

January 24, 2010

Mr. Larry French
Periodic Review Specialist
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, Oregon 97301



SUBJECT: Appeal of the Oregon DLCDC Director's Report to the LCDC

Dear Mr. French:

My name is Hilary Garrett. My husband and I live at 21663 Paloma Drive, Bend, OR 97701. I was an objector to the City of Bend's UGB expansion amendment and related PFPs and have the proper standing to take this appeal forward to the Oregon Land Conservation and Development Commission.

My primary concerns are related to the City of Bend's expansion into and urbanization of the Hamby Road area, which is characterized by Priority 4 Resource Lands. On page 5 of 156 of the Director's Report, this statement is made:

"The adopted UGB amendment is substantially different from previous submittals dated June 11, 2007 and October 8, 2008. Lands proposed to be included to the west and north are exception lands. Lands proposed to be included to the northeast and due east are a combination of exception and resource lands; lands to the south and southeast are exception lands. [Notice of Adoption of an UGB Amendment form dated April 16, 2009]."

The above is true to my knowledge and forms the basis of my appeal.

Inclusion of Priority 4 Resource Land Violates ORS 197.298

The intent of ORS 197.298 is to exclude lands designated "agricultural" from consideration for UGB expansion except under very limited circumstances, as provided in ORS 197.298(3). The ONLY circumstances under which land of a lower priority under subsection (1) of ORS 197.298(3) may be included in an urban growth boundary are if land of higher priority is found to be inadequate to accommodate the estimated land need because:

- a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands;
- b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints;
- c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.

Much of the land along Hamby Rd. is Priority 4 Resource Land. I live just off Hamby in the Vista del Sol subdivision. My home backs up to the Boe farm which is on Hamby Road. The Boe land is a working hay farm. It has an Exclusive Farm Use (EFU) tax deferral. The farm is irrigated and the Boes have placed a large sign on Hamby Road that reads, "Hay for Sale".

Likewise, the land proposed for development by Newland Communities (also in the Hamby Rd. area) is farm land, is farm tax deferred and raises income crops. The Director's Report doesn't mention the Boe farm, but does reference Newland Communities' land as Newland appealed the City's UGB. I submit that Boe and Newland Communities properties are legally identical with respect to Goal 14.

On page 7 of 156 of the Director's Report, this statement is made:

"Of the 5,475 acres considered "suitable" and available for development, 4,069 acres are exception lands, which (under state law) are the highest priority lands for UGB expansions. ORS.197.298. The remaining 1,407 acres are resource (farm) lands, which are the lowest priority lands for UGB expansions. [R. at 1058]."

The Directors Report also says this on page 71 of 156:

"In the first half of 2008, the city had certain addenda to the master plans prepared. [R. at 211]. Those include several analyses specific to particular areas (Newlands property; Hamby Road area). On October 8, 2008, the city provided the department an amended 45-day notice of its proposed UGB amendment that included a summary statement that it was also proposing to amend its public facilities plan element of the General Plan. However, no draft of the PFP Chapter (chapter 8) of the city's General Plan was provided until October 20, 2008 (seven days before the first evidentiary hearing)."

The Director's Report states the following on page 130 of 156:

"The (UGB) amendment also includes 1,253 acres of resource land identified as Areas A through D on the east and northeast side of the existing UGB. The primary justification for including these lands is that planned sanitary sewer lines must cross these intervening resource parcels in order to serve exception parcels elsewhere. The findings state that maximum efficiency of land uses within the proposed UGB requires inclusion of these lower priority resource lands in order to include or provide services to the higher priority exception lands, pursuant to an exception to the statutory priorities to add land to a UGB in ORS 197.298(3) (c). [R. at 168-171, 1183-86, including Figure V-5]."

The city ostensibly included Hamby Road resource land in its UGB expansion amendment because "maximum efficiency of land uses within the proposed UGB requires inclusion of these lower priority resource lands in order to include or provide services to the higher priority exceptions lands" which are nearby. I have heard others state that the real reason it wants to urbanize the Hamby Rd. area is to (a) expand the Bend Airport and attract business activity to its airport, (b) develop to the east in order to promote large-site industrial development in an area close to Hamby Road and Neff and (c) grow to the northeast so as to more efficiently develop Juniper Ridge. The Director hints at these motives when he states in his report:

"The (UGB) amendment includes resource lands for a future university site on the city-owned property known as Juniper Ridge, and for a large-site general industrial center adjacent to the East State Highway 20/Hamby Road intersection. The city's analysis is that land of lower priority (e.g., exception land), could not reasonably accommodate these uses, justifying an exception to the statutory priorities to add land to a UGB under ORS 197.298(3)(a). [R. at 166-167, 1181-82]."

Oregon's Revised Statute 197.298 does not allow the city to simply pick and choose what areas should be included in the UGB just because it has an interest in developing a specific part of the Study Area, particularly if it must include Priority Four Resource Land to do so. The city violates ORS 197.298 when it proposes to urbanize Priority Four Resource Land in order to develop Juniper Ridge, the Bend Airport and a special use industrial site located at the Hamby Rd. / Neff Rd. intersection. This is an even more egregious violation of Oregon's statewide land use planning laws because the city's development plans will require the implementation of a new sewer interceptor that doesn't even exist today. Over 4,100 residents in the southeast part of Bend (properties that are today inside the city's existing UGB) do not yet have sewer service. Orderly and efficient provision of public facilities and services require the city to provide sewer service to these already urbanized properties before it goes forward and builds a new sewer interceptor that does not, at the present time, even exist.

The Director's Report includes this statement on pages 131-132:

"Does the ORS 197.298(2) requirement to rank parcels by soil capability apply to all of the land types in ORS 197.298(1)(a) through (d), or does it apply only to resource lands in ORS 197.298(1)(d)? ... LUBA has agreed that the ORS 197.298(2) priority ranking scheme is applicable only to resource lands. In its decision remanding expansion of the Myrtle Creek UGB, LUBA stated: "ORS 197.298(2) and Goal 14, factor 679 establish a second priority system for including agricultural lands."

... "The language of ORS 197.298(2) and the second sentence of OAR 660-021-0030(3)(c) indicates that their use is limited to resource lands by referring to the resource capability as "appropriate for the current use." ...

The land in the Hamby Road area is not only resource land, but by definition has a higher quality class of soil than does the DSL's Section 11 land. The Hamby Road farmland is (a) irrigated (b) used to produce commercial crops and (c) Deschutes County farm tax deferred. The DSL land meets none of these specifications.

If the city must include Priority Four resource land in its expanded UGB, then ORS 197.298 indicates that it must include the DSL's Section 11 land before it includes the Hamby Road resource land. Again, this is because the Hamby Road farm land is irrigated, has a higher soil capability, has EFU farm tax deferrals, and produces a commercially viable hay crop, as evidenced by the fact that the Boe property sells hay and has done so for years. The Section 11 land is not irrigated, and therefore has lower quality soil. The Section 11 land does not produce a commercially viable crop. It also does not have a Deschutes County farm tax deferral. It has lower quality soil and therefore, ORS 197.298 and related statutes say that it must be included in the city of Bend's expanded UGB before the Hamby Rd. land can be.

Finally, and with respect to ORS 197.298, the Directors Report also included this statement:

"In applying the Goal 14 boundary location factors, the city did not adequately consider the "economic" part of the factor that considers "[orderly and economic provision of public facilities and services." The city also fails to apply one of the location factors, "Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB." (May 7, 2009, pp. 9, 13, 15-16].

Hamby Sewer Interceptor violates Goal 14, Goal 11 and OAR 660

Goal 11 and ORS 197.712(2)(e) require Bend to prepare and adopt public facilities plans for water, sewer and transportation services within its UGB. Public Facilities Plans (PFPs) are required primarily to assure that local governments plan for timely, orderly and efficient arrangement of public facilities and services, and to serve as a framework for future urban development. Timely, orderly and efficient arrangement "refers to a system or plan that coordinates the type, locations and delivery of public facilities and services in a manner that best supports existing and proposed land uses." Goal 11 and OAR 660-011-0000.

When evaluating a proposed UGB amendment, OAR 660-024-0060(8) requires that a Goal 14 boundary location determination evaluate and compare the "relative costs, advantages and disadvantages of alternative UGB expansion areas with respect to the provision of public facilities and services needed to urbanize alternative boundary locations." ... "The evaluation and comparison must include: (a) The impacts to existing water, sanitary sewer, storm water and transportation facilities that serve nearby areas already inside the UGB; and (b) The capacity of existing public facilities and services to serve areas already inside the UGB as well as areas proposed for addition to the UGB.

In 2008, the city of Bend developed an Addendum number 3 to its Collection System Master Plan. This document was entitled Technical Memorandum 1.5 – Hamby Road Sewer Analysis

(2009). The Director in his report noted that it was referenced at 693-703 of the Public Record. On page 76 of the Directors' Report, there is this statement:

"The city also adopted CSMP Addendum No. 3-Technical Memorandum 1.5-Hamby Road Sewer Analysis (2008) which proposes an alternative sewer interceptor approximately one mile east of the existing UGB on a mix of exception and resource land. The newly proposed route at least partially replaces an earlier proposed Southeast Interceptor alignment along 27th Street. [R. at 693-703] This proposed alternative interceptor, proposed as an alternative alignment for the Southeast Interceptor, would flow north from Stevens Road (Department of State Lands property located at Section 11) along Hamby Road to one of the Plant Interceptor alternatives described above. Similar to the Plant Interceptor alternatives, the findings do not explain the disposition between the CSMP's original alignment for the Southeast Interceptor expansion and the Hamby Road alternative. The Addendum No. 3 shows the costs of the two alignments to be very similar, and indicates that there are disadvantages to the Hamby Road alignment. [R. at 698]."

In including the Hamby Road land in its UGB expansion area, the city of Bend passed over suitable high-priority exception land in the southwest Buck Canyon area for actively farmed EFU lands east of Hamby Road for the indefensible reason that the farm parcels will help build the southeast sewer interceptor, which means that its provision of urban services can be more orderly and efficient. If the city can provide urban services to the Miller-Day and Coats master planned developments by constructing a Northern Crossing Bridge over the Deschutes River Canyon in order to (a) serve these developments with a northwest sewer Interceptor and (b) serve them with transportation via an extension of Skyliner Ranch Road north across the Deschutes to its connection with US 97 and US 20 than the city can hardly argue that Buck Canyon lands cannot be provided with urban services in a similar orderly and efficient manner.

Bend UGB Amendment violates Goal 14 Boundary Location Factors

In the Vista del Sol subdivision where I live, land parcels are primarily less than three (3) acres. The city wouldn't consider land inside its existing UGB as "redevelopable" if it had a dwelling and was less than 3 acres nor would it consider including the annexation of parcels smaller than 3 acres in the Buck Canyon portion of the study area.

The city can't have it both ways. Either no developed parcels under 3 acres should be included in the amendment [April 18, 2009, pp. 1-2] or else all developed parcels under three acres (both inside the UGB and in the area to be added to the UGB) must be included. The City cannot legally use a different process to measure / evaluate the Hamby Road area land than it uses to evaluate land in the southwest part of Bend (Buck Canyon) or within its own city limits merely because it wants to promote economic development in the east and northeast (Juniper Ridge, the Bend Airport and the Hamby / Neff industrial site).

The Remedy Sought

I ask the Oregon LCDRC to uphold the Director's remand of the City of Bend's UGB Expansion Amendment and Ordinance NS-2111 in its entirety and, if other appellants raise additional valid legal arguments, to add them to the legal appeal process.

Sincerely,



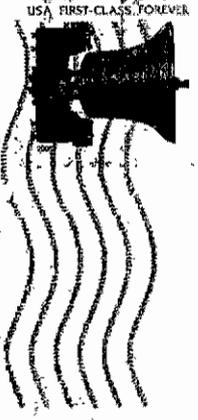
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Tuesday, January 26, 2010

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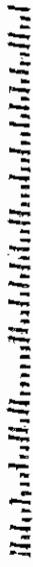
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re: Bend UGB

