consolidated applications where a zone change is dependent on a plan amendment. The court agreed with LUBA's analysis that where a county has a unified zoning and comprehensive map, such that the map cannot be changed without the amendment being both a comprehensive plan change and a zone change, the fixed goal-post rule does not apply. In a nutshell, when the standards the rule required to remain fixed are themselves bound up in the application, the goal-post rule does not apply. Accordingly, the court rejected CPM's cross-petition and found the relevant date for determining whether the proposed comprehensive plan amendment would significantly affect the intersection is 2030.

The Setnikers argued in their first assignment of error that LUBA misapplied the TPR by not requiring the county to put in place more measures to mitigate the effects of CPM's proposed operation. Because the county found that CPM's proposal would significantly affect a transportation facility, it imposed conditions of approval to ensure traffic from the development would not render the intersection inconsistent with its identified function, capacity, and performance standards. The first condition rerouted CPM employees and contract haulers on an alternate route during the hours of 4:00 to 6:00 p.m. The second required CPM to erect a gate or chain across the entrance to the haul road to make entry more difficult from Highway 51. The Setnikers argued these conditions were insufficient under the TPR, and that the TPR in fact required the conditions not only mitigate the intersection's failures caused by CPM's proposed development, but also eliminate any failures that the intersection already has that are caused by existing and background traffic.

LUBA rejected the Setnikers' reading of the TPR. The court, despite noting that LUBA's reading may make more sense and may, in fact, correct a flaw that the rule's drafters apparently overlooked, could not reconcile LUBA's interpretation with the TSP's unambiguous language and found that LUBA erred in ruling that the county could

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comply with the TSP by mitigating only CPM's significant adverse effects. The court held that, as the rule is written, if LUBA decided on remand that the intersection was consistent with relevant function, capacity, and performance standards when CPM filed its application, and that the intersection will become inconsistent by 2030 due to the effect of the amendments or due to independent growth or background traffic, then the county must put in place measures that will not only mitigate the inconsistencies caused by the amendments but also the inconsistencies resulting independently.

The Setnikers argued in their second assignment of error that LUBA's treatment of the re-routing measure failed to address all of the extra trips created by the proposed development, instead focusing solely on CPM's employees and contractors. They argued that LUBA was required to address their argument pursuant to ORS 197.835(11)(a), which provides that whenever the findings, order, or record are sufficient to allow review, the board shall decide all issues presented to it when reversing or remanding a land use decision. The court disagreed, noting the county's order plainly took into consideration suppliers, customers and visitors.

The Setnikers next argued that the county erred in allowing aggregate that is extracted off-site to be processed at the subject property. They focused on a subsection of the county's ordinance that provides that the sale of products extracted and processed on-site from a mineral and aggregate operation may be permitted in the on-site subject to site plan approval. The Setnikers argued the necessary implication of the ordinance is that, because sales permitted on-site are limited to products that are extracted and processed on site, no processing of products extracted off-site is permitted. The court noted that the logical flaw in this argument was apparent: the ordinance neither says nor implies anything about products that are extracted off-site, hauled to the site, processed on-site, then hauled and sold off-site. Further, in light of a subsection of the ordinance that expressly authorized on-site processing, the Setnikers' argument was not plausible.

Lisa Knight Davies

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