

## I. UGB Location

### 1. Do the UGB locational analysis and UGB amendment comply with the requirements of ORS 197.298, Goal 14 and OAR 660, division 24?

#### a. Legal standard

ORS 197.298, Goal 14 and OAR 660-024-0060<sup>58</sup> contain the applicable state requirements that establish *where* a city may expand its urban growth boundary (UGB).

---

<sup>58</sup> ORS 197.298 Priority of land to be included within urban growth boundary:

(1) In addition to any requirements established by rule addressing urbanization, land may not be included within an urban growth boundary except under the following priorities:

(a) *First* priority is land that is *designated urban reserve* land under ORS 195.145, rule or metropolitan service district action plan.

(b) If land under paragraph (a) of this subsection is inadequate to accommodate the amount of land needed, *second* priority is land adjacent to an urban growth boundary that is identified in an acknowledged comprehensive plan as an *exception area or non-resource land*. Second priority may include *resource land that is completely surrounded by exception areas* unless such resource land is high-value farmland as described in ORS 215.710.

(c) If land under paragraphs (a) and (b) of this subsection is inadequate to accommodate the amount of land needed, *third* priority is land designated as *marginal land* pursuant to ORS 197.247 (1991 Edition).

(d) If land under paragraphs (a) to (c) of this subsection is inadequate to accommodate the amount of land needed, *fourth* priority is land *designated in an acknowledged comprehensive plan for agriculture or forestry*, or both.

(2) Higher priority shall be given to land of lower capability as measured by the capability classification system or by cubic foot site class, whichever is appropriate for the current use.

(3) Land of lower priority under subsection (1) of this section may be included in an urban growth boundary if land of higher priority is found to be inadequate to accommodate the amount of land estimated in subsection (1) of this section for one or more of the following reasons:

(a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands;

(b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints; or

(c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.”

[emphasis added]

Statewide Planning Goal 14 (as amended April 28, 2005) requires the following:

#### Boundary Location

The location of the urban growth boundary and changes to the boundary shall be determined by evaluating alternative boundary locations consistent with ORS 197.298 and with consideration of the following factors:

- (1) Efficient accommodation of identified land needs;
- (2) Orderly and economic provision of public facilities and services;
- (3) Comparative environmental, energy, economic and social consequences; and

---

(4) Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB.

The relevant rules in OAR 660-024-0060 (adopted 10-5-06) are as follows:

#### Boundary Location Alternatives Analysis

(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 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.

(d) Notwithstanding subsection (a) through (c) of this section, a local government may consider land of lower priority as specified in ORS 197.298(3).

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

(3) The boundary location factors of Goal 14 are not independent criteria. When the factors are applied to compare alternative boundary locations and to determine the UGB location, a local government must show that all the factors were considered and balanced.

(4) In determining alternative land for evaluation under ORS 197.298, "land adjacent to the UGB" is not limited to those lots or parcels that abut the UGB, but also includes land in the vicinity of the UGB that has a reasonable potential to satisfy the identified need deficiency.

(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.

(6) The adopted findings for UGB adoption or amendment must describe or map all of the alternative areas evaluated in the boundary location alternatives analysis. If the analysis involves more than one parcel or area within a particular priority category in ORS 197.298 for which circumstances are the same, these parcels or areas may be considered and evaluated as a single group.

(7) For purposes of Goal 14 Boundary Location Factor 2, "public facilities and services" means water, sanitary sewer, storm water management, and transportation facilities.

(8) The Goal 14 boundary location determination requires evaluation and comparison of the relative costs, advantages and disadvantages of alternative UGB expansion areas with respect to the provision of public facilities and services needed to urbanize alternative boundary locations. This evaluation and comparison must be conducted in coordination with service providers, including the Oregon Department of Transportation with regard to impacts on the state transportation system. "Coordination" includes timely notice to service providers and the consideration of evaluation methodologies recommended by service providers. The evaluation and comparison must include:

(a) The impacts to existing water, sanitary sewer, storm water and transportation facilities that serve nearby areas already inside the UGB;

(b) The capacity of existing public facilities and services to serve areas already inside the UGB as well as areas proposed for addition to the UGB; and

The department provided a detailed explanation of how to complete an analysis of UGB locational alternatives in letters to the city dated May 27, 2008, October 24, 2008, and November 21, 2008 [R. at 3758, 4356, 4722, and 7268]. Deschutes County legal counsel also provided public written advice concerning the locational analysis on September 17, 2007 that is consistent with the department's letters. [R. at 8870] The process is set forth in Goal 14, ORS 197.298, and OAR 660, division 24, and is summarized as follows.

Once a local government has accommodated as much of its total 20-year identified needs for housing and employment as it reasonably can in the current UGB,<sup>59</sup> it then proceeds to analyze lands within a study area outside the existing UGB from which to select lands to satisfy any remaining needs. Goal 14, ORS 197.296, OAR 660-024-0050(4).

The first step is to determine a study area around the existing UGB. Next, the government determines which lands in the study area are the highest priority lands under ORS 197.298(1). For Bend, since there are no acknowledged urban reserves that were adopted under OAR 660-024-0060(1)(a) and ORS 197.298(1)(b), the highest priority lands for urbanization are exception areas (areas that are not subject to the agricultural or forest lands goals, and that usually are planned for rural residential, rural industrial, rural commercial or other rural uses). In the case of Bend, exception areas include properties zoned UAR, RR-10, and SR 2½, as Goal 3 and Goal 4 exceptions were taken for all of these lands (the status of the UAR zoned lands is addressed in more detail later in this section).

Once the highest priority lands are identified, the local government must develop a list of the lands and/or map them. The list or map, along with other data, is then used to analyze the lands for their suitability.

The suitability analysis relates directly to how the local government has justified its need for additional lands. If the additional lands are for general needed housing (e.g., for single family residential) the suitability criteria that may be used as a screen to eliminate lands from consideration (at this stage) are the same general criteria used in determining what residential lands are "buildable" (housing) or "suitable vacant and developed land" (employment). OAR 660-024-0060(1)(e) and 660-024-0010(1)(lands for housing are not buildable if they: have severe natural hazards, are protected by Goal 5, have slopes over 25 percent, are within the 100-year floodplain, can't be provided with public facilities); OAR 024-0010(8))(lands for employment are not "suitable" unless they are "serviceable" (OAR 660-009-0005(9) and are either "vacant" (a lot greater than 1/2 acre not containing permanent improvements or greater than 5 acres where less than 1/2 acre is occupied by

---

(c) The need for new transportation facilities, such as highways and other roadways, interchanges, arterials and collectors, additional travel lanes, other major improvements on existing roadways and, for urban areas of 25,000 or more, the provision of public transit service.

<sup>59</sup> The adequacy of the city's accommodation of identified need and efficiency measures for land within the existing UGB is addressed in more detail elsewhere in this report.

improvements, OAR 660-009-0005(14)) or developed but likely to be redeveloped during the planning period. OAR 660-009-0005(1).

If, however, the additional lands are for an “identified need” with “specified characteristics” in terms of location, then the local government may use the required locational characteristics identified in the need showing as a screen to eliminate lands from consideration. OAR 660-024-0060(5). An example is rail-dependent industrial uses. If the local government’s economic opportunities analysis demonstrates a need for this type of employment use, lands without rail access could (and should) be excluded from review under the priority of lands statute (ORS 197.298(1)). Similarly, if the local government’s housing needs analysis shows a need for high-density, multi-family housing that needs to be located close to a university, or that is located on a planned bus route (in the comprehensive plan), then the city or county may specify suitability criteria that limit its locational analysis to lands that will satisfy the identified need. OAR 660-024-0060(5).

Once the local government has determined the quantity of suitable first priority lands adjacent to the existing UGB, it compares that quantity with the amount of land need it has demonstrated in its housing needs analysis and/or economic opportunities analysis. OAR 660-024-0060(1)(b). If the amount of suitable land in the first priority category exceeds the amount needed, it then uses the Goal 14 location factors to identify which first priority lands to include in its UGB. OAR 660-024-0060(1)(b). The Goal 14 location factors are not criteria, they are considerations that are applied to each alternative parcel or group of parcels. The parcel or parcels that, on balance, best satisfy the factors are selected. In other words, no single one of the four location factors may be the sole basis for selecting a particular parcel(s) to add to the UGB.

If the amount of suitable land in the first priority category does *not* exceed the amount needed, the city or county then proceeds to evaluate the second priority category in the same manner, and so on until sufficient lands are included in the UGB. OAR 660-024-0060(1)(c).

As noted above, ORS 197.298(3)(a) allows a city or county to limit the application of the priority of lands for urbanization established in ORS 197.298(1) if the need being addressed is specific type of identified need with particular locational requirements. Similarly, ORS 197.298(3)(b) and (c) also provide bases for not including lands that would otherwise be a higher priority for a UGB expansion. See also, OAR 660-024-0060(1)(d). The exceptions to the priority statute for the difficulty of providing future urban services (ORS 197.298(3)(b), and for maximum efficiency of land use within the proposed UGB are narrowly construed as exceptions to the general rule for where UGBs are to expand.<sup>60</sup>

---

<sup>60</sup> ORS 197.298(3) allows a city or county to exclude higher priority parcels from consideration up-front, before the city selects suitable parcels in that priority; and, if the land supply in that priority category exceeds need, before the city applies the Goal 14 boundary location factors. There is a high threshold to exclude higher priority land, such as exception land (including land zoned UAR) and instead add lower

This step provides a tentative list of highest priority parcels (within the exception lands category) to add to the UGB.<sup>61</sup>

If the amount of suitable exception land is *not* sufficient to meet the land need, the local government adds all of the suitable exception lands to the UGB expansion area, and then evaluates lands in the next highest priority category in ORS 197.298(1). For Bend, the next highest priority of land for urbanization is resource land with low resource production capability.

If the analyses do not yield enough land to meet the housing and employment needs the city has identified, then city may consider lower priority lands (i.e., the next set of higher capability farm and forest lands) and produce a tentative list of suitable lands in this final priority category for addition to the UGB.

If there remains an unmet need after this process, the next step is to expand the study area and begin the process described above again from the beginning.

#### **b. Summary of Local Actions**

The following is a summary of the city's and county's analyses of where to expand the UGB:

In January 2006, the city established a study area of approximately 27,000 acres for both a proposed UGB expansion and a proposed urban reserve area designation. [R. at 45, 1060] In June 2007, the first UGB expansion scenario was prepared and sent to the department with a 45-day notice. On August 7, 2007, the city and Deschutes County

---

priority lands, such as farmlands. For example, the fact that it may cost more to provide public services to one area than others does not satisfy ORS 197.298(3)(b) or OAR 660-024-0060. Likewise, the fact that one parcel will yield fewer new homes or less development than others does not allow a local government to exclude that land from a UGB expansion area in favor of other, lower priority lands. LUBA and the courts have construed the ORS 197.298(3) exceptions narrowly to allow inclusion of lower priority lands at the exclusion of higher priority lands only in cases with compelling facts. *See, e.g., DLCD v. Douglas County*, 36 Or LUBA 26 (1999) (“Factors that may have the effect of eliminating alternative sites because they are somewhat more expensive to develop are inadequate to demonstrate the eliminated alternative site cannot reasonably accommodate the identified need.”); *1000 Friends of Oregon, et al vs. Metro*, 38 Or LUBA 565 (2000) (“Metro must determine whether exception lands can reasonably accommodate the proposed use. As we stated in *Parklane I* and *Residents of Rosemont*, exception criterion (ii) is not satisfied by findings that alternative sites to resource lands cannot accommodate the proposed use ‘as well as’ those resource lands ... a finding that the resource land has relatively fewer developmental constraints or a higher percentage of buildable lands than an alternative site is not sufficient to satisfy the ‘reasonably accommodate’ standard”).

<sup>61</sup> “The goal of consideration under [the Goal 14 boundary location factors] is to determine the ‘best’ land to include within the UGB, based on appropriate consideration and balancing of each factor.” The Goal 14 location factors “must be considered together and balanced, but individual factors are not independent approval criteria.” *Alliance for Responsible Land Use v. Deschutes Cty*, 40 Or LUBA 304, 318-319 (2001), *aff’d* 179 Or App 348 (2002). *Also see* OAR 660-024-0060(1)(b).

withdrew the urban reserve amendment until the UGB expansion was resolved. [DLCD Form 3 Notice of Denial/Withdrawal, Supplemental Record at 1423] In the fall of 2007, the city enlarged the study area to over 44,000 acres,[R. at 1061] and to respond to direction from the city council to consider the need for land for employment uses as well as housing. [R at 1060]

The city established and applied “threshold suitability criteria” to lands within the enlarged study area. [R. at 1062] The suitability criteria were intended to be consistent with the Goal 14 location factors. [R. at 1062] The parcels that met all of these criteria were considered suitable to meet Bend’s needs for housing and employment (and other land needs). [R. at 1168-1170] Those suitability criteria included:

- Whether the parcel can be served [with sewer] by an existing or proposed city facility detailed in the 2008 Collection System Master Plan [e.g., the amended Public Facilities Plan]
  - Whether the parcel is serviceable according to the 2007 City Water Master Plan, as amended, or a private water district service area
  - If the parcel scores medium or high for street connectivity
  - Not an active surface mine, not a state of local park, not a landfill, not a destination resort
  - Vacant or improved with improvement value below \$20,000
  - Improved with a dwelling, if on a parcel greater than 3 acres
  - Improved with a school or church, if on a parcel greater than 5 acres
  - Not recreational land
  - Not owned by the Bend/La Pine School District
  - Not in a commercial farm classification with 23 acres of irrigation water rights
  - Not subject to restrictive CC&Rs
  - Not in private open space
- [R. at 1169]

The “suitable” parcels were then separated into the ORS 197.298 priority groups. The city then applied the Goal 14 location factors to the exception lands by ranking them. The city developed five alternate UGB expansion scenarios after performing additional analysis and evaluation under planning commission direction.

Alternative 1 “places a strong emphasis on the statutory priorities of ORS 197.298(1)” and has “an overriding emphasis on including higher priority lands under the statute.”<sup>62</sup> [R. at 1186] The Planning Commission recommended Alternative 4 to the city council, which modified Alternative 4 as a new Alternative 4A. The city council adopted Alternative 4A on January 5, 2009, and Deschutes County adopted it on February 11, 2009. Alternative 4A between 8,462 and 8,943 acres of land to the UGB. The city’s

---

<sup>62</sup> Alternative 1 is the only one of the total seven scenarios for which the city makes this statement. Alternative 1 included 87 percent exception land and 13 percent resource land. Alternative 4A, which the city council adopted on January 5, 2009, reduced the amount of exception land to 74 percent and increased the amount of resource land to 26 percent.

findings report the total acreage as 8,462 acres [R. at 1054], but the city’s post-adoption notice to the department reports the acreage as 8,943 (which *may* be the “total” acreage of 8,462 plus the city’s “surplus” of another 519 acres). [R. at 1054]. Of the 8,500 plus acres added, it appear the city included approximately 3,500 to 4,000 acres of land that it determined are not “suitable” for inclusion in the UGB. [R. at 1054]

Of the 5,475 acres of “suitable” land included in the UGB, 4,069 acres (74 percent) was first priority exception land (79 percent of which is zoned Urban Area Reserve), and 1,406 acres (26 percent) was resource land.<sup>63</sup> [R. at. 47-48, 153-154, 156, 171-178, 1050, 1062-63, 1166-1207, including Figures V-6 and V-7 and Table V-9]

### c. Objections

Tony Aceti – The amendment includes too much EFU land and not enough exception land. [May 4, 2009 page 1]

Terry L. Anderson – The southwest Buck Canyon area, which is suitable exception land, should be included in the amended UGB. [May 6, 2009, page 1]

Central Oregon LandWatch – The amendment does not justify its assumption that the following lands are unsuitable:

- Parcels smaller than three acres with a house,
- Split-zoned parcels, and
- Parcels that did not score “medium” or “high” for street connectivity.

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

Hilary Garrett – The amendment passed over suitable high-priority exception land in the southwest Buck Canyon area for actively farmed EFU lands east of Hamby Road for the indefensible reason that the farm parcels will help build the southeast sewer interceptor. One of the suitability criteria was not evenly applied to like lands; *i.e.*, objector’s residential subdivision of lots largely smaller than three acres was included while parcels smaller than three acres in another part of the UGB study area were excluded. No parcels smaller than three acres should be included in the amendment. [April 18, 2009, pp. 1-2]

Miller Tree Farm – The city’s threshold suitability criteria impermissibly allowed the city to add resource land in place of much of the available exception land. The city gave these criteria more weight than the ORS 197.298 priorities, without justification in the record for doing so. As LUBA ruled in *Residents of Rosemont v. Metro*, 38 Or LUBA 199

---

<sup>63</sup> In response to a department request for direction to location in the record, the city identified the following pages as constituting the city’s boundary location analysis: 1059-1065, 1166-1207, and 7772-7775.

(2000) and *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000), it isn't sufficient to determine that exception lands cannot accommodate the proposed use as well as resource lands can accommodate the same use(s). Development must be directed to exception lands rather than the resource lands if the exception lands can reasonably accommodate the proposed development. For example, a finding that exception lands can't accommodate as much or as dense residential development per acre as resource lands does not justify excluding those exception lands. The city did not properly apply and balance the Goal 14 boundary location factors. [May 5, 2009, pp. 1-2, 8-10]

Paul J. Shonka – The amendment includes too much EFU land and not enough exception land. [May 1, 2009, pp. 1-2]

Cindy B. Shonka – The amendment includes too much EFU land and not enough exception land. [May 1, 2009, pp. 1-2]

Tony and Cyllene King (McGraw and Associates, LLC) – The amendment includes too much EFU land and not enough exception land. [May 1, 2009, p. 1]

Oregon Department of State Lands – The selection of land does not comply with the ORS 197.298 priorities to add land to a UGB. The “Stevens Road Tract,” a large parcel of EFU land abutting the east side of Bend's UGB and owned by the objector, should be included in the expansion if any resource land is included, because the tract is the city's “top-ranked UGB candidate expansion area.” [May 7, 2009, pp 4-5]

Rose and Associates, LLC – The city's sewer, water and transportation plans dictated the location of the UGB expansion and predetermined the outcome of the location analysis, in violation of Goal 14. The location analysis fails to include one of the four Goal 14 boundary location factors: “Comparative environmental, energy, economic and social consequences.” The location analysis inappropriately deferred the evaluation and comparison of alternate sites for provision of public facilities and services, which is required by OAR 660-024-0060(8). [May 5, 2009, p. 3]

Barbara I. McAusland – The correct lands were not selected in the location analysis. [May 5, 2009, pp. 1-2]

Swalley Irrigation District The correct lands were not selected in the location analysis and the city's suitability findings are inadequate, in violation of Goal 14. The city fails to adequately consider adding thousands of acres of highest priority exception lands in the southwest area. The amendment lacks a factual basis for its claim that all suitable exception land has been included. The city's suitability criteria, including exclusion of parcels smaller than 3 acres with a dwelling, are not consistent with State law. The city fails to comply with its own ordinance that requires application of the Goal 14 boundary location factors and the Goal 2 exception process that were in effect before LCDC amended Goal 14, Goal 2, and OAR 660-004-0010 on April 28, 2005. Exception land in the northwest area should be removed from the amendment. The location alternatives analysis should have considered the impacts of urbanization on rural irrigation systems,

which are water systems under OAR 660-024-0060(8). [May 6, 2009, pp. 40, 42-43, 60-61, 71-73, 75-79]

Newland Communities – The findings support inclusion of the objector’s 149 agriculturally designated acres in the northeast area that are surrounded by exception lands on the northeast, north, west, and south. Inclusion of this land should be augmented with a better “legal and factual argument” based on the record, which the objector provides. The city properly followed the location analysis in Goal 14, OAR 660-024-0060, and ORS 197.298. [May 7, 2009, pp. 3, 9-10, 22]

Harold W. Sampson – The city should include the exception lands east of N. Highway 97 bordered by the Burlington Northern Railroad and Juniper Ridge and should eliminate the auto mall and industrial area west of N. Highway 97. [May 1, 2009, p. 1]

Brooks Resources Corporation – Land selected for employment uses is not suitable for that use. [April 29, 2009, pp. 5-8]

#### d. Analysis

The city and county locational analysis of where to expand its UGB does not comply with ORS 197.298, Goal 14 or the pertinent provisions of OAR 660, division 24 as summarized above. The analysis does reflect a substantial effort to examine what lands are best suited for addition to the UGB, but the methodology and approach used improperly excluded a substantial amount of land planned and zoned as exception lands (including a significant amount of land in existing suburban subdivisions, many of which rely on septic systems) from consideration for inclusion in the UGB. This resulted from the city’s use of suitability criteria, some of which did not correspond to the future housing and employment needs identified by the city, and some of which simply do not comply with state law.<sup>64</sup>

Generally, the analysis of suitability is not transparent and lacks clear explanations linking its analysis to the data in the record. In addition, once they began considering farm land for the UGB expansion, the city and county were required to analyze farm lands with the poorest soils first, which they failed to do. The record does not demonstrate that all resource lands within the study area are grouped by soil capability, and then considered and added according to capability (lower capability lands before higher capability lands), in accordance with Goal 14, ORS 197.298, and OAR 660-024-0060.

---

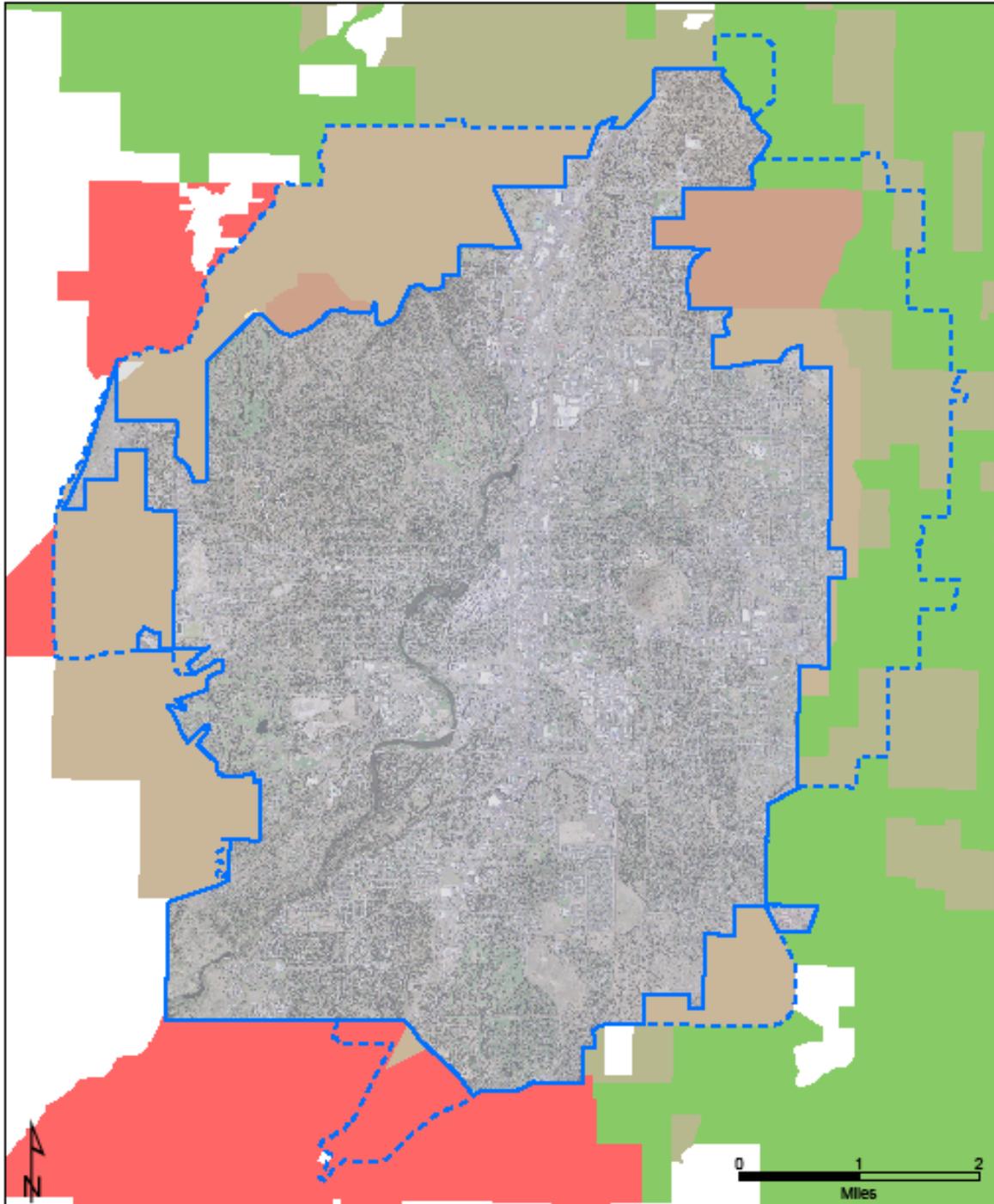
<sup>64</sup> On or about April 10, 2008, the city planning commission was presented with a proposed “strategy” for the city’s boundary alternatives analysis. [R. at 7772-75] The memorandum quoted relevant portions of Goal 14, OAR 660-024-0060, and ORS 197.298, but its explanation of how those laws must be applied was incorrect. In letters dated May 27, 2008, October 24, 2008, and November 21, 2008, the department advised the city of the deficiencies in its UGB location analysis, and offered detailed direction on how to complete the analysis correctly under state law. [R. at 3758, 4356, 4722, and 7268] The incorrect “strategy” proposed in the memorandum appears to be the methodology that the city used to arrive at Alternative 4A, which the city council adopted on January 5, 2009.

The city and county did, generally, attempt to avoid land planned as agricultural land. However, the present findings and record do not justify (at this point) any significant inclusion of agricultural lands in the UGB expansion area. The city has begun to make an adequate showing that expansion onto some agricultural lands to the east may be necessary to provide public services to higher priority lands (ORS 197.298(3)(c) [R. at 1183-1186], but given the uncertainty concerning the *amount* of land needed, the director cannot determine that the city has made the showing required by the statute at this time. There also are several, technical, problems with the submittal. The record does not include a map or description of all resource parcels in the study area, as required by OAR 660-024-0060(6). The boundary location analysis map shows only those parcels determined to be “suitable” because they met all of the city’s threshold suitability criteria. [R. at 165, 1180, Figure V-4] The department has prepared a map showing the zoning of lands in the study area as Figure 2, using GIS data from Deschutes County.

The record does not include a map or description of all exception parcels in the study area, which is required by OAR 660-024-0060(6). But see Figure 3 on the following page, prepared by the department based on the county’s official zoning maps. The boundary location analysis map in the record shows only those exception parcels that are determined “suitable” because they met all of the “threshold suitability criteria.” [R. at 164, 1179 - Figure V-3] The city removed all other exception parcels from the study area prior to the boundary location analysis, using the “threshold suitability criteria” that appears to be developed *after* the completed need analysis. Other exception lands are not part of the need analysis in the record. [R. at 47-48,153-160, 1062-63, 1168-75]

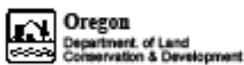
***Suitability.*** As described above, in order to eliminate lands from consideration for inclusion in a UGB expansion, they either must be found to be generally unsuitable based on the criteria in OAR 660, division 8 (“buildable” lands for housing) or division 9 (“suitable and available lands” for employment), or (if the lands are being added for a specific identified land need) the suitability criteria must be based on the applicable needs analysis (HNA or EOA). In addition, lands in a study area may be unsuitable for one need, and suitable for another (for example, suitable for single family housing, but unsuitable for a medical center). The underlying housing and employment needs analyses establish a generalized housing need – mainly for single family housing, as well as general commercial uses, and do not identify why these general uses can’t be met (at least in part) on adjacent exception lands identified as unsuitable. As shown in Figure 2, there is a substantial amount of exception land to adjacent to the southern boundary of the city. The city’s analysis of these lands is addressed in more detail, below.

The city’s application of site criteria to *all* planned urban uses before the study area parcels were divided into the ORS 197.298(1) priorities was overbroad. This step prematurely rejected many parcels that are suitable for one or more of the city’s future land needs before those parcels could be analyzed under OAR 660-24-0060 and ORS 197.298. The city improperly “refined and reduced the size of the study area for the 20-year UGB expansion (2028) in an iterative fashion.” [R. at 152, 1167]



## Exception Lands Zoning

Figure 3



This product is for informational purposes and may not have been prepared for or be suitable for legal engineering, or surveying purposes. Users of this information should review or consult the primary data and information sources to ascertain the usability of the information.

- |   |  |
|---|--|
| <b>Unincorporated County Areas</b>                                    | <b>Urban Growth Boundary</b>                           |
| <span style="color: green;">■</span> EFU Resource                     | <span style="color: blue;">▬</span> Current UGB        |
| <span style="color: brown;">■</span> SR2.5 - Res. Suburb. Low Density | <span style="color: blue;">- - -</span> Expansion Area |
| <span style="color: tan;">■</span> UAR - Urban Area Reserve           |  |
| <span style="color: olive;">■</span> MUA10 - Multi Use Agriculture    |  |
| <span style="color: red;">■</span> RR10 - Rural Residential           |  |

Aerial Image: 2008 HAP  
 UGB and zoning information extracted from maps provided by City of Bend and Deschutes County  
 DLCD GIS 08/31/09  
 WebCasting.com

The suitability criteria for a UGB amendment for a *general* residential or employment land need are identified in OAR 660-024-0010(8) (for employment uses) and in OAR 660-024-0010(1) (for general housing needs). OAR 660-024-0060(5) allows local governments to apply additional suitability criteria, but only for an “identified need.” That term is a term of art, from ORS 197.298(3)(a) – e.g. an “identified need” that has specific locational requirements that are unique to that particular use. The city could, for instance, determine that there is a need for and identified housing type, such as higher density attached multi-family housing along transit routes (where there is access to multiple modes of travel), and thereby justify not following the statutory direction to include exception lands before agricultural lands, if the only locations for this identified type of housing that are along planned or current transit (bus) lines are zoned for agriculture. Similarly, if the economic opportunities analysis identified a need for a site with rail access, and the only such site is on agricultural lands, then the city could use rail access as a suitability criterion and screen out exception lands if there are no exception lands with rail access.

Some of the city’s suitability criteria do follow the general suitability criteria allowed under OAR 660-024-0010(1) and 0010(8). Others are appropriate only for an “identified need” for a particular planned urban use that has specific locational requirements. To assist the city on remand, the director provides his evaluation of the city’s criteria in the following table.

**Table 3. Findings Regarding Boundary Location Threshold Suitability Criteria**

Criterion	Analysis
Lot is not entirely within the 100-year floodplain.	This criterion is based on OAR 660-008-0005(2) (for housing) <sup>65</sup> and OAR 660-009-0005(2) (for employment), <sup>66</sup> and is a permissible screen for both general land need and specific identified land needs.
Lot is serviceable for <i>city</i> sanitary (does not include private or public systems other than the city).	This criterion is a permissible screen under OAR 660-008-0005(2)(e) (cannot be provided with public facilities), except for the limitation to <i>city</i> facilities. So long as sanitary sewer is available or feasible during the planning period, the property cannot be excluded as unsuitable.
Lot is serviceable for city water.	This criterion is permissible, see analysis immediately above.
Lot is in regional stormwater plan service area.	This criterion is permissible, see analysis immediately above.

---

Criterion	Analysis
The lot scores medium or high for street connectivity.	This criterion is not a permissible suitability screen. As long as street access is feasible during the planning period, the property can be provided with public facilities. This criteria can, however, be used as a Goal 14 factor for determining what exception lands to include in the event there is an excess amount of such lands and the city and the county are deciding which exception lands to include.
Lot is a public or private right-of-way for roads, sidewalks, and/or landscaping.	Publicly owned land generally is not considered buildable (Goal 10 – within the existing UGB) or suitable (OAR 660-024), and is an appropriate suitability screen. However, <i>private</i> right-of-way and open space land is “generally considered “suitable and available.”
Lot does not contain an active surface mine in the county’s Goal 5 inventory.	This criterion, which is based on OAR 660-008-0005(2) (for housing) and OAR 660-009-0005(2) (for employment), is a permissible suitability screen for general land need.
Lot is not designated by the county as a Goal 5 resource.	This criterion, which is based on OAR 660-008-0005(2) (for housing) and OAR 660-009-0005(2) (for employment), is a permissible suitability screen for general land need.
Lot is not a cemetery.	This criterion, which is based on OAR 660-008-0005(2) (for housing) and OAR 660-009-0005(2) (for employment), is a permissible suitability screen for general land need.
Lot is not owned by the federal government.	This criterion, which is based on OAR 660-008-0005(2) (for housing) and OAR 660-009-0005(2) (for employment), is a permissible suitability screen for general land need.
<ul style="list-style-type: none"> <li>• Lot is not a state park;</li> <li>• Lot is not owned by the Bend Metro Park and Recreation District (listed twice).</li> <li>• Lot is not owned by Bend-La Pine School District</li> </ul>	These criteria, which are based on OAR 660-008-0005(2) (for housing) and OAR 660-009-0005(2) (for employment), are permissible suitability screens for general land need.

Criterion	Analysis
Lot is not a public or private open space.	This criterion is a permissible suitability screen for <i>publicly owned</i> open space, but not for private open space. OAR 660-008-0005(2).
Lot is developed with a school or church and is larger than 5 acres.	(1) Some church and school land may be redeveloped. Such lands may be screened as “unsuitable” only based on findings and an adequate factual base that they are not likely to be redeveloped during the 20-year planning period. Larger lots with substantial vacant land generally will be considered to be suitable (at least in part)..
Lot is not a landfill.	This criterion may be used only if based on findings and an adequate factual base that the lands are not likely to be redeveloped during the 20-year planning period. OAR 660-008-0005(2) (for housing) and OAR 660-009-0005(2) (for employment).
Lot is not a destination resort approved by the county.	This criterion may be used only if based on findings and an adequate factual base that the lands are not likely to be redeveloped during the 20-year planning period.
Lot has recorded CC&Rs prohibiting further division.	This criterion may be used only if based on findings and an adequate factual base that the lands are not likely to be redeveloped during the 20-year planning period. The director finds that the evidence cited in the city’s findings, R. at 1171-1174, does not support the city’s conclusion that the listed subdivisions cannot be redeveloped. The comments in Table V-6 [R. at 1173] show that additional residential development is not prohibited in almost all of the subdivisions listed. Even for those few subdivisions where additional land divisions are prohibited by CC&Rs, the findings do not address whether there are vacant lots, or whether additional housing not involving a land division, such as an “in-law” apartment or “granny flat” may be feasible.

<b>Criterion</b>	<b>Analysis</b>
Lot has improvements with a value of less than \$20,000.	This criterion may be used only if based on findings and an adequate factual base that the lands are not likely to be redeveloped during the 20-year planning period. The valuation threshold used by the city is very low in relation to the potential value of residential redevelopment, and would appear to effectively define lands that have minimal improvements as being developed rather than vacant.
Lot has 1 dwelling and is larger than three acres.	This criterion may be used only if based on findings and an adequate factual base that the lands are not likely to be redeveloped during the 20-year planning period. The acreage threshold used by the city is very high. A lot with an existing home and several acres of land normally could accommodate some additional residential development during a twenty-year planning period. As noted in the section of this report addressing housing need, the city has not analyzed the actual level of redevelopment that has occurred on such lands, making it impossible to reach definitive conclusions about the amount of redevelopment that is likely to occur, as those terms are used in OAR 660-008-0005(2) and 660-024-0010(1) and 0060(1)(e) and (5). The city appears to have excluded a substantial amount of exception lands based on this criterion.

Criterion	Analysis
Lot is zoned EFU-TRB with 23 acres of high value soils when irrigated OR zoned EFU-UAL with 36 acres of high value soils when irrigated.	The capability of soils on commercial farm parcels becomes relevant only if and when (a) all suitable exception parcels have been added, (b) some amount of 20-year land need remains, (c) the city goes to the next highest priority under ORS 197.298(1), which is agriculture or forest land, (d) lower capability agriculture or forest parcels have been given priority over higher capability resource parcels per ORS 197.298(2), (e) lower capability resource parcels are not suitable for the identified need, or there is not enough lower capability resource land to meet that remaining need, and (f) lowest priority high value resource land must be considered.

By excluding a large amount of adjacent exception lands as “unsuitable” based on suitability criteria that are not tied to a specific identified need for housing or employment, or are not based in the general criteria allowed under OAR 660-024-0060, the city and county have not complied with Goal 14, ORS 197.298, and OAR 660, division 24. The analysis creates an artificial shortage of first priority exception lands, and then uses that shortage to justify including lower priority resource land, effectively undermining the statutory priorities in ORS 197.298.<sup>67</sup>

---

<sup>67</sup> In *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999), *aff'd as modified* 165 Or App 1 (2000), LUBA found that Metro, in part, created its own inadequacy of higher priority lands to accommodate urban land need. LUBA concluded that this error undermined the urban reserve rule’s priority scheme “and hence the urban reserve rule.” “[W]e conclude that Metro’s failure to study enough higher priority lands created in part the inadequacy that Metro relied upon to designate lower priority lands, and further that Metro’s application of Subsections 2, 3 and 4 [of OAR 660-021-0030] as described above effectively undermines the urban reserve rule’s priority scheme and hence the urban reserve rule.” *Id.* at 554.

“The relationship between the elements of ORS 197.298(1) through (3) is essentially the same as the relationship between the elements of OAR 660-021-0030(3) and (4), and LUBA’s and the Court of Appeals’ interpretation of the latter should guide the interpretation of the former.” *Residents of Rosemont v. Metro*, 38 Or LUBA 199, 249 (2000), *aff'd in part, rev'd and rem's on other grounds* 173 Or App 321 (2001). The statutory exceptions to the priorities to add land to a UGB in ORS 197.298(3), enacted in 1995, were based on the statutory exceptions to the priorities to add land to *urban reserves* in OAR 660-021-0030(4), which LCDC had previously adopted in 1992. Therefore, interpretations of the OAR 660-021-0030(4) priority exceptions in *Parklane* apply to Bend’s use of the ORS 19.298(3) priority exceptions in this UGB amendment, including the magnitude of error caused by improper use of both the priorities and the exceptions to the priorities.

In conclusion, even assuming that (1) the city’s 20-year land need estimate of 4,956 acres [R. at 39, 43, 152, 1054, 1058, 1167] is correct, and (2) the city does not need to adopt any additional efficiency measures to accommodate housing need within the existing UGB, it appears that the city could meet all of its 20-year land needs within adjacent exception lands.<sup>68</sup>

***Aggregation of Lands for Alternatives Analysis.*** A second general problem with the locational analysis is that large areas grouped for evaluation do not have similar circumstances as required by OAR 660-024-0060(6). The analysis:

- Aggregates all parcels in the study area and then applied the same “threshold suitability criteria” for all urban land needs;
- Did not separate resource parcels by soil capability before applying site need criteria;
- Did not map or describe the resource parcels in the study area by soil capability;
- Classified resource lands by current use, which is not a valid “common circumstance” under Goal 14, ORS 197.298, and OAR 660-024-0060;
- Segregated exception parcels with potential scenic or natural resources from other exception parcels, without any Goal 5 inventory and regulatory protection program as a basis for doing so;
- Grouped together exception and resource parcels into UGB alternative scenarios based, in part, on cost to extend sewer lines, instead of following the methodology for selecting parcels to include in Goal 14, ORS 197.298 and OAR 660-024-0060;
- Segregated exception parcels into two different groups—parcels zoned Urban Area Reserve and all other exception parcels—when all exception parcels are the same priority and must be treated alike under ORS 197.298(1)(b).

As a result, the analysis does not comply with the OAR 660-024-0050(5) requirement to apply appropriate plan designations and zoning to the expansion area. This rule states:

When land is added to the UGB, the local government must assign appropriate *urban* plan designations to the added land, consistent with the need determination. The local government must also apply appropriate zoning to the added land consistent with the plan designation, or may maintain the land as urbanizable land either by *retaining the zoning* that was assigned prior to inclusion in the boundary or by applying other *interim zoning that maintains the land’s potential for planned urban development until the land is rezoned for the planned urban uses*. The requirements of ORS 197.296 regarding planning and zoning also apply when local governments specified in that statute add land to the UGB. [emphasis added]

---

<sup>68</sup> The findings provide that only 5,733 acres of the adjacent exception lands in the study area are “suitable,” and only 5,434 acres are both “suitable and available.” [R. at 159, 175-176, 1174, 1190-91]

***Response to Objections.*** For the reasons set forth above, the following objections are sustained by the director:

- The amendment includes too much EFU land and not enough exception land (Tony Aceti, Paul J. Shonka, Cindy B. Shonka, Tony and Cyllene King (McGraw and Associates)).
- The amendment does not justify excluding parcels that have a house and are smaller than three acres (Central Oregon LandWatch, Swalley Irrigation District).
- The amendment does not justify excluding parcels that are split-zoned or don't score medium or high for street connectivity (Central Oregon LandWatch)
- The correct parcels were not selected for inclusion in the UGB. (Barbara I. McAusland, Swalley Irrigation District).
- The city improperly excluded suitable high priority exception land in the SW Buck Canyon area (Hilary Garrett).
- One of the suitability criteria was not evenly applied to like lands; i.e., objector's residential subdivision containing lots smaller than three acres was included, while parcels smaller than three acres in another part of the UGB study area were excluded (Hilary Garrett).
- The use of threshold suitability criteria impermissibly allowed the city to add resource land in place of much of the exception land. Development must be directed to the exception lands instead of resource lands if the exception lands can reasonably accommodate the proposed development. A finding that exception lands cannot accommodate as much or as dense residential development per acre as resource lands does not justify excluding those exception lands (Miller Tree Farm).
- The selection of land does not comply with the ORS 197.298 priorities to add land to a UGB (Department of State Lands).
- The suitability findings are inadequate, in violation of Goal 14 (Swalley Irrigation District).
- The amendment fails to adequately consider adding thousands of acres of highest priority exception lands in the SW area (Swalley Irrigation District).
- The amendment lacks a factual basis for its claim that all suitable exception land has been included (Swalley Irrigation District).
- Suitability criteria, including exclusion of parcels smaller than three acres with a dwelling, are not consistent with State law (Swalley Irrigation District).
- The SW Buck Canyon Area is suitable exception land and should be included in the expansion if needed (Terry L. Anderson).

- The city fails to apply one of the location factors, “Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB” (Central Oregon LandWatch).
- The location analysis fails to include one of the four Goal 14 boundary location factors: “Comparative environmental, energy, economic and social consequences” (Rose and Associates, LLC).
- The amendment does not properly apply and balance the Goal 14 boundary location factors (Miller Tree Farm).

The following objections are denied:

- The “Stevens Road Tract,” a large parcel of EFU land abutting the east side of Bend’s UGB that is owned by the objector, should be included in the UGB expansion if any resource land is included, because it is the city’s “top-ranked UGB candidate expansion area” (Department of State Lands). Reason for denial: Because of the improper application of relevant state goals, statutes and rules in the city’s urban growth boundary location analysis, it is not possible to determine, until the city redoes the location analysis on remand, whether any resource land must be added to the UGB, and if so, where. In addition, there is no showing that these lands have lower capability soils, under ORS 197.298(2).
- The amendment fails to comply with a city ordinance that requires application of the Goal 14 boundary location factors and the Goal 2 exception process that were in effect before LCDC amended Goal 14, Goal 2, and OAR 660-004-0010 on April 28, 2005 (Swalley Irrigation District). Reason for denial: LCDC adopted amendments to Goal 14, Goal 2, and OAR 660-004-0010 on April 28, 2005, effective April 28, 2006. These amendments, among other things, revised the Goal 14 location factors and eliminated the need for Goal 2 exception findings for a UGB amendment. A city that began the UGB amendment process prior to LCDC’s action had the option of proceeding with either the “old” Goal 14 or the “new” Goal 14. The city submitted a 45-day notice of the UGB amendment on June 11, 2007<sup>69</sup> and adopted the UGB amendment on January 5, 2009; Deschutes County adopted the UGB amendment on February 11, 2009; and the city and county submitted a revised UGB amendment to the department on April 16, 2009<sup>70</sup>, after the goal amendments took effect. Between the time that the city submitted its notice and the time the city and county adopted the revised UGB amendment, the city made several changes to the findings and conclusions and used the amended Goal 14. Any provisions in the city’s plan or code to the contrary are not consistent with current State law and are not valid or enforceable. The goals and that apply to this UGB amendment are those in effect after LCDC amended Goal 14, Goal 2, and OAR 660-004-0010.

<sup>69</sup> See Notice of Proposed Amendment in the department’s City of Bend PAPA file 010-007.

<sup>70</sup> See Notice of Adoption of UGB Amendment in the department’s City of Bend UGB file 2009-01.

- Exception land in the northwest area should be removed from the amendment (Swalley Irrigation District). Reason for denial: The director cannot determine based on the current record whether these lands should or should not be included.
- The location alternatives analysis should have considered the impacts of urbanization on rural irrigation systems, which are water systems under OAR 660-024-0060(8) (Swalley Irrigation District). Reason for denial: OAR 660-024-0060(8)<sup>71</sup> specifies how cities apply the Goal 14 boundary location factors to the land in a statutory priority category in order to select the parcels to fulfill the city’s 20-year land need for a particular urban use. This rule addresses application of only one of the four factors, “orderly and economic provision of public facilities and services,” which must be weighed and balanced when applied to all parcels in the relevant priority. Goal 14 and OAR 660, division 24 use the term “public facilities and services,” but public facilities and their component systems are defined in Goal 11 and OAR 660, division 11. Goal 11 defines “water system” as “a system for the provision of piped water for human consumption subject to regulation under ORS 448.119 to 448.285.” (emphasis added) Irrigation is “the watering of land by artificial means to foster plant growth.” (emphasis added)<sup>72</sup> Thus, an irrigation system is not a water system under Goal 11, Goal 14, and their implementing rules, and a city does not consider irrigation systems in a UGB location analysis.

The following objections are addressed in other sections of this report:

- The location analysis inappropriately deferred the evaluation and comparison of alternate sites for provision of public facilities and services, which is required by OAR 660-024-0060(8) (Rose and Associates, LLC) (see Goal 12).

---

<sup>71</sup> This rule states:

(8) The Goal 14 boundary location determination requires evaluation and comparison of the relative costs, advantages and disadvantages of alternative UGB expansion areas with respect to the provision of public facilities and services needed to urbanize alternative boundary locations. This evaluation and comparison must be conducted in coordination with service providers, including the Oregon Department of Transportation with regard to impacts on the state transportation system. “Coordination” includes timely notice to service providers and the consideration of evaluation methodologies recommended by service providers. The evaluation and comparison must include:

(a) The impacts to existing water, sanitary sewer, storm water and transportation facilities that serve nearby areas already inside the UGB;

(b) The capacity of existing public facilities and services to serve areas already inside the UGB as well as areas proposed for addition to the UGB; and

(c) The need for new transportation facilities, such as highways and other roadways, interchanges, arterials and collectors, additional travel lanes, other major improvements on existing roadways and, for urban areas of 25,000 or more, the provision of public transit service.

<sup>72</sup> Definition from Merriam-Webster On-Line Dictionary.

- Land selected for employment uses is not suitable for that use (Brooks Resources Corporation) (see Goal 9).

#### **d. Conclusion and decision**

The UGB location analysis and UGB amendment do not comply with the boundary location requirements in Goal 14, ORS 197.298, and OAR 660, division 24.

The director remands the UGB amendment with direction to submit a UGB location analysis that is consistent with requirements of Goal 14, ORS 197.298, and OAR 660, division 24, as described in this report.

## **2. Do the UGB location analysis and UGB amendment comply with ORS 197.298?**

This section addresses the following additional issues related to the location analysis under Goal 14 and ORS 197.298:

- Which lands in Bend's UGB study area are considered exception lands under ORS 197.298(1)(b)?
- Are lands zoned UAR urban reserves under ORS 197.298(1)(a), exception lands under ORS 197.298(1) (b), or something else?
- Do ORS 197.298(2) requirements to rank parcels by soil capability apply to all of the land priorities in ORS 197.298(1)(a) through (d), or does it apply only to designated resource lands in ORS 197.298(1)(d)?
- Does the UGB expansion comply with the ORS 197.298(2) requirement to give higher priority to resource land of lower capability?
- Does the UGB expansion comply with ORS 197.298(3)(a) in including certain agricultural lands to satisfy identified needs for a future university site, and for large site, general industrial center?
- Does the UGB expansion comply with ORS 197.298(3)(c) in eliminating higher priority exception lands to the south of the city from consideration for inclusion in the UGB?

#### **a. Legal standard**

The relevant state law is ORS 197.298. As the department explained in comment letters to the city on May 27, 2008, October 24, 2008, and November 21, 2008 [R. at 3758, 4356, 4722, and 7268], ORS 197.298 requires Bend's UGB location analysis to include the following:

First, determine which parcels in the study area are the highest priority lands under ORS 197.298(1). For Bend, these are exception parcels under ORS 197.298(1)(b)

because there are no acknowledged urban reserves under ORS 195.145 and ORS 197.298(1)(a).<sup>73</sup> Make a list of these parcels and/or map them. Determine which of these parcels are suitable for an identified land need<sup>74</sup> by analyzing each parcel according to specific site suitability characteristics for the intended use, if any (*i.e.*, residential, commercial or industrial), that were identified in the earlier need analysis (for example, if the city's EOA identified special size, location and access characteristics necessary for regionally significant industrial sites).

The city may determine that study area parcels are not suitable by applying: (1) one or more of the physical site need characteristics that were identified during the need analysis, if any; or (2) one or more of the three exceptions to the statutory priorities in ORS 197.298(3), which may or may not overlap with the previously identified physical site need characteristics; or (3) both.<sup>75</sup>

The remaining parcels after this analysis form a preliminary list of suitable highest priority (exception) parcels. If the amount of suitable exception land under ORS 197.298(1) (b) *exceeds* the land need deficiency amount outside the existing UGB, then the city applies the four Boundary Location Factors in Goal 14 to all of the suitable exception parcels or areas, in order to narrow down the list and select the best exception parcels for the amount of the land need.<sup>76</sup> This provides a tentative list of highest priority parcels to add to the UGB.

If the total amount of suitable exception land is *not sufficient* to meet the amount of land need, the city must first add all of the suitable exception parcels, and then

---

<sup>73</sup> Bend's exception areas consist primarily of parcels zoned UAR, RR-10, and SR 2½.

<sup>74</sup> To determine whether the land in any of the ORS 197.298(1) priorities is "inadequate to accommodate the amount of land needed" for a particular urban use under ORS 197.298(1), a local jurisdiction must consider both quantity and suitability. *City of West Linn vs. LCDC*, 201 Or. App. 419, 440 (2005).

<sup>75</sup> In order to exclude lands in any priority category in favor of land in a lower priority, a city or county must provide data, analysis, and findings consistent with one or more of the three exceptions in ORS 197.298(3). ORS 197.298(3) allows a city to remove higher priority parcels from consideration up-front, before the city selects suitable parcels in that priority; and, if supply in that priority exceeds need, before the city applies the Goal 14 boundary location factors. However, there is a high threshold to exclude higher priority land, such as exception land (including land zoned UAR) and instead add lower priority lands, such as farmlands. For example, the fact that it may cost more to service one parcel than to service others does not satisfy ORS 197.298(3)(b). Likewise, the fact that one parcel will yield fewer new homes or less development than others does not satisfy ORS 197.298(3)(c). LUBA and the courts have construed the ORS 197.298(3) exceptions narrowly to allow inclusion of lower priority lands at the exclusion of higher priority lands only in cases with compelling facts.

<sup>76</sup> Because they are factors and not criteria, the considerations embodied in the factors are applied to each alternative parcel or group of parcels. The parcel or parcels that, on balance, best satisfy the factors should be selected. In other words, no single one of the four location factors, such as "orderly and economic provision of public facilities and services" or "efficient accommodation of identified land needs," may be the sole basis for selecting particular parcels to add to the UGB. See OAR 660-024-0060(1) (b).

evaluate all of the parcels and/or areas of similar parcels in the next highest priority category in ORS 197.298(1). For Bend, the next highest priority of land for urbanization is resource land with low resource production capability in ORS 197.298(1) (d).

This evaluation *may* start with a suitability analysis based on: (1) one or more physical site need characteristics that were identified during the need analysis, if any, or (2) one or more of the exceptions to the priorities in ORS 197.298(3) if there are adequate data and findings to support one or more of the three exceptions, or (3) both. (See OAR 660-024-0060(1)(c) and (2).) The steps described for highest priority exception land above are applied to each available parcel of lower-capability farmland, providing a tentative list of suitable parcels in this priority to add to the UGB Note that the Goal 14 boundary location factors are *not* triggered and applied in this situation. The Goal 14 factors are applied only when there is an excess amount of suitable land in a priority category.

If, after the previous analyses, the city still does not have enough land to meet all of its 20-year identified need for the particular use, the city may consider lower priority lands (*i.e.*, the next set of higher capability farm and forest lands) under ORS 197.298(2), using the same analytical methodology used to select higher priority lands, and produce a tentative list of suitable parcels in this final priority to add to the UGB.

### **b. Summary of Local Actions**

The analysis classified parcels designated UAR as exception lands. [R. at 162, 1177] In addition, the Bend Area General Plan (the city's comprehensive Plan) includes a statement that "Lands in this Urban Reserve area [land zoned UAR] are considered first for any expansion of the Urban Growth Boundary." Because of this plan provision, the amendment ranked UAR-zoned land higher than other exception land and included it in the UGB expansion before considering the other exception parcels zoned Suburban Residential 2.5-acre minimum, MUA 10-acre minimum, and Rural Residential 10-acre minimum. [R. at 175, 1190]

It is unclear from the record whether the city selected resource parcels in accordance with ORS 197.298(2), which includes mapping or describing the soil capability of all resource parcels in the study area, grouping them according to soil capability, considering low capability parcels before high capability parcels, and applying the Goal 14 boundary location factors if there is more resource land than needed.<sup>77</sup>

---

<sup>77</sup> The record is missing a map showing the soil capability of all resource parcels in the original or revised study area. The boundary location analysis map that shows resource lands does not show soil capability. [See R. at 165,1180, Figure V-4]

Consideration of resource parcels assumes that all of the 20-year needed cannot reasonably be accommodated on land within the existing UGB through efficiency measures, and on exception land outside the existing UGB. Whether the city can reasonably accommodate more or all of its 20-year land needs within the existing UGB or on exception land is addressed elsewhere in this report.

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

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

### **c. Objections**

Tony Aceti – The amendment includes too much EFU land and not enough exception land. [May 4, 2009, p. 1]

Paul J. Shonka – The amendment includes too much EFU land and not enough exception land. [May 1, 2009, pp. 1-2]

Cindy B. Shonka – The amendment includes too much EFU land and not enough exception land. [May 1, 2009, pp. 1-2]

Tony and Cyllene King (McGraw and Associates, LLC) – The amendment includes too much EFU land and not enough exception land. [May 1, 2009, p. 1]

Oregon Department of State Lands (DSL) – The amendment's selection of land does not comply with the ORS 197.298 priorities to add land to a UGB. [May 7, 2009, p. 4]

Barbara I. McAusland – The correct lands were not selected in the location analysis. [May 5, 2009, pp. 1-2]

Swalley Irrigation District – The correct lands were not selected in the location analysis. The amendment fails to adequately consider adding thousands of acres of suitable highest priority exception lands in the southwest area. The amendment lacks a factual basis for its claim that all suitable exception land has been included. The amendment's suitability criteria are not consistent with state law, including exclusion of parcels smaller than three acres with a dwelling. The amendment's suitability findings are inadequate. The analysis was not based on appropriately adopted public facilities plans (see Goal 11 objections). ORS 197.298(2)'s requirement to rank parcels by soil capability applies to all of the types

of land in ORS 197.298 (1)(a)–(d) being considered for addition to a UGB (*i.e.*, urban reserves, exception areas, non-resource lands, and marginal lands), and not just rural resource land under ORS 197.298(1)(d). The lands designated “Urban Area Reserve” were never properly excepted from Goals 3 and 4 and therefore are Agricultural lands not exception lands under ORS 197.298(1)(b) (except for one small area designated “Industrial Park”). [May 6, 2009, pp. 34-40, 59-61, 68, 70, and 77-78]

Newland Communities – The amendment properly followed the location analysis in Goal 14, OAR 660-024-0060 and ORS 197.298. The amendment properly included much of objector’s land. Objector’s property, although designated Agricultural, has the high priority of exception or non-resource land because a private consultant’s report concludes that 85 percent of the tract is non-agricultural land. [May 7, 2009, pp. 3, 9, and 11-12]

Rose and Associates, LLC – The lands designated “Urban Area Reserve” were never properly excepted from Goals 3 and 4 and therefore are Agricultural lands not exception lands under ORS 197.298(1)(b) (except for one small area designated “Industrial Park”). [May 5, 2009, pp. 1-2]

The requirements, objections, and analysis of the UGB location are complex. The following subsection is comprised of issues and sub-issues paired with a summary of the results of the department’s findings.

#### **d. Analysis**

***Which lands in Bend’s UGB study area are exception lands evaluated under ORS 197.298(1)(b)? Are lands zoned UAR urban reserves evaluated under ORS 197.298(1)(a), exception lands evaluated under ORS 197.298(1)(b)?*** On June 25, 1981, LCDC acknowledged the City of Bend comprehensive plan, which included city and county exceptions to Goals 3 and 4 for approximately 6,858 acres of land outside the 1981 UGB. These lands were designated UAR, 10-acre minimum parcel size (UAR-10), Suburban Residential, 2.5-acre minimum parcel size (SR 2½), and Surface Mining (SM). Parcels zoned UAR are therefore exception lands. UAR parcels in Deschutes County have not been designated as urban reserves under ORS 195.145.<sup>78</sup> UAR lands in Deschutes County are exception lands. [R. at 7268; Excerpts from the July 7, 1981 LCDC Compliance Acknowledgment Order for the Bend comprehensive plan are attached as Exhibit A]

***Does the ORS 197.298(2) requirement to rank parcels by soil capability apply to all of the land types in ORS 197.298(1)(a) through (d), or does it apply only to resource lands in ORS 197.298(1)(d)?*** The ORS 197.298(2) requirement to rank parcels by soil capability applies only to designated resource lands under ORS 197.298(1)(d). The types of land specified in ORS 197.298(1)(a)–(c) being considered for addition to a UGB (*i.e.*,

---

<sup>78</sup> In fact, it is impossible for land zoned Urban Area Reserve to be statutory urban reserves. ORS 195.145 was adopted by the Legislative Assembly in 1993, 12 years after Bend’s comp plan, including Goal 3 and 4 exceptions for UAR parcels, was acknowledged.

urban reserves, exception areas, non-resource lands, and marginal lands) are not ranked by soil capability, and soil capability is not a criterion or factor to determine whether those parcels are added to the UGB.

LUBA has agreed that the ORS 197.298(2) priority ranking scheme is applicable only to resource lands. In its decision remanding expansion of the Myrtle Creek UGB, LUBA stated: “ORS 197.298(2) and Goal 14, factor 6<sup>79</sup> establish a second priority system for including agricultural lands.”<sup>80</sup>

“The relationship between the elements of ORS 197.298(1)–(3) is essentially the same as the relationship between the elements of OAR 660-021-0030(3) and (4), and LUBA’s and the Court of Appeals’ interpretation of the latter should guide the interpretation of the former.”<sup>81</sup> The statutory exceptions to the priorities to add land to a *UGB* in ORS 197.298(3), enacted in 1995, were based on the statutory exceptions to the priorities to add land to *urban reserves* in OAR 660-021-0030(4), which LCDC had previously adopted in 1992. Therefore, appellate interpretations of the OAR 660-021-0030(4) priority exceptions<sup>82</sup> apply to Bend’s use of the ORS 197.298(3)(a) and (c) priority exceptions in this UGB amendment, including assigning the same meaning to the second sentence of OAR 660-021-0030(3)(c) and ORS 197.298(2). In 2000, the commission amended OAR 660-021-0030 to move the text that was a separate sub-rule, OAR 660-021-0030(3)(d), into 660-021-0030(4), apparently for consistency with ORS 197.298. In 1995, the rule text originally adopted as OAR 660-021-0030(3)(d) was codified in its own statutory subsection, ORS 197.298(2), instead of being included within ORS 197.298(1)(d).

The language of ORS 197.298(2) and the second sentence of OAR 660-021-0030(3)(c) indicates that their use is limited to resource lands by referring to the resource capability as “appropriate for the current use.” This could not apply to exception land or non-resource land (ORS 197.298(1)(b) and OAR 660-021-0030(3)(a) because once an exception has been taken to land outside a UGB, it is no longer farm or forest land.

---

<sup>79</sup> Before LCDC amended Goal 14 in 2005, the goal contained seven factors. Factor 6 was: “Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority.” The 2005 amendments separated the factors into two groups: need criteria and location factors. At the same time, location factor 6 was deleted because LCDC considered a reference to ORS 197.298 in the new preface to the location factors an adequate representation of state policy to retain agricultural land. [See April 14, 2005 staff report to LCDC, attached as Exhibit B]

<sup>80</sup> *DLCD vs. Douglas County*, 36 Or LUBA 26, 36-37 (1999). LUBA also stated: “Like ORS 197.298(2), Goal 14, factor 6 requires that when agricultural lands are added to the UGB higher priority must be given to land of lower agricultural capability.” *DLCD vs. Douglas County*, 36 Or LUBA at 37, fn 14.

<sup>81</sup> *Residents of Rosemont*, 38 Or LUBA at 249.

<sup>82</sup> See, e.g., *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

***Does the amendment comply with the ORS 197.298(2) requirement to give higher priority to resource land of lower capability?*** The amendment submittal does not contain the data and findings that constitute an ORS 197.298(2) soil capability comparison and analysis. The amendment does not include a map showing the soil capability of all resource parcels in the study area. The boundary location analysis map that shows resource lands does not show soil capability. The record lacks the data, analysis, and (particularly) findings that resource lands within the study area were grouped by soil capability, with lower capability lands being considered before higher capability lands, in accordance with Goal 14, ORS 197.298, and OAR 660-024-0060.<sup>83</sup>

The analysis in the city and county's decisions relies on the current use of resource parcels as a factor in determining which resource parcels to include in the UGB [R. at 178-184, 1193-99]; however, under state statute, resource lands must be selected for inclusion in a UGB based exclusively on soil capability. [See ORS 197.298(1)(d) and (2)]

***Does the city's UGB expansion comply with ORS 197.298(3)(a) in including certain specified areas to satisfy an identified need for land?***

***Does the UGB expansion comply with ORS 197.298(3)(c) in including certain resources lands in order to provide services to higher priority exception lands?***

The decisions rely on both ORS 197.298(3)(a) and (c)<sup>84</sup> to include resource lands on the North and East side of the city. [R. at 1181-86] Two specific employment needs are identified that must be met on agricultural lands: a need for a future university campus with approximately 150 acres of land, and a need for a large site general industrial center on county-owned land adjacent to the intersection of E. Highway 20 and Hamby Road. [R. at 1181]

The director has previously determined that the decision adequately establishes a need for these two employment uses, but that there has not been an analysis of whether they may reasonably be accommodated within the prior UGB. If the city and county conduct an analysis of lands within the existing UGB, and conclude that these uses cannot be reasonably accommodated, and that analysis is supported by appropriate findings and an adequate factual base, then they will have made the showing required by ORS 197.298(3)(a) and Goal 14 for a specific identified land need. At this point, however, due

---

<sup>84</sup> ORS 197.298(3):

(3) Land of lower priority under subsection (1) of this section may be included in an urban growth boundary if land of higher priority is found to be inadequate to accommodate the amount of land estimated in subsection (1) of this section for one or more of the following reasons:

(a) Specific types of identified land needs cannot be reasonably accommodated on higher priority lands;

(b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints; or

(c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.

to the absence of the required analysis of whether the use can occur within the existing UGB, the director is unable to conclude that the decision complies with ORS 197.298(3)(a).

The UGB expansion also includes 1,253 acres of agricultural lands included in Areas A-D on the East side of the city, based on the need to include them to serve adjacent exception lands. ORS 197.298(3)(c). [R. 1183-1186]. The findings generally demonstrate that inclusion of *some* of these lands may be necessary in order to provide services to lands already within the (prior) UGB and to serve exception lands in the expansion area. However, the findings also state that some agricultural lands in these areas were included “in order to achieve a logical boundary.” In addition, the decision relies on the city’s newly adopted public facilities plan and, as determined in that section of this decision, there are deficiencies in those plans.

“Area A” appears to consist of two non-contiguous groups of parcels totaling 143 acres adjacent to the northeast corner of the current UGB. [R. at 169-170, 1184-85 including Figure V-5] The amendment justifies adding this resource land as follows: “Inclusion of this area will allow for extension of urban services from the current UGB to the Pioneer Loop Exception land. Inclusion of Area A will allow for the extension of Cooley Rd. eastward to Deschutes Market Rd. and eventually to a link with Hamhook/Hamby Rd. In addition, the planned North Sewer Interceptor will pass through Area A as it is extended westward from the wastewater treatment plant. This interceptor is included in the city’s adopted Sewer Public Facility Plan.” [R. at 168-169, 1183-84] The problem with this rationale is that it is not clear why the entire area of resource lands must be included in order to serve lands within the UGB and exception parcels adjacent to the northeast of the current UGB. [see Figure V-5, R. at 169, 1184].

“Area B” is a 422-acre area on both the west and east sides of Hamhook Road and both north and south of Butler Market Road, east of the current UGB. It is separated from the east boundary of the UGB by a large area of exception parcels also proposed for inclusion. [See Figure V-5, R. at 169, 1184] The amendment states that “[t]his resource is included in order to provide urban services (specifically the planned Hamby Rd. sewer interceptor) from exception lands abutting Pioneer Loop in the north to exception lands on both sides of Hamby, south of Nelson Rd....the Hamby interceptor...must pass through these resource lands in order to reach higher priority exception areas to the south.” [R. at 169, 1184] The record does not demonstrate the need to add Area B, a large area of resource parcels, in order to provide public services to a small exception area east of Hamhook Road. [See Figure V-5, R. at 169]

“Area C” is 536 acres of resource land on both sides of Hamhook Road. Again, the amendment states that this land is needed to extend the sewer interceptor – and also parks and schools -- to exception land farther south; however, the Alternative 4A map shows that the exception areas farther south are accessible from the existing UGB. [Figure V-5, R. at 169, 1184]

“Area D” is 152 acres of resource land east of the current UGB, south of Areas A through C. The Alternative 4A map shows that the exception parcels adjacent to Area D are accessible from the existing UGB. [See Figure V-5, R. at 169, 1184] The findings do not explain why the entire area of resource lands must be included in order to serve the exception areas.

In conclusion, at this time the director is unable to determine that the inclusion of these agricultural lands complies with ORS 197.298(3)(c). It appears that once the problems with the public facilities plans are resolved, the city may be able to make the showing required by the statute to include some of these lands, but at present there is too much uncertainty regarding the overall amount of land need to determine that these lands must be included (it may not be necessary to include the adjacent exception lands if the overall quantity of land need is substantially lower). In addition, the city’s findings must determine with specificity that inclusion of the agricultural lands is necessary in order to serve nearby exception lands.<sup>85</sup>

**Response to Objections.** The following objections are denied by the director:

- ORS 197.298(2)’s requirement to rank parcels by soil capability applies to all of the types of land in ORS 197.298 (1)(a)–(d) being considered for addition to a UGB (*i.e.*, urban reserves, exception areas, non-resource lands, and marginal lands), and not just rural resource land under ORS 197.298(1)(d) (Central Oregon LandWatch, Swalley Irrigation District). Reason for denial: As explained in the issues discussion above, the ORS 197.298(2) requirement to prioritize land by soil capability applies only to resource lands.
- Environmental impacts to natural resources, the barrier of high land cost to affordable housing, or the impact to irrigation districts may justify rejecting suitable exception land for resource land under the ORS 197.298(3) exceptions to the ORS 197.298 (1) and (2) statutory priorities (Central Oregon LandWatch). Reason for denial: The only bases for rejecting exception parcels are:
  - They are not suitable for a particular use based on physical site need criteria established during the need analysis, or
  - An adequate factual record justifies one of the three exceptions to the statutory priorities in ORS 197.298(3).

---

<sup>85</sup> “Subsection 4(c) applies where the inclusion of lower priority lands is *required* in order \* \* \* to achieve a maximally efficient urban form, either because higher priority lands *cannot be included* absent inclusion of lower priority lands, or because urban services *cannot be provided* to higher priority lands absent inclusion of those lands. If a proposed urban reserve area can achieve ‘[m]aximum efficiency of land uses,’ that is, develop at urban densities and efficiencies, *without* including lower priority lands, then inclusion of such lands is not required, and Subsection 4(c) does not apply.” *D.S. Parklane Development, Inc.*, 35 Or LUBA at 617.

- Environmental impacts to natural resources, the barrier of high land cost to affordable housing, and the impact to irrigation districts are neither Goal 14 physical site need characteristics, nor ORS 197.297(3) exceptions to the statutory priorities to add land to a UGB. In addition, the record does not justify the city's rejection of any exception land for either of those reasons.
- Lands zoned UAR are highest priority for inclusion in the UGB under ORS 197.298(1)(a) (Miller Tree Farm). Reason for denial: As discussed in the issues section above, for the City of Bend, all exception lands are first priority under ORS 197.298(1)(b) for addition to the UGB; UAR-zoned parcels do not have any higher priority than other exception parcels.
- The lands designated "Urban Area Reserve" were never properly excepted from Goals 3 and 4 and therefore are Agricultural lands, not exception lands under ORS 197.298(1)(b) (except for one small area designated "Industrial Park") (Swalley Irrigation District, Rose and Associates, LLC). Reason for denial: As discussed in the issues section above, parcels zoned Urban Area Reserve were acknowledged as exception lands in 1981.
- The city properly followed the location analysis in Goal 14, OAR 660-024-0060, and ORS 197.298 (Newland Communities). Reason for denial: As discussed in the issues section above, the UGB location analysis was not consistent with Goal 14, OAR 660-024-0060, and ORS 197.298.
- The city properly included much of Objector's land (Newland Communities). Reason for denial: Because of the improper application of relevant state goals, statutes and rules in the city's urban growth boundary location analysis, it is not possible to determine, until the city redoes the location analysis on remand, whether any resource land may be added to the UGB, and if so, where.
- Objector's property, although designated Agricultural, has the high priority of exception or non-resource land because a private consultant's report concludes that 85 percent of the tract is non-agricultural land (Newland Communities). Reason for denial: ORS 197.298(1)(b) exception lands are only those that have been acknowledged as such by LCDC. Unless and until Deschutes County re-designates the objector's land as non-resource land or marginal land, this land is in the lowest priority of designated agricultural or forest land under ORS 197.298(1)(d).

**e. Conclusion and decision**

The UGB location analysis and UGB amendment do not comply with the ORS 197.298 priorities for adding land to an urban growth boundary.