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March 8, 2010

VIA E-MAIL AND U.S. MAIL

Richard Whitman, Director
Department of Land Conservation and Development
635 Capitol Street NE, Suite 150
Salem, OR 97301-2540

RE: Submittal of Written Exceptions to the Director's February 25, 2010 Report to the Land Conservation and Development Commission on the Bend UGB Expansion.

Dear Mr. Whitman:

I am writing on behalf of the City of Bend to submit written exceptions to the Department's February 25, 2010 report to the Land Conservation and Development Commission. This submittal is made pursuant to OAR 660-025-160(4). You will find enclosed the City's written exceptions to the Director's February 25, 2010 Report to the Land Conservation and Development Commission. Copies of this cover letter and the exceptions will be also be sent via U.S. Mail.

Sincerely,

Eric King
City Manager

cc: Bend City Council (7)
Mel Oberst, City of Bend
Brian Shetterly, City of Bend
Damian Syrnyk, City of Bend
Mary Winters, City of Bend
Gary Firestone, City of Bend
Mark Radabaugh, DLCD

THE CITY OF BEND'S

EXCEPTIONS TO

DEPARTMENT'S RESPONSE TO APPEALS

RELATING TO

THE ADOPTION OF BEND'S

REVISED URBAN GROWTH BOUNDARY

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BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

THE CITY OF BEND'S EXCEPTIONS TO DEPARTMENT'S RESPONSE TO APPEALS RELATING TO THE ADOPTION OF BEND'S REVISED URBAN GROWTH BOUNDARY

I. INTRODUCTION

As discussed in more detail below, the City of Bend still disagrees with many of the positions stated by the Department, but agrees with the Director that the differences between the City and the Department have narrowed. One key issue is the extent to which findings are required and the detail that is required in the finding. Other important issues include the extent to which the City can provide market choice for economic land needs, the adequacy of the City's efficiency measures, and the extent of transportation analysis required. These are more than theoretical concerns, but continue to raise questions of whether the Department's view of how the City should show can substitute for the local discretion allowed by the statutory goals and administrative rules.

While the City accepts that there will be a remand and has requested clarity regarding the scope of remand, a few of the recommendations include too much detail regarding what must be done on remand, to the point that they dictate the substance of decisions rather than establish legal standards. The City is also concerned that the Department's response to the appeals raises new issues and takes new positions on issues. Even granting that the Department can change positions in response to appeals, some of the new positions go beyond anything raised in appeals or in the local proceedings by Department staff, making it hard to fathom the basis for this belated raising of new positions. Within the UGB expansion process the decisions at the local level build upon each other, so that decisions later in the process are dependent upon earlier decisions (e.g., the expansion and locational decisions are based on the residential land needs analysis). Local government cannot be expected to respond to and make decisions based on a Department position that is a moving target.

These exceptions list each issue and recommendation raised by the Department, followed by the City's response and analysis.

II. RESPONSE TO SPECIFIC ISSUES

A. Required Findings and Standard of Review

Issue as Stated by Department: *Must the city adopt findings explaining how its decision complies with applicable statutory, goal and rule requirements? To what extent may the city rely on its briefing on appeal and citations to the record to substitute for findings? What is the evidentiary standard for the agency's review of the city's decision?*

Department's Recommendation: *The department recommends that the commission's decision clearly articulate that the city's findings must identify the applicable legal standards, the relevant evidence in the record before the city pertinent to that standard, and explain why the city's decision complies with the standard based on substantial evidence in the record. The department recommends that the commission not ask the city or other parties to provide additional evidence, with the exception of a request for a site visit for a general orientation to the city and the expansion area, as described in the letter from the Director dated February 24, 2010. Any additional evidence or findings should be prepared by the city and approved by the city and Deschutes County on remand, not presented to the commission without local review.*

City's Response: The findings issue is key as it is the basis for much of the disagreement between the City and the Department as to whether or not the City has done the work to satisfy the goal requirements for an urban growth boundary expansion. The Department misunderstands the City's view on findings. The City agrees that it must adopt findings to show how its legislative action complied with the statewide goals, statutes and administrative rules. The City also agrees that the findings must allow the Department and the Commission to review whether there is substantial evidence in the record to support the findings. The question is the nature and extent of the findings required.

The City did make findings to show compliance with applicable statewide goals, statutes and rules. The findings point to documents in the record, and the record is listed in detail for the Department's and Commission's use. The City is not asking for its appeal to substitute for findings, but is questioning the level of detail being required to support a legislative decision. The Department finds ongoing fault with the perceived lack of evidentiary or connecting findings linking every piece of supporting evidence in the record to those findings. In essence, the City has been penalized for its voluminous record (the result of an open and lengthy public process), which made it difficult for the Department staff to review the City's work. It now appears that the City was not always prescient enough to predict which evidentiary link the Department desired by way of further findings. Although the City does not agree that the law or the Department's past practice requires the level of detailed findings the Department appears to be requiring of the City of Bend, the City is willing to adopt further findings upon remand as to certain items as discussed below. However, the City wishes to avoid endless pages of

explanation of basic decisions and seeks adequate clarity from the Commission as to the scope of the explanation required.

Analysis: As acknowledged by the Department, the legal standard is whether there is substantial evidence in the record to support the City's decision. (Department's Response A-1.) The Department's analysis does not compel the conclusion that detailed findings are needed for every aspect of the City's decision. Rather, to the extent that there is any requirement for findings, it is that "there must be enough in the way of findings **or accessible material in the record of the legislative act** to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002)(*emphasis added*).

The City adopted 173 pages of findings addressing the many applicable standards in a UGB proceeding. (Rec. 1052 *et seq.*) Those findings addressed all standards relating to residential and related land needs, employment land needs, UGB alternatives, statewide goals, and conformance with the Bend General Plan. They demonstrate that the applicable criteria were applied and the required considerations were considered. But the Department seems to want more – a detailed step-by-step justification of every portion of every decision. This goes beyond what is required.

"Accessible material in the record" is sufficient to demonstrate that the substantial evidence standard is met. The City, in its appeal document, provided citations to the materials in the record supporting its decision on the various issues. The City is willing to provide more explanation on remand as to specific issues, but should not have to explain the obvious.

B.1. <u>Goal 10 and 14 Rules</u>

Issue as Stated by Department: *Which version of the commission's Goal 10 and Goal 14 rules apply to the city's decision?*

Department's Recommendation: *The department recommends that the commission clarify in its decision which versions of the pertinent goals and rules it is applying in reviewing the city's decision. The only rule that appears to be in some question is Division 24.*

City's Response: The City agrees with the Department on this issue, although the City believes the Department cited the wrong version of the rule in Sub-Issue I-1.

B.2 Mapping of Vacant and Redevelopable Land

Issue as Stated by Department: *After estimating its future population and the number of residential units in the planning period, the next step in a UGB expansion is for the city to determine what lands within its existing UGB are "vacant" or "redevelopable" – where future residential development could occur without expanding the UGB. This subissue concerns whether the city's buildable lands inventory (BLI) is adequate for review, and whether it properly determines what lands are "vacant" and what lands are "redevelopable."*

***Department's Recommendation**: The department recommends that the commission remand the city's decision with instructions for the city to develop and adopt findings that explain what criteria the city used to determine whether particular lands were vacant or redevelopable, and that show that these criteria are consistent with the Commission's definitions of those terms.*

City's Response: The City accepts that it will provide updated maps and additional findings on remand, but disagrees with some of the statements in the Department's analysis of this issue. For the purpose of determining potential housing units, the City divided the category of "vacant" land into three subcategories: (1) vacant acres (not platted, with no pending land use approvals); (2) vacant acres with land use approvals (listed as "vacant acres proposed new lots"); and (3) vacant acres within platted lots. (Table III-4 at Rec. 1071.) All three subcategories were properly considered by the City as vacant land, and the City properly considered land use approvals and existing subdivisions in determining the likely yield of housing units from these subcategories of vacant land. Vacant lands with minimal improvements were considered as vacant (the City would have referred to these lands as redevelopable lands with minimal improvement if it had treated them as redevelopable rather than vacant). The City's categorizations of land as vacant and redevelopable were consistent with applicable definitions and standards.

The City acknowledges that on remand it will re-evaluate "constrained" lots to determine whether the constraint is sufficient to preclude development of any units and anticipates that some units will be calculated for constrained lands. The City provided and relied on adequate parcel-by-parcel maps, but acknowledges that some minor adjustments relating to constrained properties may be needed.

Analysis: The City defined the categories of vacant and redevelopable land in a March 3, 2008 memorandum to the Bend Planning Commission. (Rec. 8408). ORS 197.296(4) and OAR 660-008-005 define buildable lands, which includes vacant and redevelopable lands. The Goal 10 administrative rule defines redevelopable land (*see* OAR 660-008-005(6)) but does not define vacant land. The City properly categorized and identified vacant lands. With respect to the lands identified as "constrained' in the City's inventory, the City understands that these lands may need to be re-evaluated, and possibly re-classified as redevelopable.

The Department did not raise this issue in comments while this matter was pending at the City. The Department submitted comments through letters dated June 11, 2007, May 20, 2008, October 24, 2008, and November 21, 2008. None of these letters raised this issue for the City's review, possible response, or amendment of the buildable lands inventory. While the City understands that "raise it or waive it" does not apply, the City will be able to make a better decision on remand if all issues are presented to it in a way that the City can adequately consider the issues in making a decision.

The Department notes that the City excluded lands from its inventory on the basis of CC&Rs, but did not explain why the CC&Rs make redevelopment less than highly likely, or why they preclude development of vacant land. Again, to be clear, the City exhaustively reviewed CC&Rs and only considered them when they either restrict additional division to create new units of land, or included setbacks larger than the zoning code, footprint restrictions, or minimum lot sizes that made redevelopment unlikely during the planning period. These CC&Rs are recorded, binding, and run with the land. It is reasonable to assume that the CC&Rs will not be amended to alter these restrictions during the planning period, and no evidence in the record shows that homeowner associations in Bend have historically amended CC&Rs to allow for more intensive infill development. Thus, the City correctly concluded on the basis of the record that there is not a strong likelihood that existing development, subject to certain CC&Rs, will be converted to more intensive residential uses. To the contrary, to assume more than the existing development on platted lots bound by CC&Rs, or more than the per unit development on platted vacant lots bound by CC&Rs, would be overly aggressive and would likely fail to achieve the projected densities.

B.3. <u>Housing Needs and Goal 10; Analysis of Housing Types</u>

Issue as Stated by Department: *Do the city's housing needs analysis and comprehensive plan properly identify needed housing under Goal 10 and the needed housing statutes? Is the city required to analyze housing need by tenure, given that it does not regulate tenure (OAR 660-008-0040), or does ORS 197.296 still require an analysis of housing needs for owner-occupied and rental housing?*

Department's Recommendation: *The department recommends that the commission remand the city's decision for it to revise its findings and chapter 5 of its comprehensive plan, as described above.*

City's Response: The City properly identified needed housing under the Goal and statutes. If the Commission believes that the City is required to go back and plan for three housing types rather than two, the City will do so on remand. However, the City is not required to plan by tenure given that the City does not regulate by tenure. The City accepts that it has a responsibility to provide affordable housing, but as shown by the record affordable housing can be provided by both owner-occupied and rental housing and by both detached and attached/multi-family housing.

Analysis: The City understands the Department's position to be that, based on state law and the Goal 10 administrative rule, it is required to analyze three types of housing. However, the City disagrees with the conclusion that the City did not comply with applicable standards in its analysis. Some background is needed to understand the City's analysis. The City first prepared a housing needs analysis that was submitted to the Department in 2005. Additional work on housing and land need was prepared and submitted to the Department in 2007. Ultimately, the City prepared and adopted the 2008 Housing Needs Analysis that was included in Chapter 5 of the Bend Area General Plan, Housing and Residential Lands. (Rec. 1280-1315.)

The analysis looked at several "types" of housing, but the City determined that the most useful analysis was to evaluate housing based on whether the housing is detached or attached. Detached housing includes single family dwellings and manufactured homes on individual lots. Attached housing includes attached single family dwellings, duplexes, triplexes, four plexes, and buildings with five or more dwelling units. The City treated housing in this way to estimate land needs by types and density. Attached housing is often, but not always, developed with multiple units on one unit of land. The Department did not suggest that a different analysis was needed. While the City believes that nothing in the applicable rules requires it to plan and project for three types of housing, the City is willing to do so on remand if the Commission so requires.

With respect to tenure, the City takes exception to the Department's requirement that it must identify housing by type and tenure in the housing needs analysis. The City understands that Goal 10, ORS 197.296, and ORS 197.303 require the City to plan for needed housing. ORS 197.303(1) requires the City to determine what types of housing will meet the need at particular price ranges and rent levels. The City has done so by examining what households can afford to spend on housing, either in the form of a mortgage payment or rent (Rec.1728-1835), and then ensuring that an adequate supply of housing by type (attached and detached) can be developed within the existing UGB and within the proposed expansion area. The City has proposed additional measures through which another 1,100 units of attached housing can be developed in the existing UGB. The proposed expansion includes 469 acres of land for medium and high density housing that can also be developed with affordable housing for sale or rent. The City has proposed application of Medium and High Density housing plan designations, which allow a variety of attached housing types through the Development Code. Based on the record developed at the local level, the City has demonstrated that it has planned for needed housing, including affordable housing of a type that is reasonable to plan for in Bend.

B.4. <u>Adequate Land Supply for Needed Housing Types</u>

Issue as Stated by Department: *Has the city planned for an adequate land supply for needed housing types as required by Goal 10 and the needed housing statutes?*

Department's Recommendation: *The Department recommends that the Commission remand the city's decision with instructions that the city plan for future development within the prior UGB and within the expansion area so that sufficient buildable lands to provide needed housing are planned within the UGB.*

City's Response: The City has planned and sufficiently explained how it will meet housing need. The City has justified the 65/35 goal for detached/attached and multi-family units. The City's role is to plan for housing needs by making appropriately zoned and sufficient land available for needed housing, after which the market determines whether the needed housing is built. The maps of proposed plan designations show that the City has done all it can to fulfill its role. This is a role that the City takes seriously, as demonstrated by the fact that as far as we know, the City is one of only two jurisdictions in the state that has adopted an affordable housing fee ordinance. Based on a percentage of permit valuation, this fee is directly intended to help contribute to the actual production of affordable housing.

The Department's statement that the "city's current planning for residential lands has resulted in a shift away from multi-family housing and toward a higher proportion of single-family units" is misleading. It is not the City's regulations that have resulted in the shift. The shift is the result of market demand. The market in Bend, at all price levels and for both owner-occupied and rental housing, is for single family, detached housing. It is possible that the Department wants Bend to take steps to impose some regulations on the market and force property owners to provide certain types of housing, but this is not required by any goal, statute or regulation. However, all that is required is to provide opportunities for development of needed housing. It is also important to consider that in Bend the largest contributing factor to the high cost, and therefore the affordability of housing, is land supply, or the lack thereof. Increasing land supply is likely the single most important factor in providing for needed housing types within the City of Bend.

Despite the evident supply shown by the plan designation maps, the City is willing on remand to provide additional findings and explanations of its decision so the Department can understand the City's decision. If the Commission requires it, the City will break down the analysis and projections into three types (detached, attached, multi-family) rather than just two.

Analysis: The City has planned for an adequate supply of needed housing on land within the City's current UGB, and in the proposed expansion. The City Housing Goals, Targets and Benchmarks analysis (Rec. 1729) concludes that more medium and high density housing is needed for very low, low, and moderate income households. Moderate and lower income housing needs may be met by the types of housing included in the City's Medium Density (RM) and High Density (RH) zones. The City's current UGB, based on plan designation, includes a supply of 1,652 acres of land for medium and high density housing. The City proposes an additional 469 acres of land that will be plan designated and zoned for medium and high density housing (*e.g.* RM

and RH) in the expansion area, which represents a 28 percent increase over the supply in the existing UGB.

The City has also planned for a shift in housing mix from 77% detached – 23% attached to 65% detached – 35% attached, based on the existing plan designated land in the UGB, proposed measures, and proposed land use designations in the expansion area. This shift in the mix of attached housing from 23% of total units to 35% represents a 52% increase in the supply of this type of zoning for very low, low, and moderate income households. Housing for very low, and low income households will be provided through attached housing, probably attached rental housing, and maybe some detached housing given the supply of such units. Housing for moderate income households will be provided through detached housing, attached single family, and some attached multi-family housing. The City cannot guarantee that housing will be built to satisfy housing needs, but has zoned lands appropriately to allow needed housing to be developed and has also taken numerous other measures outside the UGB process to encourage and facilitate needed housing.

The types of housing needed for Bend are allowed in the City's RS, RM-10, RM, and RH Zones. These types of housing include attached single family town homes, two and three unit housing, and multi-family housing with three or more housing units per building.

B.5. Second Homes

Issue as Stated by Department: *Are second homes a "needed housing type" for the City of Bend? Is the city required to coordinate with Deschutes County concerning the regional need for this form of residential use? Did the city adequately justify its projected density for second home development, and is the city required to coordinate with Deschutes County on the regional demand for second homes?*

Department's Recommendation: *The department recommends that the commission find that the city's decision regarding second-home development is supported by an adequate factual base and that the city's decision regarding second homes is not subject to the needed housing statutes or Goal 10. However, the department also recommends that the commission direct the city to coordinate with Deschutes County concerning what locations within the county should be planned for this form of development.*

City's Response: The City agrees with the Director that second homes are not a "needed housing type" for the City of Bend, and that the City's assumption concerning acreage occupied by second homes is supported by an adequate factual base. However, the City does not accept the Director's assertion that there is any legal obligation on the part of the City to "coordinate" with Deschutes County on the specific question of locations within the county to be planned for this form of development. The Director has cited no goal, statute, or rule in support of this recommendation. The City

should not be required to demonstrate that it has "coordinated" with the county to some undefined degree regarding county-wide planning for second homes.

B.6. Inclusion of Unsuitable Land

Issue as Stated by Department: *May the city include 2,987 acres of lands in its UGB that it has determined are not suitable for urbanization?*

Department's Recommendation: *The department recommends that the commission remand the city's decision for it to address the 2,987 acres of "unsuitable" lands in one of the three ways set forth above.*

City's Response: The Department states that the City must adopt one (or more) of three approaches for unsuitable land: (1) not include unsuitable land within the UGB; (2) take a committed exception for unsuitable land; and (3) determine that the lands are suitable in some way for urbanization. The City originally approached "unsuitability" on the basis of whether inclusion of the land would assist the City to meet its residential land or employment land needs, not whether the land was suitable for some other purpose consistent with urbanization. On remand, the City anticipates that, based on a lot by lot analysis planning staff has already started, it will recharacterize most of the "unsuitable" land as suitable and assign it either no yield or a low yield, will exclude some "unsuitable" land, and then adopt findings to support its decisions. Generally, the City anticipates that it will exclude unsuitable land at the perimeter of the new UGB and will recharacterize land that is not on the perimeter. While the City might estimate some yield from land currently characterized as unsuitable, land in rural subdivisions is not likely to be developed with needed housing.

B.7. "Surplus" Acres

Issue as Stated by Department: *May the city include 500 acres of lands in its UGB in addition to the total land supply that it has determined are needed for urbanization over the planning period?*

Department's Recommendation: *The department recommends that the commission remand the city's decision with instructions to remove this acreage from the city's UGB, or for the city to include only those specific lands beyond the amount it has found is needed based on an exception to Goal 14 showing that specific lands are committed to urbanization or that specific lands are necessary to provide urban services to adjacent lands.*

City's Response: The City agrees that it will reduce the surplus. However, it is impossible, consistent with providing a logical boundary and limiting the splitting of properties, to be 100% precise. On remand, the City is willing to map the land need for housing, employment, and related uses as closely as possible to the land need estimate

for these uses. The City notes that the total acreage may still exceed the "need" to ensure logical boundaries or to ensure an entire parcel is included in the boundary expansion.

B.8. Consistency with General Plan

Issue as Stated by Department: *Is the city's UGB expansion consistent with certain housing policies of the Bend Area General Plan?*

Department's Recommendation: *The department recommends that the commission remand the city's decision with instruction to adopt findings addressing consistency with Housing Policies 4, 17 and 21 in Chapter 5 of the Bend Area General Plan.*

City's Response: While the City continues to believe that a remand on this issue is not necessary for the reasons explained in its appeal (*see* City Appeal 41-44), the City will adopt more detailed findings on remand if the Commission requires.

B.9. Second Home Capacity of Destination Resorts

Issue as Stated by Department: *To what extent is the city obligated to review the second-home capacity of existing destination resorts in the area in determining its land need for this use? Is the city obligated to regionally coordinate its second home needs analysis?*

Department's Recommendation: *The department recommends that the commission deny this appeal on this subissue.*

City's Response: The City agrees with the Department's recommendation and analysis.

C.1. Accommodating Residential Land Need Within Existing UGB

Issue as Stated by Department: *Do the city's findings adequately explain how it has met the requirement in Goal 14 to determine the extent to which it can "reasonably accommodate" its projected need for residential lands within the existing UGB, prior to expanding onto new lands?*

Department's Recommendation: *The department recommends that the commission remand the city's decision for it to explain why additional efficiency measures are not feasible, including those listed in ORS 197.296 and the Director's Decisions at 45-47, as well as expansion of the city's proposed measure for transit corridors to additional acreage.*

City's Response: The Department suggests that the City has adopted only two efficiency measures. However, as noted at page 27 of the City's appeal, the City has adopted numerous measures that have increased housing capacity within the prior UGB; policy proposals to plan for higher densities in the Central Area and along transit corridors are only the most recent of these measures. As noted in the City's appeal, the City has considered a wide variety of efficiency measures and adopted those that it considers to be reasonable and likely to succeed. (Record 1084-85). The Department is correct that the City could theoretically continue to consider an unlimited number of additional measures. Potentially, there is always something more any city could do to increase the extent to which it could accommodate its projected need for residential lands within a prior UGB. The key is the term "reasonable," as used in Goal 14. As explained in the City's appeal, the City has taken numerous measures that can reasonably be expected to increase the capacity of its prior UGB. The Department has requested an explanation of City actions under ORS 197.296(9), but the City's appeal document (at 27-28) explains specifically how the City has already considered and acted on each of these measures.

The City has adequately explained its decision, as described in the City's appeal. The Department's position is second-guessing and not an evaluation of whether the City complied with applicable standards. The City will provide additional findings on remand if the Commission requires it to do so.

C.2. <u>Effectiveness of City's Proposed Efficiency Measures</u>

Issue as Stated by Department: *Are the city's two proposed efficiency measures sufficiently likely to occur? Do they "demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years?" ORS 197.296(7).*

Department's Recommendation: *On remand, the commission should direct the city to take the following actions in coordination with its Work Plan for Outstanding Metropolitan Transportation Planning Work:*

> *1. By [date], complete and adopt the Central Area Plan. The Plan must include a map with the types, densities, and locations of at least 500 additional medium-density and high-density housing units;*
>
> *2. By [date], amend zoning regulations to implement the Central Area Plan housing component;*
>
> *3. By 2012, re-zone at least 50 acres of land abutting or within one-quarter mile of existing or/and planned transit routes to RM and RH to accommodate at least 600 additional medium-density and high-density housing units; and*

4. By [date], adopt a policy in the Housing Chapter of the Bend Area General Plan that prohibits conversion of land that is designated and zoned for needed housing to another use, by re-zoning or any other action.

City's Response: The Department's discussion and analysis fails to acknowledge the numerous efficiency measures the City has already put into place to facilitate and encourage needed housing. The City is concerned that the Department is in effect asking the City to "produce" needed housing, not just to accommodate or encourage it. (*See* Department's Response at A-17.) What is required under Goal 10 and ORS 197.296 is that the city take actions to encourage the availability of needed housing and "demonstrably increase the likelihood" of development of needed housing. For example, these actions include ensuring an adequate inventory of land for needed housing. The efficiency measures taken by the City meet this standard. The City accepts that on remand it must include provisions in the General Plan requiring adoption and implementation of the Central Area Plan and rezoning of transit corridors. Specifically, the City would agree to include the following in the General Plan:

1. Within six months of acknowledgement of the expanded UGB, the City will initiate implementation of the Central Area Plan. This action will include General Plan and Development Code amendments as needed to encourage the provision of at least 500 medium and high-density housing units.

2. Within one year of acknowledgement of the expanded UGB, the City will initiate General Plan and Development Code amendments to encourage the provision of at least 600 new medium and high-density housing units along one or more existing or proposed transit corridors.

Analysis: In addition to the previously adopted measures, the City has already committed to implementing the proposed measures of the Central Area Plan and transit corridor planning through policies in Chapter 5 of the Bend Area General Plan. The City is willing to provide additional detail, including schedules for completion, potential units, and locations, within reasonable timelines as amendments to Chapter 5.

The City disagrees with the Department's position as stated at page A-17. The City has proposed measures for using residential land more efficiently in the existing UGB for the goal of providing land for needed housing. The Department appears to state a position that the City has an affirmative obligation beyond Goal 10, ORS 197.296, and OAR 660-08 to produce housing units. This position is not supported by Goal 10 and ORS 197.296, which only require the City to ensure it has provided a 20-year supply of buildable residential land for needed housing in locations appropriate for the needed types of housing. The purpose of measures, such as rezoning land to allow and accommodate a higher density of housing, is to encourage the development of needed housing under Goal 10.

C.3. Other Efficiency Measures

Issue as Stated by Department: *Has the city met the requirement of Goal 14 and OAR 660-024-0050(4) to demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB? Must the city evaluate and adopt additional efficiency measures?*

Department's Recommendations: *1. The commission should direct the city to demonstrate the number of additional housing units that parcels containing vacant lands could yield through further partitions, based on recent trends. The analysis should include a comparison of parcels in the pre-January 5, 2009 UGB that have experienced an actual increase in residential density (through land division or redevelopment, based on data since the last periodic review or the last five years, whichever is greater per ORS 197.296(5)(a)). Where a future yield estimate is less than the actual past yield for one or more parcels similar in size, shape, development pattern, and physical constraints, the city should provide the data and findings that justify assuming a smaller number of additional residential parcels and housing units for the 20-year planning period.*

2. The commission should direct the city to consider increasing residential density in the following areas of the prior UGB:

- *Southeast area: Approximately 320 acres of vacant land and vacant land with pending land use approval, on both sides of South 15th Street for approximately one mile. This could be an area that is appropriate for a mixed use center with single-family and multi-family housing, about 1.5 miles east of 3rd Street/Business 97.*

- *Southeast area: Approximately 100 acres of vacant land, vacant land with pending land use approval, and redevelopable land south of Reed Market Road and west of 9th Street, about ½ mile east of 3rd Street/Business 97. This could be a good area for multi-family housing and transit service.*

- *South side east of Deschutes River: Two approximately 20-acre vacant parcels, one adjacent to the BNSF rail line, that could be partially up-zoned for multifamily housing, and several vacant parcels with pending land use approval that could be up-zoned if the current development permits expire.*

- *East side: The area east of the 3rd Street commercial and multi-family housing zones is sprinkled with many vacant, redevelopable, and vacant parcels with pending land use approval that are generally smaller than 20 acres and suitable for increased density, particularly south of Highway 20 and east of Pilot Butte for about one mile.*

- *West side: The expiration of Northwest Crossing development permits would provide large areas with up-zoning potential, which would make transit service more feasible for this part of the city.*

3. The commission should direct the city to consider the following measures, in coordination with its Work Plan for Outstanding Metropolitan Transportation Planning Work:

- *Complete Central Area Plan and implement through policies and regulations (see below);*
- *Implement the strategies and targets in the updated Housing Chapter of the General Plan;*
- *Policies to require concept planning for areas proposed for annexation, including provisions to achieve production targets for needed housing types;*
- *Prioritize annexation of areas that demonstrate a commitment to meeting immediate needs for higher density zoning and/or particular housing types;*
- *Adoption of an average residential density standard for subdivisions and refinement plans;*
- *Increasing the minimum density in its residential zones, particularly the RS zone, or splitting that zone into two single-family zones with one reflecting well established residential neighborhoods that are unlikely to have significant redevelopment, and the other for neighborhoods where there is more redevelopment potential;*
- *Strategies for infill and redevelopment outside the Central Area Plan and the transit corridors;*
- *Permit additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer; and*
- *Up-zone a portion of land currently zoned RS to RM or RH.*

City's Response: The City is concerned that some of these recommendations from the Department are provided for the first time at this stage in the process. These are the type of recommendations that might have been appropriate early in the process, but at this point, appear to be speculative, after-the-fact second-guessing. The City has adopted numerous efficiency measures over the years, which the Department tends to gloss over. The City considered an array of additional new measures, and chose two

additional measures that seemed likely to be productive, consistent with the character of the City and existing neighborhoods. The City may consider reviewing minimum densities on remand, adding timelines for adoption of the Central Area Plan, and further consideration of some limited upzoning of large vacant parcels.

The following is the City's response to the three specific recommendations:

1. The City believes that its decision meets applicable criteria as stated in its appeal and in the analysis below and asks the Commission to reject Recommendation 1.

2. The City has sufficiently analyzed the potential upzoning of lands described in the second through fifth bullet under Recommendation 2. As described in more detail below, these areas do not present opportunities for more development than the City has calculated in its decision. However, the City accepts that the Southeast Area described in the first bullet may present the possibility for some denser development in a portion of the area and will consider a mixed-use center somewhere in this area or other upzoning of a portion of this area.

3. The list of measures in Recommendation 3 are not prerequisites to a UGB expansion. The City notes that several of these measures refer to areas to be annexed after acknowledgment of the expanded UGB. As such, they could not be considered as efficiency measures to increase the capacity of the prior UGB, even if the City agreed to implement them. The City has already shown that its housing needs cannot reasonably be accommodated within the existing UGB. To the extent the Commission believes that specific recommendations are justified, the recommendations should be along the following lines, rather than the specific requirements in the department's recommendations:

- *Implement the strategies in the updated Housing Chapter of the General Plan;*
- *Policies to require concept planning for areas proposed for annexation, including provisions to encourage development of needed housing types; and*
- *Prioritize annexations that propose and commit to developing types of needed housing consistent with the City's adopted Framework Plan.*

The Department's extensive response on this issue suggests it believes the City has an affirmative obligation under Goal 10 to ***produce*** needed housing. This suggests that any targets or estimates of need housing units that may be developed as a result of the City implementing certain measures are production targets. This misunderstands the difference between planning, over which the City has control, and market forces, over which the City can seek to influence but cannot control or even assure that targets will actually be achieved. The City has taken multiple measures over many years, and additional measures as part of this UGB expansion, and the Department has failed to articulate valid reasons as to why extensive additional analysis is required by Goal 10.

Analysis: The City has already shown that the demonstrated need for housing cannot reasonably be accommodated within the prior UGB. The City has shown through the residential land findings (Rec. 1066-1102) and the Appeal (*See* Appeal 20-23).

Chapter 5 of the City's general plan includes a summary table that shows the March 13, 2008 buildable lands inventory. This inventory divided categorized land as developed, constrained, vacant, and redevelopable. The analysis of redevelopable land was developed and reviewed by the Bend Planning Commission and Deschutes County Planning Commission liaisons, and identified as Scenario B3 (Rec. 8410).

The inventory of buildable residential land includes 12,890 acres of land. Of these 12,890 acres, 9,726 acres (75%) are developed or constrained. The City is willing to re-examine whether the acres of land that were classified as constrained should be re-classified as either developed or redevelopable land. The remaining 2,909 acres in the inventory are vacant and redevelopable lands, which represent 23% of the total inventory. The distribution of residential land by plan district, as shown in this table, is: Low Density Residential - 13%; Standard Density Residential - 75%; Medium Density Residential - 10%, and; High Density Residential - 2.5%.

Much, but not all, of RL and RS land is already subdivided into smaller parcels that either are not available or not suitable to assemble for redevelopment. The record includes a March 3, 2008 memorandum which includes a frequency distribution of lots by size for vacant and redevelopable lands, and are reproduced here (Rec. 8408-8414).

Summary of Vacant Lots by General Plan Designation					
GENPLAN	Lots	Acres	Min Size	Max Size	Ave Size
RH	20	10.16	0.000	3.02	0.51
RL	27	24.33	0.012	6.36	0.82
RM	147	128.96	0.000	39.39	0.84
RS	259	474.84	0.001	56.07	1.70
TOTAL	453	638.30			

Summary of B3 Redevelopable Lots by General Plan Designation						
GENPLAN	Lots	Acres	Existing Units	Min Size	Max Size	Ave Size
RH	2	1.14	2	0.51	0.63	0.57
RL	29	78.59	27	1.22	20.43	2.71
RM	69	139.19	263	0.50	14.62	2.02
RS	422	697.62	400	0.50	38.61	1.65
TOTAL	522	916.55	692			

Page A-20 of the Department's report includes a bulleted list under (2) that identifies potential areas, in the Department's view, for measures. The City concurs that there

may be an opportunity to consider, evaluate, and implement additional measures for some land zoned RS in southeast Bend, along 15th Street.

As to the other areas, the City is unaware of evidence in the record that these areas are likely to develop at greater densities than the densities already calculated for these areas. Indeed, the Department's description of these areas generally describes smaller parcels with existing land use approvals. The City questions the approach that would have planning based on assumptions that existing land use approvals will expire. To the extent that the Commission asks the City to consider these other areas, the City requests clarity as to the extent of findings that will be necessary to support a conclusion that the efficiency measures for these areas are not likely to develop more intensely than projected under current plan designation and zoning.

D.1. Other Lands Adjustment Factor

Issue as Stated by Department: *Did the city adequately justify its addition of a 15 percent factor for all "other lands?"*

Department's Recommendation: *The department recommends that the commission remand the city's decision for it to clarify in its findings what specific land uses are included in the "other" category, and why increasing the percentage of land devoted to these uses from 12.5 percent to 15 percent is consistent with an efficient urban form.*

City's Response: The City appreciates the Department's evolution on this issue and understands the Department's recommendation as requiring clarification of findings. The City's decision on this issue complies with applicable standards, was adequately explained, and is supported by the record, as demonstrated at pages 36-37 of the City's appeal. The City justified the increase from the actual 12.8% to 15% based on new regulations that will require more area for stormwater treatment. Nevertheless, in order to obtain closure on this issue, the City will consider adjusting the 15 percent factor to 12.8 percent if the Commission finds that it is warranted based on the record before it.[1]

D.2. Parks and Schools Lands

Issue as Stated by Department: *Do the city's findings support its decision concerning the amount of land added to its UGB for parks and schools, and has the city reviewed the extent to which these land needs may reasonably be accommodated within the existing UGB?*

Department's Recommendation: *The department recommends that the commission remand the city's decision with instructions for the city to adopt findings that are supported by an adequate factual base showing what the types of projected school and parks needs are during the planning period, including what siting criteria the districts*

[1] The actual current "other land" percentage is 12.8, not 12.5 or 12.6.

have adopted for these types of uses; and whether these uses reasonably can be accommodated within the existing UGB, or on rural lands (for passive parks uses).

City's Response: The City's decision on this issue complies with applicable standards and is supported by sufficient findings based on substantial evidence in the record, as demonstrated in the City's appeal. Materials in the record that have already been identified provide an adequate factual base for the types of school and park facilities needed during the planning period, and the criteria used by school district and the parks district for estimating these needs (Record p. 2724, 10560, and 8670). These criteria and estimates are derived from the Bend Metro Park and Recreation District's Comprehensive Plan, and the Bend La Pine School District's Sites and Facilities Plan, both of which are adopted by reference in the Bend Area General Plan (Record p. 1278-1279). The land need methodology for schools in Record 10560 enables the school district and City to calculate land needs beyond that of the Sites and Facilities Plan. If a remand is required by the Commission, it should be limited to requiring findings related to the siting criteria the districts have adopted versus requiring a new land need calculation.

D.3. Clarification of Director's Decision re Schools and Parks

Issue as Stated by Department: *Should the Director's Decision be clarified regarding school and park land needs?*

Department's Recommendation: *The department recommends that the commission affirm the Director's Decision on this subissue.*

City's Response: The City believes that the Director's Decision was erroneous rather than unclear. The City's decision on the parks and schools land issue complies with applicable standards and is supported by sufficient findings based on substantial evidence in the record, as demonstrated in the City's appeal and in the discussion in Section D.2 above.

E.1. Did City Follow Required Steps in Estimating Employment Land Need

Issue as Stated by Department: *Did the city follow the steps required by OAR 660-009-0015 and OAR 660-024-0040 and -0050 in estimating the required 20-year employment land need for Bend?*

Department's Recommendation: *The department recommends that the commission find that the city has followed the main requirements of the Goal 9 and UGB rules in estimating the amount of employment land needed by the city during the 2008-2028 planning period, with the exception of the two items addressed in subissues 2 and 4, below. The Department suggests that if the commission remands the city's decision, the city clarify its findings to state that its determination of employment land need is based on scenario B from the 2008 EOA.*

City's Response: The City agrees that the City followed the requirements of Goal 9 and UGB rules. The City does not agree that its decision was in any way deficient. The determination of employment land need is based on Scenario B from the 2008 EOA as was obvious to anyone who participated in the process and is obvious from a review of the record as a whole. The City's findings were sufficient.

E.2. Redevelopment of Employment Lands

Issue as Stated by Department: *Are there adequate factual and policy bases, and adequate findings, justifying the city's use of a 10 percent factor to estimate the amount of employment need that will be met through redevelopment of "developed" lands?*

Department's Recommendation: *The department recommends that the commission remand the city's decision for additional development of a factual and policy basis concerning the proportion of future employment need that will be met through redevelopment of "developed land" over the 20-year period.*

City's Response: While the City believes that its decision complied with applicable standards and was based on adequate findings supported by evidence in the record, the City agrees to provide more detailed findings regarding the 10 percent infill factor if the Commission requires it to do so.

Analysis: The factual basis substantiating the 10 percent infill/refill factor was mentioned only peripherally in the Director's Report and the issue had not been previously raised. The 10 percent infill/refill factor and approach to estimating redevelopment has been in place since 2007 and was included in the City's first UGB expansion proposal without adverse comment. The infill/refill factor is based on extensive research from the Metro region, is appropriate for Bend, and no evidence in the record suggests any other amount is more accurate.

While it would be ideal to be able to conduct an exhaustive study on every assumption used in a 20-year analysis, it is unwarranted given the uncertainty inherent in planning for this time period and unnecessary given OAR 660, division 9 states a "jurisdiction's planning effort is adequate if it uses the best available or readily collectable information to respond to the requirements of this division." The 10 percent infill/refill factor is based on best available and readily collectable information and is "an approximation based on research by Metro and other EOAs completed in Oregon." (Rec. 1611). "In short, these studies argue that it is more realistic to assume a general infill/refill ratio, than to attempt to identify particular parcels in the supply analysis that are likely to redevelop. This is because some highly valuable properties – for example, in downtown Bend – may redevelop, while other near-vacant properties may continue to sit empty due to location, infrastructure, brownfield, or other challenges." (Rec. 1611). The studies referenced include "Nonresidential Refill (Redevelopment and Infill)," Metro, 1999 memorandum and "2002-2022 Urban Growth Report: An Employment Land Needs Analysis," Metro

Regional Government, 2002. Also see "McMinnville EOA," 2001, p. 6-5, by ECONorthwest. (Rec. 1611). Applying an infill/refill ratio based on research from multiple jurisdictions is common planning practice, and is not unlike the Department's use of "safe harbors" for rights-of-way and land for schools and parks. In fact, some would assert that using multiple estimates from a variety of locations would tend to provide a more accurate estimate than a local analysis which could be highly skewed due to unique local short-term factors.

The alleged confusion about statements other EOA's and why the City used a factor of 10 percent versus 15 percent can be easily explained. Footnote 42 at Record 1612, as written, is incorrect. It suggests the City considered employees working in their homes, which the 2008 EOA did not consider. Instead, the 2008 EOA determined, and Director recommends approving, a consideration for a small amount of land for economic uses taking place in residential areas in non-residential structures.

The 15 percent figure referenced in other EOAs accounts for a higher rate of infill because total employment in these EOAs INCLUDED employment in home-based businesses. (See Rec. 1611.) The infill/refill factor needs to be higher in these cases since home based businesses absorb a portion of new employment and without an adjustment employment land need would be slightly overestimated. The City's 2008 EOA completely EXCLUDES land needs for employment taking place in home businesses (employment in a residential structure), and thus uses a slightly lower infill/refill factor since employment in home based businesses are not included in the City's employment estimates and subsequent land needs analysis. This makes sense because home-based businesses do not require any additional employment or residential land. The City was able to pinpoint and remove these employees from the baseline employment levels by using the City's Geographic Information System and geo-coded employment data showing employment taking place in residential structures.

E.3. <u>Updated Trends Analysis for Employment Lands</u>

Issue as Stated by Department: *Must the city update its EOA to reflect more recent trends resulting from the current recession?*

Department's Recommendation: *The department recommends that the commission deny this appeal because Central Oregon LandWatch has not identified specific trend data in the record that undermine the city's analysis to the point where the city's decision is not based on substantial evidence.*

City's Response: The City agrees with the Department's recommendation.

E.4. Market Choice for Employment Lands

Issue as Stated by Department: *Are there adequate factual and policy bases for the city's decision to increase its estimate of employment land need for commercial, medical, residential and public facility plan districts by 50 percent (except its CG plan (commercial general) district, which it increased by 25 percent)? May the city include additional employment lands beyond what it shows are needed to allow for "market choice?"*

Department's Recommendation: *The department recommends that the commission remand the city's decision for it to:*

- *Eliminate the 50 percent and 35 percent factors used to increase the amount of commercial and industrial land (25 percent for CG) need over the 20-year planning period (the city may, however, apply such factors in determining its competitive short-term supply so long as there is an adequate factual base for them);*

- *Review and justify the amount of land identified as needed for sites for medical office uses; and*

- *Document whether the other particular employment land needs identified by the city (new hospital site, university site, and two large size industrial sites) reasonably may be accommodated on vacant or developed lands within the prior UGB.*

City's Response: Market choice is a necessary element to assure an adequate supply of employment land, especially industrial land. The City has sufficiently justified the medical office use need and has provided sufficient findings, supported by evidence in the record, that the special needs sites cannot be reasonably accommodated within the prior UGB. The City recommends the Commission accept the City's economic land expansion proposal including market choice factors. If the Commission remands, the City recommends the remand provide the City the guidance to apply market choice factors to the competitive short-term supply versus total land supply to result in a total land supply for the UGB consistent with the City's current proposal.

Analysis: The City agrees with the Department's analysis that state law requires establishing a 20-year supply. However, the City asserts an adequate 20-year supply of land based on analysis and trends requires the market choice factors applied by the City resulting in the City's economic lands expansion proposal. The reasoning is discussed explicitly in the 2008 EOA. The Department has implicitly concluded that Scenario A minimum land need estimates, based on a simple calculation of new employment divided by employment density plus targeted special sites, is the only acceptable determination of 20-year employment land needs. This is an incorrect conclusion and does not consider the wealth of local conditions and policy choices the

City outlined in the 2008 EOA that justify not relying on the Scenario A minimum land need estimates.

It appears the Department has decided the total land supply is one which does not include a market choice factor applied in the short or long term land supply. Almost all of Bend's existing supply of industrial land is in one location, under one ownership, in one regulatory environment, and facing a number of critical infrastructure deficiencies. (Rec. 1604). The Department's position would require Bend to keep the same supply of industrial land priced comparable to Portland and nearly twice that of neighboring Redmond. (Rec. 1562). The local expert testimony from stakeholders, UGB TAC, and Economic Development of Central Oregon regarding Bend's dire need for additional industrial land demonstrates the need for additional industrial land within the 20-year planning period. (Rec. 1514-1516.)

The Department argues that unique special sites provide an adequate amount of land above the minimum, but fail to examine the real-world implications of the recommendations. The Department's position would site two 56-acre industrial sites in different locations without any surrounding industrial uses. Two, one-lot "industrial parks" consisting of a single 56-acre parcel held for a handful of specific uses makes no practical sense. A new hospital site without supportive medical uses makes no practical sense. Periodic review is not fast enough to respond to market demands, yet this is the remedy the Department provides the City.

The Department grants the City an opportunity to provide market choice as part of the "competitive short-term supply" but not "total land supply." Cities are required to adopt policies on "short-term supply of land," and no limits are placed on a City's policies with this regard. A City's short-term land supply policy could be to offer a tremendous variety of economic lands. However, it is clear from the Department's position that this could occur only "so long as there is an adequate factual base for them." The City has established the factual base, but the Department is unwilling to accept the City's decision. The City recommends that its economic needs analysis and determination of need for market choice be upheld.

E.5. <u>Policies for Short Term Supply of Employment Land</u>

Issue as Stated by Department: *Has the city adopted adequate plan policies to manage the short-term supply of employment land?*

Department's Recommendation: *To comply with the provisions of OAR 660-009-0020(1) and (2), the city needs to have public facilities and transportation plans that identify how improvements necessary to the competitive short-term supply of employment lands is met and continually replenished. This should include plan policies and references to SDC schedules and utility rate plans as part of the city's strategies to prepare the land supply for development, and for replacing the short-term supply as it*

develops. The plans and policies should demonstrate that the supply of short-term sites can be competitively priced and available for the anticipated uses.

City's Response: The Department has stated the City appealed this portion of the Director's Decision, which is incorrect; the issue was not raised in the Director's Report so the City could not appeal the issue. This subject was not mentioned by any appellant. The City is concerned the Department is asking for more than is required by law, and that the resulting remand would place an unreasonable burden upon the City. The Department's recommendation specifies funding and pricing elements not mentioned in the law. Therefore, the City requests the Commission not phrase the remand as suggested by the Department. If the Commission believes a remand is appropriate, the City requests its policies not be required to include competitive pricing, SDC schedules, and utility rate plans as suggested by the Department because they are outside OAR 660 division 9 requirements, and in the case of competitive pricing, outside of the City's control.

Analysis: The City has complied with all applicable requirements. (*See* Rec. 1158-1161 for Findings and Rec. 1317, 1339-1340 for the City's proposed General Plan policies.)

The Department's recommendation, while a valid aspiration, goes beyond the legal requirements by stating the City "should" include "references to SDC schedules and utility rate plans....and can be competitively priced and available for the anticipated uses." None of these terms are used in OAR 660 division 9; however, plans must include "policies committing the city or county to designate an adequate number of sites of suitable sizes, types and locations...also include policies, through public facilities planning and transportation system planning, to provide necessary public facilities and transportation facilities for the planning area" (OAR 660-009-0020(1)(c)). In addition OAR 660-009-0020(2) states "policies relating to the short-term supply of land, must include detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed. These policies must describe dates, events or both, that trigger local review of the short-term supply of land." In the aggregate, these Goal 9/OAR 660 division 9 requirements could be construed to mean the City should implement a focused public improvement plan (FPIP) coordinating capital improvement planning with land use planning for employment land. However, Goal 9 and the rules do not require a FPIP. Instead, the City has elected to follow the literal requirements of the law by providing for annual evaluations of short term and long term supply and taking measures as necessary to correct any deficiency

The City's proposed policies require reporting the supply of short-term land supply to the City Council, and if it is less than 25% of the total land supply, the report must identify obstacles, efforts, plans and potential funding mechanisms to prepare the lands to qualify as competitive short-term supply. The City's policies include dates, events, and local review. Issues such as SDC schedules and utility rate plans would naturally be discussed in the context of "funding mechanisms" mentioned in the City's proposed policy. Using this approach, it is difficult to have one fixed policy with sufficient detail to

address what will be very specific issues depending on time, funding availability, and location of land. The City recognizes that a FPIP is more desirable and is willing to strive toward completion of such a plan, which we estimate could take a year or more if we had no other work to perform for the UGB. The City would agree to undertake a FPIP and aspire toward a completion date within 3 years. A compromise acceptable to the City to achieve acknowledgement of the UGB is for new policies to be amended to require a focused public improvement plan be a part of the review of short-term land supply. The policy would then drive the requirement for the subsequent detailed analysis. The City does not believe it is practical or warranted to include fixed detailed strategies as General Plan policies, and that such strategies need to be detailed in an implementation measure such as the FPIP.

E.6. Anticipated Vacancy Rate

Issue as Stated by Department: *Does the record support the conclusion that Bend will experience a 15 percent vacancy rate in its employment lands over the 20-year planning period?*

Department's Recommendation: *The department recommends that the commission remand the city's decision, for it to utilize a long-term vacancy rate that is consistent with available trend data.*

City's Response: The City's decision complied with applicable standards and was based on adequate findings supported by evidence in the record, as demonstrated in the City's appeal and the following analysis.

Analysis: The Department's analysis assumes that since a 15 percent vacancy rate was not observed in the last decade, it is not appropriate to conclude it will be observed in the 20-year planning period. This position does not address the legal requirement to examine data and trends to predict future conditions which may be different than past trends. In other areas of the City's proposal, the Department is requiring the City to make aggressive assumptions regarding increasing residential densities well beyond what has been observed in recent development.

The Department has made assertions and conclusions without providing the City and Commission specific reasons why evidence in the record does not support the City's conclusions. The Department simply states "the evidence does not support the conclusion" without providing any evidence or rationale of its own to back its own conclusions. This approach is particularly troubling because there is no evidence or testimony in the record to suggest an alternative specific vacancy rate is more appropriate.

It is true that one of the more than ten reasons given for the selected vacancy rate is that a slightly higher vacancy rate will tend to decrease rents and prices, which will

combat a major constraint and weaknesses in Bend's economy. It is consistent with Goal 9 to:

1. Examine factual information (low vacancy rates during an economic boom);
2. Evaluate trends present in the factual information (rapidly rising vacancy rates nearing the City's final 15 percent rate);
3. Acknowledge the City's economic weaknesses and threats (low land supply and high prices);
4. Adopt policies on land availability and price (increase supply and lower prices); and
5. Consider all of these to arrive at a reasonable and appropriate vacancy rate of 15 percent.

The Director's Report has implied that an appropriate rate could be half this amount, which is neither supported by an analysis of trends and data, nor supported by the City's policies on economic lands.

The City has provided over ten specific reasons supported by a factual basis to support the 15 percent factor, yet the Department focuses on only one reason (lower land cost and greater supply) and provides no specific reasons why the bulk of the City's evidence is not adequate.

The trend data and research clearly indicate that the extremely low vacancy rates observed during the period between 1996 and 2006, which also saw a 473 percent increase in the price of industrial land (Rec. 1562), and rapid employment growth are not likely to return to Bend and Deschutes County in the 20-year planning period. This conclusion is supported by an examination of rapidly rising vacancy rates taking place between 2006 and 2009. In this short period of time, the industrial vacancy rate more than quadrupled from 2.9 percent to 12.1 percent (Rec. 1111). The trend clearly suggests rising vacancy rates, and based on this analysis, the City was conservative that such rapid and large increases in vacancy would not continue. Likewise, office space vacancy rates increased from 9 percent to 13.5 percent between 2006 and 2008. The trend clearly shows an increase, but the City assumed only a minor increase in its use of a 15 percent vacancy rate. The Department has not acknowledged these trends.

The City provided research from other larger communities demonstrating that structural vacancy rates between 14 and 17 percent are common. (Rec 1616-1617). The Department has ignored this evidence in its analysis.

The Department has not provided any concrete suggestions how to calculate a reasonable vacancy rate that considers recent history as well as recent trends. Using an average or single year statistic does not address the context of the current planning period nor policy.

The City's use of a 15 percent vacancy rate is rational and reasonable based on evidence and findings in the record.

E.7. Consideration of Non-Urban Activities

Issue as Stated by Department: *Must an urban expansion consider the impact on displaced non-urban industries, such as agriculture and agriculture irrigation?*

Department's Recommendation: *The department recommends that the commission deny this appeal. OAR 660-009-0020(3) and (4) provide that local governments, as part of their Goal 9 responsibilities, may adopt policies and take other actions to maintain and encourage the expansion of existing industries. Such industries could include agricultural industries. However, in this case, neither the city nor the county have adopted comprehensive plan policies that require them to manage the city's urban growth boundary in a manner that maintains or expands agricultural operations. To the extent that Goal 14 and ORS 197.298 require local governments to maintain agricultural industries, those requirements are addressed under those provisions and not generally under Goal 9.*

City's Response: The City agrees with the Department's recommendation and analysis.

E.8. Employment Uses on Residential Lands

Issue as Stated by Department: *Is inclusion of 119 acres of residential land for employment uses justified?*

Department's Recommendation: *The department recommends that the commission remand the city's decision to incorporate the analysis of land needs for employment uses within residential zones in the city's housing needs analysis.*

City's Response: While the City believes that this issue is appropriately included in the employment lands analysis and calculation, it agrees on remand to move this analysis and calculation to the residential/other lands analysis and calculation.

E.9. Consistency with General Plan

Issue as Stated by Department: *Is the city's decision on employment lands, including its Framework Plan designations, consistent with Policy 17 and Policy 18 of Chapter 6 of the Bend General Plan?*

Department's Recommendation: *The department recommends that the commission uphold the appeal on this subissue, and direct the city to address these two policies on remand.*

City's Response: The City notes that this issue was not raised in the Director's Report of January 8, 2010, thus depriving the City of an opportunity to respond in its appeal.

The policies referenced here are actually Commercial Development Policy 27 and Policy 28, contained in Chapter 6 of the Bend Area General Plan. If required by the Commission, the City would agree to develop findings addressing these policies on remand.

F.1. Goal 5

Issue as Stated by Department: *To what extent must the city comply with the requirements of Goal 5 and OAR 660, division 23 prior to or contemporaneously with its UGB expansion?*

Department's Recommendation: *Bend will need to apply Goal 5 to riparian corridors identified in the Bend Area General Plan, wildlife habitat known to be associated with these riparian corridors, and the Oregon Scenic Waterway along the Deschutes River. Goal 5 will be applied for these resources when the city completes the Goal 5 process and adopts a protection/management program for identified significant resources at the time the UGB expansion is adopted. Bend will either need to complete the Goal 5 process for Areas or Special Interest and adjust the buildable lands inventory based on the conclusions of such a process, or remove consideration of Areas of Special Interest from the land needs equation.*

City's Response:

The City intends to protect resources in compliance with Goal 5, as evidenced by the portions of the decision that require full Goal 5 inventory and analysis prior to any development within the UGB or annexation. Other jurisdictions, including the City of Redmond in 2006 and the City of Sisters in 2005, were not held to this same level of scrutiny with regard to Goal 5. The City recognizes the importance of Goal 5 resource protection and is committed through plan policies to do a complete Goal 5 resource inventory and protection program prior to development or annexation.

On remand, the City agrees to add the affected Middle Deschutes Scenic Waterway (including any associated wetlands, scenic areas or wildlife habitat) to the City Goal 5 inventory if this area is included within the expanded UGB. The City will also clarify findings to dispel any contradictory statements. However, there is insufficient information identifying any other Goal 5 resource for the City to be required to take Goal 5 action under the applicable regulation.

As to existing ASIs within the City, the City's acknowledged development code restricts development within certain areas with upland natural features. This protection applies independent of Goal 5 and must be taken into account in determining the extent to which the land can be developed for needed housing or employment uses. The City

can also rely on its existing regulations as to any areas added to the City. The estimate of 299 acres that will not be developable because of existing acknowledged regulations is a reasonable estimate based on substantial evidence in the record. Because these are not specifically identified areas, no Goal 5 analysis is needed.

F.2 Wildfire Risk

Issue as Stated by Department: *Must the city address wildfire risk in evaluating alternate UGB expansion areas? Does Goal 7 require the city and county to include wildland fire safety planning as a consideration in planning for its UGB expansion? Are there other state laws that would implicate an action through Goal 7?*

Department's Recommendation: *The department recommends that the commission deny this appeal. However, the director also believes that the city and county should consider the information in the Community Wildfire Protection Plan for the Greater Bend Area on remand.*

City's Response: The City agrees with the first sentence of the Director's recommendation. A statement of belief is not an appropriate recommendation or remand requirement. With that said, the City has already taken into consideration wildfire risks in evaluating a boundary for the UGB expansion. City staff met with county and state staff to discuss the provisions of the Wildfire Protection Plan and how these provisions might be incorporated into annexation agreements and development plans following annexation.

F.3. Surface Mining

Issue as Stated by Department: *Does the record contain adequate evidence to provide a factual basis for the decision to designate certain property Surface Mining on the plan map?*

Department's Recommendation: *The department recommends that the commission remand the Surface Mining designation for the portion of the appellant's property outside the area subject to the DOGAMI permit. If the subject property remains in the expansion area upon reconsideration by the city to comply with other aspects of this remand, the city and county must either demonstrate that the Surface Mining designation complies with the requirements of Goal 5 and OAR 660, division 23, or provide an appropriate alternative designation.*

City's Response: Upon remand, the City will reconsider the plan designation for the Shevlin Sand and Gravel property.

G.1. PFPs – Prior UGB

Issue as Stated by Department: *Are the PFPs submitted by the city in compliance with Goal 11 and the Goal 11 rules as to lands within the city's prior UGB? Should the commission acknowledge the PFPs as to lands within the prior UGB, even if the PFPs must be remanded as to the UGB expansion?*

Department's Recommendation: *The department recommends that the commission remand the public facility plans for wastewater and water for the city to complete the work described in the Director's Decision, starting at 82. The department will continue working with the city as it revises sewer and water master plans to address only those areas in the prior UGB, if that is what the city elects to do.*

City's Response: The PFPs may and should be acknowledged as to the City's existing UGB. However, if the Commission does not agree, the City anticipates a serial adoption of PFPs as described in the analysis below. The City has already shown in its appeal that the PFPs included the information and elements required by the Goal 11 administrative rule. (City Appeal 65-68.)

Analysis: The City is wiling to perform a serial adoption of public facility plans (PFPs) for the water and sewer collection systems for the existing UGB. The City also agrees to either amend these plans or adopt new water and sewer PFPs for the areas included in the UGB after remand. The City also seeks a decision as to whether the airport water master plan and the wastewater treatment plant plan satisfy Goal 11 and the Goal 11 administrative rule.

The City takes exception to statements on page A-42 of the report. The City's water and sewer collection master plans were <u>not</u> created for the sole purpose of serving expansion areas. The Water System Master plan is a plan that was created to serve the City's water service area within the existing UGB. (Rec. 227-340.) The plan was relied on to evaluate potential areas for UGB expansion. The record includes a number of technical memoranda that show how exception areas to the north, northwest, and due west could also be served <u>if</u> included in the UGB, through the City's water system. (Rec. 2657-2692.)

With respect to the sewer collection system master plan (CSMP), the City acknowledges that this plan proposes improvements that would potentially serve areas within the UGB and some areas that were evaluated for expansion. The CSMP evaluated deficiencies in the existing system within the existing UGB. The CSMP also examined how to serve areas outside the existing UGB with proposed sewer interceptors intended to relieve capacity deficiencies within the existing UGB. The areas outside the UGB include those identified as urban reserve under the Bend Area General Plan, and resource lands to the north and the east. One of the key elements of the CSMP is an interceptor plan that proposes four new interceptors intended to resolve service deficiencies in the existing UGB. (See City Appeal 67-68.)

G.2. PFPs- Location of Facilities Outside UGB

Issue as Stated by Department: *May a city's sewer plans include facilities and capacity intended to serve lands outside the UGB, even if the plan says no service will be permitted or provided until such lands are located inside the UGB and urbanized (rezoned to urban designations)? May specific individual components of the city's PFP be acknowledged individually, or must they be reviewed and acknowledged as a whole?*

Department's Recommendation: *The department recommends that the commission confirm that if the city wishes to update its PFPs for lands within the prior UGB only, and those PFPs will plan for facilities that are located outside of the city's prior UGB (even though they will not serve lands outside of the prior UGB), the city may do so if it follows OAR 660-011-0060(3). Alternatively, the city could (as it attempted to do in this set of actions) adopt amended PFPs that address both lands inside of the prior UGB and lands in the expansion area.*

City's Response: The PFPs may and should be acknowledged as to lands within the existing UGB. The City may include facilities outside the UGB if they are needed to provide service to areas within the UGB.

Analysis: There is a need for locating new sewer interceptors on land outside of the existing UGB. The City's waste water treatment plant is located north and east of the City's current UGB and proposed expansion. (Rec. 718.) The plant was established in 1981 in an area zoned exclusive farm use and designated Agriculture on the Deschutes County Comprehensive Plan. This type of use is allowed as a conditional use in a resource zone pursuant to ORS 215.283 and ORS 215.296.

The City is aware that Goal 11 prohibits the establishment or extension of sewer systems outside urban growth boundaries. The City has already included a new policy in Chapter 8, Public Facilities and Services that states the City will not extend sewer service to areas outside of the UGB. (Rec. 1495.) If the Commission is not satisfied with the provision, the City is willing to re-write this policy and provide further clarification that the sewer interceptors are located outside of the UGB to service areas within the UGB, and that the City will not allow any connections to properties outside the UGB. The facilities, once constructed, will be buried and not available to an individual landowner. These are not uses that could potentially interfere with or increase the cost of accepted farming practices.

G.3. Use of PFPs To Determine UGB Location

Issue as Stated by Department: *Were the city's public facilities plans improperly used to determine the location of the UGB expansion?*

Department's Recommendation: *The department recommends that the commission remand the city's public facilities plans for sewer and water, as found in the Director's Decision beginning on Page 82.*

City's Response: The City relied upon the PFPs as evidence in the record to evaluate alternate boundary locations pursuant to OAR 660-024-0060(8). The City adopted these plans and incorporated them by reference in the City's comprehensive plan. The City has proposed a serial adoption of water and sewer PFPS for the existing and acknowledged UGB, followed by amendments of these plans or adoption of new PFPS for the areas ultimately included in the UGB through the proposed expansion. The City has also shown that the elements required to be included in PFPS under the Goal 11 rule have been provided and are before both the Department and Commission. (*See* City Appeal 67-68).

The PFP's were prepared to plan for services within the existing UGB. The location and alignment of interceptors and mains were based on valid engineering analysis and design rather than on land use planning directives. The engineering analysis used the 2004 acknowledge population projection as a basis to design the capacity of the systems. The fact that the systems could serve other lands outside of the existing UGB such as the urban reserves is coincidental and was not a controlling factor in the planning process. The alignment of the sewer interceptors did become an issue once the public hearing process for the draft UGB began and the City undertook two alternative alignment analyses to respond to public comments.

G.4. PFPs and Needed Housing

Issue as Stated by Department: *To what extent must a PFP be consistent with proposed land uses, including any measures intended to meet needed housing?*

Department's Recommendation: *The department agrees that the city is not required to examine measures to meet needed housing if its action does not trigger the requirements of ORS 197.296 or OAR 660-024.*

City's Response: The City agrees with the Department's recommendation and analysis.

G.5. Service Agreements With Private Water Districts

Issue as Stated by Department: *Under OAR 660-011-0010(2), what are the city's obligations, if any, to have service agreements with private water districts?*

Department's Recommendation: *The department recommends that the commission remand the UGB expansion decision and PFP amendments with direction to coordinate and execute urban service agreements compliant with ORS 195, Goal 11, and OAR*

660, division 11. Urban service agreements should be coordinated with the City of Bend, Deschutes County, and urban service providers, including Avion Water Company and Roats Water Company, prior to acknowledgment of the UGB expansion and PFP amendments.

City's Response: OAR 660-011-0010(2) does not require the City to enter into service agreements with private water districts.

Analysis: ORS 195.065-195.085 provide statutory requirements for intergovernmental agreements identified as urban serve provider agreements. These statutes require local governments to coordinate with special districts that provide an urban service within an urban growth boundary. ORS 198.010 (1) through (26) lists the units of local government defined by statute as special districts. Avion Water Company and Roats Water Company are private utilities that are not organized as special districts under ORS 198.010. The City concurs with the Department that Goal 2 and the definition for coordination of a plan under ORS 197.015(5) require the City to coordinate with private utilities, such as Avion Water Company and Roats Water Company. However, since none of these companies are special districts under ORS 198.010, the City is not required to enter into an urban service provider agreement pursuant to ORS 195.065.

G.6. Notice of PFP Revisions

Issue as Stated by Department: *What was the city's obligation to provide notice to DLCD of PFP revisions as part of its October 8, 2008 supplemental notice of a revised UGB amendment?*

Department's Recommendation: *The department understands that this matter will be resolved as the city works through various remand items and presents a new updated notice to the Department pursuant to ORS 197.610.*

City's Response: While the City takes the position that it complied with all notice requirements, the City accepts that this is a non-issue and that any possible issue will be resolved by providing notice of the remand proceedings.

G.7. Geographic Scope of Sewer PFP

Issue as Stated by Department: *Must the city's sewer PFP cover all areas in the UGB expansion?*

Department's Recommendation: *The department recommends that the commission remand the city's public facilities plans for sewer and water, as found in the Director's Decision beginning on Page 82.*

City's Response: The City accepts that it must update the PFP after the UGB is established, but does not accept that PFPs must anticipate future boundaries.

Analysis: The City has proposed a serial adoption of the PFPS for water and sewer. The City points out again that the City's water system master plan, with the exception of the water master plan for the Bend Municipal Airport, serves the existing UGB. The sewer collection system plan, as proposed with several addenda, serves areas inside the existing UGB and areas proposed for inclusion in the UGB expansion.

G.8. Coordination with Private Utilities

Issue as Stated by Department: *Does Goal 2 and its coordination requirement apply to private water utilities when those utilities will provide an urban service to areas within the UGB?*

Department's Recommendation: *The department recommends that the commission remand this issue with instructions to coordinate planning of water service in its PFPs with Avion and Roats.*

City's Response: The City accepts that it is required to coordinate planning of water service. However, as to private water companies such as Avion and Roats, the only coordination required is that all entities know the location of their service boundaries and the size and location of transmission lines in the City. The service boundaries are mapped in the PFP. (Rec 315.) The private water companies are regulated by the PUC, not by the City, and are required to provide service within their service territories. If the Commission believes more is needed in the way of coordination, the City requests that the remand provide clear guidance as to the extent of coordination required.

G.9. Information re Private Water Utilities

Issue as Stated by Department: *Does the water system plan provide sufficient information about private utility water purveyors who provide an urban service?*

Department's Recommendation: *The department recommends that the commission remand with instructions that the city complete its public facilities plan to include areas where services will be provided by private water companies, pursuant to OAR 660-011-0010(1).*

City's Response: The City provided sufficient information about private water utilities. However, the City will provide system plans from the private utilities as attachments to the water PFP if the Commission requires.

Analysis: The City has provided information on the private water utilities. (Rec. 1486.) If the Commission concurs with the Department on this issue, the city requests clear

and specific direction on remand as to what information to include in a revised public facilities chapter of the City's general plan regarding these providers.

G.10. Irrigation Districts as Urban Service Providers

Issue as Stated by Department: *Is Swalley Irrigation District a "rural irrigation system" or is it a "service provider" under OAR 660-024-0060(8) such that there is an additional coordination obligation (in addition to Goal 2) to evaluate the relative costs, advantages and disadvantages of alternative UGB expansion areas with respect to Swalley Irrigation District? Swalley and Hunnell United Neighbors also seek clarification that the city is required to compare the costs, advantages and disadvantages of alternative UGB expansion areas with respect to public facilities and services regardless of whether it is including particular UGB expansion areas on the basis of such costs.*

Department's Recommendation: *The department recommends that the commission deny the appeal on the subissue of whether the city must coordinate with Swalley as a "service provider," and concur with the Director's Decision. The city is required to coordinate with Swalley under Goal 2, but the specific provisions of OAR 660-024-0060(8) are focused on the capacity of urban service providers to serve the expansion area, along with effects on their systems already inside the UGB. Swalley provides an important service to rural land uses. Coordination and consideration of the impacts is desirable, but is not mandated under this rule. The department agrees that the commission's decision should be clear that OAR 660-024-0060(8) requires consideration of the relative costs, advantages and disadvantages of alternate UGB expansion areas regardless of whether the city includes or excludes areas on the basis of such costs.*

City's Response: The City agrees that Swalley is not an urban service provider. Swalley Irrigation District is an irrigation district organized under ORS 545. This district exists to divert water from the Deschutes River to land owners for the purpose of providing water for irrigation for agriculture. The City did adequately consider relative costs, advantages and disadvantages of alternate UGB expansion areas. Although outside the scope of this UGB proceeding, the City notes that it will continue to coordinate and cooperate with Swalley on matters of mutual interest. (*See* Rec. 6636-6731, 7680 for documentation of past coordination, including coordination efforts through the Deschutes Water Alliance.)

G.11. Cost of Public Facilities

Issue as Stated by Department: *Does the city's analysis of public facilities and services underestimate the cost of providing such facilities and services to the UGB expansion area and, if so, must the city revise both its Goal 11 analysis and its Housing Needs Analysis to evaluate whether it is planning for needed housing in locations appropriate for the needed housing types.*

Department's Recommendation: *The department recommends that the commission deny the appeal on this subissue for the reasons stated above.*

City's Response: The City agrees with the Department's recommendation and analysis.

H.1. Relative Costs of Transportation Improvements

Issue as Stated by Department: *Do the city's findings adequately explain the relative costs of providing transportation improvements to serve individual UGB expansion areas?*

Department's Recommendation: *The department recommends that the commission clarify item 1 in the description of additional findings needed, to state that areas or parcels group for purposes of comparison must be made up of lands in the same priority category under ORS 197.298. Lands in lower priority categories are analyzed and compared only if the quantity of lands in higher priorities is not sufficient to accommodate the amount of land the city has documented is needed.*

City's Response: The City's findings adequately explain relative costs of transportation improvements to serve UGB expansion areas consistent with the Goal 14 requirements.

Analysis: The City made transportation cost comparisons based on discrete Transportation Analysis Zones (TAZs) that were chosen 'specifically' because they had common transportation characteristics and they could be developed into practical and useful segments of the transportation system (*i.e.*, logical building blocks of the transportation system). The bundling of areas into "Priority Subareas" was not deemed as a prudent means of making this analysis. To help fulfill meeting the intent of the Goal 14 analysis, the 'Priority 2' and 'Priority 4' lands were assigned the TAZ based transportation cost-per-acre values and mapped on a 'parcel by parcel' basis. (Rec. 2323-31). The map legend indicates "UAR & Exception" lands (Priority 2) and "Resource" lands (Priority 4). Transportation costs were just one piece of the Goal 14 analysis.

H.2. Costs to Overcome Topographic Barriers

Issue as Stated by Director: *Must the city provide additional information and findings regarding the costs of providing any extraordinary costs related to overcoming topographic barriers or rights of way?*

Department's Recommendation: *No change is recommended. As noted above, while the information cited by the city partially addresses the department's concerns, the*

analysis cited by the city is characterized as hypothetical and was not clearly a basis for the city's findings addressing OAR 660-012-0060(8).

City's Response: The City provided sufficient information and findings regarding costs. However, the City will provide additional findings and explanation if the Commission requires it to do so.

Analysis: "Overcoming Topography" was typically not an issue as it related to the subject of extraordinary costs (exception: the distant future Deschutes River bridge). The City also indicated in its appeal that the future Deschutes River Bridge was not a twenty-year transportation system need and also was not a cost that should be attributed to any specific expansion area because it would not be incurred in the planning period.

The City also indicated in its appeal that "extraordinary costs" were typically for transportation improvements that were "common" transportation system needs regardless of where, or if, an UGB expansion might occur and were therefore not attributable to any specific expansion area and cited the record to support this finding. (Record 2188-2189.)

The "hypothetical assignment" of possible extraordinary costs was simply a means of illustrating to the Planning Commission – at that point in the UGB discussion - how inclusion of these costs would not have altered the already high cost to develop the northern areas and those areas were not given a preference for not including the extraordinary costs. Critics of the Juniper Ridge area had perceived that by not including the extraordinary costs, it gave that area an unfair advantage in the candidate UGB area considerations. In the final version of the proposed UGB, the northern areas that were finally included in the proposed UGB area were significantly smaller than envisioned at the time of the hypothetical exercise. Hence, this was no longer an issue and why no similar presentation was made to the City Council once a final proposed UGB was advanced for the Council's consideration.

H.3. <u>Analysis/Findings re North Area Improvements</u>

Issue as Stated by Department: *Must the city provide more detailed analysis or findings of the extent to which the costs of improvements for major roadway improvements in the north area (including proposed improvements to Highways 20 and 97) are a result of and should be assigned to development in the north area rather than the city as a whole? That is, should the city's analysis and evaluation assess whether the extent of improvements in the north area might be avoided or reduced in scale or cost if the UGB was not expanded in this area or if the extent of the UGB expansion was reduced?*

Department's Recommendation: *No change is recommended. The commission should remand the city's decision to properly consider costs of providing transportation facilities needed to serve the northern expansion area.*

City's Response: The City provides sufficient analysis and findings regarding the north area improvements, as described in the City's appeal and in the following analysis.

Analysis: As indicated in the previous sub-issue analysis, the costs for needed transportation improvements in the central and north highway corridors are needed regardless of where the City might expand its UGB. Additionally, the amount of acreage proposed early in the UGB process, located in the northern part of the City, is substantially smaller than what was proposed earlier and other highway-related capacity issue areas (*i.e.*, the "Auto Mall" and a full-scale development of the Juniper Ridge area) were either eliminated or dramatically scaled-back, respectively, in the final City UGB proposal.

H.4. Types of Roadway Networks

Issue as Stated by Department: *Must the city provide comparable estimates for providing needed roadway capacity for areas that because of topographic constraints may need to be served by different types of roadway networks? For example, growth on the east side can apparently be served by a fairly complete grid of streets, while topographic barriers limit potential for a full street grid in this area.*

Department's Recommendation: *The department recommends the commission uphold the Director's Decision on this subissue.*
City's Response: The City adequately analyzed costs of roadway capacity for different areas, taking into account the different types of roadway systems in different areas, as described in the City's appeal and the following analysis.

Analysis: The fundamental objection was the perception that estimates by the City for the 'west side' of town did not accurately account for the grid system road spacing/ frequency that was used in the estimates on the east side of town. This was further perceived to be an error due to the general perception that topography was more difficult and not adequately accounted for in the west side roadway system costs.

As was indicated in the City's appeal, the City took this into account and has planned for less of a grid pattern on the west side spacing of streets. The City disagrees with these "perceptions" from the objectors and repeats the following rationale on *Frequency of Roads* and *Topography*:

Frequency of Roads. The road plan for the network proposed in the UGB (Rec. 1476) follows generally the road spacing standards found in the City of Bend Transportation System Plan (TSP) (Rec. 1376-1452) that calls for collector roads on approximately a ½-mile spacing and minor arterials on a 1-mile spacing. (TSP Table 12: Rec. 1450 and TSP Figure 29: Rec. 1452.) West side roads were noted (during Planning Commission

work sessions) as an exception to this spacing principally due to the barriers created by the existing development patterns on Bend's existing west side edge, the limited amount and density of the adjacent land uses (in the areas the roads would serve), the lack of any future development potential farther west (*i.e.*, the Forest Service lands) and topographic barriers. This deviation is primarily evident in the pattern of north-south corridors. East-west streets far better matched the grid system spacing guideline that is illustrated in the TSP.

Topography. The record contains an analysis of steep slopes. (Rec. 7664, map exhibit illustrating the areas where slopes exceed 25%.) A visual inspection of the map exhibit illustrates how those steep slope areas are limited to relatively narrow drainage swales, creeks or ravines that trend (except most of the river) in a southwest to northeast direction. The location of planned roadways generally parallels those ravines. The majority of planned arterials and collectors are also on the lower flanks of Overturf and Awbrey Buttes running generally parallel to the prevailing elevation contour lines. One roadway (Skyline Ranch Road, north of Shevlin Park Road) has also already been built to a gravel road standard and runs along the proposed alignment of the future arterial for a distance of close to a mile (which may well generate lower costs than what was estimated).

There may be isolated exceptions to slope considerations and some short roadway sections that will have more pronounced costs that might be attributable to grade but there are other parts of town that may also have additional cost considerations that may not have been accounted for in the calculations. Again, these are typically costs that are identified after more accurate field surveys and engineering has been completed for a project in the design development stage – not for rough cost estimates called for by OAR 660-012-0040. Other additional costs might include existing irrigation canal and lateral conflicts, existing utility conflicts, existing development conflicts, lava pressure ridges (peaks and troughs) and a preponderance of old existing county roads that may have non standard road sections[2], all factors that are far more pronounced in areas east of the river. The City appropriately accounted for topography in its calculations.

The Department, in its Report to the Commission, has also suggested that a different method of providing transportation capacity, such as additional travel lanes may address the lower frequency of roads. The City disagrees as the transportation analysis done by DKS did not indicate a need to provide this type of supplemental transportation system capacity under any of the land use scenarios evaluated. (Rec. 2184, 2260 and 2625.)

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[2] Cost estimates for any 'existing' roadways (common on the east side of Bend) were simply the additional cost to expand the roadway to the urban standard – these were termed "modernization" roadways. One could make an argument that these roadways actually have a higher cost to improve, as well. But due to the lack of additional detail on those roadways, such as surveys, geotechnical work and/or other detailed engineering, no attempt was made to adjust those estimates to higher (full) "new road" construction costs.

H.5. Planning Status of Deschutes River Bridge

Issue as Stated by Department: *What is the Planning Status of the Deschutes River Bridge? Is removal of the proposed Deschutes River Bridge from the city's TSP sufficient to resolve the planning status of this facility, consistent with OAR 660-012-0025(3)?*

Department's Recommendation: *The department recommends the commission uphold the Director's Decision on this subissue.*

City's Response: The Deschutes River Crossing is not planned within the 20 year planning period. It has been shown in the TSP as subject to further study prior to being designated as a needed facility. Although this bridge has not been found to be needed during the planning period the City saw no harm in acknowledging that such a facility may be needed at some point in the future, and should be the subject of further study during the planning period. However, if the Commission insists, the City would agree to adopt an explicit finding that this bridge is not a needed facility during the planning period, and to remove all references to it from the TSP.

H.6. Findings re Widening of Newport and Galveston Streets

Issue as Stated by Department: *Are city's findings sufficient to show that its transportation analysis for Goal 14 is consistent with city policies which restrict widening of Newport and Galveston Streets beyond three lanes?*

Department's Recommendation: *The analysis included in the record and cited by the city shows that city's action is not inconsistent with this plan policy. Consequently, the commission should overrule this objection and conclude that city has adequate findings in the record to show that its decision is consistent with its plan policies restricting widening of Newport and Galveston streets.*

City's Response: The City agrees with the Department's recommendation and analysis.

H.7. MPO Requirements

Issue as Stated by Department: *What must the City of Bend do to comply with the Transportation Planning Rule requirements for Metropolitan Planning Organization areas in conjunction with its UGB amendment?*

Department's Recommendation: *As provided in OAR 660-012-0016(2)(b), the department recommends that the commission direct the city to complete the following work in conjunction with its work to amend the UGB in order to comply with for*

completion of outstanding work necessary to comply with portions of the TPR specified below.

The City of Bend shall, in conjunction with adoption of a UGB amendment and by the dates specified below, complete the following tasks:

1. By September 1, 2010, the city shall prepare and present a report to the commission which estimates the status of the city's adopted plans in reducing vehicle miles per travelled (VMT). The report must include:

- *An estimate of VMT per capita in the baseline year (2000 or 2003)*
- *An estimate of expected VMT per capita for the planning period (i.e. 2030) for the current adopted UGB area*
- *An estimating expected VMT per capita for the planning period (i.e. 2030) for an expanded UGB which reflects the city's most current UGB expansion proposal The purpose of this report is to identify the extent of additional planning the city will need to undertake to comply with requirements in OAR 660-012-0035(4)-(7) (Requirements vary depending on whether the city's adopted plans are likely to result in an increase in VMT per capita, a reduction of zero to five percent per capita, or a reduction of five percent or more per capita.)*

2. The city shall as part of its work on Goal 14 efficiency measures, evaluate land use changes to increase availability and convenience of alternative modes or reduce reliance on the automobile as necessary to comply with OAR 660-012-0035(5)(c). This must include:

- *Preparing an estimate of VMT per capita in individual transportation analysis zones (TAZs) and proposed UGB expansion areas in 2030 based on the adopted TSP;*
- *Consider increasing future housing and employment densities beyond the current two efficiency measures through:*

  - strengthening minimum density requirements in the city's development code;
  - planning for and providing incentives for additional development in the central city area, along transit corridors and/or in neighborhood centers, and in areas where there is a substantial concentration of vacant and/or redevelopable lands;

3. By September 1, 2010, the city shall prepare and submit to the commission a draft work plan for completing outstanding work necessary to complete outstanding metropolitan transportation planning requirements as outlined in (a)-(c) below. If the report presented by the city in item #1 indicates that VMT per capita will increase over the planning period under the city's adopted plan or the

city's most current UGB expansion proposal, the city's work plan shall provide for completion of the TPR work plan prior to or in conjunction with adoption of a UGB expansion.

(a) Development and evaluation of potential standards for measuring increased transportation options and reduced reliance on the automobile to comply with OAR 660-012-0035(4)-(7). This should include:

i. Review and document existing and planned actions and programs to increase transportation options and reduce reliance on the automobile
ii. Identify barriers and opportunities to significantly expanding availability and convenience of alternative modes (walking, cycling, transit) and to reducing reliance on the automobile (shorter trips, ridesharing)

iii. Considering measures of reduced reliance as provided for in the TPR

iv. Conducting public review of items a-c.

(b) Preparation of amendments to TSP to compete a transit plan and a parking plan consistent with OAR 660-012-0020(2)(c) and (2)(g), and OAR 660-012-0045(4) and (5). The transit plan must identify planned transit trunk routes and major transit stops. The parking plan must either accomplish a 10 percent reduction in parking spaces per capita as provided in OAR 660-012-0045(5)(c) or include plan and code changes that carry out the parking management measures specified in OAR 660-012-0045(5)(d).

(c) Formulate and submit to LCDC for approval proposed standard and interim benchmarks, and supporting rationale to meet requirements of OAR 660-012-0035(5)-(7). This must include preparation of a proposed amendment to the TSP that sets forth a proposed standard and interim benchmarks and the supporting findings for adoption by the city and for approval by LCDC.

City's Response: The City accepts that the statement of the issue by the Department is correct: "What must the **City of Bend** do to comply with the Transportation Planning Rule requirements for Metropolitan Planning Organization areas in conjunction with its UGB amendment?" The answer to that question is simple – whatever obligation the City of Bend has under the TPR related to MPO areas is unrelated to what it must do to justify the UGB expansion. The City has obligations as a member of the MPO, and the City's local TSP, ultimately must be amended, but the approval of the UGB expansion is independent of those obligations. The MPO is a separate entity with separate obligations. (*See* Analysis below for further discussion of this issue.)

As discussed in the City's appeal, the Department and Commission need to distinguish between what is necessary to support a UGB decision and what the MPO and cities within MPOs areas may be required to do to comply with the TPR. The City acknowledges that the MPO may need to take action to make its plan consistent with the TPR, but that is the responsibility of the MPO, not of the City. The recommended remand asks for far more than is necessary to justify a UGB expansion. The City has done what is necessary under Goal 14 to analyze transportation feasibility and costs. OAR 660-012-0015, -0016 and -0035 do not require the City to complete metropolitan planning efforts prior to UGB expansion.

The decision before the Commission is whether to acknowledge the City's expanded UGB. Ultimate compliance with TPR is not an issue that the Commission is reviewing. The sole issue to be considered by the Commission is whether the City has analyzed the costs of providing transportation services to the various alternate areas being considered.

To the extent that the Commission concludes that the City must do more, the Commission should not require full compliance with all metropolitan planning tasks before approving the UGB, because full compliance could take 3-5 years, based on other metropolitan transportation planning efforts around the state. The City should not have to do more initiate amendments that may be required under the transportation planning rule.

Analysis: As an MPO member[3], the City has obligations related to the Regional TSP and MPO. The City's obligations as a member of an MPO are established by federal law and are outside the scope of review of a UGB expansion.[4] The MPO is not a party to this appeal.

In June of 2007, the MPO adopted the federally required plan. That plan is compliant with federal standards, but does not implement the state transportation planning rule.

The City understands that it must work in conjunction with the MPO on implementing provisions of the TPR relating to transportation planning in metropolitan areas. Reduction in Vehicle Miles Traveled (VMT) and other measures called for in OAR 660-

[3] Federal law (23 CFR Part 450) requires urbanized areas with a population of 50,000 or greater to have a Metropolitan Planning Organization to develop transportation plans and programs for the area. MPOs receive and are responsible for administering federal funds, and their primary function is to conduct a continuing, cooperative and comprehensive transportation planning process that will result in plans and programs that consider all transportation modes and will support community development and social goals. . Based on the results of the 2000 US Census, the Bend Urbanized Area exceeded 50,000 population, and the Bend Metropolitan Planning Organization was designated on December 18, 2002 by the Governor of Oregon. Local jurisdictions involved in the planning activities of the BMPO include the City of Bend and Deschutes County. In addition, the Oregon Department of Environmental Quality, Oregon Department of Transportation, Oregon Department of Land Conservation and Development, Federal Highway Administration, and Federal Transit Administration participate in the MPO process.
[4] The City notes that the authority of a state agency to impose requirements on a federally mandated entity may raise constitutional questions.

012-0015, 660-012-0016 and 660-12-0035 are goals that the City shares and will implement. However, the City is not required to postpone adoption of the UGB expansion until a modified regional transportation plan is completed, as appears to be required by the department's recommendation.[5] The City does accept that as part of its transportation analysis to justify the UGB expansion, it must address related Goal 14 efficiency measures related to transportation.

If the Commission remands on this issue, the remand should be limited to a description of what the City needs to do to justify a UGB expansion, which is simply to provide the required Goal 14 analysis of costs and feasibility, and undertake specific tasks related to metropolitan area planning. The City is willing to accept that on remand it must take measures to ensure that its local TSP is consistent with the MPO's plan. Currently, there are two very minor differences (two specific transportation projects are listed in the federal plan and not in the city TSP). The City is also willing accept a remand order requiring it to initiate all other metropolitan planning tasks.
It is, however, unrealistic to require the City and/or the MPO to go through a 3 to 5 year process, which will cost of hundreds of thousands of dollars and therefore requires grants and other funding sources before the City can expand its UGB. It is also not legally required and the Department's citation to OAR 660-024-0060(8) does not compel the conclusion that full completion of metropolitan planning tasks is a prerequisite to UGB expansion. Division 24 states the rule applying to a city's adoption of a UGB amendment, not how the transportation planning rules apply to another federally created entity. In addition, a statement of the general applicability of the statewide planning goals and administrative rules is not evidence of an intent to make the City's independent TSP planning standards a prerequisite to a UGB expansion. Rather, Goal 14 expressly addresses the required transportation analysis for an expansion. The City acknowledges that the Division 12 TSP requirements will then "kick in" once the boundary is established.

OAR 660-012-0015 governs the adoption of TSPs. OAR 660-012-0015(2) imposes the obligation to create regional TSPs on MPOs and counties, not on cities.

The Department appears concerned primarily with the inclusion of a VMT analysis. The City's existing local TSP includes a VMT analysis. Even before the City was within an MPO (and therefore before it was required to do so), the City recognized that VMT must be addressed. The City's adopted and acknowledged local TSP includes a VMT calculation that shows a 6.2% VMT reduction for the planning period of the TSP.[6]

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[5] The recommendation includes the following statement: "If the report presented by the city in item #1 indicates that VMT per capita will increase over the planning period under the city's adopted plan or the city's most current UGB expansion proposal, the city's work plan shall provide for completion of the TPR work plan prior to or in conjunction with adoption of a UGB expansion." This provision requires completion of the regional TPR as a condition of UGB expansion.

[6] A copy of the adopted and acknowledged TSP can be found at: http://www.ci.bend.or.us/depts/community_development/planning_division/docs/TSP_Chapter_5.pdf. The VMT information is in Chapter 5 and shown graphically in Table 8 at page 68. The City adopted findings of compliance with OAR 660-012 that referenced the TSP. (Supp. Rec. 1251, 1226-42.)

Nothing in the regulations requires the City to update this information just because it is expanding its UGB. As noted in provisions of the record relating to the transportation planning rule, the City's acknowledged TSP complied with applicable regulations at the time its was adopted (Supp. Rec. 1226-42) and the adoption of a new UGB does not trigger a need to amend acknowledged plans and regulations.

The MPO covers different areas than either the existing UGB or the expanded UGB. The MPO boundaries are not set in the UGB process. The MPO boundaries are not the same as the existing UGB or the proposed UGB. The MPO boundary includes some areas that are even outside the study area for the UGB expansion. The status of the MPO's RTSP will not provide all information needed to analyze UGB transportation issues because its boundary does not match either the existing UGB or the proposed UGB.

The proper approach to this issue is to have the new UGB boundary established based on a transportation analysis that satisfied Goal 14, and then after the new boundary is established,[7] the MPO and City can better analyze metropolitan transportation needs and impacts. Without knowing the UGB boundaries, any transportation analysis is very speculative.[8] The actions by the MPO are outside the scope of the Commission's review in this matter, and the Commission's review is limited to a review of whether the City provided a sufficient transportation analysis under Goal 14.

Other cities in metropolitan areas that have had to comply with OAR 660-012-0015, -0016 and -0035 have done so with established UGBs and not in connection with any UGB expansion. The process for completing the analyses needed to comply with these rules is lengthy. Three and a half years is an optimistic projection of the time it would take to complete the process. Holding up the UGB expansion process for that period of time would violate the requirement to maintain a 20-year supply of buildable land within the UGB established by ORS 197.296.

The City therefore requests that the Commission not follow the department's recommendation and instead require the City on remand (1) to provide finding showing analysis of Goal 14 factors relating to transportation and (2) to initiate TSP amendments to comply with metropolitan area provisions of the transportation planning rule.

H.8. <u>Reliance on Existing TSP</u>

Issue as Stated by Department: *May the City of Bend rely on its partially acknowledged transportation systems plan (TSP)?*

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[7] The City anticipates that the MPO will amend its boundaries after the revised UGB is acknowledged.
[8] VMT analysis, or "scenario planning," requires extensive and expensive modeling and, by definition, is dependent on set boundaries. The MPOs in the State of Oregon that have done such modeling have done so within their MPO boundaries based on the land uses that are adopted for those boundaries. It would be impossible to do this work without the MPO amending its boundaries to include the UGB expansion area, and base the modeling on the adopted or proposed zoning.

Department's Recommendation: *The department recommends that the commission deny the appeal on this subissue for the reasons stated above.*

City's Response: The City agrees with the Department's recommendation and analysis.

I.1. Use of Suitability in Determining UGB Location:

Issue as Stated by Department: *How may suitability be considered in determining the location of the city's UGB expansion. Are city-defined suitability criteria on an "equal footing" with the statutory priorities for the order in which different types of lands may be considered for inclusion in an urban growth boundary? How do the Court of Appeals decisions* in West Linn *and* Adair Village *affect this issue?*

Department's Recommendation: *The department asks that the commission make its interpretation of the interplay of "suitability" and the statutory priorities clear. While the department believes that the commission's rule at OAR 660-024-0060 is clear when read in context, the wording of the rule could be clearer and specific direction on this point is desirable not only for the City of Bend but also for other jurisdictions considering UGB expansions. The department believes that its application of ORS 197.298, Goal 14 and the commission's division 24, 8 and 9 rules harmonizes all of their provisions and is consistent with the history of the commission's rule and goal amendments.*

City's Response: The City agrees that clarification regarding suitability is appropriate. The City analyzed all properties in the expansion area on a parcel-by-parcel basis to determine suitability for residential needs and for employment needs. The City accepts that on remand it needs to address suitability on a broader basis and to not exclude land as unsuitable just because it has some development. The City advocates an approach that addresses suitability for inclusion in the UGB rather than capacity to accommodate residential or employment land needs.

Analysis: Suitability cannot be completely separated from the question of the adequacy of candidate lands for meeting identified needs. The City would agree on remand to reconsider what have been called "threshold" suitability criteria, and provide clearer findings demonstrating that the City's use of suitability criteria are not inconsistent with applicable law.

However, the City also notes that the Department continues to cite definitions for "buildable land" and "suitable vacant and developed land" in OAR 660-024-0010(1). That portion of the Goal 14 rule was not adopted until February 2009, a month after the City's adoption of its UGB amendment. These citations are contrary to the Department's acknowledgment that the *April 5, 2007* version of the Goal 14 rule applies to Bend's UGB amendment, not the February 2009 version.

The City also notes that the definition of "buildable land" contained in OAR 660-008-0005(2) for residential land is specific to the purpose of identifying buildable lands *within the prior UGB*. Similarly, the definition of "suitable" lands for employment use contained in OAR 660-009-0005(12) refers to "serviceable land designated for industrial or other employment use." Obviously, since land outside the prior UGB being considered for expansion would not be designated for industrial or other use, this definition is intended for use in identifying suitable employment land *within the prior UGB*. While these definitions may also be useful as a starting point for identifying buildable lands in the expansion area, the City continues to disagree that these are the only allowable criteria for identifying suitable candidate parcels for general housing and employment uses in the expansion area. As noted in the City's appeal (p. 91), the definition of "buildable land" for housing in OAR 660-008-0005(2) provides that land is *generally* considered suitable and available unless it meets certain criteria. The City continues to believe that inclusion of the word "*generally*" leaves open the possibility that other factors may make land unsuitable or unavailable.

Regarding the Department's request for clarification of the application of "suitability" criteria, rather than merely adopting the Department's analysis, the City urges the Commission to consider the actual text of the rule at issue, as well as the holdings of the Court of Appeals in the *West Linn* and *City of Adair Village* cases. Tellingly, the Department offers the less-than-definitive assertion that its application of ORS 197.298, Goal 14 and the applicable rules "harmonizes" those provisions and is "consistent with the history of the rule." These statements are standard legal shorthand for a position that is not supported by the actual language of the rules and applicable caselaw.

The key rule is OAR 660-024-0060(5), which provides as follows:

"(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*." (Emphasis added.)

This is precisely what the City has done, by adopting suitability criteria and applying those criteria to exclude land from consideration in the boundary alternatives analysis under ORS 197.298. The key term "suitability" is included in the rule that clarifies the application of the statutory alternatives analysis under ORS 197.298. OAR 660-024-0060(1) generally tracks the statutory hierarchy, but includes multiple references to the "suitability" element:

"(1) When considering a UGB amendment, a local government must determine which land to add by evaluating alternative boundary locations. This determination must be consistent with the priority of land specified in ORS 197.298 and the boundary location factors of Goal 14, as follows:

"(a) Beginning with the highest priority of land available, a local government must determine which land in that priority is *suitable* to accommodate the need deficiency determined under OAR 660-024-0050.

"(b) If the amount of *suitable* land in the first priority category exceeds the amount necessary to satisfy the need deficiency, a local government must apply the location factors of Goal 14 to choose which land in that priority to include in the UGB.

"(c) If the amount of *suitable* land in the first priority category is not adequate to satisfy the identified need deficiency, a local government must determine which land in the next priority is *suitable* to accommodate the remaining need, and proceed using the same method specified in subsections (a) and (b) of this section until the land need is accommodated."

If the process described in the above-quoted rule sounds familiar, that is because it is precisely what the City of Bend did in this case. Under (1)(a), the City determined which of the Priority 2 land was "suitable," by applying its suitability criteria. Then, under (1)(c), because there was an insufficient amount of "suitable" Priority 2 land to satisfy the need, the City determined which land in the next priority is "suitable" to meet the remaining need.

The Department's primary argument is that the "suitability" criteria developed under OAR 660-024-0060(5) may only be adopted and applied regarding "specific identified land needs" identified under ORS 197.298(3)(a). *See* Department's Analysis at A-60-61. However, there is absolutely no support for this position anywhere in the text of the rule. In fact, the rule itself supports the contrary conclusion. Under 0060(1)(a), quoted above, "a local government must determine which land in that [first] priority is *suitable* to accommodate the need deficiency determined under OAR 660-024-0050." First, this rule expressly states that the suitability standard is applied to the general 20-year need deficiency, and not to "specific identified land needs" under ORS 197.298(3)(a) as argued by the Department. Next, it seems obvious that a City would comply with this rule by applying the "suitability" criteria it has adopted under OAR 660-024-0060(5) in order to exclude lands that it has determined are not suitable to meet its general land needs.

The *West Linn* and *City of Adair Village* cases directly support the City's position, because those cases explain that the term "inadequate" under ORS 197.298(1) "addresses *suitability*, not just quantity of higher priority land." These cases establish that "suitability" is a standard that may be applied during the initial application of the statutory priorities under ORS 197.298(1), and not (as the Department argues) only during consideration of the exceptions to the priorities under ORS 197.298(3) regarding "specific identified land needs."

Although the *West Linn* and *City of Adair Village* cases are helpful, the Commission need not directly apply those cases in reaching its decision regarding the application of

the unambiguous text of the Goal 14 rules quoted above. The cases predate the Commission's adoption of the Division 24 rules at issue in this case, and did not involve the application of those rules. Therefore, the rules stand alone and the City's position regarding application of the "suitability" criteria may be measured by the Commission solely against the unambiguous text of the rules. As explained above, the City's application of suitability criteria was completely consistent with the rules, which provide that cities may exclude land from initial consideration under ORS 197.298(1) based on identified suitability criteria.

I.2. Application of Exceptions under ORS 197.298(3)

Issue as Stated by Department: *How does the exception to the normal statutory priority of lands for "specific identified land needs" under ORS 197.298(3)(a) apply in this case?*

Department's Recommendation: *The department recommends that the commission affirm the Director's Decision on this subissue, along with the city's determination that there is an ORS 197.298(3)(a) specific need for these uses.*

City's Response: The City agrees that the City's decision on specific identified land needs should be upheld.

I.3. Justification for ORS 197.298(3) Exceptions

Issue as Stated by Department: *How does the exception to the normal statutory priority of lands, where lower priority lands are required in order to include or provide services to higher priority lands under ORS 197.298(3)(c) apply in this case?*

Department's Recommendation: *The department believes that the city likely will be able to justify application of an exception to the normal priority of lands requirements under ORS 197.298(3)(c) to include resource lands on the eastern and northeastern sides of the prior UGB in its expansion area. However, before a final determination is made, the commission should ensure that the city is working with the correct total land supply required in the UGB expansion, along with wastewater facility planning that reflects that quantity of land being served within the 20-year planning period.*

City's Response: The City agrees with the Director's conclusion that the City has justified inclusion of lower priority lands under ORS 197.298(3)(c). The City also agrees on remand to provide adequate findings that will continue to justify any lower priority lands under ORS 197.298(3) for any revised boundary the City may adopt.

I.4. Status of UAR Lands

Issue as Stated by Department: *Are the county's Urban Area Reserve lands exception lands or resource lands under ORS 197.298(2)? Has the director correctly applied ORS 197.298(2)?*

Department's Recommendation: *The department recommends that the commission deny the appeals on this subissue for the reasons stated above and in the Director's Decision.*

City's Response: The City agrees with the Department's recommendation and analysis.

I.5. Cost as Basis for Exclusion

Issue as Stated by Department: *May a city exclude land from its UGB because the cost of developing it would be a barrier to affordable housing? If yes, on what legal basis?*

Department's Recommendation: *The department recommends that the commission deny this appeal.*

City's Response: The City agrees with the Department's recommendation and analysis.

I.6. Status of Lots of 3 Acres with Residence

Issue as Stated by Department: *May the city exclude lands from its UGB expansion area if they are a lot or parcel of less than three acres that contains a house?*

Department's Recommendation: *The COLW appeal focuses on the adequacy of the factual base for the city's three-acre with a home screen rather than the legal issue of whether such a screen may be used for general residential and employment land needs at all. The department agrees that the city's findings do not identify facts in the record showing that such parcels are not "buildable" (residential) or "suitable and available" (employment). The department, therefore, recommends that the commission uphold the COLW appeal on this issue and deny the Garrett and City of Bend appeals.*

City's Response: The City agrees on remand to review the status of platted lots larger than 3 acres with an existing residence. The Department appears to suggest that an analysis of the "actual level of redevelopment that has occurred on such lands" would be necessary to reach a definitive conclusion about the amount of redevelopment that is likely to occur. (Department's Response to Appeals A-67.) The City notes that such a historical trends analysis would be difficult if not impossible, since the current zoning that applies to the rural subdivisions in question does not generally permit further

division of these lots. There would be little or no history of land division or redevelopment to analyze. The City would, however, agree to conduct more detailed analysis of the likelihood of redevelopment of these parcels based on factors such as size, lot configuration, access, road frontage, placement of the existing house, etc.

I.7. Factual Basis for Excluding Exception Land

Issue as Stated by Department: *Do the other suitability criteria used by the city have an adequate factual base (if they may be used as threshold criteria to exclude exception lands)?*
Department's Recommendation: *The department recommends that the commission specifically direct the city on remand that it may not utilize these three criteria unless they are tied directly to a showing (with an adequate factual base) that it is not reasonable to provide urban services to the lands, or the lands are not "buildable" as that term is defined in OAR 660-008-0005 or "suitable and available" as that term is defined in OAR 660-009-0010 (if the lands are planned for future industrial use).*

City's Response: This issue addresses three types of land that the City found to be a basis for determining that the land is unsuitable. The City continues to take the position that destination report approval and CC&Rs that limit development are appropriate bases for determining that land is unsuitable for providing land needed for urban density residential development. The City agrees on remand to provide better findings as to property with improvements that exceed $20,000 and where the value of the improvements exceeds the value of the land. If the Commission disagrees as to the destination resort and CC&R burdened lands, the City agrees to provide additional findings on remand.

I.8. County Code Standards

Issue as Stated by Department: *Must the city and county apply Deschutes County Code section 23.48.030 as standards for this UGB expansion decision?*

Department's Recommendation: *The department recommends that the commission deny the appeal on this subissue for the reasons stated above.*

City's Response: The City agrees with the Department's recommendation and analysis.

I.9. Exception Areas in Northwest

Issue as Stated by Department: *Should the commission specifically remand the city and county decisions with respect to inclusion of the exception areas in the northwest?*

Department's Recommendation: *The department recommends that the commission deny the appeal on this subissue for the reasons stated above.*

City's Response: The City agrees with the Department's recommendation and analysis.

I.10. Buck Canyon Area

Issue as Stated by Department: *Was exclusion of the Buck Canyon exception area from the City of Bend's UGB consistent with the ORS 197.298 priorities for adding land to a UGB?*

Department's Recommendation: *The department recommends that the commission remand the city's UGB amendment with instructions to revise its housing needs analysis, residential land needs analysis, and urban growth boundary location analysis according to the instructions set out in the Directors' Decision.*

City's Response: The recommendation does not raise any new issues, and the City continues to take the position that the City is not required to re-perform any of these analyses, except to the extent that the City has agreed to do so above.

J.1. Validity of Objections

Issue as Stated by Department: *Is the validity of objections to the city's decision relevant to the commission's decision on appeals of the Director's Decision?*

Department's Recommendation: *As the validity of an objection is not a prerequisite to an appeal, the department recommends that the commission not address any appeal directed at the validity of objections to the extent that they seek to have a party to the appeal dismissed. (The appeal may be relevant to some substantive issue raised on appeal).*

City's Response: While the City continues to take the position that the Department should have complied with applicable standards in evaluating objections, the City will not further pursue this issue.

J.2. Plan Designations and Zoning

Issue as Stated by Department: *Did the city and county apply appropriate comprehensive plan and zoning designations to the UGB expansion area?*

Department's Recommendation: *The department recommends that the commission remand the county and city decisions for clarification consistent with the analysis*

presented above, and for revisions of the interim zoning applied to the expansion areas to conform to the provisions of OAR 660-024-0020(1)(d) and OAR 660-024-0050(6).

City's Response: The City accepts that in a few instances the interim zoning designation is inconsistent with the prior county designation and agrees to designate these areas with the appropriate interim zoning upon remand to be in compliance with OAR 660-024-0020(1)(d).

However, the City the does not agree with the Departments interpretation of cluster development as a means of retaining land for future urban development. The ability to do clustered developments does comply with OAR 660-024-0050(5). The provision for cluster development does not allow more development than was formerly allowed by the county. Cluster development simply requires that the allowed development potential be clustered together on smaller consecutive parcels to preserve a greater area of vacant land for future urban development. Furthermore, the code provisions require that a shadow plat be filed for not only the large vacant parcel, but the smaller cluster parcels too. The shadow plat must demonstrate that the future urban densities can be achieved. As pointed out by the Director, the expansion area has an inordinate number of rural subdivisions permitted by the county that interfere with efficient future urbanization due to their large lot sizes and disconnected street patterns. The City does not want to permit another Cascade Highlands consisting of large 10-acres ranchettes with million-dollar homes that will never redevelop.

J.3. <u>Notice re Plan Amendments</u>

Issue as Stated by Department: *Did the city fail to comply with ORS 197.610 by failing to provide adequate notice of the proposed amendments to its General Plan? Did the city meet its Goal 2 coordination obligations with regard to Swalley Irrigation District? Did the city violate Goal 1 in how it considered and provided for public participation regarding its public facility plans?*

Department's Recommendation: *The department recommends that the commission deny the appeals on these subissues, and remand the city's decision for it to reissue notice in compliance with ORS 197.610 and the commission's rules for post-acknowledgement plan amendments.*

City's Response: The City complied with all applicable notice requirements. However, the City accepts that this issue is not worth pursuing and will provide notice as required by the statute on remand.

J.4. <u>Record Issues</u>

Issue as Stated by Department: *Did the city place information in the record after the public hearing was closed and, if so, does this require remand?*

Department's Recommendation: *The department recommends that the commission deny this appeal on this subissue.*

City's Response: The City agrees with the Department's recommendation and analysis.

J.5. Definition of Scope of Remand

Issue as Stated by Department: *Should the commission more clearly define the scope of the remand?*

Department's Recommendation: *The department recommends that if the commission remands the city's decision, its remand order list any specific actions the commission is directing the city to take.*

City's Response: While the City generally agrees with the concept that the scope on remand should be clear and that specificity as to tasks is appropriate, too much specificity as to tasks is inconsistent with the role of the City as the decision-maker and can unnecessarily eliminate legal and viable options for the City's decision. In particular, the City believes that the level of detail in the recommendations as to issues C.3 (other efficiency measures and H.7 (MPO requirements) is excessive. Because this is a voluntary effort by the City to expand its UGB rather than a work task as part of periodic review, the remand tasks should not specify a date for compliance. The City does accept that the Commission can order the City to adopt comprehensive plan provisions that include timelines for City action, so long as the Commission does not dictate the timelines.

Respectfully submitted,

Mary Winters, City Attorney
City of Bend