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LAND CONSERVATION
AND DEVELOPMENT

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LAND DELIVERED

January 29, 2010

Richard Whitman, Director
Dept. of Land Conservation and Development
Suite 150
635 Capitol Street NE
Salem, OR 97301

VIA HAND DELIVERY

Re: Director's Order 001775 (Bend UGB Amendment)
Appeal of Shevlin Sand and Gravel, Inc.

Dear Mr. Whitman:

On April 16, 2009, the City of Bend and Deschutes County mailed notices of adoption of city and county ordinances approving amendments to the Bend Urban Growth Boundary (UGB). These ordinances were submitted to DLCD for review pursuant to ORS 197.626. On January 29, 2010, Director's Order 001775, remanding these ordinances to the city and county for further work, was issued and mailed to parties who filed valid objections under OAR 660-025-0140(2).

This appeal of Director's Order 001775 (Order) is filed on behalf of Shevlin Sand and Gravel, Inc. (SSG) pursuant to OAR 660-025-0150(4). As found in the Order (at pages 9-11), SSG filed a valid objection to the city/county UGB amendment submittal. SSG also participated both orally and in writing in the Bend UGB Amendment proceedings, as reflected in the Record submitted by the City of Bend, including documents at pages 2844, 3942, 5204, 7196, 7398, 7406, 7434, 7717, 7814, 7882, 8152, 8156 and 8704. SSG owns approximately 700 acres that were in the Bend Urban Area Reserve and have been added to the Bend UGB.¹ SSG operates an aggregate extraction and processing facility on a portion of this property.

SSG's appeal is based on (1) the Order's incorrect assumption that Deschutes County previously designated the SSG property as a significant aggregate resource site under Statewide Planning Goal 5; and (2) the Order's failure to sustain SSG's objection, based on Statewide Planning Goal 2, that the UGB amendment lacks an adequate factual base for designating a specific 280-acre portion of the SSG property as Surface Mining (SM).

¹ This land is sometimes referred to in the record as the "Coats properties" or "Coats ownership."

Incorrect Assumption that SSG Property was Designated by Deschutes County as a Goal 5 Significant Aggregate Resource Site

The Order (page 144) identifies the legal standard applicable to the SSG objection as OAR 660-023-0180 (Goal 5 Aggregate Resources Rule), and includes the following analysis of the SSG objection:

“The [Surface Mining] map designation is presumably based on a previous action by Deschutes County to designate the Shevlin Sand and Gravel property as a significant aggregate resource. A UGB expansion does not trigger a requirement for the city to conduct a new inventory of aggregate resources within the expansion area. Local jurisdictions are only required to amend the significant aggregate resource inventory in response to an application for a post-acknowledgement plan amendment. [OAR 660-23-0180(2)] A change in the boundaries of this site will require consideration of a separate plan amendment and will need to be based on findings developed consistent with OAR 660-23-0180.” (Emphasis added.) Order, p. 145.

In fact, no portion of the SSG property that has been added to the Bend UGB was ever designated by Deschutes County as a Goal 5 significant aggregate resource site. SSG pointed this out to the City and County several times during the course of the UGB proceedings. *See, e.g.,* Record 010090, 010512. The City and County agreed with SSG on this point, as is indicated by the findings adopted by the City and County in support of the UGB amendment (UGB findings). The UGB findings set out criteria applied by the City to determine whether land within the UGB Expansion Study Area was suitable for inclusion within the UGB. Attachment 1; Record 1168 – 1169. Criterion (6) is:

“Mining Operations: tax lot is suitable if it does not contain an active surface mine recognized as a Goal 5 resource by the Deschutes County General Plan.” (Emphasis added.) Record 1169.

On the following page, is a map that shows the results of the application of the suitability criteria, including Criterion (6) quoted above. That map shows the **entire** SSG property as being “Suitable & Available Priority 2 Lands (UAR & Exception).” Attachment 1, p. 3; Record 1170. This means the City and County did not find that any portion of the SSG property contained a surface mining site designated as a Goal 5 significant resource site by the County Plan.

Additionally, the Deschutes County Comprehensive Plan Map, as it existed prior to the subject UGB amendment, designated the entire SSG property as Urban Area Reserve, not Surface Mining. Attachment 2, p. 2. Further, the Deschutes County Combining Zones Map shows numerous Surface Mining Impact Areas² around the county, but none within the Urban Reserve

² Each presumably surrounds a designated Goal5 significant mineral or aggregate resource site.

Area containing the SSG property. Attachment 2, p. 3. Finally, the Bend Urban Area General Plan Map, as it existed prior to the subject UGB amendment, shows no Surface Mining designation applied to any portion of the subject SSG property. Rather, the SSG property is designated Urban Area Reserve (UAR). Attachment 3.

Based on the above information, the only conclusion that can be made is that no portion of the SSG property that has been included in the Bend UGB was previously designated by Deschutes County as a Goal 5 significant aggregate resource site.

Suggested Modification to Director's Report. With regard to the SSG objection, the Legal Standard section on page 144 of the Report, and the Analysis section on page 145 of the Report, should be deleted. Replacement language will be suggested in the following section of this appeal. References to the existence of a Goal 5 aggregate resource site in the northwest quadrant of the UGB expansion area should be deleted from pages 140 and 143 of the Director's Report.³

Failure to Address SSG Objection Based on Statewide Planning Goal 2

The basis for SSG's objection was that Statewide Planning Goal 2 requires all planning decisions to be supported by an adequate factual base. This means that the city and county decision to designate a certain area for Surface Mining must be supported by evidence that a reasonable person would rely on to conclude that this area is capable of being used for surface mining. In this case, there is no such evidence in the record. The southeastern portion of the area designated Surface Mining on the General Plan Map is outside the area covered by DOGAMI Permit 09-0018. The Surface Mining designation makes this portion of the property useless, because it is legally impossible for SSG to conduct mining and processing operations in this area.

³ Specifically, the following deletions should be made:

"* * * The northwest priority 2 quadrant is described as having [~~one Goal 5 resource, a 200-acre aggregate site, and~~] potential Goal 5 resources within the Tumalo Creek corridor. * * *" Report, p. 140.

"* * * The record also acknowledges the State Scenic River designation for the Deschutes River [R. at 2460] [~~and the existence of a Goal 5 aggregate resource in the northwest quadrant. [R. at 2460-2461]]~~]

"* * * Potential impacts from new uses that will result from the proposed UGB expansion on the significant Goal 5 resources that are located in the expansion area must also be identified. These include State Scenic Waterways along the Deschutes River [~~and the aggregate resource site~~] in the northwest quadrant." Report, p. 143.

We further note the above quoted portions of the Directors report cite a statement in an earlier draft of the city's findings, at Record 2460, to the effect that the existing aggregate mine in the northwest quadrant of the UGB expansion area is a designated Goal 5 resource. That statement in the draft findings is simply incorrect.

The 280 acres designated Surface Mining on the Bend Urban Area General Plan Map (Record 1226) should include only portions of the SSG property that are legally capable of being used as part of SSG's mining operation. Attachment 4 shows the approximate boundary of the 280-acre Surface Mining area designated on the Plan Map outlined in red, with the portion of the area that is outside the boundaries of DOGAMI Permit 09-0018 indicated in yellow. The City and County can resolve SSG's objection by changing the boundaries of the 280-acre Surface Mining area to include only land subject to DOGAMI Permit 09-0018, as indicated with diagonal hatching on Attachment 4. The area shown in yellow on Attachment 4 should be given the same Master Plan Area Plan Map designation as the rest of the SSG property.

The Director's Report, at pages 144-145, cites the Goal 5 Aggregate Rule, rather than Goal 2, as the legal standard applicable to SSG's objection, and fails to address the Goal 2 basis for SSG's objection. These deficiencies can be remedied by making the following modifications to the Report. Deletions are indicated by brackets and strikethrough. Additions are indicated by underlining.

"a. Legal Standard

~~["OAR 660-023-0180 addresses identification of significant aggregate resources, approval of mining activity, and protection of the resource from conflicting uses. The rule sets criteria for significance and prescribes a process for evaluating potential impacts from the proposed mining activity. The rule requires a plan amendment for amending the local inventory of significant aggregate resources, changes to the mining activities allowed on the site, changes to the post mining use of the site, and changes to the restrictions imposed in the impact area on new uses that could conflict with a protected mining activity."] Goal 2 requires all~~ planning decisions to be supported by an adequate factual base.

"b. Summary of Local Actions

"The Bend Urban Area General Plan Map, dated December 12, 2008, shows the comprehensive plan designation for 280 acres of property owned by Shevlin Sand and Gravel to be surface mining. [R..at 1226]

"c. Objection

"One objector, Shevlin Sand and Gravel (SSG), raised a concern about a comprehensive plan map designation of surface mining that does not correlate with the Department of ~~[Aggregate]~~ Geology and Mineral Industry (DOGAMI) permit authorizing mining. The objector ~~[does not cite a violation of local or state regulations, but]~~ argues the Goal 2 requirement that all planning decisions be supported by an adequate factual base means that the decision to designate a certain area for Surface Mining must be supported by evidence that a reasonable person would rely on to conclude that this area is capable of being used for surface mining. The objector explains that the plan designation depicted on the Bend Urban Area Proposed General Plan Map creates a problem with making use

of ~~[their]~~ its property. More land is designated as surface mining than is covered under the DOGAMI permit for their mining operation. The land not covered by the DOGAMI permit can't be mined, and it can't be used for other purposes due to the plan designation. The objector ~~[does not state when the plan designation was made]~~ states that the Surface Mining comprehensive plan map designation was applied to a portion of its property as part of the UGB amendment decision.

"The objection is, 'The surface mining designation makes [the] portion of the property [not covered by the DOGAMI permit] useless, because it is legally impossible for SSG to conduct mining and processing operations in this area.' The objector recommends that the City of Bend change the boundary of the area designated surface mining to include only the area subject to the DOGAMI permit. The objector has provided a diagram showing the DOGAMI permit boundary. Some land would need to be removed and other land added to the area designated as surface mining for the boundaries to be coincident. [Johnson & Sherton, Attorney for Shevlin Sand and Gravel, May 7, 2009, pp. 1-2]

"d. Analysis

~~"[The map designation is presumably based on a previous action by Deschutes County to designate the Shevlin Sand and Gravel property as a significant aggregate resource. A UGB expansion does not trigger a requirement for the city to conduct a new inventory of aggregate resources within the expansion area. Local jurisdictions are only required to amend the significant aggregate resource inventory in response to an application for a post acknowledgement plan amendment. [OAR 660-23-0180(2)] A change in the boundaries of this site will require consideration of a separate plan amendment and will need to be based on findings developed consistent with OAR 660-23-0180.]~~ The Goal 2 requirement that all planning decisions be supported by an adequate factual base means that the decision to designate a certain area Surface Mining must be supported by evidence that a reasonable person would rely on to conclude that this area is capable of being used for surface mining. There is no evidence in the record that the portion of the Shevlin Sand and Gravel property not under DOGAMI permit 98-0018 can be used for surface mining.

"e. Conclusion.

"The objection is ~~[not]~~ sustained. The Commission directs that if the subject property is included in the UGB on remand, the boundary of the area designated Surface Mining on the Bend Urban Area General Plan Map should be adjusted to include only the property subject to DOGAMI permit 98-0018." Report, pp. 144-145.

Richard Whitman
January 29, 2010
Page 6

Thank you for your consideration of this appeal. SSG intends to present oral argument in support of its appeal at the Commission's hearing.

Sincerely,



Corinne C. Sherton
Attorney for Shevlin Sand and Gravel, Inc.

Enc.

cc: Mark Radabaugh (w.enc.; via mail)
Damian Syrnyk, City of Bend (w.enc.; via mail)
Peter Gutowsky, Deschutes County (w.enc.; via mail)
Jon Skidmore (w.enc.; via mail)
Eric Coats (w.enc.; via mail)

identify suitable acres to meet the identified 20-year land needs for about 4,956 buildable acres.

Suitability Criteria

OAR 660-024-0060 requires the City to determine the suitability of land to accommodate all of its identified land needs, and to be considered in the boundary location alternatives analysis. OAR 660-024-0060(1)(e) reads as follows:

(e) For purposes of this rule, the determination of suitable land to accommodate land needs must include consideration of any suitability characteristics specified under section (5) of this rule, as well as other provisions of law applicable in determining whether land is buildable or suitable.

OAR 660-024-0060(5) also authorizes the City to specify characteristics to be used for identifying suitable parcels for meeting identified needs:

(5) If a local government has specified characteristics such as parcel size, topography, or proximity that are necessary for land to be suitable for an identified need, the local government may limit its consideration to land that has the specified characteristics when it conducts the boundary location alternatives analysis and applies ORS 197.298.

Finding: The City has developed and applied suitability criteria under both of these provisions of OAR 660-024-0060. Table V-3, below, lists threshold suitability criteria which were applied through GIS analysis to all parcels within the 2-mile radius study area to determine which parcels could be considered suitable for meeting any urban need.

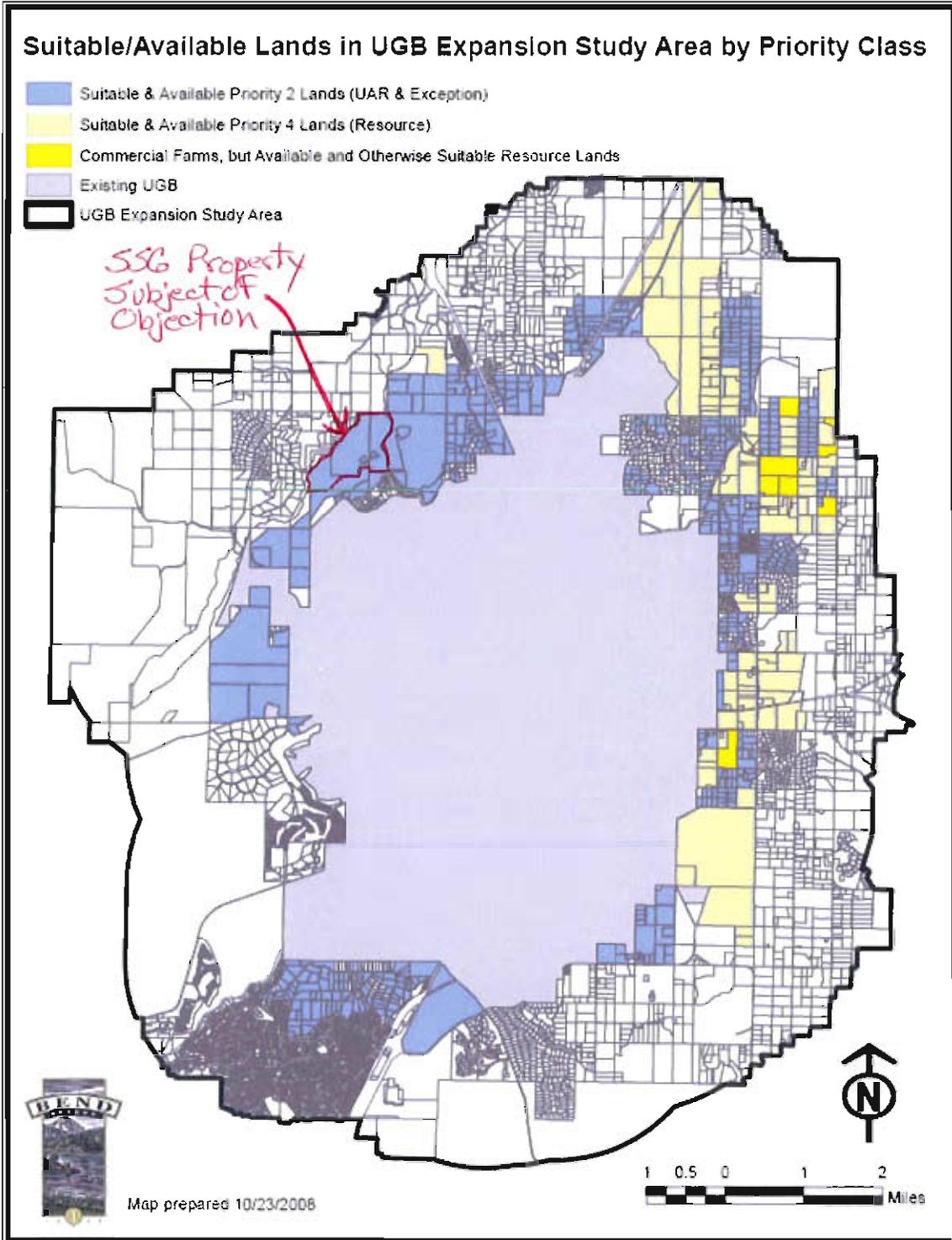
**Table V-3
Suitability Criteria Applied to All Tax Lots in Study Area***

1) Flood Plain: tax lot is suitable if it is not entirely within a 100-year FEMA floodplain.
2) Sewer Service: tax lot is suitable if it can be served by an existing or proposed City facility detailed in the 2008 Collection System Master Plan, as amended. In addition, areas of tax lots are also suitable where topography allows gravity flow to existing or proposed facilities detailed in the 2008 Collection System Master Plan, as amended. Gravity flow areas are determined by the City Engineering Division.
3) Water Service: tax lot is suitable if it is serviceable according to the 2007 City Water Master Plan Service, as amended or private water district service area.
4) Stormwater: tax lot is suitable if it is located in an area covered by a regional stormwater plan.
5) Transportation: tax lot is suitable if it is determined to score a Medium or High value for street connectivity (adjacent to an existing or planned grid street network) as determined by the City Long-range Planning Department.
6) Mining Operations: tax lot is suitable if it does not contain an active surface mine recognized as a Goal 5 resource by the Deschutes County General Plan.
7) Existing Land Use: tax lot is suitable if it is not a cemetery.
8) Existing Land Use: tax lot is suitable if it is not owned by an agency of the federal government.
9) Existing Land Use: tax lot is suitable if it is not a State Park or owned by the Bend Metro Park and Recreation District.
10) Existing Land Use: tax lot is suitable if it is not a landfill.
11) Existing Land Use: tax lot is suitable if it is not an approved destination resort recognized by Deschutes County.
12) Existing Land Use: tax lot is suitable if it is not designated as a wildlife protection area or Goal 5 resource (surface mine, historic, cultural resource) by Deschutes County.
13) Development Status: tax lot is suitable if it has the following traits: <ul style="list-style-type: none"> • Vacant – the tax lot is undeveloped land with no improvements (raw land); OR • Vacant with minor improvements – the tax lot has an improvement value less than \$20,000; OR • Redevelopable – tax lot is developed with 1 dwelling unit on a parcel greater than 3 acres in size (tax lots with 1 or more dwelling units on less than 3 acres are not suitable); OR • Developed school/church properties – tax lot is developed with a school or church and is greater than 5 acres.
14) Development Type: tax lot is suitable if it does NOT have the following traits: <ul style="list-style-type: none"> • Recreational land – the tax lot is used as a public or private open spaces; OR • Existing public school – the tax lot is owned by Bend-La Pine School District; OR • Existing public park – the tax lot is owned by Bend Metro Parks and Recreation District; OR • Land with a commercial farm classification – the tax lot is zoned EFUTRB with 23 acres of high value soils when irrigated (per NRCS) in addition to containing 23 acres of water rights certified by the State of Oregon Water Resources Department. OR the tax lot is zoned EFUAL with 36 acres of high value soils when irrigated in addition to containing 36 acres of water rights certified by the State of Oregon Water Resources Department; OR • CC&Rs – the tax lot has recorded CC&Rs that prevent further land divisions; OR • Rights-of-way – the tax lot is used as a private road, landscaped area, or sidewalks/pathways in common areas or public/private roads.

*If any of these criteria are not met, the tax lot is not considered suitable.

Figure V-1 shows those parcels within the study area which were found to satisfy these suitability criteria. These parcels are shown by their priority status under ORS 197.298(1). All parcels within the study area are considered either as Priority Class 2 ("exception" lands) or Priority Class 4 (agriculture, or "resource" lands).

Figure V-1



Mapping & Geographic Information Systems (GIS)

The Community Development Department uses GIS to support long range planning activities, population and employment forecasting, UGB and Urban Reserve studies, property development , and environmental health activities. Below you'll find GIS products we have available.

Printable Maps (pdf format)

[Zoning Map](#)

→ [Comprehensive Plan Map](#)

[Measure 37 Map](#)

[No Shooting District Maps](#)

[Destination Resort Map](#)

→ [Combining Zone Map](#)

[La Pine Comprehensive Plan Map](#)

[La Pine Comprehensive Plan Map with aerial photo](#)

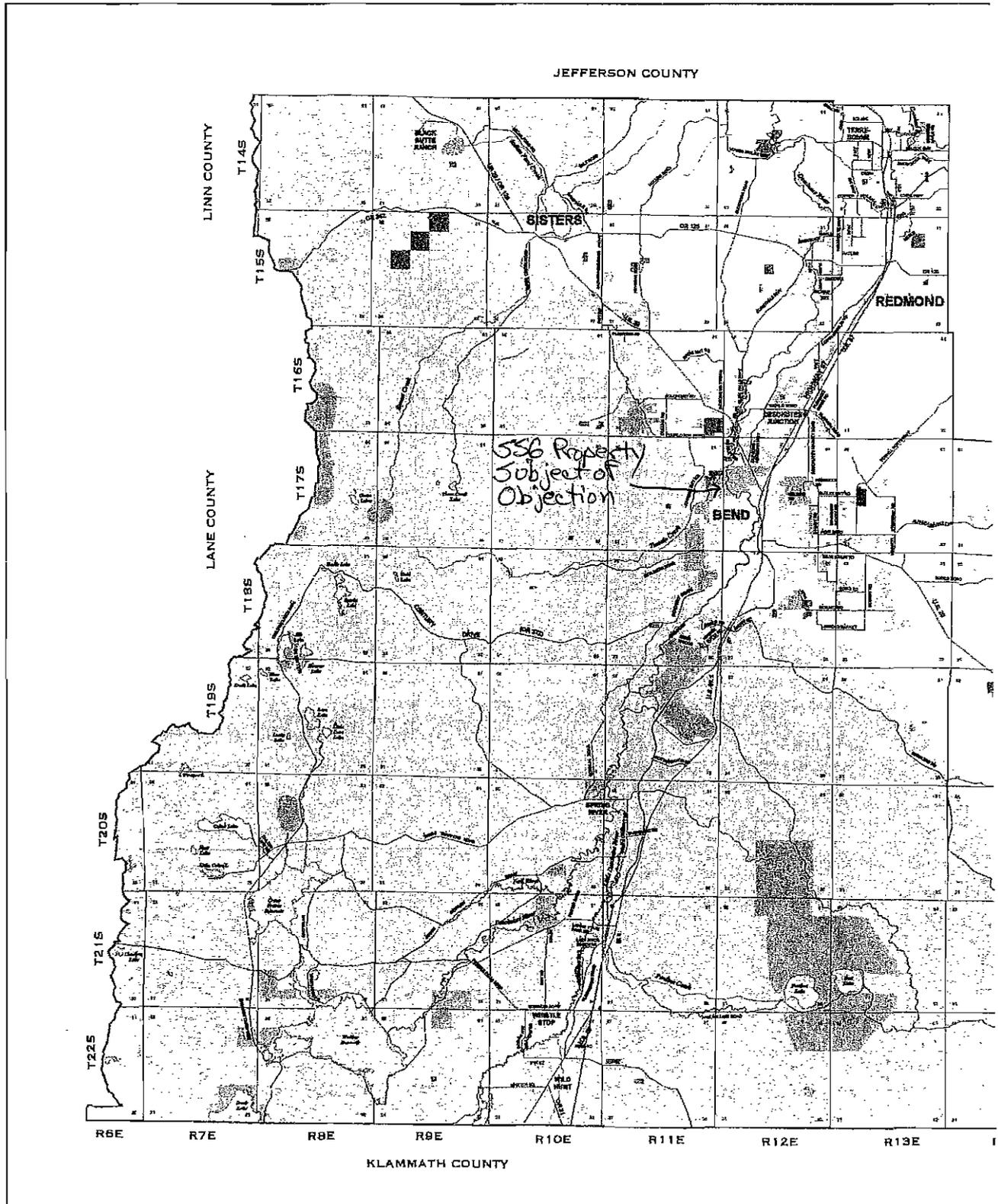
[La Pine Zoning Map](#)

[La Pine Zoning Map with Aerial Photo](#)

CDMap Property Information (Report and Mapping Research Tool)

[CDMap Property Information \(Report and Mapping Application\)](#)

Original in color 11x17, in file.



DESCHUTES COUNTY
GEOGRAPHIC INFORMATION SYSTEM

1100 S. WASHINGTON ST. STE. 200, ASTORIA, OR 97103
TEL: 503.325.2100 FAX: 503.325.2101

DESCHUTES COUNTY COMPREHENSIVE PLAN

COMPREHENSIVE PLAN DESIGNATIONS

- | | |
|----------------------------------|---------------------------|
| AIRPORT DEVELOPMENT | STREAM |
| AGRICULTURE | HIGHWAY |
| FOREST | ROAD |
| OPEN SPACE & CONSERVATION | RAILROAD |
| GENERAL INDUSTRIAL | TOWNSHIP LINE |
| RURAL COMMERCIAL | SECTION LINE |
| RURAL RESIDENTIAL EXCEPTION AREA | URBAN GROWTH BOUNDARY |
| SURFACE MINING | URBAN AREA RESERVE |
| UNINCORPORATED COMMUNITY | RIVERS & LAKES |
| | DESCHUTES COUNTY BOUNDARY |



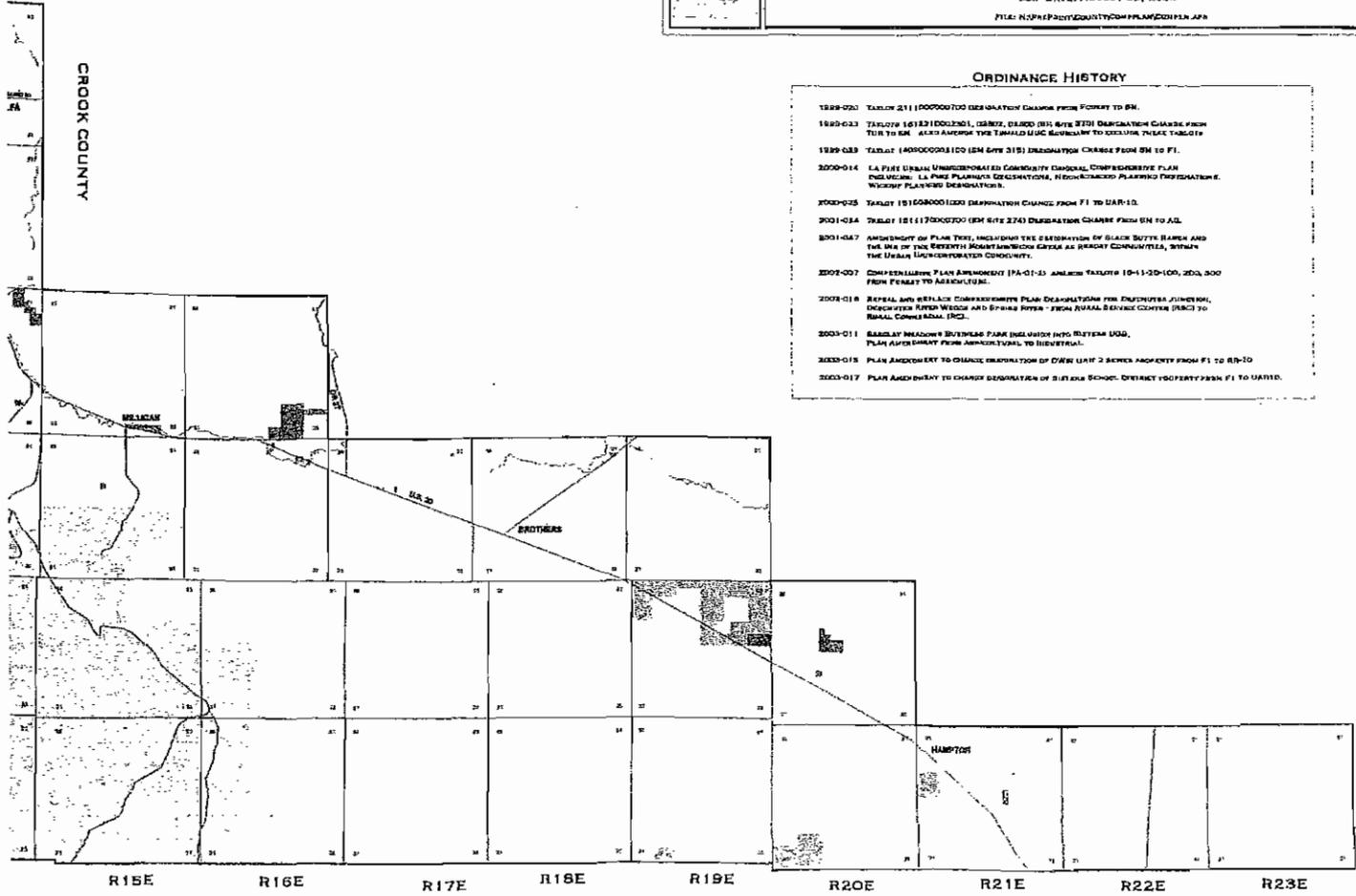
2 0 2 4 6 8 10 MILES

1 : 128,720

THE ORIGINAL PLAN FOR THIS MAP WAS PREPARED BY GUYTON & COMPANY, INC. IN 1992. THIS MAP IS THE RESULT OF THE
REVISIONS MADE TO THE ORIGINAL PLAN BY DESCHUTES COUNTY PLANNING DEPARTMENT. THE ORIGINAL PLAN IS THE
PROPERTY OF GUYTON & COMPANY, INC. AND IS NOT TO BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL,
INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT THE WRITTEN
PERMISSION OF GUYTON & COMPANY, INC.

MAP DATE: AUGUST 08, 2004

FILE: N:\SPACED\COUNTY\COMPLAN\COMPLAN.APR



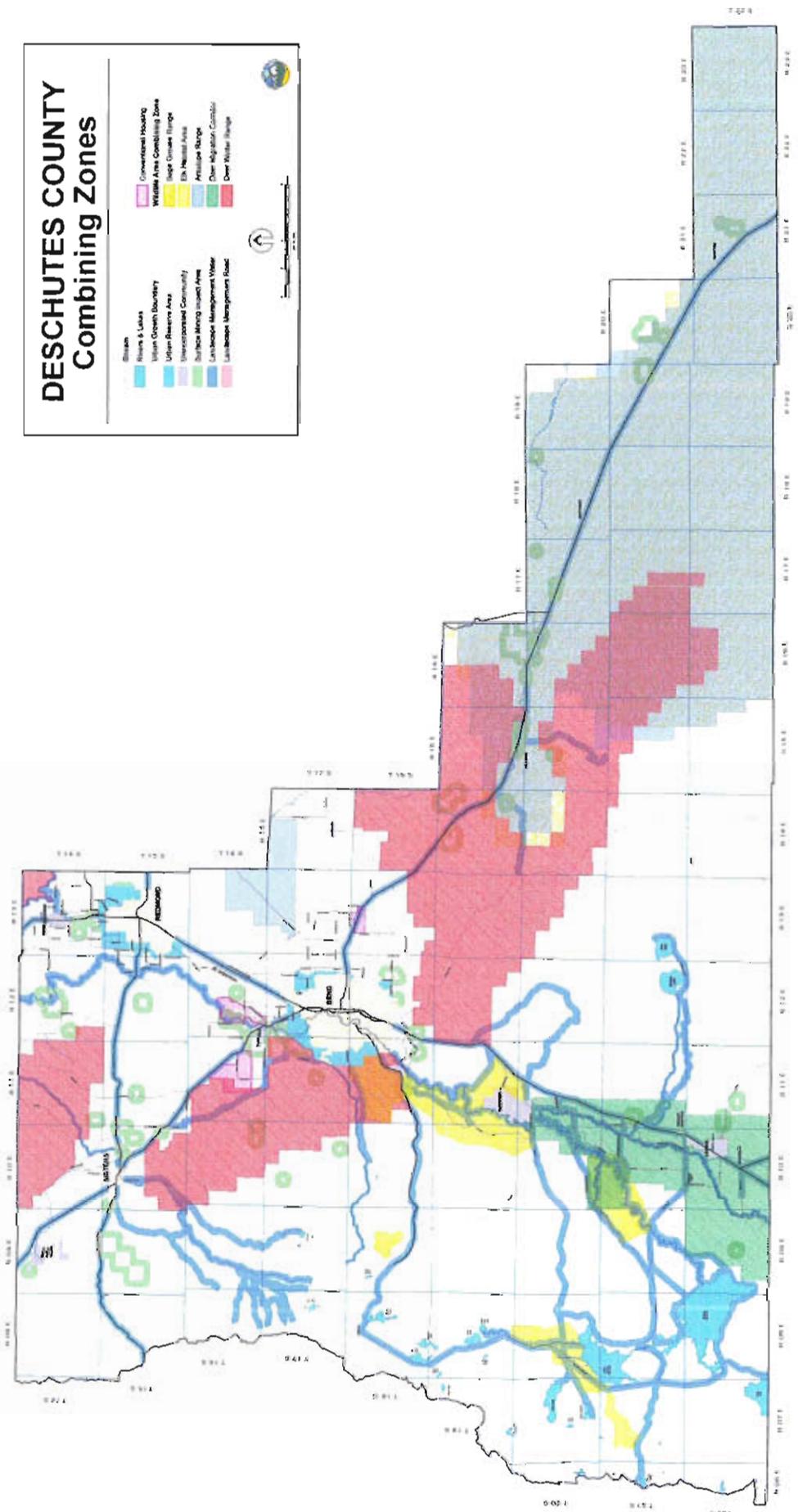
ORDINANCE HISTORY

- 1989-020 TARIFF 211 (00000700) DESIGNATION CHANGE FROM FOREST TO RM.
- 1989-023 TARIFFS 161831 DOLLARD, GARDNER, DUNN AND SITE 2701 DESIGNATION CHANGE FROM TIR TO RM. ALSO AMEND THE TARIFF 161831 RESUBMIT TO INCLUDE THESE TARIFFS.
- 1989-028 TARIFF (4000000100 (RM SITE 315) DESIGNATION CHANGE FROM RM TO FI.
- 2000-014 LA FINE URBAN UNINCORPORATED COMMUNITY GENERAL COMPREHENSIVE PLAN INCLUDING LA FINE PLANNING DESIGNATIONS, NEIGHBORHOOD PLANNING DESIGNATIONS, WILDFIRE PLANNING DESIGNATIONS.
- 2000-025 TARIFF 1816080001000 DESIGNATION CHANGE FROM FI TO UAR-10.
- 2001-024 TARIFF 18117000200 (RM SITE 274) DESIGNATION CHANGE FROM RM TO AG.
- 2001-047 AMENDMENT OF PLAN TARIFF, INCLUDING THE DESIGNATION OF BLACK BUTTE RANGE AND THE USE OF THE SEVENTH MOUNTAIN WILDFIRE CORRAL AS RESORT COMMUNITIES, WITHIN THE URBAN UNINCORPORATED COMMUNITY.
- 2001-007 COMPREHENSIVE PLAN AMENDMENT (PA-01-03) AMEND TARIFFS 19-11-20-100, 200, 300 FROM FOREST TO AGRICULTURE.
- 2002-018 REPEAL AND REPLACE COMPREHENSIVE PLAN DESIGNATIONS FOR ENDORSEMENT JUNCTION, DESCHUTES RIVER WILDFIRE AND SPRING RIDGE - FROM RURAL SERVICE CENTER (RSC) TO RURAL COMMERCIAL (RC).
- 2003-011 BEECHLEY MEADOWS OVERSEER PARK (INCLUDED INTO RUSTLEBUD LOGS, PLAN AMENDMENT FROM AGRICULTURAL TO INDUSTRIAL).
- 2003-015 PLAN AMENDMENT TO CHANGE DESIGNATION OF DUNE LIFT 2 SERVICE PROPERTY FROM FI TO RM-10.
- 2003-017 PLAN AMENDMENT TO CHANGE DESIGNATION OF SUTSKAL SCHOOL DISTRICT PROPERTY FROM FI TO UAR-10.

LAKE COUNTY

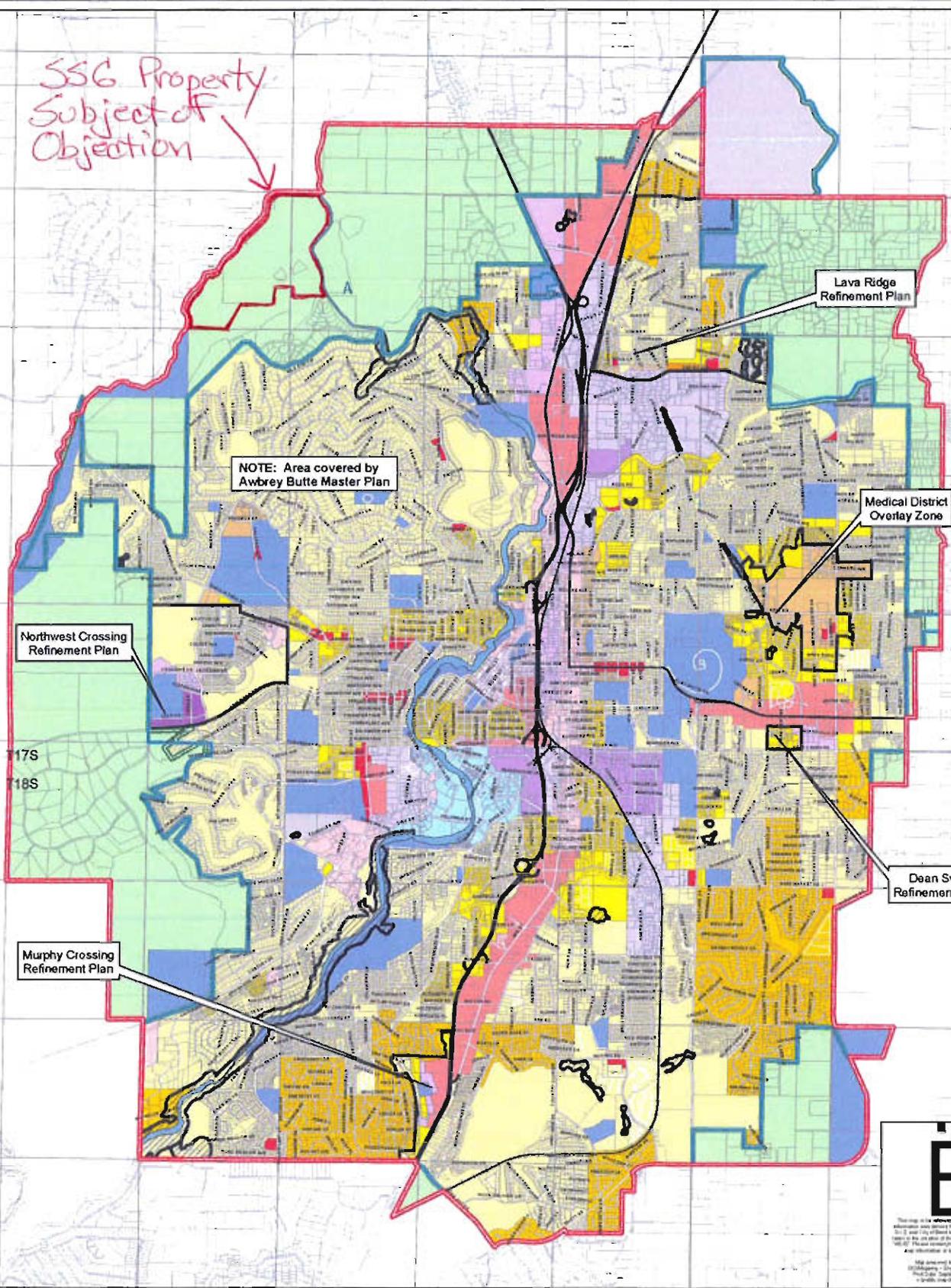
DESCHUTES COUNTY Combining Zones

- | | | | |
|---|-----------------------------|---|------------------------------|
|  | Rivers & Lakes |  | Conventional Housing |
|  | Urban Growth Boundary |  | Wildlife Area Combining Zone |
|  | Urban Reserve Area |  | Elk Habitat Area |
|  | Unincorporated Community |  | Antelope Range |
|  | Barbara Manning Inland Area |  | Deer Migration Corridor |
|  | Landowner Management Water |  | Deer Winter Range |
|  | Landowner Management Road | | |



Scale: 1 inch = 1 mile
 Date: 10/20/09
 Author: [illegible]
 Title: [illegible]

SSG Property Subject of Objection



NOTE: Area covered by Awbrey Butte Master Plan

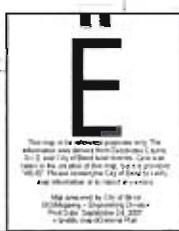
Northwest Crossing Refinement Plan

Lava Ridge Refinement Plan

Medical District Overlay Zone

Murphy Crossing Refinement Plan

Dean Swift Refinement Plan



Bend Urban Area General Plan
Code Updated December 15, 2006

- | | | |
|---------------------------|-------------------------------|--|
| City Limits | CB- Central Business District | PF- Public Facilities |
| Section Lines | CC- Commercial Convenience | PO- Professional Office |
| Railroads | CG- Commercial General | PORM/RS |
| Urban Growth Boundary | CL- Commercial Limited | RH- Residential Urban High Density |
| Parkway | IG- Industrial General | RL- Residential Urban Low Density |
| Areas of Special Interest | IL- Industrial Light | RM- Residential Urban Medium Density |
| Refinement Areas | IP- Industrial Park | RS- Residential Urban Standard Density |
| Urban Area Reserve | ME- Mixed Employment | SM- Surface Mining |
| Future Park | MIR- Mixed Riverfront | UAR- Urban Area Reserve |
| Commercial Convenience | | |

