

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEND,

10 *Respondent.*

11
12 LUBA No. 2012-043

13
14 FINAL OPINION

15 AND ORDER

16
17 Appeal from City of Bend.

18
19 Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

20
21 Mary A. Winter, City Attorney, Bend, and Gary Firestone, City Attorney, Bend filed
22 the response brief and Gary Firestone and Timothy V. Ramis argued on behalf of respondent.

23
24 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member,
25 participated in the decision.

26
27 REMANDED

11/29/2012

28
29 You are entitled to judicial review of this Order. Judicial review is governed by the
30 provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a city decision that adopts amendments to Chapter 8 of the city’s comprehensive plan and adopts a water public facilities plan.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. The city objects to section A of the reply brief, that the city argues does not respond to new matters. We agree with petitioner that the reply brief responds to new matters raised in the response brief. We allow the reply brief.

INTRODUCTION

Petitioner appeals Ordinance 2185, a 2012 city ordinance that adopts text amendments to Chapter 8, Public Facilities and Services, of the Bend Area General Plan (BGP) and adopts a Water Public Facilities Plan pursuant to Statewide Planning Goal 11 (Public Facilities and Services) and OAR 660-011-0000 et seq, the administrative rules that elaborate on the requirements of Goal 11.¹

¹ OAR 660-011-0045 provides amendment procedures for public facility plans, and provides that some minor modifications of adopted public facility plans are not required to be processed as post-acknowledgement plan amendments (PAPAs). OAR 660-011-0045(3)(a)-(b).

OAR 660-011-0045(4) provides in relevant part:

“Land use amendments are those modifications or amendments to the list, location or provider of, public facility projects, which significantly impact a public facility project identified in the comprehensive plan and which do not qualify under subsection (3)(a) or (b) of this rule. Amendments made pursuant to this subsection are subject to the administrative procedures and review and appeal provisions accorded ‘land use decisions’ in ORS Chapter 197 and those set forth in OAR 660 Division 18.”

ORS 197.835(6) provides in relevant part that LUBA shall reverse or remand an amendment to a comprehensive plan “* * * if the amendment is not in compliance with the [statewide planning] goals.”

1 **A. Planning Background**

2 In early 2009, the city adopted amendments to the city’s urban growth boundary
3 (UGB), concurrent amendments to Chapter 8 of the BGP, and a Goal 11 public facilities plan
4 for public facilities and services within the expanded UGB (hereafter the 2009 PFP).² That
5 UGB expansion effort ultimately failed to gain approval by the Land Conservation and
6 Development Commission (LCDC) and LCDC remanded the city’s decision to expand its
7 UGB, its BGP Chapter 8 amendments and the 2009 PFP adopted in conjunction with that
8 UGB expansion. LCDC concluded that the 2009 PFP was inconsistent with Goal 11 and
9 OAR 660-011-0010(1) and (2) because the 2009 PFP proposed to provide public sewer and
10 water service to land uses outside of the city’s then-existing UGB. Record 2611-12. We
11 discuss OAR 660-011-0010(1) and (2) in more detail below.

12 After LCDC’s remand, the city separated the UGB expansion effort from the public
13 facilities planning effort and proceeded to adopt amendments to Chapter 8 of the BGP and to
14 adopt another public facilities plan (hereafter the 2012 PFP). In that proceeding, the city
15 relied on studies and reports that had initially been prepared in connection with the joint 2009
16 UGB expansion and the BGP amendments and 2009 PFP, including a 2007 Water System
17 Master Plan, and also relied on additional reports prepared after LCDC’s remand, including a
18 2011 report we refer to as the 2011 Optimization Report.

19 **B. The City’s Water Supply**

20 The city’s water is supplied in part from Bridge Creek and Tumalo Creek, from an
21 intake approximately 13 miles outside of the city in the Deschutes National Forest (hereafter
22 the Bridge Creek facility). The Bridge Creek facility has supplied water to the city for

² OAR 660-011-0020 describes the general structure of a public facility plan. OAR 660-011-0020(1) requires that cities and counties prepare an inventory and assessment of public facility systems. OAR 660-011-0010(1) provides a list of the elements that must be included in a Goal 11 public facilities plan. We set out the text of OAR 660-011-0010 later in this opinion.

1 approximately 85 years, and the water is currently transmitted through thirteen miles of
2 transmission pipelines that cross federal forest and county land to the city’s treatment plant
3 known as the Outback site, which is located outside the city. Various portions of the Bridge
4 Creek facility are in need of repair or replacement. The parties have for a number of years
5 disagreed over a project, which the parties and we refer to as the Surface Water Improvement
6 Project or SWIP, that proposes improvements to the Bridge Creek facility and pipelines. The
7 SWIP proposes a new, larger, and relocated pipeline to replace two existing pipelines, and
8 proposes a new intake facility on Bridge Creek and a new water treatment facility at the
9 Outback site. The BGP amendments and the 2012 PFP identify the SWIP as a “public
10 facility project” with an estimated cost of \$57,750,000 and an additional estimated cost of
11 \$12,825,000 if the city expands the facility to take the entirety of the city’s water rights to
12 Bridge Creek (23 million gallons per day (MGD)) from the creek .³ Record 22, 59.

13 **C. Jurisdiction**

14 In its response brief, we understand the city to take the position that petitioner’s
15 challenges to the SWIP are not within LUBA’s scope of review. Response Brief 10. As we
16 understand the city’s argument, the city argues that the city’s most recently adopted public
17 facilities plan, the 1996 Utilities System Master Plan (1996 USMP), as well as its 1988
18 public facilities plan, and its 1980 comprehensive plan listed improvements to the surface
19 water supply system, and for that reason petitioner may not now challenge the SWIP in the
20 decision that includes the SWIP as part of the 2012 PFP. Response Brief 4-5, 37-38.

21 The city’s 1980 comprehensive plan listed replacement of the Bridge Creek
22 transmission line and possibly construction of an additional line, and a water storage
23 reservoir with a treatment plant. Record 2453. The 1988 public facilities plan identified a

³ OAR 660-011-0005 defines “public facility project” as “the construction or reconstruction of a water, sewer, or transportation facility within a public facility system that is funded or utilized by members of the general public.”

1 project to replace three to four miles of “* * * the mountain supply line (transmission line)”
2 with a 20” pipeline. Response Brief Appendix 13, 17. The 1996 Utilities System Master
3 Plan included construction of a 30” transmission line from Bridge Creek to the Outback site
4 and a treatment plant for surface water. Record 2499, 2501, 2502.

5 As noted, the SWIP includes replacement of the two existing transmission lines with
6 a 36” diameter pipe in an entirely new location, construction of a new intake facility and
7 construction of a new treatment plan at the Outback site, with a total estimated cost of
8 \$57,750,000. While previously adopted public facilities plans and/or comprehensive plans
9 identified as future public facilities projects some upgrades to the city’s surface water supply,
10 such as replacement of existing transmission lines and construction of a treatment plant,
11 those plans do not include the project that the city now includes in the 2012 PFP and that the
12 parties refer to as the SWIP. The SWIP proposes a larger diameter transmission pipe than
13 any previous plan, more miles of pipeline than some previous plans, and relocation of the
14 transmission pipe. It also proposes a new intake facility. Petitioner is not precluded from
15 challenging the SWIP that is included in the 2012 PFP.

16 The present appeal challenges the 2012 PFP’s compliance with applicable statewide
17 planning goals and administrative rules for reasons that are directly related to the SWIP, and
18 for other reasons unrelated to the SWIP. Against that backdrop, we address petitioner’s
19 assignments of error.

20 **STATEWIDE PLANNING GOAL 2**

21 Petitioner alleges overlapping and related assignments of error that generally assert
22 that parts of the challenged ordinance and the 2012 PFP and the process leading up to the
23 city’s adoption of the ordinance and 2012 PFP violate Statewide Planning Goal 2 (Land Use
24 Planning).

1 **A. Consistency Requirement**

2 Goal 2 provides in relevant part that “[c]ity, county, state and federal agency and
3 special district plans and actions related to land use shall be consistent with the
4 comprehensive plans of cities and counties and regional plans adopted under ORS Chapter
5 268.” See OAR 660-015-0000(2). Goal 2 requires that when the comprehensive plan is
6 amended, it must remain internally consistent after the amendment. *NWDA v. City of*
7 *Portland*, 47 Or LUBA 533, 550 (2004). In its petition for review, petitioner argues that the
8 amended BGP and the 2012 PFP are each internally inconsistent and in some cases are
9 inconsistent with each other.⁴

10 **1. Internal Consistency of Ordinance 2185**

11 As relevant, the text of Ordinance 2185 states that it adopts (1) “the September 2011
12 version [of the BGP] attached as Exhibit ‘A’” and adopts and incorporates by reference (2) a
13 “Goal 11 Water Public Facility Plan, attached as Exhibit ‘B’ and dated September 2011.”
14 Record 9. The attachments to Ordinance 2185 in the record are not labeled as exhibits, but
15 one of the documents attached to the copy of Ordinance 2185 in the record is titled “Bend
16 Area General Plan Chapter 8: Public Facilities and Services, May 2012, Amended May 2,
17 2012 – Ordinance NS-2185.” Record 11-33. The second document attached to Ordinance
18 2185 is titled “City of Bend Goal 11 Water Public Facility Plan May 2012.” Record 34-59.

19 In subassignments A and B of its first assignment of error, petitioner argues that
20 where the text of Ordinance 2185 adopts and incorporates documents that are dated
21 “September 2011” but the documents that are actually attached to Ordinance 2185 are dated
22 “May 2012,” Ordinance 2185 fails to comply with Goal 2’s requirement that the BGP remain
23 internally consistent after adoption of the ordinance. September 2011 versions of the BGP
24 and the water public facilities plan are located elsewhere in the record. Record 1566, 1611.

⁴ This section addresses petitioner’s first assignment of error.

1 In support of its argument, petitioner points out differences between the September 2011
2 versions of the BGP and the water public facilities plan that the text of Ordinance 2185 states
3 that the ordinance adopts and the May, 2012 versions that are actually attached to the
4 ordinance.

5 The city responds that despite the text of Ordinance 2185, the ordinance and record
6 viewed as whole make clear that the city council intended to adopt the more recent versions
7 of the documents that were actually attached to the adopted ordinance. In support, the city
8 cites to the version of the BGP text amendments and the water public facilities plan that were
9 presented to the city council at its final meeting at which it adopted the amendments and the
10 2012 PFP. Record 236-62. The city argues that the reference in the text of Ordinance 2185
11 to the former versions of those documents is simply a typographical error. We understand the
12 city to argue the reference to the September 2011 versions of the BGP and the water public
13 facilities plan was included in the draft of Ordinance 2185 when those were the versions of
14 the BGP and the water public facilities plan that were under consideration and the text of
15 Ordinance 2185 was simply not updated to correspond to the May 2012 versions of those
16 documents when the May 2012 versions of those documents were attached to Ordinance
17 2185 when it was adopted. The city contends such a typographical error does not amount to a
18 failure to comply with Goal 2's consistency requirements.

19 We agree with the city that the text of the ordinance contains a typographical error
20 and that the record and the attachments to the ordinance are adequate to clarify the city's
21 intent to adopt the 2012 BGP text amendments and the 2012 PFP. However, during the
22 remand proceedings, the city will have an opportunity to correct the typographical error in
23 Ordinance 2185 to accurately describe in the ordinance text the version of the BGP Chapter 8
24 text and the version of the 2012 PFP that it intends to adopt.

1 **2. Consistency of the BGP and the 2012 PFP With Each Other**

2 In subassignment of error C under the first assignment of error, petitioner argues that
3 the BGP amendments and the 2012 PFP are inconsistent with each other regarding whether
4 the city considered demand for water from lands outside of its current UGB in projecting
5 increases in demand for water during the planning period. In support of its argument,
6 petitioner points to statements in the BGP and the 2012 PFP that the city considered demand
7 from lands only within the current UGB, and compares those statements with a statement in
8 the text of the BGP that describes the lands that the city considered as including land outside
9 the city’s current UGB that are currently served by city water. Record 17. The city responds,
10 and we agree, that the BGP amendments and the 2012 PFP limit consideration of future
11 demand and the facilities needed to meet that demand to the city’s existing UGB and to
12 Tetherow Resort, a destination resort located on land within the county to which the city
13 currently provides water service. Response Brief 18, n 10. We discuss the city’s provision of
14 water service to Tetherow Resort later in this opinion in our resolution of the Goal 11
15 assignments of error.

16 In subassignment of error E of the first assignment of error, we understand petitioner
17 to argue that the BGP amendments and the 2012 PFP are inconsistent with each other in
18 another way. Petitioner points out that Table 8-2 of the BGP text amendment at Record 22
19 identifies the SWIP as one of the improvements to be constructed sometime within the
20 twenty year the planning period, while tables Tables 1.1 and 1.2 of the 2012 PFP, “Short
21 Term Projects” and “Long Term Projects,” do not include the SWIP as either a short-term or
22 long-term project. Record 46.

23 The city answers that the SWIP is not listed in Tables 1.1 or 1.2 of the 2012 PFP
24 because it has already been approved by the city in previously adopted public facilities plans.
25 Response Brief 22. However, even if that were the case, which we question, that does not
26 explain why the SWIP is not listed as a “short term project” or a “long term project” in

1 Tables 1.1 or 1.2. We agree with petitioner that the BGP amendments and the 2012 PFP are
2 inconsistent with each other where Tables 1.1 and 1.2 do not include the SWIP at all, but
3 Table 8-2 of the BGP includes the SWIP as a public facilities project to be constructed during
4 the planning period.

5 Subassignment of error E is sustained.

6 **3. 1996 Utilities System Master Plan**

7 Finally, in subassignment D of the first assignment of error, petitioner argues that a
8 statement in the BGP Chapter 8 text that states that the city's current public facility plan for
9 sewer collection is the 1996 USMP and a statement in the city's findings in support of
10 Ordinance 2185 that the 1996 USMP is the city's current water public facilities plan are
11 incorrect. Petitioner argues that those statements are contradicted by other evidence in the
12 record, including LCDC's decision remanding the 2009 public facilities plan.

13 Even if the cited statements in the city's decision are incorrect, a point which we do
14 not decide, petitioner does not explain and we fail to see how such an incorrect statement
15 provides a basis for reversal or remand of Ordinance 2185. For example, a statement in the
16 challenged ordinance that Salem, Oregon is the capital of the State of Washington, while
17 incorrect, would not provide a basis for reversal or remand, because that incorrect statement
18 has no possible bearing on any of the applicable legal criteria. Petitioners fail to demonstrate
19 that the city's finding about the legal status of the 1996 USMP, even if we assume it is
20 incorrect, implicates any applicable legal criteria for the decision on appeal. Accordingly,
21 subassignment of error D provides no basis for reversal or remand of the decision.

22 Subassignment of error E of the first assignment of error is sustained.

23 **B. Coordination**

24 Goal 2 and OAR 660-011-0015 require that the city coordinate with affected
25 governmental units and private providers of public facilities in adopting the BGP

1 amendments and the 2012 PFP.⁵ The city’s water needs are supplied in part by two private
2 service providers, Avion Water Company (Avion) and Roats Water Company (Roats).
3 Additionally, the city and Deschutes County are parties to an urban growth management
4 agreement for the development and joint management of public facilities for unincorporated
5 areas inside the city’s UGB and the city’s urban reserve area. The parties agree that the city
6 was required to coordinate preparation of the 2012 PFP with the county, Avion, and Roats.

7 Under ORS 197.015(5), comprehensive plans are “coordinated” when the needs of all
8 levels of government have been considered and accommodated as much as possible.⁶ In

⁵ OAR 660-011-0015 provides:

- “(1) Responsibility for the preparation, adoption and amendment of the public facility plan shall be specified within the urban growth management agreement. If the urban growth management agreement does not make provision for this responsibility, the agreement shall be amended to do so prior to the preparation of the public facility plan. In the case where an unincorporated area exists within the Portland Metropolitan Urban Growth Boundary which is not contained within the boundary of an approved urban planning area agreement with the County, the County shall be the responsible agency for preparation of the facility plan for that unincorporated area. The urban growth management agreement shall be submitted with the public facility plan as specified in OAR 660-011-0040.
- “(2) The jurisdiction responsible for the preparation of the public facility plan shall provide for the coordination of such preparation with the city, county, special districts and, as necessary, state and federal agencies and private providers of public facilities. The Metropolitan Service District is responsible for public facility plans coordination within the District consistent with ORS 197.190 and 268.390.
- “(3) Special districts, including port districts, shall assist in the development of the public facility plan for those facilities they provide. Special districts may object to that portion of the facilities plan adopted as part of the comprehensive plan during review by the Commission only if they have completed a special district agreement as specified under ORS 197.185 and 197.254(3) and (4) and participated in the development of such portion of the public facility plan.
- “(4) Those state agencies providing funding for or making expenditures on public facility systems shall participate in the development of the public facility plan in accordance with their state agency coordination agreement under ORS 197.180 and 197.712(2)(f).”

⁶ ORS 197.015(5) contains definitions for a number of terms, and provides in relevant part:

“‘Comprehensive plan’ means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems,

1 *Rajneesh v. Wasco County*, 13 Or LUBA 202, 210 (1985), we explained the two hallmarks of
2 a comprehensive plan that is coordinated with other governmental units:

3 “1. The makers of the plan engaged in an exchange of information
4 between the planning jurisdiction and affected governmental units, or
5 at least invited such an exchange.

6 “2. The jurisdiction used the information to balance the needs of all
7 governmental units as well as the needs of citizens in the plan
8 formulation or revision.”

9 **1. Coordination with the County**

10 Petitioner argues that the city’s findings are inadequate to demonstrate that the city
11 fulfilled its Goal 2 and OAR 660-011-0015 coordination obligations with the county.⁷
12 Petitioner maintains that Section 6.B. of the urban growth management agreement between
13 the city and the county requires the city to seek recommendations from the county for the
14 public facilities plan because the city proposes to extend utility lines to areas outside the
15 city’s UGB and outside the city’s urban reserve area, and that there is no evidence in the
16 record that the city sought such recommendations. Petition for Review App. 113-14.

17 The city responds by pointing to evidence in the record that in 2011, the city and
18 county met five times to coordinate on joint projects, including the water public facilities
19 planning process. Record 94. Although petitioner’s arguments are styled as a findings
20 challenge, the crux of petitioner’s argument is that there is not substantial evidence or an
21 adequate factual base in the record to support the city’s conclusion that it satisfied its

transportation systems, educational facilities, recreational facilities, and natural resources and
air and water quality management programs. ‘Comprehensive’ means all-inclusive, both in
terms of the geographic area covered and functional and natural activities and systems
occurring in the area covered by the plan. ‘General nature’ means a summary of policies and
proposals in broad categories and does not necessarily indicate specific locations of any area,
activity or use. *A plan is ‘coordinated’ when the needs of all levels of governments,
semipublic and private agencies and the citizens of Oregon have been considered and
accommodated as much as possible.* * **” (Emphasis added.)

⁷ This section addresses portions of petitioner’s second assignment of error and a portion of its eighth
assignment of error.

1 coordination obligations by engaging in an exchange of information with the county. We
2 agree with the city that evidence in the record supports a conclusion that the city fulfilled its
3 coordination obligations with the county under Goal 2 and any applicable provisions of the
4 urban growth management agreement that require the city to seek recommendations from the
5 county.

6 Petitioner also argues that the city failed to fulfill its coordination obligations under
7 Goal 2 and Goal 11 by failing to consider the impact of the SWIP on Tumalo Creek, which is
8 identified as a Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and
9 Open Spaces) resource in the county's comprehensive plan. The SWIP proposes construction
10 of improvements on land that is located several miles from the city's UGB, within the
11 Deschutes National Forest and on county land. We understand petitioner to argue that
12 because no coordination with the county occurred, the county was deprived of the
13 opportunity to raise concerns over impacts to Tumalo Creek. Petition for Review 29. The
14 city responds that there is no evidence in the record that the city failed to consider any needs
15 that were raised by the county during the coordination process.

16 We agree with the city. Although the SWIP is a somewhat unusual proposal due to its
17 location many miles from the city's boundary, on both federal land within the county's
18 boundaries and on county land, nothing in Goal 2, Goal 11, or the urban growth management
19 agreement requires the city to consider the impacts of the SWIP on a county-identified Goal 5
20 resource where the county was given an opportunity to and did not raise any concerns about
21 the SWIP's impact on a county-identified Goal 5 resource.⁸ Further, the urban growth
22 management agreement applies only to development of public facilities that are located
23 within the city's UGB or urban reserve area, and we do not understand the SWIP to be
24 located within the UGB or urban reserve area.

⁸ Petitioner does not argue that the SWIP is inconsistent with the county's adopted Goal 5 program for Tumalo Creek.

1 The second assignment of error and a portion of the eighth assignment of error are
2 denied.

3 **2. Coordination with Avion and Roats**

4 Petitioner also argues that there is no evidence in the record that the city coordinated
5 preparation of the 2012 PFP with Avion and Roats.⁹ The city points to evidence in the
6 record that the city coordinated with Avion and Roats and considered their planning
7 documents in preparation of the 2012 PFP. Record 94-95. We agree with the city that it
8 satisfied its Goal 2 and OAR 660-011-0015 coordination obligations with respect to Avion
9 and Roats.

10 OAR 660-011-0010(1)(a) and (b) require the city to include in its public facilities plan
11 an assessment of the water systems of Avion and Roats, and a list of the significant public
12 facilities projects planned by Avion and Roats that support the land uses designated in the
13 city’s comprehensive plan. Petitioner first argues that the city’s assessment of the water
14 systems of Avion and Roats is inadequate where the city relied on and incorporated the
15 planning documents of the service providers to assess the systems. According to petitioner,
16 the city is obligated to conduct its own assessments of the private service providers’ systems.
17 Petition for Review 25.

18 The city incorporated by reference the water service providers’ planning documents,
19 as OAR 660-011-0015(3) allows it to do.¹⁰ Record 40. Petitioner does not argue that the
20 Avion and Roats existing plans are inadequate to meet the requirements of OAR 660-011-

⁹ This section addresses portions of petitioner’s second assignment of error and the sixth assignment of error.

¹⁰ OAR 660-011-0010(3) expressly provides that LCDC did not intend to dictate that a local government’s Goal 11 public facility plan must completely occupy the field of public facility planning or cause unnecessary duplication where the necessary planning has been done by others. Where public facility planning already exists, and that existing public facility planning “meets all or some of the requirements of [OAR chapter 660, division 11],” those existing plans, or parts of them, may simply be incorporated into a local government’s Goal 11 public facility plan.

1 0010(1)(a). Absent such argument, we agree with the city that its incorporation of the
2 planning documents of Avion and Roats was proper.

3 Petitioner also argues that the 2012 PFP fails to include a list of significant public
4 facilities projects for Avion and Roats, and argues that even where the 2012 PFP includes a
5 list of the projects, the city is obligated to conduct an independent assessment of whether the
6 projects “support the land uses designated in the [city’s] comprehensive plan.” Petition for
7 Review 25-26. The 2012 PFP incorporates Avion’s 2006 Master Plan and the city’s findings
8 explain that Avion’s master plan lists significant public facilities projects. Petitioner does not
9 argue that Avion’s 2006 Master Plan is insufficient to meet the requirements of OAR 660-
10 011-0010(1)(b), or that the projects included in the master plan do not support land uses
11 designated in the city’s acknowledged comprehensive plan, or otherwise challenge the city’s
12 findings.

13 Regarding Roats, the city’s findings explain that Roats has not developed a list of any
14 significant public facilities projects, and that no such projects are projected to be necessary
15 because of the small size of Roats’ service area, its interconnections with the city’s and
16 Avion’s water systems, and its limited growth potential. Record 49, 67. Petitioner does not
17 acknowledge or challenge those findings. Those findings are adequate to satisfy the city’s
18 obligation under OAR 660-011-0010(1)(b) with respect to Roats.

19 The second, sixth, and a portion of the eighth assignment of error are denied.

20 **C. Adequate Factual Base**

21 Goal 2’s purpose is in relevant part “[t]o assure an adequate factual base for [all
22 decisions and actions related to use of land].” OAR 660-011-0010(1)(a) and (b) require the
23 city to include in its public facilities plan an inventory of existing systems, and a description
24 of future public facilities projects. In its petition for review, petitioner argues that the record

1 does not include an adequate factual base for the BGP amendments and the 2012 PFP in
2 several respects.¹¹

3 **1. Water Demand Projections**

4 The city adopted several planning documents as part of the 2012 PFP, including a
5 2007 Water System Master Plan (2007 Plan), the 2011 Optimization Study, and a 2011 Water
6 Management and Conservation Plan. Record 40, 56. The 2007 Plan was initially prepared in
7 connection with the city’s 2009 UGB expansion effort, and therefore analyzed projected
8 demand for water from the city’s anticipated expanded UGB and proposed water public
9 facility projects for lands outside of the city’s existing UGB. In a portion of its third
10 assignment of error, petitioner argues that the BGP and the 2012 PFP are not supported by an
11 adequate factual base because the record does not include an update of the 2007 Plan that
12 projects the demand for water based only on lands within the city’s existing UGB. In a
13 portion of the fourth assignment of error, petitioner argues that the BGP and the 2012 PFP are
14 not supported by an adequate factual base because the 2007 Plan and the 2011 Optimization
15 Study project future demand for water based on providing water to Tetherow Resort, a
16 destination resort located in the county that the city currently provides water service to. We
17 discuss Tetherow Resort in more detail later in this opinion.

18 The city responds that Table 1 of the 2012 PFP at Record 43 to 45 makes clear that
19 the city relied on the 2007 Plan only to inventory existing water facilities, and relied on the
20 2011 Optimization Study and the 2011 Water and Conservation Plan to determine future
21 demand and the need for future projects. With the exception for projecting demand from
22 additional phases of Tetherow Resort that we discuss below in our resolution of the Goal 11
23 issues, neither of those documents projected demand for water based on the city’s anticipated
24 UGB expansion and proposed water public facility projects for lands outside the city’s

¹¹ This section addresses petitioner’s third assignment of error, a portion of its fourth assignment of error, and the seventh assignment of error.

1 existing UGB. Therefore, with the exception of consideration of Tetherow Resort, we agree
2 with the city that the additional studies in the record that were prepared after LCDC’s remand
3 provide an adequate factual base for the city to determine future demand for water in
4 planning “significant public facility projects which are to support the land uses designated in
5 the comprehensive plan” as required by OAR 660-011-0010(1)(b).

6 A portion of the fourth assignment of error is sustained.

7 **2. Outdated Information**

8 Petitioner also argues that the BGP amendments and the 2012 PFP are not supported
9 by an adequate factual base because “the city relies on very outdated information.” Petition
10 for Review 16. As one example, petitioner points to Figure 8.2 of the BGP text that provides
11 information on water usage from 1998 to 2005, indicating that the city’s water demand
12 increased over that period. Record 19. According to petitioner, Figure 8.2 contradicts the
13 city’s findings in support of the 2012 PFP, which conclude that there has been a significant
14 decline in water use in the years after 2005. Record 42. As another example, petitioner
15 points to Table 1.1 of the 2012 PFP at Record 46, which refers to a five year planning period
16 from 2008 to 2012, and argues that Table 1.1 does not provide an adequate factual base for
17 the decision because the specified period was nearly over before the city adopted the BGP
18 amendments and the 2012 PFP.

19 We disagree with petitioner that Figure 8.2 provides either exclusive or conclusive
20 information about historical water usage and projected future demand. Figure 8.2 is an
21 illustrative figure showing that the city’s water demand increased between 1998 and 2005.
22 The 2011 Optimization Study makes clear that future demand projections were revised
23 several times during the period that the public facilities plan was being developed.¹² We also

¹² The Optimization Study explains that:

“The future demand forecast and spatial distribution of demands was revised a number of times since the first pass was presented by MSA in November 2009. Water demand

1 disagree with petitioner that the fact that Table 1.1 refers to a five year planning period that
2 commenced when the city initially commenced its planning for water public facilities and
3 that ended five years later amounts to legal error. Petitioner does not point to any legal
4 requirement that the city continually update its planning studies or time lines during a multi-
5 year planning process. The city's reliance on information and studies prepared several years
6 prior to the adoption of the 2012 PFP does not necessarily mean that the city's decision is not
7 supported by an adequate factual base. Petitioner does not explain why the information that
8 the city relied on does not provide an adequate factual base for the city's water public
9 facilities plan. Absent any argument that the data that the city relied on is inaccurate or that
10 other evidence in the record contradicts the data, the fact that data was collected and analyzed
11 several years before the ultimate adoption of the 2012 PFP does not, in itself, provide a basis
12 for reversal or remand of the decision. *Hillsboro Neighborhood Dev. Comm. v. City of*
13 *Hillsboro*, 15 Or LUBA 426, 434-35 (1987).

14 As a final example of the city's use of outdated information, petitioner argues that the
15 BGP amendments regarding the city's sewer facilities are not supported by an adequate
16 factual base because the BGP amendments list facilities that the city plans to construct
17 "through 2002." Record 16. According to petitioner, the city was required to update and
18 address the portion of the BGP that describes the city's sewer facilities in amending the BGP
19 to adopt the 2012 PFP.

20 The city responds that it is in the process of adopting an updated sewer public
21 facilities plan. Response Brief 14, n 9. The city explains that the text of the BGP that
22 petitioner cites to is a re-adoption of the version of the BGP in effect prior to the city's
23 attempt to expand its UGB, and that the city did not adopt and was not required by Goal 2's

projections were developed with consideration for both historical rates of water demand growth and the availability of developable land and redevelopable land within the existing UGB. Refinements were made to the assumed per capita consumption for residential customers, the per-acre usage rates for non-residential areas, and the spatial distribution of development growth in the early years of development." Record 1986.

1 factual base requirement to adopt a sewer public facilities plan as part of Ordinance 2185.
2 We agree with the city.

3 **3. Bridge Creek Water Capacity**

4 Finally, petitioner challenges the adequacy of the factual base to support the statement
5 in the BGP that “[t]he Bridge Creek source can deliver up to 13.5 million gallons per day
6 [MGD].” Record 18. Petitioner points to a statement in the 1996 Utilities System Master
7 Plan that “[t]he Bridge Creek source delivers 10.9 MGD.” Record 2478. The city responds
8 that the BGP correctly states that the potential amount of water that the Bridge Creek water
9 supply is capable of delivering is 13.5 MGD and that the 1996 plan correctly stated the
10 amount of water that the Bridge Creek source supplied at that time. Record 2479. We agree
11 with the city that the statement in the BGP addresses the potential amount of water that the
12 Bridge Creek water supply is capable of delivering and the statement is supported by an
13 adequate factual base.

14 A portion of the fourth assignment of error is sustained. The third assignment of error,
15 the remainder of the fourth assignment of error, and the seventh assignment of error are
16 denied.

17 **STATEWIDE PLANNING GOAL 11**

18 Goal 11 requires the city to adopt a public facilities plan for areas within the city’s
19 urban growth boundary. As relevant here, OAR 660-011-0010 and -0020 require the city to
20 provide in its public facility plan (1) an inventory of significant public facility systems that
21 includes a general assessment of the condition of the facility; and (2) an identification of
22 “significant public facility projects which are to support the land uses designated in the
23 acknowledged comprehensive plan.”¹³

¹³ OAR 660-011-010 provides the required elements for a public facility plan:

“(1) The public facility plan shall contain the following items:

1 **A. Projects That Serve Areas Outside of the City’s UGB**

2 In a portion of its fourth assignment of error, we understand petitioner to argue that
3 the 2012 PFP fails to comply with Goal 11 and OAR 660-011-0010(1)(b) because the 2012
4 PFP identifies “significant public facility projects” that are not limited to supporting “land
5 uses designated in the acknowledged comprehensive plan.” Put another way, we understand
6 petitioner to argue that the 2012 PFP violates Goal 11 and OAR 660-011-0010(1)(b) because
7 it includes projects that will provide water service to land uses that are outside the city’s
8 UGB. Petitioner points to projects listed in the 2012 PFP that propose expansion of water
9 service to additional development phases of Tetherow Resort, a destination resort that is
10 located on county land that is currently served by city water, and service to a portion of a
11 1,500 acre area known as Juniper Ridge, approximately 1,000 acres of which are located
12 outside of the UGB.¹⁴ Record 46 (Table 1.1), 58 (Table 2.13).

-
- “(a) An inventory and general assessment of the condition of all the significant public facility systems which support the land uses designated in the acknowledged comprehensive plan;
 - “(b) A list of the significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan. Public facility project descriptions or specifications of these projects as necessary;
 - “(c) Rough cost estimates of each public facility project;
 - “(d) A map or written description of each public facility project’s general location or service area;
 - “(e) Policy statement(s) or urban growth management agreement identifying the provider of each public facility system. If there is more than one provider with the authority to provide the system within the area covered by the public facility plan, then the provider of each project shall be designated;
 - “(f) An estimate of when each facility project will be needed; and
 - “(g) A discussion of the provider’s existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each public facility project or system.”

¹⁴ We do not understand petitioner to challenge the city’s inclusion in its *inventory* under OAR 660-011-0010(1)(a) the *existing* water service to Tetherow.

1 The city responds that the 2012 PFP properly includes new projects to provide
2 expanded water service to additional development phases of Tetherow Resort because the
3 city is contractually obligated to provide water service to the resort, and that to exclude
4 demand from expanded water service to the resort would result in underestimating the future
5 demand for city water and overestimating the capacity of the city’s current water supply
6 systems to meet that demand. The city maintains that nothing in Goal 11 prohibits the city
7 from providing water service outside of the city’s UGB where the city is already providing
8 water service to the area and is contractually obligated to continue to provide that service.
9 The city also responds that approximately 500 acres of the Juniper Ridge area is located
10 within the city’s UGB and the public facility projects that are included in the 2012 PFP
11 propose service only to areas that are located within the UGB.

12 While we agree with the city that the 2012 PFP properly includes public facility
13 projects to provide water service to the area of Juniper Ridge located inside the city’s UGB,
14 we agree with petitioner that the 2012 PFP is inconsistent with Goal 11 and OAR 660-011-
15 0010(1)(b) because it includes new projects to expand water service to additional phases of
16 Tetherow Resort, such as the proposed pump station described in Table 2.13 and the
17 proposed 18-inch main pipe described in Table 1.1. Record 46, 58. Goal 11, Guideline A.2.
18 provides:

19 “Public facilities and services for rural areas should be provided at levels
20 appropriate for rural use only and should not support urban uses.”

21 *See also Foland v. Jackson County*, 239 Or App 60, 71, 243 P3d 830 (2010) (extension of
22 water service to serve an urban use on rural land does not comport with Goal 11, and an
23 exception to Goal 11 to extend the water service is required).¹⁵

¹⁵ The text of Goal 11 provides in relevant part:

“Local governments shall not rely upon the presence, establishment, or extension of a water or sewer system to allow residential development of land outside urban growth boundaries or

1 The city argues that it is contractually obligated to provide expanded service to
2 Tetherow and therefore that the 2012 PFP properly includes projects that expand that service.
3 However, whatever the origin and timing of the provision of water service to the existing
4 phases of the destination resort and notwithstanding the city’s contractual obligation to
5 expand that service to accommodate future phases of Tetherow, such a contractual obligation
6 does not permit the city to avoid Goal 11’s proscription against providing water service that
7 supports urban uses on rural lands, or its prohibition on relying on the presence of a water
8 system to allow residential development of that rural land at a density higher than authorized
9 without that water service. The city’s contract with Tetherow does not permit the city to
10 avoid its obligation to ensure that expanded water facilities comply with Goal 11 or are
11 authorized by an appropriate exception to Goal 11.

12 The city does not argue that its provision of expanded water service to Tetherow is
13 provided at a level “appropriate for rural use,” or argue that its provision of expanded water
14 service to Tetherow does not “allow residential development of land outside urban growth
15 boundaries * * * at a density higher than authorized without service from such system.”
16 Accordingly, we agree with petitioner that the 2012 PFP improperly includes public facilities
17 projects that provide expanded service to Tetherow Resort, because the resort is a land use
18 that is not provided for in the city’s acknowledged comprehensive plan, and because the city
19 proposes to provide water service that is not at a level “appropriate for rural use.”

20 The fourth assignment of error is sustained, in part.

21 **B. SWIP Description**

22 OAR 660-011-0020(2) requires the public facility plan to “list the title of the project
23 and describe each public facility project in terms of the type of facility, service area, and

unincorporated community boundaries at a density higher than authorized without service
from such a system.”

1 facility capacity.” Petitioner and the city disagree about the requisite level of specificity that
2 the rule requires in describing the SWIP. The SWIP is described in the 2012 PFP in Table
3 2.18, entitled “Total Capital Costs – Final Build-out Solution,” as “Surface Water Supply,
4 13.5 MGD, membrane treatment, no hydro” with a cost of \$57,750,000. Record 59.
5 Petitioner argues that the identification and description of the SWIP in the 2012 PFP does not
6 have the requisite level of specificity. Citing *Homebuilders Assoc. v. Lane County*, 50 Or
7 LUBA 134 (2005), petitioner argues that the description of the SWIP fails to satisfy OAR
8 660-011-0020(2) because unlike other projects that are included in the 2012 PFP, there is no
9 breakdown of component parts of the SWIP and their separate costs. Given that the SWIP is
10 the most expensive project that is listed in the 2012 PFP, petitioner argues, more specificity
11 than a couple of lines listing a \$57,750,000 total cost is required to describe the project.

12 The city responds that the 2012 PFP lists everything that OAR 660-011-0020(2)
13 requires for what the city characterizes as a single public facility project to upgrade the city’s
14 surface water supply. However, in that response the city also describes the SWIP as
15 including at least two components, construction of a water pipeline and construction of a
16 treatment facility. The city also responds that planning documents that the city adopted as
17 appendices to the 2012 PFP provide additional descriptions of the SWIP.

18 The 2012 PFP Table 2.18 described above lists seven different “Cost Item[s]” and
19 includes a total cost for each item.¹⁶ Record 59. The SWIP is the first cost item. The

¹⁶ The “costs items” set out in Table 2.18 at Record 59 are:

“Surface Water Supply”

“13.5 MGD, membrane treatment, no hydro”

“Additional supply to meet 23 MGD (9.5 MGD)”

“New Groundwater Wells”

“New Storage”

1 second, third, sixth and seventh cost items listed in Table 2.18 are broken down in more
2 detail in Tables 2.11, 2.12, 2.13 and 2.14 that immediately precede Table 2.18. Record 57-58.
3 For the fourth item, “New Pipe Improvements for Growth,” a detailed breakdown of the costs
4 is found in one of the appendices that is incorporated into the 2012 PFP at Record 3087-
5 3090, and for the fifth item, “Pipe Improvements for Fire Flow,” a detailed breakdown of
6 costs is found in the same appendices at Record 3095. Tables 2.11 through 2.14 break down
7 the cost item by location, description of the project, and cost per location. The spreadsheets
8 at Record 3087-90 and 3095 contain even greater detail than Tables 2.11 through 2.14. We
9 do not find anything in the record pages cited by the city or any other record pages that we
10 have reviewed to support the city’s assertion that the appendices to the 2012 PFP provide a
11 greater level of detail, or any detail, for the SWIP.

12 As noted, the city describes the project as being comprised of at least two different
13 components, construction of the water pipeline and construction of a treatment facility. In
14 light of that description and the greater level of detail that is presented in the 2012 PFP or
15 appendices to the PFP for all of the other cost items that appear in Table 2.18, we do not
16 think the general reference in Table 2.18 to “Surface Water Supply” that lists the total cost of
17 \$57,750,000 suffices as an adequate description of the SWIP. Consistent with our decision in
18 *Homebuilders*, 50 Or LUBA at 146-51, OAR 660-011-0020(2) leaves the city a fair amount
19 of discretion in determining the level of detail that is required under the rule in describing
20 public facilities projects. We only determine here that the level of detail the city has provided
21 for the SWIP in the 2012 PFP that is before us in this appeal is inadequate.

“New Pipe Improvements for Growth”

“Pipe Improvements for Fire Flow”

“Pump Station Expansion”

“New Valves”

1 The fifth assignment of error is sustained.

2 **STATEWIDE PLANNING GOAL 5/TUMALO CREEK**

3 The riparian area along Tumalo Creek within the city is identified in the BGP as a
4 significant resource under Goal 5.¹⁷ Petition for Review Appendix 122. Petitioner argues
5 that the city is required to demonstrate that the BGP amendments and the 2012 PFP comply
6 with OAR 660-023-0250.¹⁸ According to petitioner, the BGP amendments require the city to
7 “follow the procedures and requirements of” OAR chapter 660 division 23, *see* n 18,
8 because the SWIP amounts to a “new use” under OAR 660-023-0250(3)(b) because it will
9 increase the amount of water taken out of Tumalo Creek. Petitioner argues that the city
10 should have conducted a new economic, social, environmental and energy (ESEE) analysis as
11 required by OAR 660-023-0040 to determine the impact of the additional water removed
12 from the creek.

13 The city adopted findings that the BGP amendments do not allow new uses that
14 would conflict with a Goal 5 resource, and petitioner does not acknowledge or expressly
15 challenge those findings. Record 81. Absent any developed argument from petitioner that
16 explains how increasing the amount of water that is currently taken out of Tumalo Creek

¹⁷ This section addresses portions of petitioner’s eighth assignment of error.

¹⁸ OAR 660-023-0250(1) provides that “[l]ocal governments shall follow the procedures and requirements of this division” in the adoption or amendment of all post-acknowledgment plan amendments (PAPAs) “pertaining to Goal 5 resources.” OAR 660-023-0250(3) provides, in relevant part:

“Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

- “(a) The PAPA creates or amends a resource list or a portion of an acknowledged plan or land use regulation adopted in order to protect a significant Goal 5 resource or to address specific requirements of Goal 5;
- “(b) The PAPA allows new uses that could be conflicting uses with a particular significant Goal 5 resource site on an acknowledged resource list[.]”

1 constitutes a new “use” that would conflict with the riparian area along Tumalo Creek within
2 the city boundaries, petitioner’s argument does not provide a basis for reversal or remand.

3 Bend Development Code (BDC) Section 4.6.200(B)(2) requires that the post
4 acknowledgement plan amendment to the BGP be “consistent with applicable [BGP] goals
5 and policies.” Petitioner argues that the city’s findings are inadequate to address several
6 statements in the BGP that set out the city’s position that conservation and improvement of
7 wetlands and riparian areas along Tumalo Creek is important, and that development within
8 Tumalo Creek or its riparian areas should meet development standards in the BDC.
9 Petitioner also cites two policies in the BGP that require the city to prepare development
10 regulations to reduce impacts of development along the creek and that require trout spawning
11 habitat to be protected. Petition for Review 27-28. As noted above, petitioner does not
12 explain, and we do not understand, the effect if any of the SWIP on the portion of Tumalo
13 Creek within the city.

14 The city responds that the city was not required to adopt findings that the BGP
15 amendments are consistent with the statements and policies cited by petitioner because the
16 statements and policies apply when the city is proposing changes to the BDC that would
17 affect Tumalo Creek, and the BGP amendments do not propose changes to any BDC
18 development regulations. We agree with the city.

19 The eighth assignment of error is denied.

20 The city’s decision is remanded.