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LAND CONSERVATION  
AND DEVELOPMENT

ORIGINAL



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January 29, 2010

VIA E-MAIL & HAND-DELIVERY

KATHIE ECKMAN  
Mayor

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

MARK CAPELL  
Mayor Pro Tem

**RE:** Appeal of Director's Decision on Bend Urban Growth Boundary Amendment  
(Order 001775).

JIM CLINTON  
City Councilor

Dear Mr. Whitman:

JODIE BARRAM  
City Councilor

JEFF EAGER  
City Councilor

TOM GREENE  
City Councilor

ORAN TEATER  
City Councilor

I am writing on behalf of the City of Bend to appeal the Director's Decision on the Bend UGB amendment (Order 001775) dated January 8, 2010 to the Land Conservation and Development Commission. This appeal is made pursuant to OAR 660-025-0150. Under OAR 660-025-0150 (4) (b), the local government may appeal the Director's remand to LCDC. The City of Bend is the local government that made the decision, and thus has standing to appeal. The amendment to the Bend urban growth boundary was also adopted by Deschutes County, as required by the rule. In the appeal, we use the terms "Bend" or "the City" to refer to the joint decision by the City of Bend and Deschutes County to adopt an amendment to the Bend urban growth boundary.

You will find enclosed the City's appeal to the Land Conservation and Development Commission. Copies of this cover letter and the appeal will be hand delivered to the Department's Salem office before the close of business today.

ERIC KING  
City Manager

Sincerely,

SONIA ANDREWS  
Finance Director

  
Eric King  
City Manager

SANDRA L BAXTER  
Police Chief

LARRY HUHNS  
Fire Chief

PATRICIA STELL  
City Recorder

CC: Bend City Council (7)  
Mel Oberst, Community Development Director  
Brian Shetterly, Long Range Planning Manager  
Damian Symyk, Senior Planner  
Mary Winters, City Attorney  
Gary Firestone, Assistant City Attorney  
Mark Radabaugh, DLCD Central Oregon Regional Representative

**APPEAL BY THE CITY OF BEND**

**OF**

**THE DIRECTOR'S DECISION**

**ON**

**THE ADOPTION OF BEND'S**

**REVISED URBAN GROWTH BOUNDARY**

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## **BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION**

### **Appeal by the City of Bend of the Director's Decision on the Adoption of a Revised Urban Growth Boundary of the City of Bend**

#### **PART ONE -- SUMMARY AND INTRODUCTION**

##### **I. EXECUTIVE SUMMARY**

Bend, Oregon lies at the upper end of the Deschutes River basin between the rugged Cascades and the high desert. There are 300 days of sunshine and expansive views of beautiful snow covered mountains. With 10 inches of precipitation and an elevation of 3,600 feet the growing season is only 88 days long but the recreational season is year round. The City is surrounded by cinder cones and lava flows with Ponderosa forests to the west and sage brush and juniper desert to the east. The pristine Deschutes River cuts a canyon from the south into the downtown heart of the City where it mellows into the reflective Mirror Pond before returning to its gorge. Rimrock, buttes, lava tubes and pressure ridges are predominant features of Bend's landscape that lend the City its dramatic beauty yet portend the difficulties to be had in creating an urban environment.

With the influx of residents drawn by its natural beauty, affordability and quality of life, over the last two decades Bend became the fastest growing city of comparable size in the state. By 2005, Bend's population had surpassed its 2020 forecast, 15 years earlier than anticipated, growing by over 60,000 people since the last UGB acknowledgement in 1981. This is a 365% increase in population, compared to a 3% increase in UGB size since 1981. As acknowledged by Department of Land Conservation and Development (DLCD), the population is projected to swell to 115,065 by 2028. This growth pressure and long timeframe since the last expansion led to an increasingly severe shortage of affordable residential and, most significantly, a lack of affordable or available employment land. By 1998, Bend had annexed all land within its UGB, so no land was available for expansion.

It became evident that Bend's population was increasing much faster than had been planned for and land supply was diminishing quickly. With land values increasing dramatically and in some instances raw land being purchased for approximately \$400,000 per acre, the actual and perceived scarcity of land resulted in escalating costs for land for residential, employment and industrial development. With immigrants arriving daily from western Oregon, Washington, California and Arizona, Bend was, and continues to be, on the national radar as a very desirable place to live. It is important to acknowledge the absence of a clear point of reference within the state for what happened to Bend and what will continue to happen to this unique place. The traditional growth management tools established in western Oregon for cities growing by 2 to 3% annually are inadequate and often misplaced for a city growing by 5 to 8% annually. Although this growth rate has slowed consistent with the state and national downturn, in a 20-year planning period the City must plan based on its population projection and past trends show that the Bend will experience a boom cycle again.

In response to this diminishing supply and increasing cost of land within the UGB, the City Council began the UGB expansion process in 2004. The City initiated a Residential Lands Study, chiefly consisting of a buildable lands inventory (Rec. 1798) and housing needs analysis. (Rec. 1742) The City engaged a technical advisory committee (TAC) comprised of agencies and stakeholders. The Council also appointed a Steering Committee to provide a citizen's perspective on the framework plan. Based on staff and committee work from 2004-2007, in June of 2007, the City Council formally initiated the UGB boundary expansion process. Over the course of 18 months, the City held over 60 public meetings, including 15 additional TAC meetings and 32 Planning Commission work sessions on the proposed UGB expansion. (Rec. 194.) Hundreds of citizens participated in these meetings. During the course of the process, the City developed a 15,000 page record,<sup>1</sup> including written comments from members of the public, as well as numerous reports from experts commissioned to assist the City in developing a factual basis for its decision. The City also received extensive public comment and testimony at public hearings before the Planning Commission and City Council.

The City developed six alternatives over this period. The Director's Summary, which distinguishes between the first alternative submitted on June 11, 2007 of 4,884 acres, and the revised proposal submitted on October 27, 2008 of 8,943 acres, and emphasizes the acreage increase, omits a key fact. As explained in the findings, the first alternative only included a very small percentage of employment land at Juniper Ridge. (Rec. 1060.) In August of 2007, the City Council expanded the scope of the June 2007 proposal to include full consideration of city-wide employment land needs for the 2008-2028 planning period. This resulted in an expanded and updated Economic Opportunities Analysis which looked beyond the Juniper Ridge site to the full range of commercial, industrial and mixed-use developments consistent with Goal 9. (Rec. 1498.) In addition, the final proposal included land for other urban uses consistent with Goals 9 and 14.

The City Council directed the inclusion of sufficient land through the UGB expansion process to meet its land needs, within the bounds of state law, rather than just "go small," for two reasons. The first was recognition of the time and expense of the expansion process under the Oregon land use system, and the desire to not have to come back in 5 or 10 years because it acted overly conservatively. Since 2004, the City has expended over \$4,000,000 on the UGB expansion. Second, Council had the strong policy desire to moderate the escalating residential land values and the decreasing supply of employment land. It was also increasingly apparent that the city needed to provide a diversity of shovel-ready industrial land to promote primary job growth and the expansion of existing businesses, so as to reduce the dependence in the economy on tourism and the real estate boom. This need for employment land has become even more critical in recent times and will continue into the future, and is a glaring deficiency in the current city boundaries.

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<sup>1</sup> In addition to the almost 15,000 printed and numbered pages, there are numerous oversized exhibits, as well as computer disks that contain hundreds of pages of material.

The City also received overwhelming citizen input in favor of preserving the look and feel of existing neighborhoods. The City nonetheless looked carefully at accommodating its need for residential land within the existing UGB. Of the 16,681 additional dwelling units identified as needed, the City proposes that 11,159 residential units be accommodated within current City boundaries. Thus a full 2/3 of the projected need is proposed to be accommodated within City limits. In addition to the efficiency measures already adopted by the City through action such as its Development Code update, the City considered additional efficiency measures for accommodating growth within the existing UGB, concluding that upzoning along transit corridors and pursuing planning through the Central Area Plan were measures most likely to succeed, given the specific history and growth patterns of Bend. (Rec. 2163.)

Throughout the process, the City undertook a very cautious and methodical process to complying with the applicable goals, statues and regulations. City staff, with the help of experienced outside legal counsel, constantly assessed whether it was acting within the parameters of the statutes, goals and rules. Despite the long and expensive process, involving hundreds of citizens and costs millions of dollars, the Director finds the City's planning inadequate, lacking in groundwork and too indefinite. From the agency perspective, the overarching problems are two-fold—while acknowledging the need for a new university site and a large site general industrial area, and giving a slight nod to the City's possible need for an expansion, the extensive remand, in essence, is a directive to the City to go back and start over again to prove that all of its 20-year land needs cannot reasonably be accommodated either entirely within the existing UGB through efficiency measures, or completely on exception land within the expansion area.

On key issues related to residential land, employment land, vacancy rates, and whether property is redevelopable, the Report either disagrees with the City's conclusions or simply fails to acknowledge clear evidence in the record. In many cases, the Report demands a reworking of accurate and extensive analysis in the record rather than seriously evaluating the existing analysis. Although the Report states that the decision is to remand for "revisions," it demonstrates a lack of understanding of local trends, local knowledge, local testimony or local policy. Time and again, the remand items direct the City to start the analysis over, following a prescribed path, rather than acknowledging that the City could proceed under other approaches consistent with applicable law. The Report, as a whole, is not a simple remand to fix a few errors, but is a rejection of Bend's entire process and requires a total revision of the already extensive and complex analysis.

Thus, at its core, the Commission's review of the Director's Order is about the extent of a local government's authority and discretion, based on extensive public input within the bounds of growth management law, to make legislative decisions to determine its own boundary expansion. The Director would have the City of Bend make decisions in the manner, and with the outcome, that the administrative agency desires. From the start of the process, no amount of work or analysis, no number of meetings, hearings, citizen testimony or reports responding to agency concerns, has changed the Department's

essential view that the City of Bend cannot expand without following the exact process that it dictates using the Department's factual assumptions.

Bend respectfully submits that it is being held to an unprecedented level of scrutiny and a bar that has been raised so high as to be impossible to meet. Extensive findings are being required for a legislative decision on virtually every conceivable issue that formed the basis for that decision, far beyond the rationale and justification already in the record. There is a difference between holding Bend to the requirements of the statute and the rules, and expecting Bend to follow Department's philosophy and preferences. The Report shows little acceptance that the applicable goals, statutes and regulations provide discretion for a range of acceptable decisions, but rather faults the fundamental basis for the boundary expansion. The Report shows no recognition whatsoever that Central Oregon has grown differently, and has a different geography and geology than the Willamette Valley, so that its future growth patterns may not conform to a "one size fits all" approach.

The City Council (the elected policy decision-makers of the City) carefully weighed the extensive evidence before it, including several options regarding the extent of the expansion of the UGB and specific locations to be added to the UGB, and made a decision applying legal standards to the facts and evidence before it. The Director of the DLCD issued a decision that would overturn the City's final action. The Director's decision does not apply the correct legal standards and ignores the evidence in the record supporting the City Council's conclusions. The City therefore appeals the Director's Decision.

## II. BACKGROUND

### A. Population

The City of Bend's initial UGB was established in 1981. At that time, the City's population was 17,425. In 1998, the City updated its comprehensive plan and at that time forecast a population of 68,775 by the year 2020. Population growth far exceeded the estimate – the City exceeded the projections for 2020 by the year 2005. The following chart shows the City's population growth since 1981.

DATE	POPULATION	ACRES IN UGB
1981	17,425	20,640
1990	20,469	20,674
1998	35,635	20,719
2000	52,800	20,719
2005	70,330	21,224
2008	80,995	21,262

Despite the 365% increase in population since 1981, the City's UGB has increased only 3% (about 622 acres) since that time. Since the establishment of the UGB in 1981, the UGB has not been expanded for housing needs.

The City has seen a period of sustained growth from 1980 to 2008, averaging an annual growth rate of 5.67% in population, per year, in that time. It experienced a period of extremely rapid growth from 1998 to 2005, with an average annual population growth rate of 5.9%.

Although Bend has been hurt hard by the economic downturn, the population of the City has continued to grow, albeit at a slower rate. In any 20-year period there will be fluctuations in the rate of growth and these are anticipated by the population projection. There will be times of more rapid growth, times of slower growth, and possibly even times that an area loses population. During the worst year of the recession, Bend's population grew by almost 2%. With Bend continuing to experience some population growth even during the recession of the last two years, it is unlikely that it will have a period in the foreseeable future when it loses population. On the contrary, it is likely that the City will see another period of significant growth sometime in the next 20 years as the recent market correction has made Bend an even more affordable and desirable place to live and work.

Recognizing that the City needs to plan for a growing population, the City and Deschutes County developed a new population forecast between 2002 and 2004. The coordinated population forecast has been incorporated into the City's comprehensive plan and is acknowledged. (Rec. 1980.) The acknowledged population forecast is for a population of 109,389 by 2025. Because state law requires that UGBs provide adequate lands to accommodate a 20-year housing supply, the population projection was extended to 2028, using the very conservative annual growth rate of 1.7%, resulting in a population projection of 115,063 for 2028. (Rec. 8801.) That is an increase of 37,626 new residents over 2008.

#### B. Area

At the time the City's UGB was established in 1981, the UGB had a total area of 32.25 square miles and a population density of 544 people per square mile. The City limits were extended to include the entire UGB in 1998. At that time, the total area with the City/UGB was 32.37 square miles and the population density was 1,018 people per square mile. Since that time, there have been incremental expansions of the UGB and City limits to add employment lands, bringing the total area within the City/UGB to 21,262 acres (or 33.22 square miles). The City's population had grown to 80,995 by 2008, increasing the population density to 2,454 people per square mile.

With the expansion of the City limits to completely fill the UGB, the City has limited options for accommodating the 20 year projected population growth. Population growth requires both additional housing and additional non-residential uses – commercial uses to provide services to the population and other economic uses (office, manufacturing, service) to provide employment for the population, as well as parks, schools and open spaces. Bend is a tourist destination, and tourism service uses and second home uses also create a demand for land.

The UGB expansion adds 8,462 gross acres to the UGB. (Rec. 1054.) Of this amount, 5,475 acres are considered suitable and available for meeting needs. (Rec. 39.) The majority of this area, 4,069 acres (74%), is Priority 2 land (urban area reserve or other exception land), while 1,407 acres, or 26%, is Priority 4 land (resource land). (Rec. 1188.) The expanded area includes 2,866 acres of residential land and 2,090 acres of employment land, for a total of 4,956 acres of land needed for residential and employment land. When this acreage is deducted from total suitable and available acres, a theoretical "surplus" of about 519 acres of suitable and available land remains. Acreage that is neither suitable nor available is already developed or otherwise unsuitable for accommodating documented land needs, as will be further explained.

### C. Location

Bend is in Central Oregon, just east of the Cascades. Mount Bachelor, the Three Sisters and other Cascade peaks make Bend both a year-round tourist destination and an attractive place to live. Bend is the cultural and economic hub of Central Oregon and it satisfies regional demands for recreation, education, health care, communications, industry, retail and hospitality uses. The Deschutes River runs through Bend and also contributes to the desirability of the City as both a tourist attraction and a permanent home.

In addition to being a natural, scenic and recreational resource, the Deschutes River is a geologic divider, presenting a physical barrier to transportation and imposing an increased cost of providing other urban services, particularly wastewater services, across the river. Land to the west of the river is generally hilly, and the foothills of the Cascades extend into Bend. This west side is mostly second-growth pine forest land. The land east of the river is generally flat high-desert land of with sagebrush, bitterbrush, bunch grasses, and juniper woodland. The areas east of Bend also include pressure ridges, rock outcroppings, and geology typical of a high-desert environment.

### D. Process<sup>2</sup>

In 2004, when it had become evident that Bend's population growth was increasing much faster than had been planned for, the City initiated a residential lands study as the first step in the process to expand the UGB. The residential lands study was undertaken in two phases. Phase 1 included a buildable lands inventory and a housing needs analysis. (Rec. 1742.) Phase 2 determined the remaining capacity within the UGB and calculated the amount of area needed beyond the then-current UGB to provide the 20 year supply of residential land required by ORS 197.296.

In 2006, the residential land study had identified the need for an expansion of the UGB and a 27,000 acre study area was identified for potential UGB expansion. The study

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<sup>2</sup> For additional details on the process followed, see the Background and UGB Alternatives sections of the Findings. (Rec. 1057-64, 1166-1207.)

area was increased in 2007 to include all lands within 2 miles of the existing UGB. The revised study area included 44,000 acres and a total of 6,361 parcels of land.

The City developed suitability criteria as required by OAR 660-024-0060.<sup>3</sup> The City applied the suitability criteria and the standards of ORS 197.298(3) in developing five alternatives for UGB boundary expansion. The City used a GIS-based analysis of each parcel within the study area in applying the suitability criteria and the ORS 197.298(3) standards to develop the five alternatives. This GIS analysis utilized the most current tax assessment records, detailed aerial photographs, GIS data on sewer, water, and transportation systems, soil maps, and specialized data from agencies.

By 2007, the City had developed enough information about the need for additional residential land and formally initiated the UGB expansion process by submitting notice to DLCD. (Supp. Rec. 1587.) In August 2007, the Council directed that the UGB expansion process consider the need for employment lands, as well as the need for land to accommodate housing. (Rec. 4920.)

Recognizing the importance of the effort it was undertaking and the value of broad public input into the process, the City established a technical advisory committee (TAC) to provide critical advice on various aspects of residential lands study, including the buildable lands inventory, housing trends, the housing needs analysis and redevelopment potential. The TAC met frequently from October 2004 through March 2007. The TAC reconvened after the UGB expansion process was initiated and held 15 public meetings from October 2007 to September 2008 to discuss potential configurations to the UGB expansion. (Rec. 1060.)

The City also appointed a Steering Committee comprised of the Planning Commission and one member from each of the City's 14 neighborhood associations. The Steering Committee met monthly from January 2006 through May 2007 to provide public input into the process. All of the TAC and Steering Committee meetings were duly noticed public meetings. (Rec. 1060.)

The Planning Commission held 32 work sessions from October 2007 until it held the public hearing and made its recommendation to Council in late 2008. (Rec. 1060.)

The City started its process to amend its public facilities plans in 2005, with concurrent processes to update the water and sewer collection master plans. The plans were prepared by highly qualified national engineering firms using state of the art modeling technology. The cost of these efforts exceeded \$1,000,000. The plans were presented to the public in a series of well attended public workshops and then packaged into

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<sup>3</sup> OAR 660-024-0060(5) provides:

(5) If a local government has specified characteristics such as parcel size, topography, or proximity that is 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 alternative analysis and applies ORS 197.298.

amendments to the public facility plans. The City incorporated amendments to its public facilities plans into the same process for the UGB expansion, in part because DLCD advised the City to do so through Department letters dated July 11, 2007, October 24, 2008, and November 21, 2008. This process was noticed to DLCD on June 11, 2007, and again on October 8, 2008, and October 20, 2008. (Rec. 2895-96, 4920-27, Supp. Rec. 1587.)

The process the City followed was effective in obtaining public input. Numerous changes were made to the proposed UGB. First, public input was considered in developing the initial proposal for the UGB expansion in June 2007. That original proposal was housing-based. The initial response to the June 2007 proposal required reconsidering many of the underlying assumptions behind the residential analysis and the Economic Opportunities Analysis. Public input received throughout the subsequent process resulted in the adopted 2008 EOA and Housing Needs Analysis. It is important to note the City's evolving proposal was in direct response to public input, not simply policy direction from the City Council or a desire to expand the size of the proposal. Public input was also considered in the decision to increase the scope of the expansion to bring in employment land as well as land for housing in August 2007. Including employment land as well as residential land substantially increased the size of the expansion area. The Director's omission of this obvious fact leads one to believe the resulting proposal doubled without cause and is therefore not credible when, in fact, there were legitimate reasons for the increased size as the record demonstrates.

The Planning Commission held a public hearing on October 27, 2008 and recommended adoption of Alternative 4, one of six alternatives under consideration, to the City Council. (Rec. 4706.) The City Council held a joint public hearing with the Deschutes County Board of Commissioners on November 24, 2008. (Rec. 2642.) Written submissions were accepted until December 1, 2008. The City Council deliberated on December 3 and 17, and adopted the Planning Commission's recommendations, with some amendments. (Rec. 2482, 2498.)

### III. STANDARD OF REVIEW

The Commission reviews the submittal for compliance with the statewide goals, applicable statutes and administrative rules. OAR 660-025-0040. The City's decision is a legislative decision. The requirement for an adequate factual base requires that a legislative land use decision be supported by substantial evidence. *DLDC v. Douglas County*, 37 Or. LUBA 129, 132 (1999); *Citizens Against Irresponsible Growth v. Metro*, 179 Or. App. 12, 21, 38 P.3d 956 (2002). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.428(8)(c); *Dodd v. Hood River County*, 3176 Or 172, 179, 855 P.2d 608 (1993). Where the evidence in the record is conflicting, if a reasonable person could reach the decision the city made in view of all the evidence in the record, the choice between the conflicting evidence belongs to the city. *Mazeski v. Wasco County*, 28 Or. LUBA 178, 184 (1994), *aff'd* 133 Or App. 258 (1995).

As the Court of Appeals has acknowledged, there is no statutory, goal or rule-based requirement that legislative decisions be supported by findings demonstrating compliance with applicable criteria. However, findings, which are supported by substantial evidence, have been required. "We note there are some instances where controlling statutes, rules, or ordinances specifically requires findings to show compliance with applicable criteria. Also, to permit LUBA [and presumably LCDC] and us to exercise our review functions, there must be enough in the way of findings or accessible material in the record of the legislative act to show that the applicable criteria were applied and that the required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or. App. 12, 16, n 6.

## PART TWO – RESPONSE TO PROVISIONS OF REPORT

### I. GENERAL COMMENTS ON REPORT

The City followed required legal procedures and applicable standards in reaching a decision that is within the range of permissible decisions allowed by applicable law.<sup>4</sup> The Report appears to take the position that there is only one way of complying with the law, rather than considering the range of options allowed by law. The Report also fails to provide key facts.

An example is the emphasis on the extent of the unsuitable land added to the UGB when the need for inclusion of unsuitable land surrounded by included suitable land is clearly evident in the maps included in the findings.

#### A. Factual Issues

The Report includes numerous statements claiming a lack of evidence in the record, or inadequate findings. Of great concern to the City, the Report generally fails to cite or acknowledge existing evidence in the record. Specific details regarding the evidentiary support will be provided in the discussion of specific issues below.

The Report also contains numerous assumptions unsupported by the record. For example, the Report contains various requirements, recommendations and suggestions to increase density both within the existing UGB and within the proposed UGB contrary to the substantial evidence in the record that those measures are impossible, impractical and would not result in increased density.

The City hired qualified, reputable and experienced consultants to work with the City to prepare land need estimates for housing, a new housing element, and an economic opportunities analysis. The reports and testimony of the City's consultants are the only expert testimony in the record. The Report fails to consider the expert testimony.

#### B. Legal Authority

The Report essentially assumes that there is only one possible decision and that the City did not have a range of options available to it. Oregon land use planning statutes make local elected bodies the decision-makers on legislative land use actions. ORS 197.015(10), 197.175, 197.829. As the local elected decision-making body, the City Council's findings may be overturned only if not supported by substantial evidence. The goals, statutes and regulations provide a complex weave of requirements that can be met in more than one way. The Director's and Commission's review of the Council's decision is limited to determining whether the Council's decision was within the range of

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<sup>4</sup> The City acknowledges, as detailed below, that there are a few minor issues on which a remand is needed, but these issues are few and minor, and will not require the City to go through the entire process again, as would be required by the Report.

acceptable decisions applying the law to the facts.<sup>5</sup> The Report does not appear to acknowledge the legislative nature of the Council's decision or the lengthy and open process that the City held. Rather, the Report is an attempt to substitute the Director's (or Department's) personal views for those of the elected and responsible decision-maker.

The Director frequently cites comments from DLCD to the City in the course of the UGB process as if those comments were legal standards equivalent to statutes, goals, regulations, or court decisions. The statements by staff do not have any controlling legal effect. See *DLCD v. Jackson County*, 33 Or LUBA 302 (1997). While in some cases DLCD comments may correctly state the law, when issuing a decision on administrative review, the decision should cite applicable law directly.

The Director also failed to cite applicable legal authority, in particular, in the discussion of prioritizing lands and the relationship of the various Goal 14 statutory and regulatory provisions governing the process for selecting which land to add to the urban growth area. Surprisingly, the Director failed to discuss or cite recent Court of Appeals cases and relied on older LUBA cases in attempting to justify DLCD's opposition to the City's decision.

#### C. Applicable Version of OAR Chapter 660 Division 24

The City initiated its buildable lands review in 2004. It formally initiated the UGB expansion process on June 11, 2007, by submitting a Notice of Proposed Expansion to DLCD. The City submitted an amended notice on October 8, 2008, and provided additional materials for the October 8, 2008 notice on October 20, 2008. The City made its final decision on January 5, 2009, and the final decision was submitted to DLCD for review on April 16, 2009. OAR Chapter 660, Division 24 was amended effective April 28, 2008, after the City initiated the UGB amendment process but before the City's final decision. The rules were amended, again, effective April 18, 2009, after the final decision. See OAR 660-024-0000 for a description of the amendments to OAR 660-024. The amendments effective April 18, 2009, do not apply to the City's decision, but the amendments effective April 28, 2008 are applicable. A copy of those regulations is attached as Exhibit A and is provided for reference purposes.

#### D. Goal 1

The City Council's decision was the culmination of two years of public process and citizen input. The Director's Decision mandates a substantially different decision, ignoring the public process in violation of Goal 1.

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<sup>5</sup> The facts are the facts as found by the City based on the record, not the assumption of state agency.

## II. SPECIFIC RESPONSES TO REPORT<sup>6</sup>

### A. Response to Director's Background and Summary

The Background section mentions the original 4,884 acre UGB expansion proposal and the subsequent 8,462 acre expansion proposal, without explaining that the original proposal was for residential lands and one specific employment land parcel and that the second proposal included additional acres because of the 20-year employment land needs identified in the City's employment land study. The City added employment lands in response to directions from DLCD to address employment land needs as well as residential land needs. (See DLCD letter dated September 11, 2007; Supp. Rec. 1407). Therefore, it should not be surprising that a substantially larger expansion is needed to meet both housing and employment land needs than to just meet housing needs.<sup>7</sup>

The "Summary of the UGB Expansion" section in the Report notes that the proposed 8,462 acre addition to the UGB is an approximate 40% increase. This increase needs to be put in context. With the exception of a 500 acre employment land increase and some minor expansions, the UGB area has remained unchanged since 1981. In that time, the City's population has grown by 365%, from 17,425, to 80,995.<sup>8</sup>

The Summary also fails to explain the 2,987 acres of land that is unsuitable for residential or employment development. The unsuitable land includes existing developments (but excluding undeveloped and underdeveloped lots), parks, schools and rural residential subdivisions platted before the county adopted its comprehensive plan in 1979.

The Report implies that the City identified only approximately 5,000 acres of need for employment and residential land, but the City went ahead and proposed to expand by almost 8,500 acres. This implication is misleading. Any expansion of the UGB will necessarily include land that will be used for other purposes or that is already developed.<sup>9</sup> To expand under the standards created by Goal 14, ORS 197.296 and OAR Chapter 660 Division 24, the City ended up with 2,987 acres of unsuitable land within the UGB. For the most part, this unsuitable land is either surrounded by suitable land or has been included to allow service to and through the area to other suitable

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<sup>6</sup> On a few specific issues, the Director rejected issues raised by objectors. The City agrees with those rejections and does not separately address those issues.

<sup>7</sup> The original request did include one piece of property intended to meet a special employment need, but at that point, the City had not developed its general employment lands needs analysis and did not include land needed to meet the 20-year demand for employment land. The later submission simply added needed employment lands.

<sup>8</sup> The City acknowledges that some (approximately 17,000) of the population increase has come from adding residents through annexation, but even if only the old city limits are considered, the population growth is still 274%.

<sup>9</sup> While there may be some cities with only large tracts of undeveloped land adjacent to their UGBs, Bend is not one of them. The extent of existing residential development around the City means that Bend either has to include unsuitable land, or end up full of holes.

lands. (See Figure V-1 Suitable Available Lands in UGB Expansion Area by Priority Class, Rec. 1170, and Figures V-2, V-3 and V-4 at Rec. 1178-1180.) The summary states that the findings do not indicate the priority of the 3,506 acres of land that have been included in the UGB and that are either unsuitable or surplus. The maps included in the record as Figures V-1, V-2, V-3 and V-4 do show the information as to priority and suitability. Rec. 1170, 1178-1180. As to surplus lands, the surplus is just a number, not any specifically identifiable area.

The Summary of the UGB expansion states that there is a 519 acre surplus. The statutes expressly provide that exact precision is not required. However, the City accepts that the decision will be remanded on other issues and commits to a decision on remand that will significantly reduce the "surplus."

## B. Objections

The Report properly cited OAR 660-025-0140 as requiring the rejection of objections that do not meet certain standards, including the requirement to clearly identify the alleged deficiency and the relevant statute, goal or regulations and to suggest specific revisions that would resolve the objection. The Report properly rejected the objections of two objectors in their entirety as not meeting these standards. The Report then stated that specific objections from other objectors, many of whom submitted multiple objections, may be found to be invalid under OAR 660-025-0140.

However, when it came to considering the various objections by parties, the Report did not follow the statutory criteria, and upheld numerous objections that were generally in line with the Director's point of view, regardless of compliance with OAR 660-025-0140. The City has prepared a chart listing all objections received, including each specific objection for persons/entities who objected to more than one aspect of the City's decision. The chart, attached as Exhibit B, demonstrates which objections were invalid. Many of these invalid objections were accepted as valid and upheld by the Director, in violation of OAR 660-024-0140.

The Report discusses various objections in each section of the Report. Essentially, if the objection was consistent with the Director's position, the Director sustained the objection, and if the objection disagreed with the Director's position, the Director did not uphold the objection. The Director did not add substantial analysis in the response to any of the objections. The discussion and analysis in this document directed at the Director's position is intended to apply to all the objections the Director sustained.

## C. Residential and Related Land Need

### 1. Statutory Framework

Goal 10 provides that buildable lands for residential use be inventoried and mandates that plans encourage the "availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial households and

allow for flexibility of housing location, type and density.” Buildable lands are those “lands in urban and urbanizable areas that are suitable, available and necessary for residential use.” ORS 197.296(2) mandates that “[a]t periodic review or any other legislative review of the comprehensive plan or regional plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, a local government shall demonstrate that its comprehensive plan or regional plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years.”

In order to meet the requirement of ORS 197.296(2) to provide a 20-year supply of buildable land, the statute creates a two-step process. Under ORS 197.296(3), the City must: (a) Inventory the supply and housing capacity of buildable lands within the urban growth boundary; and (b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.296 and 197.303 and statewide planning goals and rules to determine the number of units and amount of land needed for each needed housing type for the next 20 years. ORS 197.296(2). For the purposes of this inventory requirement, ORS 197.296 (4)(a) provides that “buildable lands” include:

- (A) Vacant lands planned or zoned for residential use;
- (B) Partially vacant lands planned or zoned for residential use;
- (C) Lands that may be used for a mix of residential and employment uses under the existing planning or zoning; and
- (D) Lands that may be used for residential infill or redevelopment. ORS 197.296 (4)(a).

For the purpose of the inventory and determination of housing capacity described in subsection (3)(a), the local government must demonstrate consideration of:

- (A) The extent that residential development is prohibited or restricted by local regulation and ordinance, state law and rule or federal statute and regulation;
- (B) A written long term contract or easement for radio, telecommunications or electrical facilities, if the written contract or easement is provided to the local government; and
- (C) The presence of a single family dwelling or other structure on a lot or parcel. ORS 197.296(4)(b).

ORS 197.296(4)(c) provides that “Except for land that may be used for residential infill or redevelopment, a local government shall create a map or document that may be used to verify and identify specific lots or parcels that have been determined to be buildable lands.”

ORS 197.297(5)(a) explains the data collection necessary for the analysis:

.....[T]he determination of housing capacity and need pursuant to subsection (3) of this section must be based on data relating to land within the urban growth boundary that has been collected since the last periodic review or five years, whichever is greater. The data shall include:

- (A) The number, density and average mix of housing types of urban residential development that have actually occurred;
- (B) Trends in density and average mix of housing types of urban residential development;
- (C) Demographic and population trends;
- (D) Economic trends and cycles; and
- (E) The number, density and average mix of housing types that have occurred on the buildable lands described in subsection (4)(a) of this section.

If the determinations required by ORS 197.296(3) show that the housing need is greater than the housing capacity, ORS 197.296(6) requires the City to either amend the UGB to include sufficient buildable lands to accommodate housing needs for the next 20 years, or to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the urban growth boundary, or adopt a combination of the two. Further, ORS 197.296(5) requires the City to use the housing needs analysis developed under ORS 197.296(3)(c) to evaluate whether changes in density or housing type mix are necessary to meet housing needs over the next 20 years.

Administrative regulations provide some additional guidance in conducting this process. One important addition by the regulations is the definition of "redevelopable land" provided by OAR 660-008-0005(6):

(6) "Redevelopable Land" means land zoned for residential use on which development has already occurred but on which, due to present or expected market forces, there exists the strong likelihood that existing development will be converted to more intensive residential uses during the planning period.

Finally, ORS 197.296(9) provides that in establishing that actions and measures adopted under subsections (6) or (7) demonstrably increase the likelihood of higher density residential development, the local government shall at a minimum ensure that land zoned for needed housing is in locations appropriate for the housing types identified under 197.296(3) and is zoned at density ranges that are likely to be achieved

by the housing market using the analysis in subsection (3). ORS 197.296(9) provides that actions or measures, or both, may include but are not limited to:

- (a) Increases in the permitted density on existing residential land;
- (b) Financial incentives for higher density housing;
- (c) Provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer;
- (d) Removal or easing of approval standards or procedures;
- (e) Minimum density ranges;
- (f) Redevelopment and infill strategies;
- (g) Authorization of housing types not previously allowed by the plan or regulations;
- (h) Adoption of an average residential density standard; and
- (i) Rezoning or redesignation of nonresidential land of land.

Thus, any amendment to the UGB must consider any amendments to the comprehensive plan and implementing regulations that increase density. The government must "ensure that land zoned for needed housing is in locations appropriate for the housing types . . . and is zoned at density ranges that are likely to be achieved by the housing market." ORS 197.296(9). ORS 197.296(9) also includes a list of actions that "may" be taken to increase density, *but does not require that any specific number or combination of the listed actions must be taken.*

## 2. Facts

From 2002 through 2004, the City worked with Deschutes County to develop a coordinated population forecast. The forecast was adopted by the County in 2004, and ultimately upheld by LUBA in 2005 (see Rec. 1980). The City adopted amendments to Chapter 4 of the Bend Area General Plan, Population and Demographics, in June 2005. These amendments to Chapter 4 include the City's coordinated population forecast. The City's decision to adopt the coordinated forecast was not appealed to LUBA and is now acknowledged.

In 2005, the City completed a buildable lands inventory (2005 BLI) (see Supp. Rec. 1987) and a housing needs analysis (2005 HNA). (Rec. 2046.) The City followed state law and DLCD's Goal 10 guidebook to develop both products. The 2005 HNA relied in part on the 2005 Oregon Housing Needs Model, which included an a built-in tenure split of 55% owner occupied and 45% renter occupied for needed units that could not be altered by the City. The model output also included some assumptions that distributed housing by types, including manufactured homes in parks. The City used the model, but noted concerns regarding the built-in parameters. (Rec. 2105-06).

After further work with the TAC, the City updated housing element results, following DLCD's Goal 10 guidebook in April 2006. (Supp. Rec. 2157.) Based on the findings of the 2005 HNA and the analysis of trends, the City concluded that manufactured homes would be provided on separate lots in the future, not in parks. The City also concluded

that a more relevant factor for estimating current and future housing needs is type of housing unit (attached/detached) rather than tenure (rent/own).

In 2007, consultant Angelo Planning Group prepared a final report that presented land need estimates for housing, schools, parks, and institutional uses. (Rec. 2137.) This 2007 report also presented a series of forecasts for residential land needs, following ORS 197.296 and DLCD's Goal 10 workbook. Another consultant, Cogan Owens, prepared a draft housing element that, along with the 2007 Angelo land need report, were submitted to DLCD with a 45-day notice on June 11, 2007. (Supp. Rec. 1587, 1789.) Following the initial public hearings in July and August of 2007, the City, working in public sessions of the Bend Planning Commission, reviewed and amended the proposed elements of the UGB expansion, including the work that supported the housing element.

From September 2007 through October 2008, the Bend Planning Commission held 35 public works sessions on the UGB expansion. Through these work sessions, which included extensive public input, the City revised its buildable lands inventory, housing needs analysis, and residential land need estimate. This work resulted in 2008 versions of the buildable lands inventory, housing needs analysis (Rec. 1280, 1728), and residential land needs analysis that were incorporated in the 2008 version of the housing element submitted to DLCD in April 2009.

Between 2005 and 2007, the City adjusted several key variables used for performing the buildable lands inventory and housing needs analysis based on input received from experts and the public. Those adjustments included:

1. A change in housing density from seven units to the net acre to six units per net acre. This change was based on evidence that seven units per net acre is an unrealistic expectation in the Bend market.
2. The housing mix was revised to 65% detached and 35% attached. This decision was based on the identified need to increase the amount of needed housing.
3. The City revised its conclusions as to the proportion of second/vacation homes in the total housing mix, based on evidence as to the proportion of second family homes in vacation destinations such as Bend. This resulted in an increase of 123 acres for a total of 500 acres to account for the development of second homes.
4. The City recognized the need for some neighborhood commercial uses in the 2007 residential lands need estimate. In 2008, this need for land was incorporated in the City's estimate of employment land need.

5. The City recalculated the land need estimates for public schools and parks for 2008-2028 based on coordination with the Bend La-Pine School District and the Bend Metro Parks and Recreation District.
6. The City updated the 2005 buildable lands inventory (BLI) and the 2005 housing needs analysis with data from calendar years 2005, 2006 and 2007. The 2005 BLI (Supp. Rec. 1987) analyzed the mix and density of housing from 1998 through the middle of 2005. (Rec. 2046.) The City updated the BLI, and the data and analysis for the HNA, for calendar years 2005, 2006, and 2007 and the Bend Planning Commission reviewed this information between January and March 2008. (Rec. 8287, 8406, 8670.) The City incorporated the 2008 BLI and the updated data for the Housing Needs Analysis in the 2008 version of Chapter 5, Housing and Residential Land, of the Bend Area General Plan. (Rec. 1280.) To sum up, the City has incorporated data and analysis of trends from 1998 through 2007 for the update of the residential and housing chapter of the Bend General Plan.

The City determined that the projected population increase in the 20 year planning period is 38,512. The City concluded that there was no reason to alter the 2.4 persons per household (dwelling unit) safe harbor provided by OAR 660-024-0040. The City also determined that vacant land can be developed at six dwelling units per net acre, which is a 50% increase in the City's current density of four units per net acre. (Rec. 1081.)

At 2.4 persons per household, the City needs 16,681 new dwelling units. The City conducted a property-by-property review of land within the City that could accommodate residential development and redevelopment and concluded that 11,159 housing units can be accommodated within the existing City/UGB. In calculating the amount of housing that can be provided within the existing UGB, the City concluded that increased density could be achieved in the downtown areas and along transit corridors, but that increased density is not likely to be achieved in developed residential areas outside downtown and transit corridor areas. The City relied on the barriers that existing land division and development patterns present to higher density redevelopment, as well as the restrictions placed on much of the residential land within the City by CC&Rs. Based on the information in its database, the City developed a Buildable Lands Inventory – Residential Lands map. (Supp. Rec. 1257.)

### 3. Bend Followed the Applicable Process in Determining Housing Need

The Report sets out a five-step process for determining the quantity of land required for needed housing.

1. Forecast 20 year population growth.
2. Inventory and determine capacity of buildable lands within existing UGB.
3. Determine number of units and land needs for needed housing by type.
4. If need exceeds availability, consider rezoning within existing UGB and/or measures to increase capacity in the City.
5. Add land to UGB if needs cannot be accommodated within the existing UGB.

While the City agrees generally that these are the steps in the process, the City disagrees with details of the Report's analysis and the conclusions that the City did not fully comply with the required process for determining the extent of the expansion of the UGB needed to accommodate residential land needs. The City followed the process set forth in the statute and rules. The City did forecast population growth, did inventory and determine capacity of buildable lands within the existing UGB, did determine the land needs by housing type, did take measures to increase capacity in the City, and ultimately decided to add land to the UGB based on its determination that, although the existing UGB could accommodate the majority of the needed housing units, additional land was needed even with the measures to increase density within the existing UGB.

### 4. Map or Other Document for Vacant, Developed, Redevelopable and Constrained Parcels

The Report complains that the findings do not clearly explain how the City determined the amount of land in the existing UGB available for development or redevelopment and claims that the City did not include a map showing residential buildable lands. ORS 197.296(4)(c) requires the City to create a *map or document* identifying lots or parcels that are buildable lands. The City did create a map entitled "Buildable Lands Inventory – Residential" as required. (Supp Rec. 1257.) The City further complied with this requirement by creating the parcel-level database on which it based its decisions. The final summary table of the BLI, by plan designation, is Table 5-4 of the 2008 Housing Element. (Rec. 1288.)

Due to a copying error, the raw data parcel-level database from the GIS system was not originally included in the record submitted to the Department, although it was part of the City's record during the expansion process. The City has asked the Commission to consider that database as additional evidence. This information was available to the public during the local process in graphic forms, summary tables and maps, and the City provided the data to interested parties upon request. The City received additional public comments on the BLI between January and March 2008. (See Planning commission and TAC meeting minutes and summaries, Supp. Rec. 1213-88.)

The Director remands with directions to create a map of buildable lands as required by ORS 197.296(4)(c). As discussed above, the City has provided a map and also has provided documents with that information, as allowed by statute. The City spent considerable time during work sessions between January and March 2008 to complete the residential BLI. (Rec. 8660-67, 8406-08, 8278.) These documents and the summary table of the BLI, the map of buildable lands, and the database classified all lots with a residential plan designation within the UGB. The BLI was developed using the City's geographic information system (GIS) and included developed, vacant and redevelopable land, including vacant land that was platted or for which a building permit of residential development had been issued. The City's analysis of buildable lands was comprehensive using the 2007 BLI database. The information is already in the record and no new map of residential buildable lands or other document is required.

#### 5. Distinction between Zoning vs. Plan Designation

The Report lists the City's conclusions regarding the number of units that may be developed within each "zoning district." Report 27. However, the applicable regulation requires analysis by plan designation, not by zoning district.<sup>10</sup> The Director has confused plan designations and zone districts in his analysis of UAR and SR 2½ zones. Further, the Director should not have required the City to "add" SR 2½ and UAR lands to the BLI, since all residential lands within these zoning districts are already included in the BLI under their corresponding plan designations.

The City's inventory does provide the information by plan designation and complies with OAR 660-008-0010. There is no requirement to provide the information by zoning district. The City has individual parcels or small areas zoned UAR 10 and SR 2½ in the UGB. Some of the UAR land is located within the Broken Top planned community at Bend's western edge. Some land zoned SR 2½ is located north of downtown Bend and south of the Deschutes River. The remaining UAR-zoned land includes Juniper Ridge and one other tract that are designated for employment on the City's General Plan map. These areas were analyzed in the City's buildable lands analysis, but under their plan designations. In relying on zoning districts to find alleged errors in the buildable lands inventory, the Director has created confusion and has misstated the requirements of the rule.

#### 6. Buildable Land Analysis

ORS 197.295(1) states that "buildable lands" means lands in urban and urbanizable areas that are suitable, available and necessary for residential uses. Further, buildable lands include both vacant land and developed land likely to be redeveloped. The

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<sup>10</sup> OAR 660-008-0010 states:

The mix and density of needed housing is determined in the housing needs projection. Sufficient buildable land shall be designated on the comprehensive plan map to satisfy the housing needs by type and density range as determined in the housing needs projection. The local buildable lands inventory must document the amount of buildable land in each residential plan designation. (*Emphasis added.*)

definition expresses four conditions precedent to a finding that land is buildable: (1) vacant or likely to be redeveloped; (2) suitable; (3) available; and (4) necessary. If it is likely to be redeveloped but not suitable, it is not buildable. If it is suitable but not likely to be redeveloped, it is not buildable. The statute and rule expressly state an intent of a realistic calculation of lands that will be developed inside the UGB in order to determine the real planning need over the 20-year horizon. The Commission has provided guidance in applying the statutory standards by providing a definition of "redevelopable." ORS 660-008-2005(6) provides:

"Redevelopable Land" means land zoned for residential use on which development has already occurred but on which, due to present or expected market forces, there exists the *strong likelihood* that existing development will be converted to more intensive residential uses during the planning period." (*Emphasis added.*)

The Report takes issue with the City's conclusion that developed lots must be at least 0.5 acres in size and have a land value greater than the improvement value in order to be classified as redevelopable. (Report at 26.) The Report bases its analysis only on the definition of "buildable land" in OAR 660-008-005(2) and ignores the definition of "redevelopable land" in OAR 660-008-0005(6). Both definitions have to be considered together, with the result that the only developed land considered to be buildable land is land where there is a "strong likelihood of redevelopment for more intensive residential uses during the planning period."

The two categories of land that the Report suggests should have been included as redevelopable (half-acre and land/improvement value ratio) reflect the City's reasoned conclusion as to which developed lots have a strong likelihood of being redeveloped to more intensive uses. The City made a rational determination, based on the City's understanding of market forces, to conclude that there is not a strong likelihood that these two categories of lots will be developed to more intensive residential developments. Perhaps some lots that do not meet the criteria for being classified "redevelopable" will ultimately be redeveloped, but it is just as likely that some lots classified as "redevelopable" will not be redeveloped within the 20-year planning period. The Director chooses to de-emphasize the "likely to be redeveloped" portion of the definition and ignores the City's application of that portion of the rule in determining, based on evidence in the record regarding existing and predicted market forces, that specific types of developed property do not have a strong likelihood of redevelopment during the planning period. The City's conclusion that these categorized of land are not likely to be redeveloped is based on substantial evidence in the record and is consistent with under OAR 660-008-0005.

The Report states that some land (parking lots, open space) classified as developed should have been classified as redevelopable. Much of the land classified as parking lots is required parking for existing developments. The City's determination that those lands are not buildable is consistent with the standard that land is to be considered buildable only if it is likely to be redeveloped. The open space designation is applied only to parcels specifically used as open space. Some of the open space parcels are

required open spaces and include buffers for natural resources. The City and its citizens are protective of natural areas in the City and development of any area designated as open spaces would be difficult or impossible. Again, the City reasonably concluded that open space is not likely to be redeveloped.

The Report takes the position that some of the lots identified by the City as constrained may be "buildable" as defined by OAR 660-008-0005(2). (Report at 26.<sup>11</sup>) The Report states that the "rule provides that lands are generally considered suitable unless they meet certain specific criteria." (Report at 26.) The inclusion of the word "generally" means that the standard is not absolute. The City's categorization of "constrained" lots generally is in accord with the regulatory standard of unsuitable or unavailable lots. Lots that the City determined to be constrained are not likely to be developed or redeveloped in the 20-year planning period.

Regarding the issue of mixed residential/employment lands or "split-zoned" lots (Report 26), the City did consider these lands. For lands with mixed or split designations, the City allocated future housing units or jobs (depending on designations) to the plan designations total in the BLIs for housing and employment. (See Rec. 2040 *et seq.* for additional background on the methodology for developing the BLI.)

In an enigmatic footnote, the Director's Report includes a statement that the City excluded "certain developed land" from consideration for redevelopment potential, but the Report does not identify what "certain" developed land the Report is talking about. The Report then asserts that "even developed land must be considered for redevelopment," but does not attempt to explain the significance of this statement in the context of the City's decision or as part of the specific remand issues.<sup>12</sup>

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<sup>11</sup> The Report cites another LUBA case, *Opus Development Corp v. City of Eugene*, 28 Or LUBA 670, 693-695 (1995), for the proposition that developed lands have to be considered for redevelopment under Goal 10. That case is factually unhelpful and does not stand for the suggested proposition. In interpreting a prior version of the administrative rules, LUBA was faced with a challenge to Metro plan designations that downzoned its refinement plan (held to be part of Eugene's comprehensive plan and therefore subject to the statewide planning goals) a neighborhood from medium and low density residential to low density, mixed use or non-residential designations. LUBA rejected the argument that because the properties were developed and committed to other uses the City didn't need to identify or address in its finding which properties affected by the zone changes were included in the buildable lands inventory required by Goal 10. LUBA found that it needed to do so and then determine and explain why its buildable lands inventory remains adequate to satisfy Goal 10. This case did not involve a UGB expansion or any issue before this Commission.

<sup>12</sup> As support for this general statement, the Report cites *Opus Development Corp v. City of Eugene*, 28 Or LUBA 670, 693-695 (1995), which did not involve a UGB expansion and does not stand for the proposition stated by the Director. In *Opus*, LUBA was faced with a challenge to comprehensive plan amendments that reduced residential density in certain areas. LUBA rejected the argument that because the properties were developed and committed to other uses the City didn't need to consider whether properties affected by the zone changes were included in the City's buildable lands inventory. LUBA merely held that the City cannot "assume" that developed residential land is not included on a buildable lands inventory.

## 7. Housing Needs

The Report takes the position that the City must analyze housing needs for each of three housing types – (1) attached single-family, (2) detached single-family; and (3) multi-family. The City did analyze based on these categories. (See Tables III-8 and III-9, Rec. 1077.) ORS 197.296(7) requires that measures to increase the supply of needed housing must “increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years.” The term “housing types” is not defined for purpose of this statute, and nothing in the statute directs that specific measures be taken as to each housing type, only that the measures increase the likelihood that the needed types will be required. Whether the City based its targets on two or on three housing “types,” the issue is whether the measures the City took increase the likelihood that needed housing types will meet housing needs.

The City analyzed housing needs for various subtypes of housing and determined that the types of needed housing in the City most appropriately fit into two categories – attached and detached. Nothing in the applicable statute or regulations prohibits the City from combining attached and multi-family categories in developing targets for allowable development, which is what the City did.

The City has complied with the requirement to analyze housing mix by type by analyzing the detached/attached housing mix. The proposed housing mix of 65 % detached and 35% attached satisfies ORS 197.296(3). The record includes an April 11, 2006 memorandum in which staff details the purpose and reasoning behind a detached/attached housing split. (Supp. Rec. 3457.) That staff memorandum provides substantial evidence for the Council findings at pages 1088-81 of the Record. The proposed housing mix of detached/attached satisfies ORS 197.296, OAR 660-008-0020, and ORS 197.303. Attached single family housing (e.g. townhomes, rowhouses) is more similar to the larger category of multi-family housing. The difference between attached and multi-family is often a matter of ownership rather than an actual difference in the type of housing. The City incorporated attached single family housing and multi-family housing within the broader category of “attached” housing to set development targets. Developments of attached single family housing (e.g. townhomes or condominiums) more often consume less land than single-family detached, consistent with development of attached multi-family housing. Because the City does not regulate tenure (ownership or rental) attached housing can be developed for either owner or renter occupancy.

Citing *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001) the Report takes the position that the city must consider the housing needs of both present and future residents. In the *McMinnville* case, LUBA concluded that the city failed to comply with applicable law when it concluded that a housing lands deficit existed, but then failed to address the deficit (*i.e.*, amend the UGB and/or adopt other measures). Because the statute and rule prescribe a highly iterative process integrated with Goal 14, LUBA held that the city could not achieve finality with respect to the housing needs analysis under

ORS 197.296(3) without also taking action under ORS 197.296(4)-(7). In direct contrast to the process found to be at fault in the *McMinnville* that case, the City of Bend has gone through the entire iterative process and complete analysis required under ORS 197.296 and has taken the required actions to address the deficit by both adopting plan measures to facilitate density within the City and expanding the UGB.

The City's housing needs analysis, which complies with ORS 197.296, OAR 660-08-0020, and ORS 197.303 was incorporated in the amended Bend Area General Plan Chapter 5. (Rec. 1285.) The 2008 analysis further relied upon and incorporated by reference the 2005 HNA. (Rec. 2046.)

#### 8. Tenure

OAR 660-008-0040 provides:

Any local government that restricts the construction of either rental or owner occupied housing on or after its first periodic review shall include a determination of housing need according to tenure as part of the local housing needs projection.

The City does not regulate housing by tenure through the Development Code. The Development Code regulates housing by type, and indicates where types of housing are allowed in the City's residential districts. Therefore, it was not required to determine housing need by tenure.

ORS 197.296 refers to the mix of housing types. Tenure is not a housing "type" under ORS 197.296, unless the City regulates by tenure. The mix of attached and detached housing that the City accommodates is available for both owner and renter occupancy. Tenure cannot estimate the need for acres of land for needed housing. The City has complied with ORS 197.296 in analyzing the need for housing types and has established targets to meet those needs based on the attached/detached split.

#### 9. Multi-family Housing

The City prepared all required elements of the HNA required under ORS 197.296(3) and (5). This work included the inventory of buildable lands and an analysis of housing by type and density. The 2005 HNA and the 2008 updated Housing Needs Analysis include analysis of the required variables listed under ORS 197.296(5) (see Rec.1285-1310; 2046-2113). The City recognizes that the obligation to provide needed housing is ongoing, and will address future housing needs through additional strategies and benchmarks. (Rec. 1728-97.)

The Report also criticizes the City for failing to explain how the City will meet the demand for multi-family housing. (Report 34.) The City has established a target of 65% detached/35% attached,<sup>13</sup> which provides for substantially more attached housing

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<sup>13</sup> "Attached" includes all categories of housing other than single family detached.

than the current split in the City. The City considered a more aggressive split, but concluded that the market would not support any greater amount of attached housing. In 2008, the City's housing split was 77% detached and 23% attached. (Rec. 8670.) The City uses several means of encouraging the development of needed multi-family housing in order to reach a 65/35 split by 2028. The City calculated that the proposed efficiency measures of additional housing through the Central Area Plan and along transit corridors will provide an additional 1,100 units of attached, multi-family housing. (Rec. 1082-85.) In addition, the City has proposed medium and high density residential zoning for 469 acres of land in the UGB expansion. (Rec. 1235.) Finally, the City has developed an affordable housing program intended to support the actual development of needed multi-family housing through the providing of funding from city and federal resources. (Rec. 1833.)

The proposal before DLCD includes an additional 469 acres of land zoned for RM and RH development in the expansion area. The City has proposed locations for this zoned land in neighborhood centers and close to land designated for services and employment. The City has also proposed measures through which an additional 1,100 units of high-density, multi-family attached housing can be developed in the Central Area and along transit corridors.

The Report states that there is simply too much land planned for low density zones (RL, RS and SR 2.5) to allow density increases. This position ignores that the only RL zoned areas in the expansion area are already developed subdivisions where rezoning to higher densities would have no effect (other than, perhaps, to antagonize residents of those areas).<sup>14</sup> Most of the SR2.5 areas are planned for future RS development. The Report seems to take the position that some amount of land zoned RL or RS is acceptable, but that Bend has exceeded that amount. The existing RL and RS zones within the City have been acknowledged and are largely developed.

In considering the City's decision relating to housing density, the Report does not give sufficient consideration to ORS 197.296(9) which requires that zoning be at "density ranges that are likely to be achieved by the housing market." The City's determination of zones was based on its analysis of the density ranges likely to be achieved by the housing market. The City determined that, although some increased density is possible, the Bend housing market simply will not support an increase in density beyond that reflected in the City's decision.

The evidence in the record supports the City's conclusion that more intensive zoning would not be supported by the housing market. The City's proposed housing mix of 65% detached and 35% attached is a significant step towards more attached housing. In 2008, the City's housing mix was approximately 77% detached and 23% attached. The record includes testimony on which parties testified and provided their input on the City's proposed housing mix. (Rec. 9488, 8824; Supp. Rec. 1385.) The 65-35 mix proposed by staff, agreed to by the TAC, recommended by the Planning Commission,

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<sup>14</sup> The City acknowledges the possibility of additional RL zoning in Master Plan Areas 3 and 4 on the Framework Plan but this possibility is for areas where topography limits development.

and adopted by Council, was also recommended by Winterbrook Planning and supported by Newland Communities. (Rec. 8922, 8824, 1385.) All decision-makers in the process, including the Council, determined that the market would not support a greater shift than the 65/35 split during the 20-year planning period.

The record includes an analysis that translates this housing mix that is reflected in the proposed RS, RM, and RH plan designations applied to the expansion area (see Rec. 1302 – 1310). The City also proposed additional Strategies, Targets, and Benchmarks for encouraging the development of needed multi-family housing. (Rec. 1728-41.)

The City did take measures to increase needed housing by setting ambitious goals for attached housing and providing zoning to facilitate those goals. However, the City was realistic in establishing assumptions for density. The City took into account parcelization patterns and existing private restrictions prohibiting lot divisions (CC&Rs) in developed subdivisions. Existing low density development, particularly in areas with CC&Rs, is a barrier to redevelopment and increased density. In these areas, due to the absence of vacant land and the existence of existing dwellings, future development, if any, would only occur through partitions rather than more efficient subdivision patterns. The City exhaustively reviewed CC&Rs (Supp. Rec. 3505) and found that over 25% of the land in existing subdivisions had CC&Rs that significantly restrict additional development by prohibiting land divisions, prohibiting additional units, and/or setting minimum setbacks.

The testimony received by the City was uniformly in favor of protected existing neighborhoods, and opposed to allowing city-wide upzoning of residential plan designations. The City can only plan for what is feasible, and any general upzoning within the City (existing UGB) is simply not a realistic possibility. No evidence was put before the City by opponents to support the speculative hope that a city-wide upzoning of the existing plan designations would result in higher densities.

#### 11. Efficiency Measures

OAR 660-024-0050(4) requires consideration of efficiency measures, UGB expansion, or both. OAR 660-024-0050(4) also provides that the City must determine that the needs cannot reasonably be accommodated on lands inside the UGB. In compliance with this requirement, the City looked at measures that could lead to increased capacity for housing units within the City before expanding the UGB. (Rec. 1082-85.) The Director apparently believes that the City could or should have done more, but the City adopted those measures it determined would result in actual increased density and thereby meet the "reasonably be accommodated" standard and rejected options that it determined would not be effective, and therefore would not meet the "reasonably be accommodated" standard. (Rec. 1084-85.) The Director's position is essentially second-guessing a decision within the scope of the Council's discretion and expertise. (See Rec. 1085, Council finding expressly rejecting DLCD argument that other measures could be effective.)

The Planning Commission and Council took a long and hard look at what could actually be achieved through additional efficiency measures. (Rec. 1082-85.) The City has adopted numerous efficiency measures in proceedings other than the UGB expansion and where adding units per acre would strategically have a chance of success. (Rec. 1083-84.) The Report discounts the measures (Central Area Plan and transit corridors) to increase the capacity for additional dwelling units within the UGB. The City has determined, based on evidence in the record, that these measures will be effective. (Rec. 1084-85.) For the purpose of determining the amount of land to be added to the UGB, the City calculates the area needed on the basis that these measures will provide additional housing units. (Rec. 1085.) If the Director is correct that these measures will not increase density, the alternative is to increase the UGB expansion area.

The Report does not sufficiently credit the efficiency measures the City has taken. The City started the housing needs analysis in 2004. Since that time, the City has taken numerous measures to increase housing capacity within the City, and had taken some efficiency measures even before that time. The City has:

- Established minimum densities for residential zones
- Restricted detached single family in RH district
- Restricted offices in RH district
- Allowed decreased internal lot sizes in RS district
- Allowed accessory dwelling units
- Allowed multifamily units in some commercial districts
- Allowed flexibility in off-street parking requirements
- Adopted maximum parking standards
- Created standards to allow infill options in connection with master plans
- Adopted affordable housing strategies, including
  - Expedited review and permitting
  - Planning and building fee exemptions
  - SDC deferrals

(See Table III-3 at Rec. 1083-84.)

ORS 197.296(9) includes a non-exclusive list of measures a city can consider in taking actions or measure to increase the likelihood that needed housing will be provided. The City has taken measures included on the list and additional measures. The following chart sets out the list of measures included in the statute, and actions that the City has taken that are at least similar to the listed actions:

<b>ORS 197.296(9)</b>	<b>CITY ACTION</b>
(a) Increases in the permitted density on existing residential land;	The Central Area Plan and transit corridor measures will increase permitted density
(b) Financial incentives for higher density housing;	The City provides financial incentives for affordable housing, which is typically higher density.

(c) Provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer;	The City provides for additional density with infill options and master planning.
(d) Removal or easing of approval standards or procedures;	The City has eased approval standards and procedures for affordable housing.
(e) Minimum density ranges;	The City has established minimum densities.
(f) Redevelopment and infill strategies;	The City has developed infill strategies.
(g) Authorization of housing types not previously allowed by the plan or regulations;	The City allows additional housing in some commercial districts.
(h) Adoption of an average residential density standard; and	The City has adopted minimum density standards.
(i) Rezoning or redesignation of nonresidential land.	The City has allowed residential uses in more zones, which effectively rezones them.

The Director suggests other actions the City could have taken, but a conclusion that any of those actions would have resulted in more capacity for housing within the City is not supported by the record and is contrary to the Council's decision not to pursue those options.

The actual mix of housing that will be constructed and the density at which that housing will be constructed is almost always uncertain in planning. Absolute precision is not required but rather a level and kind of justification that a reasonable decision maker would rely on to conclude that the residential and related land needs amendments will leave the City able to accommodate expected housing needs within the planning period with the land that is planned and zoned for that purpose. *See 4-J Land Co v. City of Sandy*, 50 Or. LUBA 525, 535 (2005). Cities are not required to conduct expensive analysis for years on end; rather, Goal 10 requires inventories, analysis, assumptions and projections, all of which the City did in the record before this Commission.

The City acknowledges the goal of in-fill and increased density in urban areas in the State of Oregon. However, the City's analysis showed that broad measures like those suggested by the Director – upzoning existing residential neighborhoods, rezoning to allow multi-family, splitting the existing RS zones into two or more zones, reducing lot sizes so that vast areas of the City's residential neighborhoods become non-conforming uses – while theoretically “possible” are not viable strategies in the City of Bend. . These broad measures lack any factual justification or plausible arguments to sufficiently demonstrate that they will achieve the development densities the Department desires, whereas specifically tailored measures such as those the City has adopted are likely to provide needed housing types and density. The Director's position fails to consider the statutory standard that rezoning must be “at density ranges that are likely to be achieved by the housing market,” ORS 197.296(9) and also ignores the Commission's definition of developable land as land where there “exists the strong

likelihood that existing development will be converted to more intensive residential uses during the planning period." The Council rightly rejected options that would change the character of neighborhoods because those measures are not likely to be achievable or create any additional capacity in reality, because owners and residents would oppose those measures.

Had the City relied on speculative measures as the ones proposed by the Director, it would not have met its obligation to provide measures that will provide needed housing. The City chose, instead, to adopt amendments that will alter the density increases that the evidence anticipates will actually occur in targeted residential zones during the planning period.

12. Remand Tasks

The Report remands the UGB amendment with specific instructions. As shown in the chart below, the City disagrees with the remand requirements:

REMAND REQUIREMENT	CITY'S RESPONSE
<p>1. Include a map of buildable lands, as required by ORS 197.296(4)(c), as well as a zoning map and a comprehensive plan map for the lands within the prior UGB.</p>	<p>Maps of buildable lands were included in the record. (Supp. Rec. 125-59, Rec. 5262-64.) The statute requires a map or "other document.: ORS 197.296(4). The City also provided summary tables providing the required information on buildable lands. (Rec. 1288.) The City prepared and used a parcel-level spreadsheet that satisfied the statutory requirement. That document has been submitted as additional evidence.</p> <p>The City's zoning map and comprehensive plan maps are both official documents that have been acknowledged. There is no requirement to include additional copies in the record. DLCD can take administrative notice of these official records.</p>

<p>2. Include as its inventory of buildable lands, an analysis for each residential plan district of those lands that are "vacant," and of those lands that are "redevelopable" as those terms are used in ORS 197.296(4)-(5) and OAR 660-008-005(6). As part of this inventory, include an analysis of what amount of redevelopment and infill has occurred, and the density of that development, by plan district, since 1998. The inventory must include the UAR and SR 2 ½ plan districts, as well as the RL, RS, RM and RH districts.</p>	<p>The City's decision complies with these requirements. The parcel-level spreadsheet contains information on each vacant and redevelopable lot, and the information is summarized in the Table 5-4 of the 2008 General Plan Chapter 5. (Rec. 1288.)</p> <p>The City has performed an analysis of the amount of redevelopment that has occurred since 1998. (Rec. 8660.)</p> <p>The Report confuses "plan district" and "zoning district." The requirement is to perform the analysis by "plan designation." OAR 660-008-0010. There is no UAR plan designated land within the UGB.<sup>15</sup> SR2.5 is a zoning district, not a plan district. The inventory complied with the applicable requirement and there is no need to address UAR and SR 2.5.</p>
<p>3. If the city excludes lands on the basis that there is not a strong likelihood that existing development will be converted to more intense residential uses during the planning period, include an analysis of lands within all districts showing the extent to which infill and redevelopment has or has not occurred since 1998.</p>	<p>The City has included an analysis of infill and redevelopment since 1998. (Rec. 8660.) In considering the likelihood of redevelopment, the City can consider any factor that makes redevelopment unlikely. The City's standards for what developed lands are likely to be redevelop is a rational categorization, based on evidence in the record. Developed lands are to be categorized as redevelopable only if there is a strong likelihood of redevelopment. OAR 660-008-0005(6). The Report essentially takes the approach that the City must disprove any possibility of development rather than accepting the City's rational conclusions that certain categories of land do not meet the "strong likelihood" standard.</p>

<sup>15</sup> The City notes that some zoning designations have not yet caught up with plan designations and that there are UAR and SR2.5 zones within the City. The City is planning to make all zones consistent with applicable plan designations,

<p>4. For each zoning district, analyze the number of units, density and average mix of housing types of urban residential development that has actually occurred since 1998 (including through rezoning) and how much of this occurred on vacant lands, and how much occurred through redevelopment.</p>	<p>The City has already done this. (Rec. 1285 - 1290; Supp. Rec. 1987 - 2002.) State law does not require a zone-by-zone analysis of this data.</p>
<p>5. For each zoning district, analyze whether future trends over the 20-year planning period are reasonably expected to alter the amount, density and mix of housing types that has actually occurred since 1998.</p>	<p>The City has analyzed trends over the 20-year planning period and has based its decision on its reasonable expectations of achievable density and mix of housing types. The City's decision is based on evidence in the record. A decision that assumes development at greater density would not be supported by the record. The City's decision did take into account the "density ranges that are likely to be achieved by the housing market." ORS 197.296(9). The Report ignores this applicable and mandatory standard. State law does not require a zone-by-zone analysis of this data.</p>
<p>6. For each zoning district, adopt findings and conclusions regarding the number of units, the density, and the mix of housing types that the city concludes is likely to occur over the planning period, and identify how much is expected to occur on vacant lands, and how much is expected to occur through redevelopment.</p>	<p>The applicable standard is "residential plan designation." OAR 660-008-0010. The City did adopt findings supported by the evidence on a plan designation basis and reached rational conclusions regarding the amount of expected development. State law does not require the level of analysis at the zoning district or plan district level. The City completed this work. (Rec. 1302 – 1310.) State law does not require a zone-by-zone analysis of this data.</p>

<p>7. Revise the Housing Needs Analysis to comply with ORS 197.296, OAR 660-008-0020, and ORS 197.303. The Housing Needs Analysis must include an evaluation of the need for at least three housing types at particular price ranges (owner occupancy) and rent levels (renter occupancy), and commensurate with the financial capabilities of <i>current and future</i> residents. Those housing types include: (a) attached single family housing (common-wall dwellings or rowhouses where each dwelling unit occupies a separate lot pursuant to OAR 660-008-0005(1)); (b) detached single family housing (a housing unit that is free standing and separate from other housing units pursuant to OAR 660-008-0005(3); and (c) multiple family housing (attached housing where each dwelling unit is not located on a separate lot pursuant to OAR 660-008-0005(5)).</p>	<p>The City has already compiled a housing needs analysis that complies with ORS 197.296, OAR 660-08 and ORS 197.303. (Rec. 1257-59, 1288, 1302-10, 8660.) The City did analyze the need for many types of housing and established targets to meet those needs based on attached/detached split.</p> <p>The analysis of housing by type does group housing units in Bend into two types – attached and detached. However, the analysis considered various subtypes of these two types to look at trends and recent development. The analysis itself includes a number of tables where housing data was presented using five housing types to reflect the development of housing between 1998 and 2007. (Rec. 1285-1298, Supp. Rec. 1987-2002.)</p> <p>The City is required to provide an analysis by owner-occupied/rental status only if the City differentiates between owner-occupied and rental housing in its land use regulations. OAR 660-008-0040.</p>
<p>8. Adopt the revised Housing Needs Analysis as an element of the comprehensive plan, along with findings that demonstrate how the revised Housing Needs Analysis complies with the applicable statutory, goal and rule requirements described above.</p>	<p>The City adopted its 2008 Housing Needs Analysis with Chapter 5 of the Bend Area General Plan. (Rec. 1280 - 1315) and Appendices to the Analysis. (Rec. 1728 - 1835.)</p>
<p>9. Analyze what the mix of plan designations should be in the UGB expansion area in direct relation to the city's projected housing needs, and consider the adoption of new residential plan districts that encourage more multi-family, higher density single family housing, and other needed housing types for a greater proportion of the expansion area, in order to meet the city's and the region's demonstrated housing needs.</p>	<p>There is no requirement in the goals, statutes or regulations to adopt different plan designations. The City considered various options to increase density/provide additional opportunities for housing, and did take some measures, including expanding the UGB. It is not required to do more.</p>

<p>10. Consider measures to encourage needed housing types within additional areas of the city, including rezoning of areas along transit corridors and in neighborhood centers.</p>	<p>There is no statutory, goal or regulation requirement to take this action before expanding the UGB. It is sufficient that the City has amended its plan. The requirement to take this action is at the time of periodic review.</p>
<p>11. Consider splitting the existing RS zone, which covers most of the residential areas of the city, into two or more zones in order to encourage redevelopment in some areas while protecting development patterns in well-established neighborhoods.</p>	<p>There is no applicable requirement to do so. This is gratuitous policy advice, not a determination of what the City is required to do. The City has considered various measures and actions and proceeded only with those it determined would likely be effective.</p>
<p>12. In areas where the city is planning significant public investments, consider upzoning as a means to help spread the costs of such investments.</p>	<p>There is no applicable requirement to do so. This is gratuitous policy advice, not a determination of what the City is required to do. A careful review of the public facilities plans would have shown that the City's water and sewer infrastructure are at or reaching capacity throughout the existing City boundaries; the City has no legal ability to require new in-fill residential development to pay for investing in the large-scale capital projects identified in the PFPs.</p>
<p>13. Consider strengthening the minimum density provisions in the existing UAR and SR 2½ zones by eliminating PUDs and other clustering tools.</p>	<p>There is no applicable requirement to do so. This is gratuitous policy advice, not a determination of what the City is required to do. Clustering allows more intense development and is a tool to allow other areas to remain undeveloped to either protect natural areas or allow future development at appropriate urban levels.</p>
<p>14. Consider strengthening the minimum density provisions in the existing RS and RM zones to encourage development of needed housing types, rather than relying on low density residential development.</p>	<p>There is no applicable requirement to do so. This is gratuitous policy advice, not a determination of what the City is required to do. The City has considered a range of options, and decided to proceed with those it determined would be effective.</p>

D. Land Added to the UGB for Related (Non-Employment) Uses

1. Parks and Schools

The Report takes the position that the City did not adequately address whether the need for additional park and school lands can be met within the existing UGB. Quite simply, the City did so. The Bend La Pine School District uses an adopted "Sites and Facilities Plan" to identify eligible properties both inside and outside the City before the need arises. (See Rec. 10276-340.) The Bend Metro Park and Recreation District uses a similar planning method. In addition to standards regarding size, terrain, services and access, both parks and schools have locational requirements. If a school is needed to serve elementary students east of 27<sup>th</sup> Avenue, it does no good to identify a parcel on the northwest side of Awbrey Butte. If a neighborhood park is needed to serve residents in the Mountain High subdivision, it cannot be sited in Juniper Ridge. The parcel-level spreadsheet/database identified every developable parcel within the City. No available parcels were identified that satisfied the locational needs for parks and schools.

The City worked closely with the School District and Parks District in determining appropriate sites or areas for schools and parks. The attempt to undo the City's decision would be contrary to the coordination requirement of Goal 2. The record includes two memoranda in which the City documented coordination with and the use of the School District's methodology for estimating future school land needs. (Rec. 8670,10560). One of these same documents also relies on the Park District's method for estimating the future needs for community and regional parks. (Rec. 8670.)

Even if the City were to identify one or more likely sites for school or parks facilities within the UGB, the only possible sites would be on sites that have been identified as providing capacity for residential or employment land needs. This would result in a corresponding need to increase the UGB expansion by the same amount of area.

The Report notes that the land need estimate for parks was increased from 362 acres to 474 acres based on a land need on a quadrant basis using the Framework Plan. (Report 47.) The Bend Metro Park and Recreation Department submitted a letter (Rec. 2724) that justifies the increased land need based on refined quadrant based planning efforts done after the release of the Alternative 4 map. The estimate of 362 acres was based on an earlier boundary proposal.

The Report also takes the position that some of the parks needs could have been satisfied by land outside the UGB. While some type of parks can be provided outside the City limits, land for parks needed to provide service to urban residents within the City/UGB should be within the UGB if possible. Otherwise, rural land is being used to provide service to urban residents. While this is not prohibited, it is more consistent with Goal 14 to bring parks that serve urban residents within the UGB.

## 2. Second Homes

The Report accepts the City's determination of the estimated number of second homes, as a percentage (18%) of total needed units. However, the Report erroneously concludes that the City has found that all future second homes will be accommodated on expansion lands. When the evidence indicated that 18% of needed units was a reasonable basis for estimating future second homes, that 18% factor was applied to *all* 16,681 of the estimated needed housing units for the planning period. Two-thirds of those 16,681 units are expected to be built within the prior UGB. There was no attempt (and no need) to identify what proportion of future second homes would be built in the prior UGB, and what proportion would be built in the expansion area. Over the 20-year planning period, second homes will be equally likely to be built in the prior UGB and in the expansion area. Wherever they are built, they will be occupying land that is no longer available to provide needed housing for permanent residents. This results in the need for the overall 18% adjustment, which the Report accepts. To the extent that any additional second homes are developed within the City, they will displace non-seasonal homes and force additional permanent home needs outside the UGB. This consideration was important to the City to ensure a 20-year buildable land supply for needed housing pursuant to ORS 197.296.

The Report also contends that the City has not justified the density expectations for second homes because the City did not treat second homes any differently than primary residences in terms of density assumptions, i.e. six units per net acre overall. The City does not distinguish between first and second homes in its land use regulations. Visitors from outside the region can and will purchase both attached dwellings and detached dwellings as second homes at varying densities. There is no evidence in the record that there is a difference between primary and second homes in terms of the amount of land they occupy, or that a separate density assumption is warranted for second homes. Since there is no basis for assuming that second home purchases will occur at density levels that differ from the average density of primary dwellings, the City's assumption of six units per net acre for second homes is reasonable and consistent with the density assumption for primary dwellings. The Bend Planning Commission and Deschutes County Planning Commission liaisons discussed this topic at length at the January 14, 2008 work session. (Rec. 8670, Supp. Rec. 3817 (audio of January 14, 2008 work session).)

The Report includes a remand task calling for the City to coordinate with Deschutes County to consider the regional demand for second homes. There is no requirement in the law to do this. The City did coordinate extensively with Deschutes County throughout the UGB amendment process, as required by Goal 2; the County has adopted findings and amendments to its comprehensive plan that correspond to and support the City's boundary amendment in all respects. The County did not adopt an alternative estimate of second homes, in Bend or regionally, that conflicts with or undermines the City's estimate. Moreover, any estimates that might result from a regional analysis would have little relevance for Bend. Any methodology that attempted

to guess with any degree of reliability how Bend's share of future second homes might compare with the shares of other jurisdictions and destination resorts in the region would be highly speculative. In contrast, the City of Bend has analyzed and has adopted adequate factual evidence regarding the only relevant question concerning second homes and this UGB amendment – namely, how much buildable acreage in Bend's urban area might reasonably be expected to be consumed by second homes during the 2008-28 period? The answer is roughly 500 acres, based on an estimate that second homes will be built in numbers equivalent to 18% of needed housing units, and at an average density of six units per net acre.

### 3. Private Open Space and Rights-of-Way

The first sentence of the Executive Summary of the Report states: "The City of Bend is nationally recognized as a high-quality, desirable place to live and work." In its discussion of the City's allocation of land for private open space and rights-of-way, the Report states "there is no explanation in the record why prior development patterns, with a relatively large amount of private open space, is needed within the expansion area." The explanation is simple: the City's decision as a whole reflects the Council's goal of maintaining the City as a high-quality, desirable place to live and work. Changing development patterns to reduce the amount of open space would change the character of the City. The Council, not a state agency, gets to decide the character of the City.

Moreover, the description of this category as "private open space and rights of way" is inaccurate and potentially confusing. The City, in preparing the respective buildable land inventories for housing and employment, also accounted for land that was not addressed as housing, employment, public facilities, or rights of way. (Rec. 1280.) One of the purposes for doing so was to ensure that, when considering the 20-year land need for Bend, the City would account for all potential uses that may occupy housing and employment land.

The Report incorrectly characterizes the City's 15% factor as applying only to "private open space and right-of-way." This estimate is for all "other lands." The 15% factor was developed based on analysis of the prior UGB (12.8 percent factor), and an assumption that in the future surface stormwater<sup>16</sup> and needs for more open space will increase this estimate in the expansion area from 12.8 percent to 15 percent. (Rec. 2180-2182.) The City applied this 15 percent factor to net residential, park, school, and employment land needs in the future.

The Report states "projecting a land need for private open space does not appear logical....there is no explanation in the record ... simply adopting past development

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<sup>16</sup> Unlike areas west of the Cascades, in Bend most stormwater is **not** channeled into streams but is instead absorbed into the ground on-site. The City now requires all development to accommodate stormwater on-site without run-off. Older parts of town did not meet this standard, so the 12.% existing number is unattainable for areas of new development. Furthermore, increasing strict rules that protect groundwater will require more areas for treatment before discharge.

patterns is not a sufficient basis to demonstrate a land need under Goal 14.” (Report 49.) The Report then contradicts itself on page 53 by stating “the city can choose to rely on evidence consisting of development patterns from lands within the prior UGB in estimating land need in the expansion area for public right-of-way unless there is a showing that doing so would violate the city’s code or comprehensive plan.” This second statement is correct. It is appropriate to consider history and trends to estimate the future needs and uses.

If the “other lands” factor is not added, then land for needed residential uses will be displaced. This consideration is important to ensure a 20-year buildable land supply for needed housing pursuant to ORS 197.296. The city would not be able to satisfy ORS 197.296 if it did not account for these “other uses” that the record shows exist and consume land.

The future land needs for institutional uses such as churches, benevolent/fraternal organizations, utilities, cemeteries, golf courses, and irrigation district properties have to be taken into account and are not accurately calculated through the methodology in the 2008 EOA (employment estimates divided by employment density). The City expanded its analysis to take into account these land needs that are neither not purely “residential” nor “economic.”

The City assured that the estimate for “other lands” did not result in any “double counting” by cross-referencing the GIS parcel database (and land shown in Rec. 2182) with 2006 geo-coded employment data and lands categorized as institutional/recreational “other” lands. (See also Rec. 8329, 1651-1653.)

Residential and economic zones allow a multitude of “other” uses, and these uses are an integral part of the Bend community. The City’s estimate is based on analysis and expected trends, is consistent with all applicable Goals, statutes and regulations.

#### 4. Unsuitable Land

The Report states that the City has included almost 3,000 additional acres of land found to be unsuitable for urbanization within the expansion area with no need determination, and directs the City to remove this land from the expansion area or explain with specificity why its inclusion is justified under Goal 10 and Goal 14.

These 2,987 acres are comprised of entire parcels that were deemed unsuitable, unsuitable *portions* of otherwise suitable parcels, and existing rights of way. Unsuitable land includes developed land that is not likely to be redeveloped within the 20-year planning period and other land that is not suitable for residential or employment use, such as schools and park land. It also includes land covered by steep slopes and those within the 100-year floodplain. The record adequately reflects the location of the unsuitable land and provides sufficient justification for its inclusion. (See Figures V-1, V-2, V-3 and V-4 of the Findings at Rec. 155, 163-165). A copy of these maps is attached as Exhibit C. Those maps show how extensively unsuitable land in

interspersed with suitable lands, making it impossible to exclude the unsuitable land. The parcel inventory database provides details of the unsuitable parcels and the unsuitable portions of otherwise suitable lands. (Supp. Rec. 3507.)

In *Hummel v. LCDC*, 152 Or App. 404, 954 P2d 824 (1998), a city justified including unbuildable land in the UGB on the grounds that the land was necessary in order to provide urban services to the buildable land and that excluding it would create a confusing boundary, with non-urban land surrounding UGB land in an illogical pattern. LCDC concluded that it was necessary to add a large amount of unbuildable land in order to reach and serve buildable land, and the Court of Appeals upheld this grounds for approval of expanding the UGB in that area to meet the buildable land need. Thus, case law supports the City's inclusion of land that is unsuitable in a UGB to provide connection to buildable land and to achieve an efficient development pattern and logical boundary.

#### 5. Surplus Acreage

The Report notes that the result of the City's decision is a surplus of 519 acres in the UGB expansion area above and beyond the total of needed suitable land. The Report characterizes the presence of this surplus as a discrete decision by the City to simply add un-needed acreage in direct violation of Goal 14. As explained in the adopted findings (Rec. 39), this surplus acreage is simply the *result* of a number of actions taken to ensure that sufficient and adequate acreage to meet identified needs is in fact available within the boundary, and to achieve a logical and coherent boundary configuration. If the City is to meet its needs for housing, employment, related uses, identified needs, and also include a certain amount of unsuitable lands that happen to be in the way of suitable higher-priority lands, and seek orderly and economic provision of public facilities by including land on both sides of roads where possible, a final boundary that includes some amount of "surplus" acreage is virtually unavoidable. These areas were not added to allow the addition or an extra "cushion" of land, but to make the boundary logical. See *Hummel v. LCDC, supra*. Absolute precision cannot be expected, and these 519 acres amount to less than 10% of all land added to the UGB. Nevertheless, the City commits to fine-tuning the final decision to substantially reduce the amount of surplus land.

#### 6. Buffer Area and Land Shown as RL in the Framework Plan

The Report takes the position that a buffer area to the west of Master Plan Area 3 and 4 should not be brought into the UGB. The City brought this land into the UGB to provide a buffer between the City and forest land to the west. While the City believes that it is appropriate to bring this land within the UGB and that bringing the land in would provide a better buffer than would occur if it were left outside the UGB, the City accepts that this land should be either deleted from the UGB or reclassified as part of the adjacent Master Plan areas.

The Report also takes issue with all other RL lands brought into the UGB. Examination of the Framework Plan Map shows that all other RL designated areas are already subdivided. These rural subdivisions are already highly parcelized and redevelopment of greater density is extremely unlikely given the current lot sizes and development pattern. The RL zone designation will allow these rural properties to take advantage of the City's development code provisions to create accessory dwellings that will provide one type of needed housing. Five of the six RL areas are surrounded by higher density zoning. Only one of the five is on the border of the UGB and is included to make a logical boundary. The City provided a proper plan designation for these areas and their inclusion does not violate any statute, goal or regulation.

7. Remand Directions

The Report includes specific suggestions for actions on remand related to related non-employment uses. The following chart sets out those suggestions and the City's responses.

<b>REMAND REQUIREMENT</b>	<b>CITY'S RESPONSE</b>
1. Determine whether the need for land for public schools can reasonably be accommodated within the existing UGB.	The City has already performed this analysis. The City relies on information submitted by the School District and Park District for determining land need. Any other approach would have violated the City's obligation to confer with these governmental entities. The identified land need for schools to be included within the expanded UGB reflects this analysis.
2. Determine whether the need for land for public parks (including trails) can reasonably be accommodated within the existing UGB, and whether this need is already met in whole or in part by facilities, planned or existing outside of the UGB.	The park district has determined the need for parks and trails in the UGB expansion area and the best evidence of the need is the material submitted by district. The need for parks and trails to serve residents of the expansion area cannot be met within the UGB but must be met in the neighborhoods. There is a specific need for trails within and linking neighborhoods, and for parks to provide public recreation areas within close proximity to neighborhoods. Bend's population is very active and demands a high-level of parks and trails. The need cannot be met outside the UGB. To the extent that a park is on the edge of the UGB, there is no applicable requirement that it be kept outside the UGB if it serve the population within the UGB.

<p>3. Adopt findings that justify the increase in land needed on a quadrant basis for parks, or use the prior estimate of the district for a lesser acreage.</p>	<p>The BMPRD provided refined quadrant based land need calculations (Rec. 2724) after the releases of the Alternative 4 map. No findings are needed because the reason for the change is clear on the Record.</p>
<p>4. Coordinate with the county specifically concerning the need for second-home housing, and where this need should be satisfied regionally.</p>	<p>The decision was adopted by both the county and the City and reflects their joint determination as to how much land is needed for second homes for Bend. The analysis was based on needs for the City and does not include any need for second homes that can be satisfied outside of the Bend UGB. There is no applicable requirement for this specific coordination.</p>
<p>5. Evaluate whether this need can reasonably be accommodated on lands within the existing UGB.</p>	<p>The City's analysis makes no distinction between the existing UGB and the expansion area with respect to second homes. The clear assumption, and a reasonable expectation, is that second homes will be built in both areas to some extent. The only way to accommodate second homes on land within the UGB would be to displace primary home residential lands, which would result in a need to increase the expansion area for primary homes equivalent to the decrease resulting from moving second homes within the UGB. This direction simply adds time and cost to the process without changing the outcome.</p>
<p>6. To the extent that additional lands are required, establish a reasonable, specific density of development for this housing type for the next 20 years.</p>	<p>The City has already done so.</p>

7. Either remove private open space and private rights-of-way as categories of land need, or justify why private open space and private rights-of-way are needed within the UGB expansion area in addition to estimated land needs for public parks and rights-of-way.	The City has provided adequate justification for inclusion of these areas.
8. Remove the approximately 3,000 acres of land from the UGB expansion area that the city has found are not suitable for urbanization, or explain with specificity why their inclusion is justified under Goal 10 and Goal 14.	The City has provided an adequate justification for inclusion of these areas. Reviewing the location of the expanded UGB, the plan designation in the Framework Plan Map and the parcel-level database demonstrates the need for inclusion of these lands. The City notes that it will pursue a reduction in the 519 acre surplus on remand.
9. Remove lands from the UGB expansion area that the City has designated as RL in its Framework Plan map, or explain with specificity why their inclusion is justified under Goal 10 and Goal 14.	The City has provided an adequate explanation for the existing subdivided and developed RL lands. The City acknowledges that it will need to delete or reclassify the RL zoned land at the west edge of Master Plan Areas 3 and 4.

E. Consistency with General Plan

The Report takes the position that the UGB and related plan amendments result in inconsistencies within the Bend General Plan. The City's decision does not create inconsistencies in the General Plan. The Report analyzes this issue as if every provision of a comprehensive plan must implement every other provision. That is not the applicable standard – the issue is whether a provision actually contradicts or is incompatible with another provision. See *NWDA v. City of Portland*, LUBA No. 2003-162 (Or LUBA 9/27/2004) at slip op. 12-14 (analyzes argument of consistency among plan provisions based on actual inconsistency, not whether a plan provision furthers another plan provision).

The following chart lays out the alleged conflicts and shows that there are no inconsistencies:

<b>ALLEGED INCONSISTENCY</b>	<b>CITY RESPONSE</b>
<p>The new plan provision "Adopted policies in the Bend General Plan support the designation of higher-density residential areas in proximity to commercial services, parks and schools" is alleged to be inconsistent with existing policies that allegedly do not support this conclusion.</p>	<p>This is not a standard or requirement, but a statement of fact that there are policies in the General Plan that support higher density residential areas in proximity to commercial services. As the Report acknowledges, there are plans for higher density in the Central Plan Area and along transit corridors, so the statement that there are policies is accurate. The provision does not require that all commercial areas be surrounded by high density requirements, and the City does not understand how it could be interpreted as requiring redevelopment. In addition, a look at the Bend General Plan Map shows that commercial service areas (along Highway 97 and downtown) are generally surrounded by higher density designations (RM and RH) and that the lower density designations (RS and RL) are generally away from commercial development.</p>
<p>Housing Policy 4 "Implement strategies to allow for infill and redevelopment at increased densities, with a focus on opportunity areas identified by the city through implementation strategies associated with this report" is alleged to be inconsistent with the limitation of infill and redevelopment to certain areas.</p>	<p>There is no inconsistency. Housing Policy 4 itself provides that the infill and redevelopment is to be focused on identified opportunity areas. Those identified opportunity areas are the Central Area Plan and transit corridor areas, and the Report acknowledges that the plan provides policies for infill and redevelopment in those area. This provision does not require redevelopment implementation strategies for areas where redevelopment is unlikely due to existing development and restrictions such as CC&amp;Rs. Furthermore, the City has implemented this policy by adopting BDC 4.5.200, which provides infill development options making it easier for individuals to pursue infill development.</p>

Housing Policy 17 "Implement changes to the City's code that facilitate the development of affordable housing for very low, low and moderate-income residents, as determined by appropriate percentages of Area median Family income, consistent with recent updates to the city's code and/or new strategies identified in the Plan" is alleged to be inconsistent with the lack of measures in the UGB amendment relating to affordable housing.

Housing Policy 17 does not require every subsequent action taken by the City to facilitate the development of affordable housing. Housing Policy 17 is satisfied if the City has taken measures to facilitate development of affordable housing. The City has taken measures. The measures it has taken to facilitate the development of affordable housing include: (1) planning and building fee exemptions; (2) expedited review and permitting; (3) system development charge deferrals; (4) off-site improvement assistance; (5) density bonuses; and (6) minimum lot size exemptions.<sup>17</sup> Some of these strategies are included in BDC 3.6.200C. The City has also taken measures to protect existing affordable housing by adopting BDC Chapter 2.7.900 regulating closing of manufactured home parks. An important factor in the affordability of housing is the cost of land. Increasing the supply of land reduces upward pressure on housing cost, and reducing the supply of land increases housing cost for all, including low and moderate income residents. While nothing in the City's decisions is contrary to this policy, adopting a significantly smaller UGB, as advocated by the report, would be inconsistent with the policy because it would hinder the development of affordable housing.

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<sup>17</sup> A summary of these incentives is on the City's website at [http://www.ci.bend.or.us/depts/urban\\_renewal\\_economic\\_development/developer\\_s\\_incentives\\_for\\_affordable\\_housing.html](http://www.ci.bend.or.us/depts/urban_renewal_economic_development/developer_s_incentives_for_affordable_housing.html).

<p>Housing Policy 21 " In areas where existing urban level development has an established lot size pattern, new infill subdivision or PUD developments shall have a compatible lot transition that compliments the number of adjoining lots, lot size, and building setbacks of the existing development while achieving at least the minimum density of the underlying zone. New developments may have smaller lots or varying housing types internal to the development" is alleged to be inconsistent with the City's decision in that the City's amendments "do not plan for – in fact, do not permit – any infill subdivisions in existing neighborhoods.</p>	<p>Nothing in the City's decision prohibits infill subdivisions and nothing in Housing Policy 21 requires infill subdivisions. Indeed the City has taken measures to facilitate infill development. BDC 4.5.200. The standard in Housing Policy 21 is that infill subdivisions or PUDs must have a compatible lot transition. The only thing in the City's decision even remotely related to this standard is the general policy of preserving existing neighborhood character, and that policy is totally consistent with Housing Policy 21.</p>
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The Report remands on this issue with direction to revise to be consistent with these General Plan policies. The existing decision is consistent with the policies, and the suggested changes would make the decision less consistent with the policies.

F. Compliance of the UH-10, UH 2.5 and SR 2.5 Zones with Goal 14

The Report takes the position that the UH 2.5 and SR 2.5 zones are inconsistent with Goal 14 and implementing regulations, and that the allowance of clustering in the UH-10 zone is also inconsistent with Goal 14 and implementing regulations.

The opportunity for cluster development does not violate Goal 14, specifically OAR 660-24-0050(5). The City assigned an interim zoning designation that reflects the existing zoning that was assigned by the county prior to the inclusion in the UGB. The adopted code provision (Rec. 1843, 1924) provides an opportunity for reasonable use of rural lands while retaining the opportunity for efficient development in the future. The provision for cluster development requires an applicant to demonstrate how future urban densities can be accommodated including future redevelopment of the smaller 15,000 square foot minimum cluster lots as necessary to meet the required urban densities. Large acreage parcels in the expansion area are far more likely to be redeveloped to urban uses efficiently after annexation if allowable housing is clustered on smaller lots on a small portion of the parcel, leaving the rest of the acreage undisturbed until it is urbanized. Allowing subdivisions of 10-acre lots in the urbanizable area is likely to be far more difficult to redevelop efficiently after annexation.

The UH-2.5 designation has been applied to existing county zoned SR 2.5 exception lands with one exception. The rural subdivision along the easterly UGB boundary has a county zoning designation of MUA-10. The City accepts that the planning designation for this area should be consistent with the county designation and agrees to designate

this rural subdivision as UH-10 even though the largest lot within the subdivision is just over 3 acres in size. The City also acknowledges that the resource land included in the UGB and designated as UH-10 poses a potential increase impact and agrees to create a new interim designation that would preclude land divisions smaller than 20 acres on resource land.

The City agrees to modify plan designations in specific locations as noted in the preceding paragraph. The City does not agree that clustering of permitted housing in UH-10 areas, for the purpose of preserving more land for efficient urbanization, is contrary to Goal 14 or OAR 660-024-0050.

#### G. Economic Development Land Need

The City has determined its economic land needs in full compliance with Goal 9 and OAR Chapter 660, Division 9. Nevertheless, the Report, while appearing to accept some portions of the City's work, ultimately requires the City to undertake a major reworking of the economic lands analysis.

##### 1. Applicable Standards

The City and Director are not far apart as to what standards are applicable, but the Report's conclusions and requirements do not follow the applicable standards. Both agree that employment lands analysis is governing by Goal 9 and its implementing regulations in OAR Chapter 660, Division 9. The City agrees with statements in the report to the effect that there is no "one size fits all requirement," (Report 59), that the city established a substantial record of fact gathering and analysis (Report 62), that the City complied with the trend analysis requirement of OAR 660-009-0015(1) (Report 60), and that the City developed substantial findings on issues related to on Goal 9. The City also agrees with the following statements in the record:

"There is in the record policy direction, fact-based analysis of an employment projection, and market analysis of the rationale for providing employment land above the minimum 20-year need. No upper limit is established in rule or statute..." (Report 65).

"There is in the record policy direction, fact-based analysis of an employment projection and market analysis of the rationale for providing land for a hospital, a university campus, and two 50-acre industrial sites" (Report 68-69).

##### 2. Adequate Factual Basis - Process

Section III.F.1 of the Report is headed with the question: "Did the city have an adequate factual basis for including and excluding lands for employment uses?" However, the analysis appears more concerned with process than with the factual support for the City's decision. The following addresses each of the five steps discussed in that section of the report:

a. Determination of the 20-year supply of employment land

OAR 660-009-0005 provides the following definitions:

(1) "Developed Land" means non-vacant land that is likely to be redeveloped during the planning period.<sup>18</sup>

(14) "Total Land Supply" means the supply of land estimated to be adequate to accommodate industrial and other employment uses for a 20-year planning period. Total land supply includes the short-term supply of land as well as the remaining supply of lands considered suitable and serviceable for the industrial or other employment uses identified in a comprehensive plan. Total land supply includes both vacant and developed land.

(15) "Vacant Land" means a lot or parcel:

(a) Equal to or larger than one half-acre not currently containing permanent buildings or improvements; or

(b) Equal to or larger than five acres where less than one half-acre is occupied by permanent buildings or improvements.

The definition for "developed land" is what most people consider "redevelopable land". The rule has no definition for "redevelopable", nor what most people considered "developed" to mean (i.e. no additional capacity for further intensification or development). Traditionally, the term "land supply" means land which is currently zoned and available to meet a need. However, the rule defines "total land supply" to include existing supplies of "vacant" and "developed" (or what most would consider re-developable) plus the additional land made available through a UGB expansion to meet the needs of a 20-year planning period. The definition of "vacant" is the clearest and was followed exactly by the City's 2008 EOA. The Report does not use these terms correctly or consistently (see Report 64) because they are so confusing.

The City's adopted 2008 EOA is a technical document, but a document written to be useful to decision makers and the public. As a result, there is not a perfect match between the terminology used in the 2008 EOA and terminology in OAR 660 Division 9. The 2008 EOA performs all the analysis required by OAR 660 Division 9, even in the sequence requested by the Director's report, but uses plain English rather than the confusing and misleading language of the regulation.

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<sup>18</sup> The City notes that this definition is inconsistent with the plain meaning of the defined term, which can cause confusion. While not relevant to this decision, the City strongly urges that, if this definition is used, it be applied to the term "redevelopable land" rather than to developed land, and that "developed land" be defined as "land with existing development" or "land with existing development that is **not** likely to be redeveloped in the 20-year planning period." The current definition is an invitation to failure and appeal.

The Director's remand asks for a "determination of the 20-year supply of employment land," apparently asking for the "total land supply."<sup>19</sup> Data from four tables found in the 2008 EOA in Record 1587, 1588, 1622, 1626, and text in four pages at Record 1628-1631 demonstrate "total land supply."

- i. What the 2008 EOA calls "Supply of Net Acres" in Table 42 and 44 of the EOA (Rec. 1622 and 1626, respectively) meets the exact definition of net "vacant" in OAR 660 Division 9. See a/so Rec. 1590 through 1598 for more detail on land supply illustrating exactly how the city performed the land inventory work.
- ii. What OAR 660 Division 9 calls "developed" is what most would consider "redevelopable" land. The information on infill calculations at Rec. 1587 and 1588, together with the employment densities at Rec. 1612 account for redevelopable land (or "developed land" to use the regulatory definition).
- iii. What the 2008 EOA calls "Net Deficit Acres" in Table 42 (Rec. 1622), and Table 44 (Rec. 1626) represent another component of "total land supply" which is the net acreage of land needed above currently available supplies to meet 20-year needs.
- iv. All of the above analysis was done for 14 general plan designations which have been used to describe and group the number of acres of employment sites by type.
- v. This information provides a determination of net "total land supply" which is convertible to gross "total land supply" by using the factors in Tables 42 and 44 (Rec. 1622 and 1626) of the 2008 EOA.
- vi. The above analysis assumes all "vacant" and "developed" land in the current UGB is consumed to meet estimated needs in the planning period. In addition to the general need for employment lands, there is a need for a handful of unique sites. The Report acknowledges the need for the unique sites is substantiated (Report 69.) The gross acreage totals of these sites (Rec. 1628-1631) is added to the reconfigured gross acres "total land supply" from above, to arrive at the final estimate of gross acres of "total land supply" matching the exact definition of OAR 660 Division 9.

The data, analysis, findings, and conclusions in the record demonstrate the legal requirements of OAR 660 Division 9 have been met and that the City has identified total land needs for the 20-year planning period.

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<sup>19</sup> OAR 660-009-0015 does not contain a specific requirement that the EOA include the total land supply.

- b. An inventory of existing employment land categorized into vacant, developed land likely to redevelop within the planning period, and developed land unlikely to redevelop within the planning period

The Director's report adds a new category of land "developed unlikely to redevelop," which, if the definition in the regulation is used, is inherently contradictory. The City understands that the Director, like the EOA, is using the common-sense meanings rather than the regulatory definitions. The City has already completed this step. (Rec. 1590-1606.)

- i. The exact definition of "vacant" in OAR 660 division 9 was used in the City's categorization of land. (Rec. 1590-1606.)
- ii. What the Director calls "developed land unlikely to redevelop within the planning period" the city called "developed" in the 2008 EOA. (Rec. 1590-1606.)
- iii. What the Director calls "developed land likely to redevelop" is not defined or mentioned in OAR 660 division 9. The law simply requires a consideration for land likely to redevelop in the planning period (see definition for "developed" land in OAR 660 division 9 for the only reference to redevelopment in the rule). The City has taken an approach that does not target specific parcels for redevelopment, but instead has calculated that 10% of new employees requiring land will be employed on land that is "developed."

The Report claims "there is no analysis included that distinguishes developed employment land likely to redevelop during the planning period from that not likely to redevelop," that this is required of an EOA, and "there is no analysis of trends to support this assumption." (Report 63.) The record clearly provides an adequate reason for the City's approach, based on two extensive analyses and applied to Bend based on trends. (Rec. 1611.) No evidence in the record is contrary to the City's conclusion. Furthermore, OAR 660 Division 9 has no mention of the term "developed land likely to redevelop" and does not require a "site by site" analysis of redevelopment potential.

The City has appropriately determined a "redevelopment" or "infill" factor as allowed by OAR 660, division 9, but has done so in a way that takes into consideration it is impossible to accurately predict exactly which sites will redevelop in a 20-year planning period. As documented in the record cites above, this approach has been used throughout the Portland Metro region and is an appropriate assumption for Bend.

c. Identification of required site types that are not in the inventory of either vacant or likely to redevelop sites

The Director uses a term not defined by law or rule in “likely to redevelop sites.” It is possible that the Director is confusing the housing lands needs analysis requirements with the employment land needs requirements. The Report’s analysis and conclusions imply the City’s 2008 EOA did not inventory or identify required site types. The city has again performed this analysis, but has done so in a way allowed by a part of the law the Director has omitted from the discussion of Goal 9 and OAR 660 Division 9.

OAR 660-009-0015(2) requires that the “economic opportunities analysis must identify the number of sites by type reasonably expected to be needed to accommodate the expected employment growth based on the site characteristics typical of expected uses.” It qualifies this requirement by stating: “Industrial or other employment uses with compatible site characteristics may be grouped together into common site categories.” The Director implies that a site-by-site analysis is required by law, ignoring the authority to group sites provided by OAR 660-009-0015(2). The City has complied with the law by calculating the total land supply by common site categories and acreages.

The City’s 2008 EOA calculates “total land supply” for economic uses in common site categories of 14 general plan designations (five commercial, four industrial, one public facility, three residential, and one medical). The City has also identified three unique site needs: large industrial sites for targeted industries; a new hospital; and a new university.

The following describes the process to determine the number (or acres) of sites by common site categories:

- i. First, Bend’s existing employment “site types” are described in narrative form as industrial, prime industrial, vintage industrial, commercial, and mixed employment lands, economic uses in residential areas, public facilities, and medical lands. (Rec. 1565-74.) This narrative also describes the site characteristics that are needed for these types of uses as they relate specifically to Bend.
- ii. The City’s 2008 EOA uses a sophisticated GIS employment projection methodology based on local data to result in an estimate of “total land supply” for each of the common site categories defined as Bend’s economic land General Plan designations. The total land supply for each of the 14 general plan designations is calculated by:
  - (a) Making employment projections by employment category (Rec. 1575-89);
  - (b) Assessing the exact percentage of employment by category taking place in each of the 14 plan designations to account for the “mixing” of employment type and location. (Rec. 1607-11.) This critical step enables the City to

accurately account for the fact that the same type of employment (by NAICS category) may take place in a wide variety of locations and general plan designations rather than assuming a type of employment seeks only one type of site;

- (c) Accounting for "redevelopment" and infill in each of the 14 plan designations, converting future employment to land demand by using Bend's calculated employment densities for each of the 14 plan designations (Rec. 1612); and
- (d) Subtracting existing supplies of land by each of the 14 plan designations and calculating the need for additional land by each of the 14 plan designations (Rec. 1625, 1627, and summarized on 1634).

This approach of grouping rather than segregating required site types is supported by data and analysis in the record. The 2008 EOA and City's record is filled with discussion on the topic of the blurring of lines between traditional industrial and commercial and mixed uses. (Rec. 1547-49.) Business models and activities are increasingly blended, diverse, and seeking a more diverse variety of site types and locations. This is true in Bend more than many communities because of Bend's unique employment characteristics and trends. (Rec. 1547-49, 1567-74.)

Accurately predicting exact number of firms, by size, by type, each firm's site requirements by size, type, industry, location, for a 20-year period assumes a level of certainty and knowledge that is simply not possible for a 20-year plan. It is pure guesswork to conduct such an analysis, and is not required by law, which expressly allows grouping into common site categories. The information pages 1607-1610 of the Record also illustrates why the City's 2008 EOA used a methodology avoiding predicting the precise site needs for each specific type of use. Employment in major categories (industrial, heavy industry, general retail, large retail, office, services, etc.) takes place in a wide variety of general plan designations, is extremely mixed in location and site type, and not even a majority of employment by category takes place where it would be expected to take place. In Bend, the assumption that industrial uses will need purely industrial land, commercial uses demanding commercial land, and so on, is false. The City's 2008 EOA uses a methodology accounting for Bend's unique employment "geography" and accounts for Bend's unique distribution of land needs by type as required by law. This conclusion was reached by the City's expert consultant based on research and experience (Leland Consulting).

d. Identification of serviceable lands

The Report adds a concept of "serviceability" in the EOA, which is not required by law. While the term "serviceable" is defined,<sup>20</sup> the rules pertaining to EOAs in OAR 660-009-

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<sup>20</sup> OAR 660-009-0005(9) defines "serviceable" as lands the city has "determined that public facilities and transportation facilities, as defined by OAR chapter 660, division 011 and division 012, currently have adequate capacity for development planned in the service area where the site is located or can be upgraded to have adequate capacity within the 20-year planning period."

0015(1)-(4) do not mention the term "serviceable." OAR 660-009-0015(3)(a)(B) requires land inventories to describe "development constraints or infrastructure needs that affect the buildable area of sites in the inventory." The City's EOA complies with this requirement; it determines the amount of land that currently has adequate capacity for development and those sites that have development constraints. (Rec. 1604-06.) The City has provided findings demonstrating lands in the prior UGB and UGB expansion are capable of being served by water, sewer, and transportation upgrades planned for the 20-year planning period to meet the technical definition of "serviceable." (Rec. 1161-62.)

e. Reconciliation of need and supply

The City's 2008 EOA (Rec. 1634) and findings (Rec. 1114) show the amount of land in gross acres by general site category that need to be added to the City's current inventories of economic land to meet future needs. This "reconciliation" is in the record. It assumes all existing supplies of "vacant" and "developed" land defined in statute are fully utilized according to employment densities. (See Record 1612.) This reconciliation is done according to the complex process detailed in the City's 2008 EOA. (Summarized at Rec. 1620-35 and 1106-27.) Findings (Rec. 1129-1131) provide additional conclusions supporting the need for a UGB expansion for economic lands.

3. Adequate Factual Basis – Specific Issues

The Director's analysis of the City's 2008 EOA on pages 62-63 of the Report is incorrect on a number of very important points.

First, the "main steps" outlined on page 62 were followed by the 2008 EOA, but as explained for reasons above, the exact terminology of the rule was not used. Nonetheless, all data required by the rule is contained in the 2008 EOA (Rec. 1500-1726) and Findings pertaining to Goal 9. (Rec. 1103-1165.)

Second, the City has adopted only one 2008 EOA, but the Director is clearly confused on this most basic point. The City's 2008 EOA, like other technical research papers and studies, cites and references a wide range of sources in one document. The Director states "conflicting" findings are referenced, yet does not cite any specific findings to prove the point. The Director references "the original EOA as the analysis and basis for findings, but the original EOA analysis was significantly modified later in the process, and it does not appear that the original EOA is still a basis for the city's decision given the findings." (Report 63.) The City adopted **one** 2008 EOA, which is internally consistent and consistent with the findings, but includes references to other technical studies. The first page of the 2008 EOA provides a detailed explanation of the 2008 EOA (Rec. 1508-09, and 1575) for this very reason. By the time the city council directed staff to add a full 20-year supply of economic land to the UGB, the Leland study was outdated and required a major re-write. However, since much of what was done by Leland Consulting was not directly tied to employment projections (which were updated), it was preserved and clearly referenced.

Third, the Director claims the record does not support the conclusion that Bend will experience a 15% vacancy rate, and that a "desire to drive industrial and commercial land rents down...cannot be a basis for inflating trend data because, taken to its extreme, it would have no limit..." (Report 63.) The Department's characterization that "the local vacancy rates have been approximately half this amount" is incorrect, and the record supports the City's decision.

The actual vacancy rate fluctuates through time and the question is the appropriateness of the statistic selected and complying with Goal 9 and the administrative rule. The city's record illustrates recent local vacancy rates, advice from stakeholders, and research on "ideal" rates. The rate of 15% was selected because it is **slightly** higher than the relatively low rates seen before 2008. Given a major constraint to economic growth in Bend is high land prices and leases, slightly higher supplies of land and higher vacancy rates tend to drive prices down and make Bend more price competitive. This approach is backed up by data, addresses a major weakness in the Bend economy as required by Goal 9, and is supported by the record.

Record 1616 through 1617 and Findings in Rec. 1111-1112 present an analysis of vacancy rates. This data refutes the Director's conclusions:

- The Department's own "Guidebook" suggests using a vacancy rate between 5-15%, consistent with the City's use of 15%. (Rec. 1616, 1111.)
- Industrial vacancy rates have fluctuated between 4-9% and office 4-13% over the past 12 years (Rec. 1111) during some of the most rapid economic development in the entire state when vacancy rates would be expected to be relatively low. (Rec. 1503-1505.)
- Vacancy rates have steadily increased since 2005. (Rec. 1111.)
- The office space vacancy rate in Bend was 9.0% in 2006, increasing to 13.5% in 2008. (Rec. 1111.)
- The industrial space vacancy rate in 2006 was 2.9% and increased to 12.1% in 2008. (Rec. 1111.)
- The trends above show that with vacancy rates increasing dramatically in Bend in recent history, it is reasonable to assume future rates will be slightly higher than what was seen during the "boom" years before 2006.
- High economic land prices and low vacancy rates are a threat to Bend's economic growth. (Rec. 1561-62.)
- The estimate of 15% is slightly higher than was currently observed in Bend, but realistic given data from larger municipalities such as Los Angeles, Phoenix, and Salt Lake City experience actual vacancy rates observed between 14-17%. (Rec. 1112.)
- Evidence from testimony from Economic Development for Central Oregon points out land supply and price are the main factors constricting economic growth in Bend and to support the city's proposed economic lands expansion. (Supp. Rec. 9-10.)

- No other objectors or DLCD presented evidence into the record suggesting any other specific statistic is more appropriate. The DLCD letters, presented very late in the process, were the only source of criticism of the rate while the record was open. Conversely, the 15% rate was open for discussion and comment for months, without other comment.
- While the City acknowledges that this information is outside the record, the reasonableness of the City's determination of vacancy rates is demonstrated by the recent vacancy rates. Second quarter 2009 commercial vacancy rates were 17%, 24%, and 17.6% for Bend's Downtown, Highway 97/3rd Street, and Westside respectively. Industrial rates are at 15%, 18.8%, 18.8%, and 20.5% for Southeast, Northeast, Central, and Westside areas of Bend (Compass Commercial "Points").

4. The City's Analysis Appropriately Determined the Need for Employment Land

The second question asked in the Report regarding employment land is: "Does the analysis show too great a need for employment land?" The answer is an emphatic "No!"

OAR 660-009-0025(2)<sup>21</sup> provides: "Plans must designate serviceable land suitable to meet the site needs identified in section (1) of this rule. Except as provided for in section (5) of this rule, **the total acreage of land designated must at least equal the total projected land needs** for each industrial or other employment use category identified in the plan during the 20-year planning period." (*Emphasis added*). The rules make it clear that plans must at least provide a 20-year supply, but are not limited to a 20-year supply.<sup>22</sup> The language of the rule clearly allows for additional acreage to be designated for employment uses beyond the projected land need, and clearly prohibits plans from designating less land than is needed.

The Report states:

- "There is in the record policy direction, fact-based analysis of an employment projection, and market analysis of the rationale for providing employment land

<sup>21</sup> The Report states "these rules [OAR 660-009-0015 and 660-024-0040(5) make it clear that the standard is for the city to provide a 20-year supply of land for employment". OAR 660-024-0040(5) places no additional requirements or specificity pertaining to land need determinations in addition to the requirements of Goal 9 and OAR 660 Division 9.

<sup>22</sup> The Director's summary of local actions (Report 64) contains a misleading summary of the city's work. Findings clearly describe current supplies of economic land. (Rec. 1108-10.) Findings (Rec. 1129-30) provide even more detail regarding the inadequacy of residential lands inside the prior UGB to meet the needs for economic lands. Findings clearly summarize the 2008 EOA's methodology, rationale, and conclusions resulting in the need for additional land to be added to existing supplies. (Rec. 1110-26.) The Report falsely states the final land need determination was based only on input from "Stakeholders". Findings clearly state a wide variety of reasons for the final land need determination, primarily based on a policy direction from the City Council, Planning Commission, and research (Rec. 1115, 1125-26.)

above the minimum 20-year need. No upper limit is established in rule or statute..." (Report 65.)

- The Director states the record contains "policy direction and ample discussion." (Report 66.)

However, the Director's analysis also states:

- OAR 660-009-0015(2) states that the EOA "must identify the number of sites by type *reasonably expected to be needed* to accommodate the expected employment growth." (Report 65-66.)
- The city's findings "do not explain the land need determination in a fashion that demonstrates it complies with OAR 660, division 9." (Report 66.)
- "In order to justify an increase in the need for certain types of employment land within the UGB over what a trends-based analysis would conclude, there would need to be a policy directive to provide additional land for economic development purposes in the record, a factual basis in the EOA, ...a finding that the job-growth estimate that supports the land need determination is reasonable and cannot be accommodated within the existing UGB." (Report 66.)

The record and Director's own analysis state there is sufficient policy direction, fact-based analysis, and market rationale to support the city's land need determination. The Director's remand on this specific topic seems to "duck the question" on market choice by remanding with "the same instructions explained in subsection 1.e." pertaining to the first economic lands remand order. For reasons discussed previously, the city disagrees with the Director's conclusions on the first topic. The city has also clearly demonstrated above that the record clearly supports the final economic land need determination consistent with OAR 660, division 9.

##### 5. Employment in Residential Areas

The Report asks the question: "Did the city err in designating 114 acres for employment in residential areas?" The Director and City may not be far apart from an acceptable conclusion to this question. Since the Director has taken such a firm stance that "the 119 acres of residential land is not justified, and must be removed from the employment land need," the City strongly disagrees with the Director's conclusions. The record clearly justifies the amount of land needed for this employment use, and the City believes allocating these uses to residential plan designations is not prohibited by law and makes good practical sense.

The City agrees that OAR 660-009-005(6) definition for "other employment uses" clearly includes "retail, wholesale, service, non-profit, business headquarters, administrative and governmental employment activities that are accommodated in retail, office, and *flexible building types*. Other employment uses also include employment activities of an entity or organization that serves the medical, educational, social service, recreation and security needs of the community typically in *large buildings or multi-building*

*campuses. (Emphasis added.)* Employment uses by definition are not limited to considering employment taking place in employment zones or plan districts, but buildings regardless of plan designation. This is exactly what the city's analysis has done.

OAR 660-009-0025 requires local governments to "adopt measures adequate to implement policies" and "appropriate implementing measures including amendments to plan and zone map designations". The Director's analysis states "OAR 660, division 9 does not permit designation of residential land for employment use." This conclusion does not flow from any provision in OAR Division 9. Nowhere in OAR 660-009-0025 does it say that employment uses can only take place on lands with plan or zoning designations limited to employment uses, nor does it prohibit economic uses from residential areas, and instead requires "appropriate implementing measures." Appropriate measures may be to add employment land, mixed use lands, or in this case, residential land under conditions that allow employment uses. Where the city has accurately estimated employment taking place in residential general plan designations, the "appropriate implementing measure" is to add small supplies of residential land to the proposal to account for such uses. OAR 660-009-0025(1) also allows for mixed-use zones to be designated to meet multiple needs in a given location, so it seems odd the Director does not recognize this flexibility provided by law.

The Director's summary and conclusions of local actions on page 67 beginning with "the 2008 EOA recommends..." is factually incorrect, and the opposite conclusion is supported by the record. Where the Director has claimed the 2008 EOA recommends "an increase to the employment projection", the record citation given (Rec. 1651-52) explains the employment projection methodology excludes employment for jobs taking place in public facilities, schools, churches, and home occupations because land needs for these uses is captured in the 15% factor for "other lands." This was done to remove employment in these uses so it would not bias the final determination that 119 gross acres of residential land are needed for non-residential uses.

The Director concludes "the 119 acres of residential land is not justified". The record and 2008 EOA clearly demonstrate considerable amounts of employment take place on lands with a plan designation of RS, RM, or RH, excluding the MDOZ, public schools, and people working in residential structures (home occupations). The resulting employment meets the definition of "other employment use" in the rule. The record shows how this land need was defined and why it is appropriate to account for this employment:

- a. General discussion regarding residential areas. (Rec. 1573.)
- b. Employment projection methodology including discussion of employment on residential lands. (Rec. 1575-77.)
- c. Table 35 illustrates that in 2006 nearly 1% of general industrial, over 1% of retail, nearly 1% of large retail, nearly 8% of office employment, over 5% of "other" employment, and nearly 1% of government employment takes place in buildings located areas with residential general plan designations. (Rec. 1609.)

- d. Employment estimates for residential zones does not include employees in public schools, on institutional/recreational "other" lands accounted for in the 15% factor, and employees working in their own homes. (Rec. 1609, 1611.) This was done by cross-referencing the GIS parcel database with 2006 geocoded employment data and lands categorized as institutional/recreational "other" lands to prevent any double counting. (See also Rec. 8329, 1651-1653.)
- e. The number of new future employees expected to be employed on residential land, and residential land employment densities are based on 2006 geocoded employment data. (Rec. 1610-12.) Note the employment densities are relatively high and very conservative.
- f. Final employment projections were converted to land need. (Rec. 1622.) Note that Table 42 does not assume supplies of land for economic uses taking place in residentially designated areas because the residential analysis, which did not account for any conversion of residential land for economic uses, assumed all vacant and redevelopable residential lands are consumed by residential development in the planning period.
- g. Findings document why it is important to consider the land needs for these economic uses by listing the types of non-residential uses allowed in these zones. (Rec. 1113.) The Director's analysis does not take into consideration the reality of the City's acknowledged zoning ordinance, that residential zones allow a multitude of non-residential uses in order to provide goods, services, and employment in an increasingly mixed use setting in residential areas.

The Report states "OAR 660, division 9 does not permit designation of residential land for employment uses." (Report 67.) However, OAR 660, division 8 "permits adjustments to the residential buildable lands inventory to account for non-residential uses." The only reference to non-residential land in OAR 660 division 8 is in 660-008-0020(1), which states residential plan designations shall be assigned to all buildable land and "may allow nonresidential uses as well as residential uses." There is no standard discussing adjustments in the rule as suggested by the Director's analysis. The City has met the requirements of OAR 660 division 8 by designating 119 acres of residential land for non-residential uses, but has simply conducted the analysis in the 2008 EOA versus the Housing Needs Analysis, as allowed by law.

OAR 660 divisions 8 and 9 allow for non-residential uses to be designated in residential plan-designated areas and mixed use plan-designated areas to be designated in employment areas to account for the "real world" mixing of housing and employment uses throughout a city. The City's accurately accounted for 119 acres of land, using an analysis and approach based on facts and findings in the record and consistent with applicable law. While the City could have simply allocated the same 119 acres to an economic designation to account for these economic uses or included the acreage under the analysis of residential land needs, but was not required to do so. Economic uses taking place in residential areas are more accurately analyzed under OAR 660 Division 9, and it is more accurate to allocate a small portion of future residential land for economic uses.

6. The City Appropriately Included Land for the Hospital, University and Special Industrial Sites

The Director concludes and city agrees there is an adequate basis for the need for the hospital, university and special industrial sites. The City disagrees with the position in the Report that "the EOA does not adequately identify land already in the UGB that could be developed for some or all these uses." The Report also faults the City for failure to adopt policies that provide adequate protections to ensure the sites remain available for the intended uses.

The City did determine that there were not suitable sites for these uses within the City. (Rec. 1125 (suitable large industrial sites are not in the current supply), Rec. 1594 (map of land available for public facilities).)

Furthermore, the City's determination of land needs for both employment and housing anticipate full usage of all sites within the City during the 20 year planning period by other uses. With all land consumed for development inside the UGB, meeting special site needs inside the UGB is not possible. The record demonstrates these special sites cannot reasonably be accommodated inside the existing UGB.

The City has also adopted sufficient protective measures for these sites. Chapters 1 and 6 of the newly adopted General Plan contain policies to protect these sites and direct future code development to protect these sites. Chapter 6 contains a policy specific to these sites:

"9. Large-lot and specialty employment sites are important to the overall inventory of available economic land and shall be protected through the use of zoning, deed restrictions or other appropriate instruments to ensure that these sites will not be further subdivided prior to development" (Rec. 1340.)

In addition, policy 13 states:

"The General Plan Map shall designate a supply of large industrial and commercial lots over 25 acres to attract large site users. Development Code standards shall preserve the inventory of large parcels for suitable uses." (Rec. 1340.)

Framework Planning policies 20-29 (Rec. 1239-1240) establish further protections (special employment sites are designated in the adopted Framework Plan). Development inconsistent with the Framework Plan designations is not allowed, specialty employment sites are clearly indicated in the plan, economic policies speak to protecting these sites for specific uses, and further development code work is required by policies. The requirements of OAR 660-009-0025(8), which requires cities to "adopt policies and land use regulations providing for those special site needs" have been met. The city's proposal identifies the sites in the Framework Plan and in Chapters 1 and 6,

limits land divisions and permissible uses that interfere with development of the site for the intended use as required by OAR 660-009-0025(8). The Director has stated the city must adopt measures related to "conflicting uses", however the rule states such policies are required "where necessary", and not mandatory. The City has sited special economic uses in areas where they will be compatible with surrounding uses to prevent any incompatibilities. (Findings Rec. 1122-25.)

7. Remand Requirements

The following charts provide the City's response to the remand requirements relating to employment lands:

<b>REQUIRED PROVISION</b>	<b>CITY'S RESPONSE</b>
Determine the 20-year supply of employment land.	The City has already done this. Data from four tables found in the 2008 EOA (Rec. 1587, 1588, 1622, 1626) and text in four pages of text (Rec. 1628-1631) demonstrate "total land supply". Simply reconfiguring the totals with different labels as described in previously text meets the exact terminology in OAR 660, division 9.
Provide an inventory of existing employment land categorized into vacant, developed land likely to redevelop within the planning period, and developed land unlikely to redevelop within the planning period.	<p>This work has been completed in the City's 2008 EOA. (Rec. 1590-1606.) The exact definition of "vacant" in OAR 660 division 9 was used in the City's analysis. What the Director calls "developed land unlikely to redevelop within the planning period" the city has called "developed" in the 2008 EOA. (Rec. 1590-1606.)</p> <p>What the Director calls "developed land likely to redevelop" is not defined or mentioned in OAR 660 division 9. The law simply requires a consideration for land likely to redevelop in the planning period (see definition for "developed" land in OAR 660 division 9 for the only reference to redevelopment in the rule).</p> <p>The record clearly provides an adequate reason for the City's decision (Rec. 1611) which is based on two extensive analyses and applied to Bend based on trends. The City has taken an approach that does not target specific parcels for redevelopment, but instead has calculated that 10% of new employees requiring land will be employed on land that is "developed". There is no evidence in the record to dispute this assumption. Furthermore, OAR 660 division 9 has no mention of the term "developed land likely to redevelop" and does not require a "site by site" analysis of redevelopment potential as preferred by the Director.</p>

<p>Identify required site types that are not in the inventory of either vacant or likely to redevelop sites.</p>	<p>The standard is that the approximate number, acreage and site characteristics of sites needed to accommodate industrial and other employment uses must be identified. OAR 660-009-0025(1) The City has done this. The use of the term "types" is confusing, because plans are not required to provide a different type of site for each industrial or other employment use. OAR 660-009-0025(1). The city has again performed this analysis, but has done so in a way allowed by a part of the law the Director has omitted from the discussion of OAR 660-009-0015(2), which is "Industrial or other employment uses with compatible site characteristics may be grouped together into common site categories."</p> <p>Bend's existing employment "site types" are described at pages 1565-1574 of the record. The total land supply for each of the 14 general plan designations is calculated by making employment projections by employment category (Record 1575-1589); assessing the exact percentage of employment by category taking place in each of the 14 plan designations to account for the "mixing" of employment type and location (Record 1607-1611) to accurately account for the fact that the same type of employment may take place in a wide variety of locations and general plan designations; accounting for "redevelopment" and infill in each of the 14 plan designations; converting future employment to land demand by using Bend's calculated employment densities for each of the 14 plan designations (Record 1612); subtracting existing supplies of land by each of the 14 plan designations and calculating the need for additional land by each of the 14 plan designations. (Record 1625, 1627, and summarized on 1634.)</p> <p>The City has provided the factual basis for its methodology and approach due to considerable mixing of "type" and location of land required to satisfy the needs of the same "type" of employment. (Rec. 1547-1549, 1547-1549, 1567-1574, 1607-1610.)</p>
<p>Identify serviceable land.</p>	<p>The City has provided findings in Record 1161-1162 demonstrating lands in the prior UGB and UGB expansion are capable of being served by water, sewer, and transportation upgrades planned for the 20-year planning period to meet the technical definition of "serviceable". (Rec. 1161-62, 1604-1606.)</p>

<p>Reconcile need and supply.</p>	<p>Another way of saying this is “determine how much additional land is needed to meet the need.” The City has done this.</p> <p>The City's 2008 EOA (Record 1634) and findings (Record 1114) show the amount of land in gross acres by general site category that need to be added to the City's current inventories of economic land to meet future needs. This “reconciliation” is in the record. It assumes all existing supplies of “vacant” and “developed” land defined in statute are fully utilized according to employment densities in Record 1612. This reconciliation is done according to the complex process detailed in the City's 2008 EOA as summarized in Record 1620-1635 and 1106-1127. Findings (Record 1129-1131) provide additional conclusions supporting the need for a UGB expansion for economic lands.</p>
<p>15% vacancy rate not comply with Goal 9 rule</p>	<p>The City provides an analysis of vacancy rates complying with OAR 660-009. (Rec. 1111-12, 1616-17.) The City's work incorporates trends (Rec. 1111), local data, a vacancy rate as suggested by the Department's “Guidebook” (Rec. 1616, 1111), addresses threats to the City's economy (Rec. 1561-1562), is within measured ranges of much larger cities (Rec. 1112), and is supported by undisputed evidence in the record.</p>
<p>119 acres of residential land is not justified, and must be removed from the employment land need.</p>	<p>Director's conclusion is not clearly based in law. OAR 660-009-0025 does not provide that employment uses can only take place on lands with plan or zoning designations limited to employment uses, nor does it prohibit economic uses from residential areas, and instead requires “appropriate implementing measures” under OAR 660-009-0025.</p> <p>The record shows how this land need was defined and why it is appropriate to account for this employment. (Rec. 1113, 1573, 1575-1577, 1609-12, 1622, 1651-53, 8329.)</p>

<p>Analyze whether uses for hospital, university campus, and two 50-acre industrial sites can reasonably be accommodated within the existing UGB. Additionally, the City must "adopt measures" to protect special sites for intended uses.</p>	<p>The City did determine that there were not suitable sites for these uses within the City. (Rec. 1125 (suitable large industrial sites are not in the current supply), Rec. 1594 (map of land available for public facilities).)</p> <p>The City did adopt measure to protect the special sites. (Rec. 1340, 1239-40.)</p>
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H. Public Facilities Plans

The Public Facilities Plans section of the Report has a significant defect in its approach and analysis. The Public Facilities Plans (PFPs) were adopted separately from and prior to the UGB amendment as amendments to the Public Facilities Element (Chapter 8) of the Bend General Plan.<sup>23</sup> The adoption of the amended PFPs is subject to Goal 11 and implementing regulations. Whether the PFPs provide an adequate basis for adoption of an expanded UGB is a totally separate issue. In a fairly confusing manner, the Report fails to distinguish the two issues, ultimately determining that the PFPs do not justify the UGB expansion. That is not a valid basis for denying acknowledgment of the PFPs as to this existing UGB amendment. See ORS 197-251(6)(b) (acknowledgment may be limited to certain geographic areas).

Failure to acknowledge the PFPs to the existing UGB and the convoluted approach taken in the Report is also contrary to the basic concept of a PFP. A PFP is a plan that describes facilities "which are to support the land uses designated in the appropriate **acknowledged** comprehensive plans within an urban growth boundary containing a population greater than 2,500." OAR 660-011-0005(1) (*emphasis added*). The UGB amendment has not been acknowledged, so the PFPs were only **required** under Goal 11 to address the public facilities needed to serve the existing UGB. The City expressly asked the Director to acknowledge the PFPs as to the areas within the City, but the Director has denied the City's request.

The Report provides two basic reasons for denying the City's request for acknowledgment of the PFPs as to the existing UGB. The first is that the CSMP shows facilities that provide service outside the existing UGB, in violation of Goal 11. The prohibition is on actual extension of lines, not on planning for extensions if and when the UGB is extended, so this is not a valid basis to withhold acknowledgment. However, the City's amendments to Chapter 8 of the General Plan, Public Facilities, include policy language that clearly state the City will not provide service to these areas (Rec. 1495).

<sup>23</sup> During the amendment process, DLCD took the position that the City could not rely on public facility plans that were not adopted and incorporated as elements to the City's general plan (see Rec. 3758, 3770, 4722, 4737 DLCD letters from 10/24/08 and 11/21/08).

The second reason for failing to acknowledge the PFPs is the lack of consistency between assumptions in the PFPs and those in the housing needs analysis. That is similarly not a valid basis for not acknowledging the PFPs. The issue is whether the PFPs provide for a timely, orderly and efficient arrangement of public facilities. They do and should be acknowledged. The Department has not cited language from Goal 2 or the Goal 11 administrative rule that supports their position of a precise mathematical match of assumptions used in the residential BLI and the public facility plans.<sup>24</sup>

A further flaw in the Reports treatment of the PFPs is that it analyzes the various PFPs as if they were a single document. There is no reason to fail to acknowledge one PFP based on alleged inadequacies in a separate PFP.

While the Report muddles these two issues, the following discussion separates the two issues, so does not exactly parallel the Report.

OAR 660-011-0010 states that the PFP shall contain:

- (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

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<sup>24</sup> It should also be noted that the PFPs, as they relate to the City's existing UGB, would normally be adopted as a post acknowledgement plan amendment, and in fact were in this case. OAR 660-011-0040 (portions of PFPs adopted as part of comprehensive plans prior to periodic review will be reviewed pursuant to the post acknowledgment procedures). In an appeal pending before LUBA, the parties agreed to suspend the appeal and the City ultimately acquiesced to placing the PFPs in front of DLCD for acknowledgement. However, this does not change the fact that review of PFPs for acknowledgment is limited to meeting the Goal 11 and administrative rule requirements, the same as would have been required by LUBA. The Department cannot add its own acknowledgement criteria.

(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.

The rule specifically states that "it is not the purpose of this division to cause duplication of or to supplant existing applicable facility plans and programs. Where all or part of an acknowledged comprehensive plan, facility master plan either of the local jurisdiction or appropriate special district, capital improvement program, regional functional plan, similar plan or any combination of such plans meets all or some of the requirements of this division, those plans, or programs may be incorporated by reference into the public facility plan required by this division" 660-011-0015 (3).

Whether in the plan itself or a document incorporated by reference, the inventory must include: (a) Mapped location of the facility or service area; (b) Facility capacity or size; and (c) General assessment of condition of the facility (e.g., very good, good, fair, poor, very poor). The public facility plan shall identify significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan. The public facility plan shall list the title of the project and describe each public facility project in terms of the type of facility, service area, and facility capacity. OAR 660-011-0020.

Finally, the rules address the general timing, location and rough cost requirements:

*Timing of Required Public Facilities:* (1) The public facilities plan shall include a general estimate of the timing for the planned public facility projects. This timing component of the public facilities plan can be met in several ways depending on whether the project is anticipated in the short term or long term. The timing of projects may be related directly to population growth, e.g., the expansion or new construction of water treatment facilities. Other facility projects can be related to a measure of the facility's service level being met or exceeded, e.g., a major arterial or intersection reaching a maximum vehicle-per-day standard. Development of other projects may be more long term and tied neither to specific population levels nor measures of service levels, e.g., sewer projects to correct infiltration and inflow problems. These projects can take place over a long period of time and may be tied to the availability of long-term funding. The timing of projects may also be tied to specific years.

(2) Given the different methods used to estimate the timing of public facilities, the public facility plan shall identify projects as occurring in either the short term or long term, based on those factors which are related to project development. For those projects designated for development in the short term, the public facility plan shall identify an approximate year for development. For those projects designated for development over the long term, the public facility plan shall provide a general estimate as to when the need for project development would exist, e.g., population level, service level standards, etc. Timing provisions for public facility projects shall be consistent with the acknowledged comprehensive plan's projected growth estimates. The public facility plan shall consider the relationships between facilities in providing for development.

*Location of Public Facility Projects:* (1) The public facility plan shall identify the general location of the public facility project in specificity appropriate for the facility. Locations of projects anticipated to be carried out in the short term can be specified more precisely than the locations of projects anticipated for development in the long term.

(2) Anticipated locations for public facilities may require modifications based on subsequent environmental impact studies, design studies, facility master plans, capital improvement programs, or land availability. The public facility plan should anticipate those changes as specified in OAR 660-011-0045, 660-011-0035.

*Determination of Rough Cost Estimates for Public Facility Projects and Local Review of Funding Mechanisms for Public Facility Systems:* (1) The public facility plan shall include rough cost estimates for those sewer, water, and transportation public facility projects identified in the facility plan. The intent of these rough cost estimates is to:

(a) Provide an estimate of the fiscal requirements to support the land use designations in the acknowledged comprehensive plan; and

(b) For use by the facility provider in reviewing the provider's existing funding mechanisms (e.g., general funds, general obligation and revenue bonds, local improvement district, system development charges, etc.) and possible alternative funding mechanisms. In addition to including rough cost estimates for each project, the facility plan shall include 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. These funding mechanisms may also be described in terms of general guidelines or local policies. OAR 660-011-0035.

In reviewing a PFP, the Department shall evaluate:

- (1) Those items specified in OAR 660-011-0010;
- (2) Whether the plan contains a copy of agreements required under OAR 660-011-0011 and 660-011-015; and
- (3) Whether the public facility plan is consistent with the acknowledged comprehensive plan.

Thus, the review is fairly limited, and simply authorizes the Department to determine whether the plan contains the various specified elements and for consistency with the General Plan. The Report remands the public facilities plans back to comply with ORS 660-011-0010(1), which the Director describes as the "minimum content" although the rules do not state the content as a "minimum". In any event, the City's adoption of the public facilities plans fully satisfies the review standard found in OAR 660 – Div. 11 for each plan. (See the City's findings on Division 11 Rec. 211 – 224.) As the Public Facilities Plan is already an acknowledged element of the General Plan, the only aspects before DLCD for review are the amendments to the Public Facilities Element of the Bend General Plan. The record shows that the amended PFPs contain all seven categories of the information required under OAR 660-011-0010(1). With respect to

OAR 660-011-0010(2) there are no other special service districts with which the City has existing service agreements for water, sewer, or transportation services. With respect to OAR 660-011-0010(3), the City has shown that the water and sewer public facility plans were developed to be consistent with and support implementation of the acknowledged Bend Area General Plan.

1. The PFPs Were Validly Adopted and Should Be Acknowledged

a. Notice

The Report's analysis of the PFPs starts with a discussion of the notice provided for the PFPs. The City provided notice to DLCD of a proposed amendment on June 11, 2007. (Supp. Rec. 1587.) The Report complains that no subsequent notice was provided when the City increased the area of the UGB. (Report 77.) No additional notice regarding the PFPs was required because any changes in the PFPs were not significant enough to require re-noticing. The documents included in the June 11, 2007 Notice of Proposed Amendment were the same identified in the October 8, 2008 notice to DLCD. (Supp. Rec. 2457 – 2824.) In addition to these documents, the City included several addenda to the CSMP, including a report by Mackay and Sposito on the northeast interceptor, and a report by CH2M Hill, and Crane/Merseth, on a Hamby Road interceptor. These addenda and the CSMP serve almost all of the land included in the UGB expansion. These reports were included as addenda to the adopted CSMP. (Rec. 517, 6934.) The purpose of the reports was to respond to comments that alternative alignments would be a lower cost option to serve the UGB.

b. Compliance with OAR 660-011-0010

The Report directs that on remand the PFPs be revised to include specific content. The City provided findings on the Goal 11 Administrative rule (Rec. 211 - 224), which address the rule requirements for public facility plans. The respective documents that constitute the public facility plans are located at pages 227 through 1,049 of the record. The following table shows the record citations for the elements required under OAR 660-011-0010 for a public facility for each plan included in the City's submittal to DLCD.

OAR 660-011-0010, Public Facility Plan	Water Master Plan (see Rec. 227)	Airport Water Master plan (see Rec. 341)	Collection System Master Plan (see Rec. 385)	Wastewater Reclamation Facility Plan (see Rec. 712A)
OAR 660-011-0010(1)(a) inventory and General Assessment	Rec. 249-259; 260-271	Rec. 356-372	Rec. 402-437	Rec. 718-745
OAR 660-011-0010 (1)(b) list of significant public facility projects	Rec. 301-312	Rec. 374-376	Rec. 469-471, 474, 476, 477, 480  488, 490, 492, 507	Rec. 787 - 795

OAR 660-011-0010 (1)(c) rough cost estimates	Rec. 312, 317-336	Rec. 374-376	Rec. 469-471, 474, 476, 477,480  488, 490, 492, 507	Rec. 797-799
OAR 660-011-0010 (1)(d) map or written description of projects' general location or service area	Rec. 318	Rec. 360	Rec. 467, 468, 472, 473, 475, 478, 479  488-491  495-506	Rec. 788, 790
OAR 660-011-0010 (1)(e) policy statements or agreements	Rec. 1495	Rec. 1494	Rec. 1495	Rec. 1478
OAR 660-011-0010 (1)(g) discussion of funding mechanisms	Rec. 1487	Rec. 1478	Rec. 603-692, 1482-1483	Rec. 795, 1478

c. Water System Plan

The Report alleges that the water system master plan is incomplete because the plan does not contain details of the two private water systems that serve a part of the City. The Report also alleges a lack of coordination, presumably directed towards the lack of coordination with the two private water systems. During the City's process, no one objected regarding this issue and DLCD did not provide any comments on this issue. One of DLCD's roles is to provide assistance to local governments in their planning responsibilities. DLCD fails in that role if it fails to provide comments on a proposed comprehensive plan amendment and only raises the issue after a final decision.

The coordination requirements of Goal 2 do not apply here because Avion Water Company and Roats Water Company are private utilities, not special districts that provide water service. Both Avion and Roats are regulated by the PUC, and they answer to the PUC for their ability to meet water quality and service criteria within their service areas.

The Water PFP does identify the areas served by each system, thereby providing sufficient information for the City to plan for water service. (Rec. 249, 261, 315.) The City relied on the city's Water System Master Plan and Avion Water Company's master plan to evaluate potential areas for UGB expansion, based on whether the City or Avion would service these areas. (Rec. 6318, 6400-21.) The City included sufficient information about the private water systems to meet the standards of OAR 660 Division 11 and coordinated sufficiently with the two private water system providers. Even assuming that the water PFP should be amended to provide more detail regarding the private utilities, a partial acknowledgment as to the City water system, with a remand to complete the plan as to other areas of the City would be more appropriate. In any event, it is clearly not a reason for denying acknowledgement of other public facilities plans.

d. Collection Sewer Master Plan

The Report appears to take the position that the Collection Sewer Master Plan does not provide for adequate facilities to service existing areas, including the Central Area proposed for redevelopment and existing unserved areas. The City disagrees. The CSMP includes plans for significant additional facilities that will assure service to both redeveloping and newly developing areas within the existing UGB. The CSMP as supplemented by Addenda 1 through 3 is a document of City-wide applicability. It is a multi-component document that provides an inventory and assessment of the failing condition of areas of the sewer system serving the City. The CSMP provides a means for the City to cure existing system deficiencies and to serve lands within the existing City limits based on the already acknowledged Bend Area General Plan. Many of the facility components found in the amended CSMP adopted by the City are also found in the acknowledged 1998 General Plan and the 1996 Sewer Master Plan. The CSMP contains recommendations for necessary facility upgrades and a plan for completing those upgrades to correct existing deficiencies, without which retaining existing businesses, job growth and infill development are and will be severely limited.

To put it in factual context, today, the City only has one main trunk line serving the entire City, which is aging and has limited capacity. The City lacks system redundancy in the event of trunk line failure. (Rec. 385-516; 517-704.) The new sewer lines authorized in the adopted CSMP are also needed to serve over 4,000 households inside the City that lack sewer service or that are overcapacity. (Rec. 493-494, 723.) Over 53% of the land within the City is not currently served by the City's sewer system. (Rec. 406.) Nearly 43% of the properties that lack sewer service are developed. However, the existing trunk line is reaching capacity and will not be able to carry future wastewater flows generated by the City's growing sewer system (Rec. 395.) These deficiencies must be corrected to allow for development to occur at planned urban densities established by the City's comprehensive plan map (Rec. 447-50.) Until sewer service is provided, development is limited to the lower density of development prescribed by the City's zoning map, and even that level of development may not be attainable due to sewer system constraints.

The CSMP proposes four new interceptors for providing sanitary sewer service to improve existing service within the existing UGB and to provide new service to unserved areas within the existing UGB as follows: 1) provide a southeast interceptor to unserved areas of southeast Bend; 2) reroute flows away from the downtown core area of Bend to relieve current and future capacity deficiencies to allow redevelopment and intensification of uses in the core area; 3) provide a second trunk line to the treatment plant, providing additional required capacity and redundancy in the system, and; 4) provide a means to transition to more of a gravity-based system which would allow removal of pump stations to reduce maintenance costs and allow for intensification of uses within the existing UGB. The current capacity deficiencies in the UGB include approximately 4,200 lots that are developed, but served with on-site sewage disposal systems. One of the key goals of the CSMP is to move the City away from a system

relying on pumping and pressure to transport effluent to the treatment plant. The construction of four new interceptors will allow the City to move to a safer, more reliable, and less costly system and will allow the City to increase density.

The Report also criticizes inconsistencies between the assumptions in the CSMP and those in the City's housing needs analysis. (Report 81.) However, the CSMP assumptions are conservative assumptions intended to provide a worst-case scenario for possible demands on the system. This is not a reason to find the CSMP invalid because the CSMP does what is required – it shows the facilities that are planned and those facilities are adequate to meet demand. The consultants who prepared the CSMP relied on a higher buildout density for sizing the new lines and interceptors contemplated under the CSMP. The City's work on buildout capacity was based on the plan designations approved in 1998, and the 2006 Development Code, along with the proposed measures. The Department has not cited a legal authority that requires the City's ORS 197.296 buildable lands inventory to precisely match the Goal 11 sewer public facility plan. A reasonable person could find that the City's record supports more prudent estimates of density in the City to ensure adequate sizing of facilities, particularly if the City must employ more measures to improve efficiency and increase density of residential development in the UGB. The consultants who prepared the CSMP did this to ensure adequate capacity to address current deficiencies, potential areas that might be included in the UGB, and the potential for residential infill and redevelopment. (Rec. 415-23.)

e. Alternatives Analysis

The Director also remands the PFPs back to the City with instructions to incorporate the alternatives analysis with respect to public facilities following OAR 660-024-0060(8). As stated, the City provided this analysis with its findings on the UGB expansion. (Rec. 184-92.) The Goal 11 administrative rule does not require this analysis for PFP acknowledgment. The City fully understands that under Goal 11, any public facilities that serve the existing city boundaries cannot be used to serve areas outside the UGB until such areas are included within the UGB. The Report confuses the Goal 11 requirements for acknowledgement with the Goal 14 factor 3 boundary location determination. The City's engineering staff prepared two technical memoranda, relying on the respective water and sewer collection master plans, which provided the factual basis for the City's evaluation of potential areas for UGB expansion based on capacity to provide water and sewer service. (Rec. 6318, 6336.)

The Report takes issue with the fact that the CSMP addresses areas not included in the UGB expansion and does not include all areas within the UGB expansion. The plan is required only to plan for facilities within the acknowledged UGB (OAR 660-011-0005(1)), although it may plan for other areas. What the CSMP provides in the way of future planning for areas that may or may not be added to the UGB is irrelevant as to whether the CSMP should be acknowledged as a public facilities plan applicable within the existing UGB. The City's findings on Goal 11 (Rec. 211-24) also describe the components of the sewer public facilities plan. The sewer PFP includes not only the

Collection System Master Plan, but three addenda that cover most, but albeit not every property included in the UGB expansion. The CSMP covers the territory that is designated urban reserve under the Bend Area General Plan. Addenda 1, Final Executive Summary and "Alternative Technical Analysis: North East Bend" (2007) prepared by MacKay & Sposito, Inc, shows how the City can serve the areas included north and northeast in the UGB expansion that include exception and resource land. Addenda 3, Technical Memorandum 1.5 – Hamby Road Sewer Analysis (2008). CAMES and CH2M Hill, provides for an alignment of a sewer interceptor along Hamby Road that can serve the exception and resource lands included to the east of the current UGB. The properties south of the existing UGB along Knott Road, and north of the Baker Road interchange are not included in these plans. However, the City did determine through separate analyses in the record that the City could serve these areas through the CSMP (see August 18 memorandum from Victoria Wodrich to the Bend Planning Commission and Deschutes County Planning Commission liaisons, Rec. 6336).

In *Citizens Against Irresponsible Growth v. Metro*, 179 Or. App. 12, 16-17, 38 P.3d 956, 38 P.2d 956 (2002), the Court was faced with the argument that a local government amending its UGB must find that public facilities and services can and will be economically provided to the area to be included in the UGB before the amendment can be approved. LUBA found, and the Court concurred, that Goal 14, factor 3 (orderly and economic provision of public facilities and services), does not stand alone but is one of several factors to be considered when amending a UGB. Whether conclusively determining that public services can be provided in an orderly and economic fashion does not alone determine whether the amendment must be allowed, and no single factor is of such importance as to be determinative. Further, and significantly, the UGB amendment does not convert rural or urbanizable land to urban use but additional action will need to be taken to accomplish that result, and the amendment only sets the stage for later, more specific planning decisions. Therefore, Metro's consideration of alternative sites as part of its consideration of the Goal 14 factors did not violate the goals. *Id.* At 19.

The same analysis holds true here. Once the City has a new, acknowledged UGB, it will adopt a new, amended public facility plans providing for extending service to the newly included areas, in compliance with Goal 11 and the implementing regulations. The process must, by necessity, be sequential and interactive. Until the City adopted its final UGB boundary, and then the UGB boundary is acknowledged, it is premature and unnecessarily costly to do a Goal 11 analysis for the expansion area.<sup>25</sup> The Director should have acknowledged the PFPs. As for the Goal 14 locational analysis, the City believes that the record shows that it has done the required analysis as further set forth in Section J of this Appeal.

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<sup>25</sup> See, e.g., *Hummel v. LCDC*, supra, 152 Or. App. 404, which discussed the timing of the city's work under periodic review. Similarly, the City of Bend's UGB amendment is being reviewed by LDCD in the manner provided for periodic review. OAR 660-024-0080.

The provisions required on remand, and the City's responses, are shown in the following chart:

REQUIREMENT	RESPONSE
An inventory and general assessment of the condition of all the significant public facility systems which support the land uses designated in the acknowledged plan.	With the possible exception of the two private water systems, the PFPs already include this assessment. (Rec. 214.)
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 specification of these projects as necessary.	The PFPs already include this information. (Rec. 214 and portions of the record listed in the table above showing compliance with OAR 660-011-0010.)
Rough cost estimates of each public facility project.	The PFPs already include this information. (Rec. 214 – 215 and portions of the record listed in the table above showing compliance with OAR 660-011-0010.)
A map or written description of each public facility project's general location or service area.	The PFPs already include this information. (Rec. 215 and portions of the record listed in the table above showing compliance with OAR 660-011-0010.)
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.	The PFPs already include this information. (Rec. 215; see also amendments to Chapter 8 of Bend Area General Plan at Rec. 1478 – 1497 and portions of the record listed in the table above showing compliance with OAR 660-011-0010.)
An estimate of when each facility project will be needed.	The PFPs already include this information. (Rec. 215 and portions of the record listed in the table above showing compliance with OAR 660-011-0010.)
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.	The PFPs already include this information. (Rec. 216 and portions of the record listed in the table above showing compliance with OAR 660-011-0010.)

## I. Transportation Planning

### 1. Legal Requirements

The relevant regulation is OAR 660-024-0060(8), which provides:

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.

The rule requires "evaluation and comparison of the relative costs, advantages and disadvantages of alternative UGB expansion areas" but does not require any specific technique or process for conducting this work, it simply directs communities considering urban growth boundary modifications to provide "...an evaluation and comparison of the **relative** costs, advantages and disadvantages."

### 2. Facts: What the City Did

#### a. Transportation Modeling

The first step in the analysis of transportation system impacts was the development of a transportation model for the UGB area. This modeling work was performed by Oregon Dept. of Transportation's (ODOT's) Transportation Planning and Analysis Unit (TPAU) in coordination with DKS Associates, transportation consultant for the City on the UGB.

DKS used the model output from TPAU to prepare transportation impact analysis for a broad range of UGB growth scenarios.

One of the key building block pieces of the transportation model is trip generation. Trip generation is based on Population and Employment forecast allocations for distinct geographic areas with common transportation system characteristics. These unique areas are referred to as transportation analysis zones (TAZs). The output of the model helped to predict areas that would have traffic congestion and thus need mitigation. This work culminated with an analysis of trips generated by the UGB areas that were predicted to pass through specific nodes (intersections) and links (roadway segments). (Rec. 2184-2303, 2625-37.) DKS provided cost estimates for specific locations that would need transportation capacity improvements (transportation impact mitigation). This included an identification of each improvement related to each respective studied UGB alternative. (Rec. 2271-74.) This was the basis of their transportation improvement "mitigation" recommended caused by potential growth related to the expanded growth boundaries.

b. Goal 14 Boundary Analysis

The City performed an analysis of the different areas of the City being considered for inclusion in the UGB. (Rec. 6878-6891.) This analysis was aimed specifically at addressing each of the elements of OAR 660-024-060(8). UGB area impact scorings of the different UGB subareas reviewed were converted into a series of GIS parcel-based maps and scores assigned to individual tax lots relative to the Goal 14 transportation impacts. (Rec. 2304-31.)

c. Transportation Improvement Costs

Transportation improvement costs for needed arterial and collector streets were calculated for each TAZ in the potential UGB growth areas, (*i.e.*, the costs attributable to transportation improvements that were *within* each respective TAZ). (Rec. 3441-60.)

The costs for each TAZ were aggregated into one of ten UGB sub areas. (Summary Table, Rec. 3455, 6879.) The costs for each of the respective TAZ that fell within a UGB sub area were summed and divided by the developable acreages, resulting in a transportation "cost-per-acre" for each sub area. A score was assigned to each of the ten sub areas; a low cost received a "3", a medium cost received a "2" and a high cost received a "1". This cost-per-acre calculation was a means of normalizing the different sized TAZ areas so an "apples-to-apples" transportation improvement comparison could be achieved for the different geographically sized areas under consideration for the UGB. This information was converted into a GIS parcel-based map. (Rec. 2323.)

Transportation needs were also calculated for needed transportation mitigation related to the additional traffic impact due to new UGB area system loading. (Rec. 2271-74, 5342-53.) Likewise, these costs were assigned to different "quadrants" of the City (one quadrant was split into two so there were a total of five "quadrant" areas, *i.e.*, NW, NE,

SE, SW<sub>(e)</sub> and SW<sub>(w)</sub>). (Rec. 5348.) The mitigation costs were rated and allocated in the same manner as other costs to develop a cost-per-acre value for each described quadrant. Likewise, the cost-per-acre value for each quadrant area was assigned a score; low cost was assigned a “3”, a medium cost assigned a “2” and a high cost assigned a “1”. This information was converted into a GIS parcel-based map.<sup>26</sup> (Rec. 2330.)

d. Extraordinary Costs

Several major transportation improvements will be needed in the future regardless of which UGB boundary might be selected. These costs were termed “extraordinary” and are focused principally on the state highway system. Extraordinary costs are for improvements that benefit the entire community - particularly, those costs that may impact Highway 97 north of Colorado Avenue. (Rec. 2188.) Due to the complex nature of these projects, detail (need for preliminary engineering) and/or the consideration of numerous alternatives with a wide range of costs (e.g., US 97 North Corridor Project), it is very difficult to obtain accurate cost estimates that would be useful or accurate enough for the UGB work.

Most of the traffic generated in any part of town has a common reliance on the central and northern state highway system and most traffic filters through these limited transportation corridors for travel in or out of town. Transportation analysis by DKS determined that these are common costs regardless of what UGB area is to be developed. (Rec. 2188-89.) A ‘no UGB expansion’ (considering the same level of growth projections within the existing UGB) could well result in an even greater impact on the state highway system as there would be very limited development of alternative transportation corridors on the edge of town that could reduce highway traffic impact and the principle mode of travel for regional trips is by a motor vehicle (*i.e.*, regional trips having a negligible percentage of non-automobile trips; bike, pedestrian and/or transit).

Extraordinary costs, or costs for “big-ticket” transportation costs – given in part to the nature that these projects have a more system-wide benefit – were not included in the growth area estimates for the relative comparison of UGB impact costs. It is premature to quantify actual project costs – a task normally conducted during transportation project development. A prime example is the US 97 North Corridor Project, once envisioned as a project that could range in cost from \$125 M to \$185 M, now has estimates over \$300 M. There is also a planning effort to downscale this project improvement’s scope and/or to consider other interim or phased project elements.

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<sup>26</sup> “Developable Acres” were calculated by GIS for each TAZ. “Available acres” and “buildable acres” are used synonymously with Developable Acres. The UGB modeling only indicated a need to mitigate intersections and typically not a need to provide additional widening of existing roads. Analysis of the Bend transportation system did however indicate a failure of many transportation corridors regardless of the areas under consideration for UGB expansion.

Further, any attempt to assign these rather vague or widely ranging (and in the case of the North Corridor Refinement Study, constantly changing and fluctuating) estimates was considered to be too arbitrary. Rather, it was deemed more prudent (*i.e.*, more equitable and fair) to limit the comparison of the individual TAZ area costs to those items described above under "Transportation Improvement Costs" for a more accurate UGB development cost comparison.

3. Consistency with Goals 12 and 14 and Implementing Regulations

a. Response to Main Issues

The Report takes the position that the City's evaluation of transportation costs, which was based on the various alternative UGB locations, was improper because it failed to assign costs to individual UGB expansion areas. The rule allows the method of analysis to be within the City's discretion as long as the work product complies with the rule and is supported by substantial evidence. The City's approach to compare costs based on the alternative UGB location is consistent with the requirement of OAR 660-024-0060(8) – it is a comparison of the relative costs, advantages and disadvantages of alternative UGB expansions areas. The position taken in the Report goes beyond the requirement of the regulation. The City does not agree with a remand to follow a different methodology for evaluating the different transportation UGB expansion areas. The data was summarized on parcel-based GIS maps so fair comparisons of any combination of properties (on an individual tax lot level) could be made in the Goal 14 comparisons. The methodology used provided a fair, equitable and accurate estimate of relative cost differences to compare the different proposed UGB areas.

The consultant evaluated a base case scenario that had a very conservative growth element plus five<sup>27</sup> UGB expansion scenarios. Each of the scenarios placed emphasis on various combinations of different growth strategies that were intended to capture the full range of potential extremes that might be encountered in any UGB expansion concept. A key finding by the consultant was "the location, function and scale of needed additional improvements on the state and city street network had very many common elements among the scenarios. (Rec. 2188.) That means that the total expected investment to serve growth will be very similar, no matter which combination of areas within the planning area is selected." Staff further summarized the consultant's data which indicated that an average of 60% of the locations were common, representing an average of 70% of the total cost (net the Highway 20/97 and post DKS study completed projects). (Rec. 5342-53.) As the land use scenarios reviewed a full range of worst case situations, it supported the probable conclusion that similar combinations of lands/land uses that might be included in a final UGB package would likely result in similar transportation impacts to those included in the UGB transportation analysis.

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<sup>27</sup> A 'fifth' land use scenario; "The North/Northeast Alternative" was included in a supplemental memorandum by DKS, July, 2007 (Rec. 2260)

The Report claims that the City has not “justified alignment of costs for key major highway improvements.” The Report does not cite to any authority requiring that costs be “aligned” in any way. The City and the State have spent considerable time and effort trying to decide who should pay for the costs of major highway improvements, but the ultimate decision as to who may be responsible for those payments is not a basis for concluding that the City’s analysis of transportation costs of alternative UGB expansion areas was in any way flawed. The City does not agree that a remand to evaluate the extraordinary costs relative to the US 97 North Corridor project is required. The City does not agree that accounting of additional improvement costs along the central and northern state highway system is required. The costs are attributable to the City as a whole and any cost estimates have unreliable accuracy. There is no requirement in any applicable goal, statute or regulation that requires the City to perform substantial project engineering work to develop refined, reliable cost estimates for a particular project before it can expand its UGB. The supplemental analysis suggested by the Department is unnecessary to fulfill the Goal 14 relative cost analysis.

The City also does not agree with a remand for the City to do additional work relative to evaluating different types of roadway networks. Additional estimation work related to overcoming topographic barriers is unnecessary – topography is not a significant factor for the proposed west side arterials and collectors particularly because there is no need to accommodate a bridge within the twenty-year plan. The estimates of costs for the west side of town are realistically within an acceptable margin of error as compared to costs that were developed for other areas of the community.

The Report takes issue with the difference in the level of detail regarding the cost of improvements in the Juniper Ridge area. The City notes that a large portion of the area governed by the Juniper Ridge Master Plan is already within the UGB, and that the only area actually brought into the UGB is an area for a specific need – the “university” area. The City’s analysis contained sufficient information to support its decision on the alternative UGB expansion areas.

The Director cites communications with the City (Rec. 10378, 4722 and 4392) from both DLCD and ODOT, implying that the City ignored the comments. However, to the contrary, the City responded to each communication providing clarification, explaining the City’s position, describing additional work that the City was doing in response. (Rec. 3898, 9396, 3908.) A major source of ODOT’s concern was inclusion of the north ‘Auto Mall’ area, and the City responded by removing that area from the final UGB recommendation. The City coordinated with ODOT as required by the applicable regulation, and the coordination requirement does not compel a particular outcome.

The Report takes the position that the analysis does not appear to have taken into account existing plan policies that restrict the widening of Newport and Galveston. None of the analyses indicated a need to expand either Newport or Galveston beyond the 3 lanes permitted by existing policies, so the analysis and the proposed amendment are not in conflict with the policy regarding the widening of minor arterial roadways. (See Memorandum from DKS, Rec. 2625-26.)

The Report also criticizes the City's decision based on the fact that the final decision-maker, the City Council, made some minor changes in adopting one of the proposed alternatives, so that the evaluation of the expansion adopted does not totally conform to the analysis of the alternative UGB expansion areas. The changes were not significant enough to make a major change in the analysis, and the analysis is sufficient to support the final decision.

The Director is again holding the City to a high level of scrutiny and analysis in excruciating detail not warranted by the rules or Goal 14. In *Concerned Citizens v. Metro*, supra, 179 Or. App. 12, LUBA deferred to Metro's findings, which were based on the consultant's report in the record, that the land in the expanded area would be served with adequate transportation services. The Court upheld LUBA's decision that Metro's decision was supported by substantial evidence. Here, the City hired consultants, did its work, and made a record to support its decision. No contrary evidence is in the record on which to base the Report's criticisms.

b.. Response to Specific Issues

*West and NW UGB Road Estimates.* Topography on the west side is hillier than on the east side, and include steep slopes and canyons. The City took this into account and has planned for less of a grid pattern on the west side.

*Frequency of Roads.* The road plan for the network proposed in the UGB (Rec. 1476) follows generally the road spacing standards found in the City of Bend Transportation System Plan (TSP) (Rec. 1376-1452) that calls for collector roads on approximately a ½-mile spacing and minor arterials on a 1-mile spacing. (TSP Table 12: Rec. 1450 and TSP Figure 29: Rec. 1452.) West side roads were noted (during Planning Commission work sessions) as an exception to this spacing principally due to the barriers created by the existing development patterns on Bend's existing west side edge, the limited amount and density of the adjacent land uses (in the areas the roads would serve), the lack of any future development potential farther west (*i.e.*, the Forest Service lands) and topographic barriers. This deviation is primarily evident in the pattern of north-south corridors. East-west streets far better matched the grid system spacing guideline that is illustrated in the TSP.

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

for a distance of close to a mile (which may well generate lower costs than what was estimated).

There may be isolated exceptions to slope considerations and some short roadway sections that will have more pronounced cost that might be attributable to grade but there are other parts of town that may also have additional cost considerations that may not have been accounted for. Again, these are typically costs that are identified after more accurate field surveys and engineering has been completed for a project in the design development stage – not for rough cost estimates called for by OAR 660-012-0040. Other additional costs might include existing irrigation canal and lateral conflicts, existing utility conflicts, existing development conflicts, lava pressure ridges (peaks and troughs) and a preponderance of old existing county roads that may have non standard road sections<sup>28</sup>, all factors that are far more pronounced in areas east of the river. The City appropriately accounted for topography in its calculations.

*Juniper Ridge.* The Juniper Ridge sub area included 8-TAZs<sup>29</sup> with a total of \$117.5 M for transportation improvements over approximately 2,200 developable acres. (Rec. 2455.) This results in a cost-per-acre calculation for the Juniper Ridge sub area of \$53,796/acre. (Rec. 3457.) In comparison to the other sub areas, this cost per acre was a high unit cost and thus received a "low rating." Again as discussed in 'b.', this system of cost-per-acre provided an "apples to apples" regardless of the size of the sub area. This methodology accounted for the size of a geographic areas; a large geographic area, like Juniper Ridge, had more road costs included so the gross cost of road improvements was also higher, smaller geographic areas had fewer roads, etc. Thus, using the general spacing of ½-mile for collector or arterial roads, most sub areas had similar cost-per-acre values (*i.e.*, close to \$50,000/acre) regardless of the size of the sub area. (Rec. 3457.) The calculation for Juniper Ridge was no exception to this methodology and therefore received no advantage in the rating of sub areas due to its large acreage.

Inclusion of other costs, such as for the Cooley Road/US 97 interchange, would not have changed the rating for this subarea. An exhibit (Rec. 3458) illustrated a "Hypothetical Estimate of Including Extraordinary Costs by Sub Area." In this exercise, staff used professional judgment to apportion Extraordinary Costs to each sub area. As the cost per acre for Juniper Ridge was already high (and received a low rating), assigning more cost to the area didn't alter its already low rating so again, there was no advantage in the methodology for the Juniper Ridge sub area.

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<sup>28</sup> Cost estimates for any 'existing' roadways (common on the east side of Bend) were simply the additional cost to expand the roadway to the urban standard – these were termed "modernization" roadways. One could make an argument that these roadways actually have a higher cost to improve, as well. But due to the lack of additional detail on those roadways, such as surveys, geotechnical work and/or other detailed engineering, no attempt was made to adjust those estimates to higher (full) "new road" construction costs.

<sup>29</sup> What was called the "Juniper Ridge UGB Sub Area" in the UGB analysis included a couple of adjacent land areas - parts of TAZs #118 and 527 - that are not within the City-owned Juniper Ridge parcels resulting in a higher acreage in this sub-area than in what most people refer to as "the Juniper Ridge 1,500 acres").

c. Response to Remand Requirements

The Report remands the decision to revise the findings and analysis in specific ways. The remand requirements and the City's response are set out in the following chart:

<b>REMAND REQUIRMENT</b>	<b>CITY'S RESPONSE</b>
1. Identify and assign costs of individual UGB expansion area, rather than combination of different areas.	The City's analysis fully complies with the applicable rules.
2. Provide additional information regarding the costs of providing transportation services to serve individual areas, including any extraordinary costs related to overcoming topographic barriers or rights of way.	The City's analysis fully complies with the applicable rules.
3. Provide more detailed analysis of the extent to which the cost of improvements for major roadway improvements in the north area (including proposed improvements to Highways 20 and 97) are a result of and should be assigned to development in the north area rather than the city as a whole. (That is, the city's analysis and evaluation should assess whether the extent of improvements in the north area might be avoided or reduced in scale or cost if the UGB was not expanded in this area or if the extent of the UGB expansion were reduced.	The City's existing analysis adequately addresses these issues. As discussed above, these are system costs. The state appears to be attempting to dictate the result of a legislative decision to be made by the Council in deciding how to allocate costs.
4. Provide comparable estimates for providing needed roadway capacity for areas that, because of topographic constraints, may need to be serviced by different types of road networks. For example, growth on the each side can apparently be served by a fairly complete grid of streets, while topographic barriers limit potential for a full street grid in this area.	The City provided estimates for the expected roadway system. A more complete roadway system on the east side is anticipated, which results in higher costs, as well as the ability to move more traffic and avoid areas with traffic congestion. The City has fully analyzed these issues.

4. Need for Acknowledged Urban Area TSP

The City agrees with the Report's position that the City can rely on the partially complete and partially acknowledged TSP.

## 5. Adequate Planned Facilities

The Report takes the position that some of the zoning in the UGB expansion area may allow for development that would generate more trips than allowed by the current zoning. The Report remands the decision to either retain current zoning or evaluate and adopt findings and measures to address the transportation planning rule requirement to analyze impacts of zone changes on the transportation system.

The applicable rule is OAR 660-024-0020(1)(d), which provides that the TPR requirements of OAR 660-012-0060 are not triggered by a rezoning of land added to the UGB if existing zoning is retained or if the City assigns "interim zoning that does not allow development that would generate more vehicle trips than development allowed by zoning assigned prior to inclusion in the boundary."

The designation of the holding zones in the UGB could technically result in more vehicle trips. Assuming a highly unlikely worst case scenario that all the potential UGB properties were developed to the holding zone density maximum, it is not likely that new 'holding zone' development would result in a sufficient roadway volume increases that would have a significant affect on any segments of the transportation system to a point that it would require changing the functional classification of a road or reduce/worsen an existing or planned transportation facility below the minimum acceptable performance standard.

The City acknowledges that some of the adopted interim zoning may theoretically allow increased vehicle trips and on remand will either restore the existing county zoning or adopt zoning that does not create a potential for increased trips.

## 6. Planning Status of Deschutes River Crossing

The Report takes the position that a possible bridge over the Deschutes River in the northwest area (the Deschutes River Crossing) must be either fully addressed in the TSP or deferred with required findings. TSPs are required to address improvements anticipated in the 20-year planning horizon. The Deschutes River Crossing is an anticipated need beyond the 20-year planning horizon. (Rec. 2626.) Therefore, it does not need to be either addressed or deferred.

However, if the Commission insists, the City will simply remove the Deschutes River Crossing from any maps.

## 7. Requirement to Include Measures to Reduce Reliance on Automobiles

### a. Applicability of Metropolitan Transportation Planning Requirements

The Report takes the position that the TPR requirements applicable for metropolitan areas are applicable to the City at this time. The City does not dispute this.

b. Compliance with TPR Requirements for Metropolitan Areas

The Report takes the position that the City must adopt Commission-approved standards or benchmarks to show how the City's transportation and land use plans will significantly increase the availability and convenience of alternative modes of transportation and reduce reliance on automobiles. The City accepts that additional work needs to be done to bring the City's TSP into compliance with applicable standards for metropolitan areas.

c. Timing of Compliance

The Report appears to take the position that the City must be in compliance with the TPR requirements prior to or contemporaneously with the UGB expansion. The Report also takes the position that the TPR mandates changing land use designations and imposing higher densities. While the City agrees that compliance with the TPR is required, the Report reflects an overly aggressive interpretation of the applicable rule. The City has designated areas, the Central Plan Area and multi-modal transportation corridors, for compact mixed-use development and higher densities. The City's density is increasing, and the City has adopted minimum density standards. While the City acknowledges that it must take action to fully comply, final action is not a prerequisite to adoption of an expanded UGB. The City accepts a remand to address these TPR issues, but they do not need to be complied with prior to the UGB expansion. The applicable requirement for UGB expansion is OAR 660-024-0060(8), which simply requires an "evaluation and comparison of relative costs, advantages and disadvantages of alternative expansion areas with respect to the provision of public facilities and services." The City has conducted the evaluation and comparison in compliance with OAR 660-024-0060(8) and is not required to do more in connection with the UGB expansion.

8. Appropriate Zoning within UGB<sup>30</sup>

The Report takes the position that the City violated OAR 660-024-0050(5) by applying rural plan designations to portions of the expansion area and by failing to maintain the urban development potential of the land either by retaining pre-existing zoning or other zoning that maintains the potential for urbanization. The City accepts that it will be required to address plan designation and zoning issues on remand. To the extent that the Director intended to include a requirement that any zone change must take into account the Transportation Planning Rule, the City understands and will comply with the TPR.

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<sup>30</sup> Although the heading of this section of the Report (Report at 104) contains a reference to the Transportation Planning Rule, this section appears to be out of place because it does not relate to transportation.

## J. UGB Location

The Director asserts that the UGB locational analysis and UGB amendment is inconsistent with ORS 197.298, Goal 14 and applicable administrative rules. The Director finds numerous flaws in the City's analysis, starting with its application of suitability standards and the locational alternatives analysis. The Director is applying the standards in a matter that is not required under the language in the goal, statute and rules and is not supported by the relevant cases or the Commission's position in prior cases. A careful analysis of the process undertaken by the City and the evidence in the record demonstrates that the City's decision and process is in compliance with the statute, goal and rules.

### 1. Legal

In making a decision to expand its UGB, a local government must comply with applicable goals, statutes and regulations. The primary sources of law for determining priority of land to be included within the UGB are Goal 14, ORS 197.298, and OAR 660-024-0060. All three provisions must be considered in the UGB expansion process. ORS 197.298 and OAR 660-024-0060 together establish a priority of land to be brought into the UGB, but provide exceptions to the priority system. Those exceptions are:

1. Higher priority land can be excluded if not "suitable land." OAR 660-024-0060.
2. Lower priority can be included even if some higher priority land is not included if:
  - (a) Specific identified land needs cannot be reasonably accommodated on higher priority lands. ORS 197.298(3)(a);
  - (b) Future urban services cannot reasonably be provided to higher priority land due to topographical or other physical constraints. ORS 197.298(3)(b); and
  - (c) Maximum efficiency of land uses within the proposed UGB requires inclusion of lower priority lands to include or provide services to higher priority lands. ORS 197.298(3)(c).
3. Other provisions of state law are to be applied in determining suitability. OAR 660-024-0060(1)(e). Those provisions include Goal 14 itself, which includes the following boundary location factors:
  - (a) Efficient accommodation of identified land needs;
  - (b) Orderly and economic provisions of public facilities and services;
  - (c) Comparative environmental, energy, economic and social consequences; and

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

In addition to these exceptions, OAR 660-024-0060 provides in part: "The determination must be consistent with the priority of land specified in ORS 197.298 and the boundary location factors of Goal 14." This gives the boundary location factors of Goal 14 equal footing with the ORS 197.298 priorities. In addition to violating Goal 14, complying with the priorities of ORS 197.298 without consideration of the boundary location factors would also violate OAR 660-024-0060 ("the determination must comply with . . . the boundary location factors of Goal 14.")

This critical section on the UGB location is an instance of the Director justifying DLCD's opposition to the City's decision without analyzing recent court cases or even previous LCDC positions. Courts have unequivocally recognized that suitability, the exceptions under ORS 197.298(3) and the boundary location factors of Goal 14, allow for inclusion of lower priority land even when adjacent higher priority land is not brought in. In *City of West Linn v. LCDC*, 201 Or App 419, 440, 119 P3d 285 (2005), LCDC rejected the Petitioner's argument that before resorting to fourth-priority agriculture land in two study areas, Metro was required to conclude that none of the areas under consideration of a higher priority, wherever they may be located, provided adequate acreage. In agreeing the Court of Appeals held:

We agree with Metro that LCDC correctly construed ORS 197.298(1). The statute provides that progressively lower lands may be included within a UGB if higher priority land is "inadequate." The operative word is "inadequate." Whether there is adequate land to serve a need may depend on a variety of factors. In particular, the adequacy of land may be affected by locational considerations that must be taken into account under Goal 14. As LCDC correctly noted, ORS 197.298(1) expressly provides that priorities that it describe apply "[i]n addition to any requirements established by rule addressing urbanization," such as the locational factors described in Goal 14. As a result, the fact that other priority land may exist *somewhere* adjacent to the UGB does not necessarily mean that the land will be adequate to accommodate the amount of land needed if using it for an identified need would violate the location considerations of Goal 14. In other words, the statutory reference to "inadequate" land addresses suitability, not just quantity of higher priority land." 201 Or. App at 296.

The Court further held that the inclusion of lower priority farmland was justified under ORS 197.298(3), authorizing inclusion of such land if "[m]aximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or provide services to higher priority lands." Metro relied on evidence explaining that inclusion of such land between two exception areas would enable such areas to be efficiently urbanized and planned to satisfy its suitability factors of Goal 14.

LCDC accepted its reasons as adequate, and the Court of Appeals agreed that efficiency of land uses within the proposed UGB expansion can require inclusion of lower priority land in terms of service delivery and establishing a buffer area between remaining rural land and the nearby urban areas. *Id.* at 298-99.

More recently, in *Hildenbrand v. City of Adair Village*, 217 Or App 623, 636, n3, 177 P3d 40 (2008), the court held that the local government must demonstrate that Goal 14 factors were considered and balanced in an expansion that brought in fourth priority land under ORS 197.298. Balancing the Goal 14 boundary location factors requires evaluation and comparison of public facility costs, advantages and disadvantages for the various UGB expansion areas being considered. *Id.*, 217 Or App at 634-37.

In *Hildenbrand*, an issue was whether the local government insufficiently justified the location of the urban growth boundary expansion, which included an expansion area that was planned and zoned for agricultural uses, rather than an exception area. In upholding the City's discretion, the Court noted that ORS 197.298(3) "relaxes the prioritization requirements in certain circumstances." It reasoned:

The rationale adopted by the city and county for expanding the urban growth boundary to include fourth priority lands under ORS 197.298(1) was that extension of sewer and water services to the exception area would be cost prohibitive because of the need for expensive borings under the state highway; a more efficient transportation system could be engineered on land east of the highway; and the exception area was not configured to accommodate a stated plan objective of "compact community development" and plan growth management policies favoring a "village center" and a transportation system disassociated from the highway. After summarizing the adopted findings, the board determined:

ORS 197.298(3) allows the city to include resource land within the [Urban Growth Boundary (UGB)] over existing exception areas if urban services cannot reasonably be provided due to physical constraints. Highway 99W physically separates the existing UGB from the Tampico Road exception area, and the evidence in the record indicates that due to the high cost of extending urban services across the highway, those services cannot be reasonably provided to that area. Coupled with the findings that inclusion of the Tampico Road exception area within the UGB would be contrary to adopted Plan policies, we think the findings are sufficient under ORS 197.298(3) to justify the inclusion of lower-priority resource land in the UGB rather than the higher priority Tampico Road exception area.

On review, petitioners categorically contend that the board erred in allowing the addition of any lower-priority land to the urban growth area without proof that the quantity of all types of higher-priority lands was inadequate. That contention is inconsistent with the plain language of ORS 197.298(3) that sets out qualitative considerations for including

lower-priority land. We rejected the same contention in City of West Linn v. LCDC, 201 Or.App. 419, 119 P.3d 285 (2005). In that case, we concluded that whether there is "inadequate" land to serve a need depends on not only the constraints identified by ORS 197.298(3), but also the criteria for locating an urban growth boundary expansion under Goal 14. The "statutory reference to 'inadequate' land addresses suitability, not just quantity, of higher priority land." 201 Or.App. at 440, 119 P.3d 285. ***Thus, the ranking of land under ORS 197.298(1) is a function of its prior classification as urban reserve land, exception land, marginal land, or resource land, as well as the application of the qualitative factors under Goal 14 and ORS 197.298(3).*** *Id.* at 634-635 (*emphasis added*).

LCDC has in the past accepted that the prioritization in ORS 197.298 is not absolute. For example, in its decision reviewing the expansion of the McMinnville UGB, LCDC considered various boundary location factors to allow exception land to be excluded, including increased cost of providing urban services, and barriers caused by floodplains and state highways. As in these cases, a careful review of the record shows that the City has done the required land need analysis that must be demonstrated before including lower priority land.

## 2. The City's Analysis

The area around Bend includes Priority 2 (exception) land and Priority 4 (resource) land. There are no Priority 1 or 3 lands in the study area.

The area around Bend, in particular the area immediately to the east of Bend, is a mixture of resource and non-resource land and a checkerboard of suitable and unsuitable lands. The interspersing of resource and non-resource lands and of suitable and unsuitable lands requires the inclusion of some resource land in order to properly serve the non-resource land. The inclusion of substantial areas of unsuitable land surrounded by suitable land was done to provide needed residential and employment lands and to achieve a logical boundary configuration.

Bend's downtown is east of the Deschutes River, as are most of its industrial, employment and commercial areas. For the most part, the area west of the river is hillier. The combination of terrain, the need to cross the river, the location of the sewage treatment plant to the east of Bend, and the extent of existing infrastructure makes it generally more cost-effective to provide services on the east side of the river.

The majority (74%) of the land brought within the UGB is Priority 2 land. Only 26% of the land brought into the UGB is Priority 4 land.

The Priority 4 land that was included within the expanded UGB is to the east of Bend, and most of it is north of Highway 20. Those lands are close to the City's only sewer treatment facility and therefore significantly less costly to provide with urban services.

(Rec. 2317, 3508). There is substantial transportation infrastructure with adequate capacity in this area, and adding residential and employment uses in this area is less likely to burden Highway 97 or the Deschutes River bridges, which may become transportation bottlenecks.

Furthermore, much of the land in the area consists of non-agricultural Class VII and VIII soils. (Rec. 1194-95). While they may have agricultural zoning, they in fact are not agricultural resources. Additionally, some areas classified as resource lands have no irrigation rights, which in desert areas like the area on the east side of Bend, makes agriculture impossible.

The City used the residential land study process and additional work to develop a total land need of 4,956 acres. The process and analysis that determined total land need is discussed in Part Two, Section III.C.

With the total land need established, the City then determined how it would make decisions as to which lands to include in the UGB. OAR 660-024-0060(5) provides:

(5) If a local government has specified characteristics such as parcel size, topography, or proximity that is 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 alternative analysis and applies ORS 197.298.

Consistent with this provision, and the need to determine suitability for general housing and employment uses, the City established a process that included TAC input to develop suitability criteria. The City prepared and applied a detailed list of both general suitability criteria and special suitability criteria for identified needs. As listed at page 154 of the record, the general suitability criteria are as follows:

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

<b>Table 1: Suitability Criteria Applied to All Tax Lots in the Study Area – If ANY of these criteria are not met, the tax lots is not suitable</b>
1) <i>Flood Plain</i> : tax lot is suitable if it is not entirely within a 100-year FEMA floodplain.
2) <i>Sewer Service</i> : tax lot is suitable if it can be served by an existing or proposed City facility detailed in the 2008 Collection System Master Plan, as amended. In addition, areas of tax lots are also suitable where topography allows gravity flow to existing or proposed facilities detailed in the 2008 Collection System Master Plan, as amended. Gravity flow areas are determined by the City Engineering Division.
3) <i>Water Service</i> : tax lot is suitable if it is serviceable according to the 2007 City Water Master Plan Service, as amended or private water district service area.
4) <i>Stormwater</i> : tax lot is suitable if it is located in an area covered by a regional stormwater plan.
5) <i>Transportation</i> : tax lot is suitable if it is determined to score a Medium or High value for street connectivity (adjacent to an existing or planned grid street network) as determined by the City Long-range Planning Department.

6) <i>Mining Operations</i> : tax lot is suitable if it does not contain an active surface mine recognized as a Goal 5 resource by the Deschutes County General Plan.
7) <i>Existing Land Use</i> : tax lot is suitable if it is not a cemetery.
8) <i>Existing Land Use</i> : tax lot is suitable if it is not owned by an agency of the federal government.
9) <i>Existing Land Use</i> : tax lot is suitable if it is not a State Park or owned by the Bend Metro Park and Recreation District.
10) <i>Existing Land Use</i> : tax lot is suitable if it is not a landfill.
11) <i>Existing Land Use</i> : tax lot is suitable if it is not an approved destination resort recognized by Deschutes County.
12) <i>Existing Land Use</i> : tax lot is suitable if it is not designated as a wildlife protection area or Goal 5 resource (surface mine, historic, cultural resource) by Deschutes County.
13) <i>Development Status</i> : tax lot is suitable if it has the following traits: <ul style="list-style-type: none"> <li>• Vacant – the tax lot is undeveloped land with no improvements (raw land); OR</li> <li>• Vacant with minor improvements – the tax lot has an improvement value is less than \$20,000; OR</li> <li>• Redevelopable - tax lot is developed with 1 dwelling unit on a parcel greater than 3 acres in size (tax lots with 1 or more dwelling units on less than 3 acres are not suitable); OR</li> <li>• Developed school/church properties – tax lot is developed with a school or church and is greater than 5 acres.</li> </ul>
14) <i>Development Type</i> : tax lot is suitable if it does NOT have the following traits: <ul style="list-style-type: none"> <li>• Recreational land – the tax lots is used as a public or private open spaces; OR</li> <li>• Existing public school – the tax lots is owned by Bend-La Pine School District; OR</li> <li>• Existing public park – the tax lot is owned by Bend Metro Parks and Recreation District; OR</li> <li>• Land with a commercial farm classification – the tax lot is zoned EFUTRB with 23 acres of high value soils when irrigated (per NRCS) in addition to containing 23 acres of water rights certified by the State of Oregon Water Resources Department, <b>OR</b> the tax lot is zoned EFUAL with 36 acres of high value soils when irrigated in addition to containing 36 acres of water rights certified by the State of Oregon Water Resources Department; OR</li> <li>• CC&amp;Rs – the tax lots has recorded CC&amp;Rs that prevent further land divisions; OR</li> <li>• Rights-of-way – the tax lot is used as a private road, landscaped area, or sidewalks/pathways in common areas or public/private roads.</li> </ul>

ORS 197.298(3)(a) allows deviation from the priority of ORS 197.298(1) if “specific identified land needs cannot be reasonably accommodated on higher priority lands.” The City identified specific uses with specific land needs that cannot be met within the existing UGB: a future university, two large industrial sites, a healthcare campus, and an auto mall. Additional suitability criteria were adopted for these identified needs. (Rec. 160.) While the City decided not to pursue the auto mall and was able to find potential locations for a healthcare campus site and one large industrial site on Priority 2 lands, no Priority 2 lands met the criteria for the university or the other large industrial site. Therefore some Priority 4 lands (areas for the university and one large industrial site) were included within the expanded UGB because these were specific land needs that could not be met within the existing UGB or on Priority 2 lands, as authorized by ORS 197.298(3)(a).<sup>31</sup>

<sup>31</sup> The Report takes the position that the City has not established the unavailability of land for these two uses, but the City Council found a lack of industrial lands in the current supply (see Rec. 1125) and the map of available public facilities land demonstrates the lack of available land for the university (see Rec. 1594).

A total of 950 acres was needed for the various uses with specific land needs. That amount was deducted from the total 4,956 acre land need, leaving a target expansion of 4,006 acres for general residential and employment needs.

A total of 5,434 acres of Priority 2 land were found to meet the general suitability criteria. However, application of the boundary location factors and the standards or ORS 197.298(3)(c) (maximum efficiency), resulted in a determination that some of the Priority 2 land was not adequate to meet the City's needs. (Rec. 1178-79.)

The City ultimately developed six alternatives for the UGB boundary expansion, Alternatives 1-4 and Alternatives 3a and 4a. Each of these alternatives was based on the same determination of suitable and available parcels and the exceptions to the priority ranking system of ORS 197.298. The Goal 14 evaluation factors were applied to the six alternatives. The Planning Commission ultimately made a recommendation, which the City Council accepted with some minor modifications, based on the application of the Goal 14 factors to the alternatives, giving due consideration to ORS 197.298 and OAR 660-024-0060.

The Director appears to be concerned that a single, specific sequence was not followed by the City in its boundary alternatives process. In particular, the Director asserts that OAR 660-024-0060 was violated because the City did not clearly identify Priority 2 lands first, and then proceed to include all of those lands that were considered suitable. As discussed above, the priorities of ORS 197.298(1) must be considered along with the location factors and the exceptions of ORS 197.298(3) in order to determine those Priority 2 lands that are not only suitable, but adequate and available to meet the City's needs. Goal 14 location factor findings were adopted as the basis for identifying Priority 2 lands that were found to be both suitable, available and adequate, as well as identifying those that were not and were therefore not included in the boundary (see Rec. 4778, *et seq.*) All of those Priority 2 lands that were found to meet criteria for suitability and that were found to be adequate under the location factors and available were included in the expanded UGB boundary.

It is also important to note that at the outset of the boundary alternatives process, the City created a master database consisting of all parcels in the UGB study area (Supp. Rec. 3507). This database was created as a GIS file which enabled detailed evaluation of all 6,361 parcels based on numerous factors, including priority status. With this database the City was able to easily identify the priority status of each parcel, as well as its development status, size, zoning, proximity to existing and planned public facilities, etc. Thus, for each of the boundary alternatives considered it was possible to easily determine total acreage of Priority 2 and Priority 4 lands. The Director appears to believe that the City was required to create this master parcel database in a series of steps and started by including only Priority 2 parcels, without including any lower priority parcels. However, not only is the Director's preferred sequential process not required under the applicable rules, this approach would clearly have been an inefficient method of analysis. The fact that a single, overall database was created, allowing for evaluation

of all parcels in the study area simultaneously does not result in a violation of OAR 660-024-0060. The adopted findings are clear that the City considered all Priority 2 lands for suitability, availability and adequacy in each of the boundary alternatives that were created. These same findings justify exclusion of unavailable or inadequate Priority 2 parcels based on location factor findings lands, and inclusion of Priority 4 lands based on exceptions allowed in ORS 197.298(3).

### 3. Compliance with Location Standards

The Director and the City are in general agreement that Goal 14, ORS 197.298 and OAR 660-024-0060 contain the applicable provisions regulating which lands can be brought into the UGB. The Director and the City both agree that ORS 197.298 establishes a priority system. They also agree that lower priority land may not be brought within the UGB if suitable higher priority land is not brought in unless one of the exceptions of ORS 197.298(3) apply. Again, those three exceptions are:

- (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.

There are two main areas of disagreement between the City and the Director. First, the City and Director disagree as to the factors that can be considered in determining suitability of land for particular uses, and as to the timing of the City's application of the suitability factors. Second, the Director appears to take issue with the City's application of ORS 197.298(3).

#### a. Suitability

The City takes the position that the interrelationship between ORS 197.298, Goal 14 and OAR 660-024-0060 allow consideration of the Goal 14 factors in determining whether land is suitable and adequate. This position is consistent with the holdings in *City of West Linn v. LCDC* and *Hildebrand v. Adair Village*, discussed above, which (respectively) state that the statutory reference to "inadequate" land addresses suitability, not just quantity of higher priority land, and that the ranking of land under ORS 197.298(1) is a function of its prior classification as exception land as well as the application of the qualitative factors under Goal 14 and ORS 197.298(3).

These holdings make it clear that Goal 14 factors may be considered in determining the suitability of land under ORS 197.298. The Director ignores these holdings and takes

the position that Goal 14 factors are not considered in determining suitability under ORS 197.298 and can only be considered as location factors ranking land of equal priority.

b. Application of ORS 197.298(3)

The Director does not seem to accept that the City has justified the inclusion of some priority land under ORS 197.298(3), which allows the City to bring in lower priority land when (a) needed for specific land types, (b) when the provision of urban services cannot reasonably be provided, or (c) in order to include or service higher priority land.

c. Response to Director's Analysis and Conclusions

While the Report acknowledges the substantial effort of the City in this process, it states a concern with the exclusion of a "substantial amount of lands planned and zoned as exception land."<sup>32</sup> It is important to understand that the City did not add any Priority 4 land to the UGB based on exhaustion of all suitable Priority 2 land, but only included Priority 4 land that met one of the exceptions under ORS 197.298(3). The fact that not all Priority 2 land was added is essentially irrelevant if the only Priority 4 land brought into the UGB met the ORS 197.298(3) standard.

The City developed reasonable suitability criteria and applied those criteria in excluding land that is ill-suited to urban development. The suitability criteria are discussed in more detail in the chart below. The Director's Report appears to fault the City for applying suitability criteria to the entire UGB study area as an initial screening mechanism, prior to considering the statutory priorities under ORS 197.298(1). However, there is nothing in the language of OAR 660-024-0060 or the statute that requires the strict "iterative" process required by the Director. Rather, OAR 660-024-0050 provides that the City "may limit its consideration to land that has the specified [suitability] characteristics when it conducts the boundary location alternatives analysis and applies ORS 197.298." Consistent with this rule, the City began by excluding all land that did not meet its adopted suitability criteria, and then undertook the statutory priority analysis. The fact that DLCD staff would have preferred the City to take these steps in a different order does not mean that staff's preference is the law.

The Report notes that a substantial amount of the Priority 2 land that was not included within the expanded UGB is in suburban subdivisions that lack access to a public sewer system. No applicable law, goal or statute requires that the City fix deficiencies in existing developments outside the UGB. These rural subdivisions should never have been permitted, but the City has no responsibility for the planning and development nightmare that exists south of the City.<sup>33</sup>

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<sup>32</sup> The City notes that the term "planned and zoned as exception land" should not be interpreted as implying that these lands were planned in any way. In particular, the rural residential land to the south of town qualified as exception land because of the haphazard rural residential development in this area that resulted from a lack of planning and zoning restriction.

<sup>33</sup> The City does not intend to criticize the County, and recognizes that the existing situation is the result of a general lack of planning authority before the development of modern land use planning laws empowering counties to prohibit, restrict or regulate rural subdivisions.

The Report notes that once the City started considering agricultural resource land, it was required to prioritize based on soil classification. This was unnecessary under the rule because all of the agricultural land included in the boundary was justified under either ORS 197.298(3)(a) or (c).

The Report alleges that the findings do not justify inclusion of lower priority land when suitable higher priority land was not included. The City's findings justifying the inclusion of Priority 4 land are located at pages 130-134 of the findings. Rec.1181-1186. These findings justify the inclusion of Priority 4 land based on two of the exceptions of OAR 197.298(3).

The Director has accepted that the City has demonstrated a need for the university site and one large general industrial use site with supportive employment uses and none of the available Priority 2 land is suitable to accommodate these identified needs. These sites can be added under ORS 197.298(3)(a).

The large-site general industrial area is located east of Hamby Road just north of Highway 20.<sup>34</sup> It is not contiguous to the existing UGB. This site and adjacent supportive employment land are on and surrounded by resource land. The expansion into this site is justified by ORS 197.298(3)(a). However, because it is separate from the existing UGB by resource land, additional resource land must be included in the UGB expansion area. The area added to the UGB between Bear Creek and Neff Road is needed to serve this land and is allowed to be added under ORS 197.298(3)(a) and (c).

Additional lands are justified on the basis that they are needed to include or provide service to exception lands. ORS 197.298(3)(c). Priority 4 lands at the northeast corner of the expansion area lie between the existing UGB and areas of Priority 2 land.

Other lands on the east side are justified on the basis of the need to provide sewer service to other areas of the existing City and UGB (see Rec. 1183). The findings are adequate to include these lands, even though some suitable exception land is not included.

Table 3 of the Report discusses specific suitability criteria developed by the City. In addressing the City's suitability criteria, the Director appears to rely on portions of the Goal 14 administrative rules that were not adopted until after the City's adoption of its amended UGB. Specifically, OAR 660-024-0010(1) and (8) were not added to the regulations until after the City made its final decision, and therefore cannot be applied to the City's UGB expansion. Nevertheless, for the most part, the Report accepts the City's suitability criteria. The following chart lays out the City's response to those criteria not accepted in the Report:

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<sup>34</sup> The City is aware that the Director takes the position that the City has not made adequate findings that there are no available sites in the existing UGB, but this ignores the City's findings that "none are in the current supply." (See Rec. 1125.)

CITY CRITERION	DIRECTOR'S POSITION	CITY'S RESPONSE
Lot is serviceable for City sanitary.	The criterion is a permissible screen under OAR 660-008-005(2) . . . except for the limitation to city facilities. So long as sanitary sewer is available or feasible during the planning period, the property cannot be excluded as unsuitable.	There is no available or feasible public sanitary sewer in the area other than the City sanitary sewer system. There is no other special district provider of sewer services in the vicinity.
Street connectivity	Street connectivity is not a suitability factor but can be considered as a Goal 14 factor comparing withIn similar type (exception/resource) land.	The City can consider Goal 14 factors as part of suitability. Those factors include "efficient accommodation of identified land needs," orderly and economic provision of public facilities and services" and "comparative environmental, energy, economic and social consequences." An area that lacks street connectivity possibilities does not meet three of the four Goal 14 boundary location factors and therefore is not suitable.
Lot is not a public or private right-of-way for roads, sidewalks and/or landscaping.	Publicly owned land generally is not considered buildable or suitable and is an appropriate suitability screen. However private right-of-way is generally considered suitable and available.	Private rights-of-way for roads, sidewalks and landscaping are either undevelopable or not likely to be developed because of the rights of more than one party to keep the area open for the existing use, particularly if the rights-of-way are platted.
Lot is not a public or private open space.	This criterion is a permissible suitability screen for publicly owned open space, but not for private open space.	The definition of "buildable land" in OAR 660-008-005(2) provides that land is generally considered suitable and available unless it meets certain criteria. The inclusion of the word "generally" leaves open the possibility that other factors may make land unsuitable or unavailable. The City reasonably concluded that designated private open space is unlikely to be developed. The City uses the term "open space" to mean only land specifically identified as open space in a plan, approved site map, or zoning designation. These areas are not likely to be available for development.
Lot is developed with a school or church and is larger than five acres.	Some church and school land may be redeveloped. Such lands may be screened as unsuitable only based on findings and an adequate factual bases 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.	The City agrees that larger church/school lots (greater than five acres) are likely to be redeveloped and did not exclude those lots. The regulations do not require findings. This is an attempt to second-guess the City's determination of which lots are likely to be redeveloped. Developed land is considered redevelopable only if there is a "strong likelihood" of redevelopment. OAR 660-008-0005(6)

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.	The City's conclusion that landfills are not likely to be redeveloped under the "due to present or expected market forces, there exists the strong likelihood that existing redevelopment will be converted to more intensive . . . uses during the planning period" standard is a reasonable conclusion based on the record.
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 period.	The City reasonably concluded based on the record and existing law that destination resorts are not likely to be redeveloped during the 20-year planning period.
Lot does not have 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 does not support the city's conclusions that the listed subdivisions cannot be redeveloped. The comments in Table V-6 show that additional residential development is not prohibit 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.	The Director misunderstood the City's findings and application of the criteria. Whether the Director thinks so or not, it is not likely, and certainly not strongly likely, that there will be redevelopment within existing subdivisions, especially developed subdivisions with CC&Rs. Development of vacant lots is always possible, and vacant lots in subdivisions were counted as vacant lots in determining the capacity to provide housing units.
Lot has improvements with a value of less than \$20,000. <sup>35</sup>	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.	The Director's concern appears to be based on a dispute of what the dollar threshold should be for this criterion. The number was based on the City's determination of the likely use of properties with minimum development. Once the level of development reaches a certain threshold, the property becomes less likely to be bought or sold for redevelopment. The City's classification was reasonable and supported by the record.

<sup>35</sup> The City notes that, as applied, properties with improvement values of over \$20,000 were classified as redevelopable and suitable if the land value was greater than the improvement value.

<p>Lot has 1 dwelling and is larger than three acres.</p>	<p>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 20-year planning period. As noted in the section of this report addressing housing needs, 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. The city appears to have excluded a substantial amount of exception lands based on this criterion.</p>	<p>The City has substantial findings based on the evidence in the record. (Rec. 1171-73.) Numerous rural residential properties surround the City. People from the Valley may not understand, but people in Bend know that the owners of mini-ranches in general are not likely to subdivide their properties. The City's conclusion is rational based on the evidence. The City also notes that the City can consider the Goal 14 factors in determining suitability, and bringing in a bunch of 2.5 acre parcels is contrary to the Goal 14 factors: "efficient accommodation of identified land needs," orderly and economic provision of public facilities and services" and "comparative environmental, energy, economic and social consequences." Based on Framework Plan designations, the City will not prohibit further division of these large lots, but the City concluded that there is not a "strong likelihood" that these lots will be further subdivided during the planning period.</p>
<p>Lot is EFU-TRB with 23 acres of high value soils when irrigated or zoned EFU- AL with 36 acres of high value soils when irrigated.</p>	<p>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.</p>	<p>This criterion was used by the City as a proxy for ranking parcels by soils capability. Deschutes County defines "Commercial Farm" as a parcel with at least 23 acres of high-value soils when irrigated in the EFU-TRB zone, or a parcel with at least 36 acres of high-value soils when irrigated in the EFU-AL zone. However, given the UGB as adopted by the City, use of this criterion is moot, as explained above, because all agricultural lands included are justified under either ORS 197.298(3)(a) or (c).</p>

The Report states that by excluding a large amount of adjacent exception land as unsuitable, the City created an artificial shortage of higher priority lands, allowing the inclusion of lower priority lands. A more careful review of the record reveals that this concern is misplaced. Lower priority land was included in the UGB expansion under ORS 197.298(3), not because of the general lack of suitable Priority 2 land. Also, as explained above, the City's application of suitability standards to exclude certain adjacent exception areas as unsuitable for urban development is consistent with the

language of OAR 660-024-0060 and the Court of Appeals rulings in the *West Linn* and *Hildenbrand* cases discussed above.

The resource lands that were included are (1) the university area to the northeast of Juniper Ridge, which was included based a specific type of identified land need, (2) a large industrial site on the east side, north of Highway 20; and (3) lands on the east side of the City that were included under ORS 197.298(3)(c). The City developed extensive findings justifying the inclusion of these areas, and those findings are supported by the record. In addition, suitable Priority 2 parcels that were excluded were found to be inadequate based on application of the Goal 14 location factors. (Rec. 4778.)

The Report also claims that the City improperly aggregated lands for evaluation, taking the position that OAR 660-024-0060(6) prohibits aggregating of parcels in considering alternative areas for annexation. However, the only requirement in the rule is to describe or map all of the alternative areas evaluated in the boundary analysis (which the City did), and other provisions in the rule are permissive rather than mandatory.

The report also restates its conclusion that the City failed to assign urban plan designations to land brought within the UGB. The City has adopted a Framework Plan map (Rec. 1235), which indicates future urban plan designations for all land brought within the UGB. The City and Deschutes County have also adopted interim plan designations and zoning designations (Rec. 1850-1852) intended to maintain the urbanizable area in holding zones that do not permit more intensive uses until after annexation to the City, consistent with Goal 14.

#### 4. Compliance with ORS 197.298

The Report argues that the City did not comply with the priority system of ORS 197.298. The Report first takes the position that the City was required to prioritize by soil capability when choosing which Priority 4 lands to include. The City did not bring any Priority 4 land into the UGB under the general priority system, but only under exceptions to the Priority system. The prioritization by soil capability requirement does not apply to land brought in under ORS 197.298(3) exceptions.

The Report also takes the position that, although the City established the need for specific land use types under ORS 197.298(3), it has not established that the specific types cannot be accommodated within the existing UGB. The City established the specific need types based on a determination that there was a need for these types of lands that was not met within the City. (Rec. 1178-86.) The City specifically found that the industrial sites were not available in the City. (Rec. 1125) (“[]industries seeking large site for these uses” had considered Bend “but since none are in the current supply, the firms looked to other communities.”)

The Report takes the position that the City has not adequately justified the inclusion of lands under ORS 197.298(3). First, as discussed above, the City has justified the

inclusion of special sites (university and employment) on Priority 4 land under ORS 197.298(3)(a).

The rest of the Priority 4 land brought into the UGB meets the ORS 197.298(3)(c) standard: "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." The City's findings supporting the inclusion of these lands are at pages 131-134 of the Findings. (Rec. 1183-86.)

The City grouped these lands into four areas, Areas A, B, C and D, and prepared findings for each area. Area A is needed to provide urban services to Priority 2 land along Pioneer Loop Road. (Rec. 1183-4, including Figure V-5). Area B was included to provide urban services to Priority 2 land along Hamhook Road, north of Repine Drive. The City did adopt findings that this area includes substantial areas that have non-agricultural or lower capability soils. (Rec. 1185.)

Area C is needed to provide urban services between the City and the special large industrial site and to Priority 2 land interspersed in this area. (Rec. 1185.)

Area D includes Priority 4 lands that lie between the City (current UGB) and Priority 2 lands and which are needed to be included in the UGB to provide service to the Priority 2 lands. (Rec. 1185.)

The City's findings justify the inclusion of all Priority 4 lands under ORS 197.298(3).

5. Response to Specific Comments

The following chart sets out the City's responses to bulleted comments included in the sections of the Report on boundary location:

COMMENT	CITY'S RESPONSE
Aggregates all parcels in the study area and then applied the same "threshold suitability for all urban land needs."	The City's analysis was based on various sets of GIS data, combined into one database. The City could effectively turn layers on and off as needed in the analysis. The City properly performed its analysis.
Did not separate resource parcels by soil capability before applying site need criteria.	Because no resource land was brought in under the priority system, but only under exceptions to the priority ranking system, the soil capability standard did not apply. The City's GIS parcel database classified agricultural parcels as either Commercial Farm or not Commercial Farm, based on soil type and irrigation, as identified by Deschutes County. All other suitability criteria were applied to both Commercial Farm parcels and non-Commercial Farm parcels through the GIS database.

Did not map or describe the resource parcels in the study area by soil capability.	Based on the adopted UGB, the City did not need to map or describe the resource parcels in the study area by soil capability because the City never reached that level of analysis. The only resource land brought in by the City was land brought in under one of the exceptions of ORS 197.298(3); the City did not add any resource land based on general need.
Classified resource land by current use, which is not a valid common circumstance under Goal 14, ORS 197.298 and OAR 660-024-0060.	This statement does not correctly state any applicable legal standard. To the extent that the City did group resource land by current use, that "grouping" did not result in any land being included or excluded from the UGB.
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.	The City was not required to perform a full Goal 5 analysis. The City properly considered the developability of land and found some lands not developable and therefore not suitable. The City also estimated an amount of acreage that was considered likely to be unavailable for development due to various constraints and reasonably accounted for this acreage in locating the boundary (see Rec. 1174).
Grouped together exception and resource parcels into UGB alternative scenarios based, in part, on cost to extend sewer lines, instead of following [specified] methodology.	The City's approach was consistent with Goal 14, ORS 197.298 and OAR 660-024-0060. The City is allowed to consider "efficient accommodation of identified land needs," "orderly and economic provision of public facilities," and "comparative environmental, energy, economic and social consequences" under Goal 14. There is no prohibition under Goal 14, ORS 197.298, or OAR 660-024-0060 against considering an alternative boundary scenario based in part on cost of public facilities, including sewer.
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).	While the City did prepare separate maps based on this distinction, this did not result in any difference in the ultimate UGB. As the adopted findings indicate, both UAR and non-UAR parcels were considered on an equal footing as Priority 2 lands.
Resource land must be selected based exclusively on soil capability.	The requirement to select resource land based solely on soil capability does not apply to resource land included in the UGB under ORS 197.298(3). The only resource land the City included in the UGB was brought in under ORS 197.298(3), so the City was not required to rate soil capability.
While the City has justified specified need lands, it has not shown that they cannot be accommodated within the existing UGB.	The City has demonstrated that these needs cannot be met within the existing UGB. See discussion above.
The City has not adequately justified the inclusion of lands under ORS 197.298(3).	The City has provided an adequate justification. See discussion above.

K. Natural Resources and Hazards

1. Legal Standards

OAR 660-024-0020(1)(c) provides:

(1) All statewide goals and related administrative rules are applicable when establishing or amending a UGB, except as follows:

- (c) Goal 5 and related rules under OAR chapter 660, division 23, apply only in areas added to the UGB, except as required under OAR 660-023-0070 and 660-023-0250.

OAR 660-023-0070 is inapplicable here. OAR 660-023-0250(3)(c) describes when Goal 5 applies to a UGB amendment:

(3) 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:

\* \* \* \* \*

- (c) The PAPA amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.

Therefore, Goal 5 applies only to the extent that the City has received information **demonstrating** that a Goal 5 resource site exists within the proposed UGB expansion area.

If Goal 5 resources are identified within the UGB, the City must go through the inventory process steps of OAR 660-023-0030 to the extent necessary, but may also rely on existing inventories. The inventory process steps of OAR 660-023-0030 are:

- (a) Collect information about Goal 5 resource sites;
- (b) Determine the adequacy of the information;
- (c) Determine the significance of resource sites; and
- (d) Adopt a list of significant resource sites.

Both the City and the County have existing measures to protect significant resource sites, so inclusion of a site on the list of significant resource sites is sufficient to trigger the protection and satisfy applicable regulations.

## 2. Compliance with Goal 5 and Implementing Regulations

The Report takes the position that the City is required to conduct a new inventory, identify conflicting uses, and complete the Goal 5 process for riparian corridors, wetlands, and wildlife habitat.<sup>36</sup> The extent of the City's Goal 5 obligations is limited by OAR 660-023-0250(3), which provides: "Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource." The City implemented measures to ensure that the UGB expansion would not affect any Goal 5 resource. The City has established restrictions on any development or land use approval in any area where there is a potential Goal 5 resource, precluding any impact on a significant Goal 5 resource until a full Goal 5 inventory and analysis is performed. (Rec. 1238, 1255.)

Deschutes County has an acknowledged 2003 Goal 5 inventory for the county's unincorporated territory, including Bend's UGB expansion area, and its Goal 5 program and protective measures have been acknowledged. The County measures currently in place protecting inventoried Goal 5 resources in the UGB expansion area remain unaffected by Bend's UGB expansion.

This approach is consistent with the methodology used by the City of Sisters in 2005 and the City of Redmond in 2006. These two UGB expansions were acknowledged by the state without the requirement for a completely new inventory of Goal 5 resources and adoption of a program to provide new levels of protection.

The City's adopted UGB avoids all 2003 Deschutes County acknowledged Goal 5 resources with the exception of the Oregon Scenic Waterway. (Rec. 1215.)

However, the City accepts that the portion of the Deschutes River within the northern UGB is a Goal 5 resource under OAR 660-023-0130 Oregon Scenic Waterways as pointed out in the Report. The City agrees to designate the Oregon Scenic Waterway as a significant Goal 5 resource on the City's inventory in conformance with 660-023-0130(2), even though the OSW reach would not be within the City's jurisdiction until annexation of the territory occurs. As discussed above, the County currently has in place acknowledged protective measures that apply to this inventoried resource.

The Report would have the City conduct a broad Goal 5 inventory, not limited to sites where factual information has been submitted demonstrating that a resource site is within the UGB. While there is information that uninventoried resource sites may be in

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<sup>36</sup> The City notes that the Department's position has been something of a moving target. In his November 11, 2008 letter to the City, the Director states that the Department's position is "that applying Goal 5 in consideration of a PAPA means that there is sufficient information on the quantity, quality and location of the resources to inform decisions relevant to the UGB expansion. It is difficult to see how this can be accomplished without the inventory being initiated prior to expansion." (Rec. 3756.) Since that time, the City has explained in its record and findings that Goal 5 resources were considered and addressed as part of the UGB decision. The Department has confused the need for sufficient information with the onerous requirement for an inventory of an expansion area that was not even established until the City Council adopted its preferred alternative.

the UGB, the factual information the City has received does not demonstrate that a resource site is in fact included in the amended UGB area, other than the scenic waterways designation of the Deschutes River.

For purposes of estimating buildable acres in the expansion area consistent with OAR 660-023-0070, the City's findings include an estimate of about 299 acres that will be unsuitable and unavailable for development. (Rec. 159.) Not unlike the City's methodology for determining future rights-of-way need within the UGB, the City used a GIS analysis to consider potential view corridors and identify prominent rock outcroppings within the landscape. Through the City's land development process, the City encourages and sometimes requires the preservation of natural features as open space, even if they are not significant Goal 5 resources. Within the existing City limits, it is estimated that over 200 acres of natural features and open spaces have been preserved in this way.

The City is unaware of any other UGB expansion in which the local government has been required to conduct a Goal 5 inventory and process to the extent that the Director is asking in this case. Cities have Goal 5 jurisdiction within their boundaries and to some extent within their UGBs. They do not have Goal 5 jurisdiction outside their boundaries, on private and public land over which they have no regulatory authority. The City of Bend cannot reasonably be required to conduct a full Goal 5 inventory and analysis in the study area until after a final UGB expansion decision. Accordingly, the City has adopted policy language committing to carry out a Goal 5 inventory following acknowledgment of the amended UGB, and to require Goal 5 compliance for landowners who seek annexation or development of land prior to the City's inventory work. (Rec. 1255.)

The City disagrees with the Director's Report on most issues raised regarding Goal 5. The City is in compliance with OAR 660-023 and OAR 660-024 to the extent those rules apply with one exception. The City agrees to designate the portion of the Deschutes River designated as an Oregon Scenic Waterway on the City's Goal 5 inventory consistent with OAR 660-023-0130(2).

### 3. Goal 5 Aggregate Resources

The Report finds that a UGB expansion does not trigger a requirement for the City to conduct a new inventory of aggregate resources within the expansion area based on OAR 660-023-0180(2), which states:

*(2) Local governments are not required to amend acknowledged inventories or plans with regard to mineral and aggregate resources or at periodic review as specified in section (9) of this rule.*

The City did consider Goal 5 aggregate sites within the context of the UGB expansion. The only active aggregate site within the UGB is located within the urban reserve, with a UAR plan designation (see Rec. 3942). In 1988, the City of Bend revised the Bend

Area General Plan regarding Mineral and Aggregate Resources and recognizing their long term use as urban (see Rec. 6584).

4. Goal 7

The Report admits that there is no administrative rule implementing Goal 7 but still remands a directive that the City and county ***should consider*** the information in the Community Wildfire Protection Plan for the Greater Bend Area even though compliance with Goal 7 is not a requirement of a UGB expansion. The City already coordinates with the county and meets with other fire protection agencies on a regular basis. The City staff specifically met with Deschutes County Forester Joe Stutler to discuss the impacts of wildfire on the pending UGB. The county encouraged the City to require Wildfire Protection Plans for subdivisions that develop on the fringe of the City. Bend Fire Marshal, Gary Marshall, submitted a memo into the record to outline additional measures the City may adopt for enhanced fire protection. (Rec. 3932.) The City is not required to do more than it has done. The Director's position on Goal 7 is outside the range of the Director's discretion and is unsupported by relevant law. The City disagrees with the remand item to comply with Goal 7.

L. Procedure

1. Notice

The Report takes the position that the City violated ORS 197.610 by failing to provide adequate notice of the proposed amendment to the General Plan. The City strongly disagrees. The City provided timely notice to DLCD, and properly amended the notice as circumstances changed. The claim that anyone has not had an adequate opportunity to participate in the process, respond to submittals or present their positions is absurd. The City provided DLCD with the notice required by ORS 197.610 on June 11, 2007. (Supp. Rec. 1587.) The city amended this notice to DLCD on October 8 and 20, 2008. (Rec. 4920.) The City also provided property owners with the notice required by 1998 Ballot Measure 56 (ORS 227.186) before evidentiary hearings held in July 2007 and October 2008. (Rec. 5072, 10390.)

The City's notices complied with all applicable requirements of ORS 197.610 and OAR 660, Division 18. There is no basis for remanding for additional notice.

### **PART THREE -- CONCLUSION**

For the most part, the City acted within the range of discretion allowed by law in amending the UGB. Most of the criticisms of the City's action in the Report lack a legal and/or factual basis. The City requests that the Commission:

1. Acknowledge the PFPs as to areas within the existing UGB/City;
2. Affirm the City's decision on the UGB expansion except to the extent that the City has conceded deficiencies in this document; and
3. Remand solely to address the acknowledged deficiencies.

**APPEAL BY THE CITY OF BEND**  
**OF**  
**THE DIRECTOR'S DECISION**  
**ON**  
**THE ADOPTION OF BEND'S**  
**REVISED URBAN GROWTH BOUNDARY**  
**EXHIBIT A**

# EXHIBIT A

## Chapter 660 Land Conservation and Development Department

(b) All the participating local governments agree to apply this division for work tasks under the jurisdiction of more than one local government; and

(c) The local government provides written notice to the department. If application of this division will extend the time necessary to complete a work task, the director or the commission may consider extending the time for completing the work task as provided in OAR 660-025-0170.

Stat. Auth.: ORS 183 & 197  
Stats. Implemented: ORS 197.040 & 197.225 - 197.245  
Hitt: LCDC 2-1996, I, 8-30-96, cert. of. 9-1-96

### DIVISION 24

#### URBAN GROWTH BOUNDARIES

##### 660-024-0000

###### Purpose and Applicability

(1) The rules in this division clarify procedures and requirements of Goal 14 regarding local government adoption or amendment of an urban growth boundary (UGB).

(2) The rules in this division interpret Goal 14 as amended by Land Conservation and Development Commission (LCDC) on or after April 28, 2005, and are not applicable to plan amendments or land use decisions governed by previous versions of Goal 14 still in effect.

(3) The rules in this division are effective April 5, 2007, except as follows:

(a) A local government may choose to apply this division prior to April 5, 2007;

(b) A local government may choose to not apply this division to a plan amendment concerning the evaluation or amendment of a UGB, regardless of the date of that amendment, if the local government initiated the evaluation or amendment of the UGB prior to April 5, 2007;

(c) For purposes of this rule, "initiated" means that the local government either:

(A) Issued the public notice specified in OAR 660-018-0020 for the proposed plan amendment concerning the evaluation or amendment of the UGB; or

(B) Received LCDC approval of a periodic review work program that includes a work task to evaluate the UGB land supply or amend the UGB;

(d) A local government chooses whether to apply this division must include the entire division and may not differ with respect to individual rules in the division.

Stat. Auth.: ORS 197.040, Other Auth. Statewide Planning Goal 14  
Stats. Implemented: ORS 195.015, 195.036, 197.295 - 197.314, 197.610 - 197.650, 197.764

Hitt: LCDD 8-2006, I, 10-19-06, cert. of. 4-5-07

##### 660-024-0010

###### Definitions

In this division, the definitions in the statewide goals and the following definitions apply:

(1) "Local government" means a city or county, or a metropolitan service district described in ORS 197.015(14).

(2) "Safe harbor" means an optional course of action that a local government may use to satisfy a requirement of Goal 14. Use of a safe harbor prescribed in this division will satisfy the requirement for which it is proscribed. A safe harbor is not the only way or necessarily the preferred way to comply with a requirement and it is not intended to interpret the requirement for any purpose other than applying a safe harbor within this division.

(3) "UGB" means "urban growth boundary."

(4) "Urban area" means the land within a UGB.

Stat. Auth.: ORS 197.040, Other Auth. Statewide Planning Goal 14  
Stats. Implemented: ORS 195.015, 195.036, 197.295 - 197.314, 197.610 - 197.650, 197.764

Hitt: LCDD 8-2006, I, 10-19-06, cert. of. 4-5-07

##### 660-024-0020

###### Adoption or Amendment of a UGB

(1) All statewide goals and related administrative rules are applicable when establishing or amending a UGB, except as follows:

(a) The exceptions process in Goal 2 and OAR 660, division 4, is not applicable unless a local government chooses to take an excep-

tion to a particular goal requirement, for example, as provided in OAR 660-004-0010(j);

(b) Goals 3 and 4 are not applicable;

(c) Goal 5 and related rules under OAR 660, division 23, apply only in areas added to the UGB, except as required under OAR 660-023-0070 and 660-023-0250;

(d) The transportation planning rule requirements under OAR 660-012-0060 need not be applied to a UGB amendment if the land added to the UGB is zoned as urbanizable land, either by retaining the zoning that was assigned prior to inclusion in the boundary or by assigning interim zoning that does not allow development that would generate more vehicle trips than development allowed by the zoning assigned prior to inclusion in the boundary;

(e) Goal 15 is not applicable to land added to the UGB unless the land is within the Willamette River Greenway Boundary;

(f) Goals 16 to 18 are not applicable to land added to the UGB unless the land is within a coastal shorelands boundary;

(g) Goal 19 is not applicable to a UGB amendment.

(2) The UGB and amendments to the UGB must be shown on the city and county plan and zone maps at a scale sufficient to determine which particular lots or parcels are included in the UGB. Where a UGB does not follow lot or parcel lines, the map must provide sufficient information to determine the precise UGB location.

Stat. Auth.: ORS 197.040, Other Auth. Statewide Planning Goal 14  
Stats. Implemented: ORS 193.015, 195.036, 197.295 - 197.314, 197.610 - 197.650, 197.764

Hitt: LCDD 8-2006, I, 10-19-06, cert. of. 4-5-07

##### 660-024-0030

###### Population Forecasts

(1) Counties must adopt and maintain a coordinated 20-year population forecast for the county and for each urban area within the county consistent with statutory requirements for such forecasts under ORS 195.025 and 195.036. Cities must adopt a 20-year population forecast for the urban area consistent with the coordinated county forecast, except that a metropolitan service district must adopt and maintain a 20-year population forecast for the area within its jurisdiction. In adopting the coordinated forecast, local governments must follow applicable procedures and requirements in ORS 197.610 to 197.650 and must provide notice to all other local governments in the county. The adopted forecast must be included in the comprehensive plan or in a document referenced by the plan.

(2) The forecast must be developed using commonly accepted practices and standards for population forecasting used by professional practitioners in the field of demography or economics, and must be based on current, reliable and objective sources and verifiable factual information, such as the most recent long-range forecast for the county published by the Oregon Office of Economic Analysis (OEA). The forecast must take into account documented long-term demographic trends as well as recent events that have a reasonable likelihood of changing historical trends. The population forecast is an estimate which, although based on the best available information and methodology, should not be held to an unreasonably high level of precision.

(3) As a safe harbor, if a coordinated population forecast was adopted by a county within the previous 10 years but does not provide a 20-year forecast for an urban area at the time a city initiates an evaluation or amendment of the UGB, a city and county may adopt an updated forecast for the urban area consistent with this section. The updated forecast is deemed to comply with applicable goals and laws regarding population forecasts for purposes of the current UGB evaluation or amendment provided the forecast:

(a) Is adopted by the city and county in accordance with the notice, procedures and requirements described in section (1) of this rule; and

(b) Extends the current urban area forecast to a 20-year period commencing on the date determined under OAR 660-024-0040(2) by using the same growth trend for the urban area assumed in the county's current adopted forecast.

(4) As a safe harbor, a city and county may adopt a 20-year forecast for an urban area consistent with this section. The forecast is deemed to comply with applicable goals and laws regarding population forecasts for purposes of the current UGB evaluation or amendment provided the forecast:

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(a) Is adopted by the city and county in accordance with the notice, procedures and requirements described in section (1) of this rule;

(b) Is based on OEA's population forecast for the county for a 20-year period commencing on the date determined under OAR 660-024-0040(2); and

(c) Is developed by assuming that the urban area's share of the forecasted county population determined in subsection (b) of this rule will be the same as the urban area's current share of county population based on the most recent certified population estimates from Portland State University and the most recent data for the urban area published by the U.S. Census Bureau.

Stat. Auth.: ORS 197.040, Other Auth.: Statewide Planning Goal 14  
Stat. Implemented: ORS 195.015, 195.036, 197.295 - 197.314, 197.610 - 197.625,  
197.764  
Hist.: LCDD 8-2006, I 10-19-04, cert. cl. 4-5-07

#### 660-024-0040

##### Land Need

(1) The UGB must be based on the adopted 20-year population forecast for the urban area described in OAR 660-024-0030, and must provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period consistent with the land need requirements of Goal 14 and this rule. The 20-year need determinations are estimates which, although based on the best available information and methodologies, should not be held to an unreasonably high level of precision.

(2) If the UGB analysis or amendment is conducted as part of a periodic review work program, the 20-year planning period must commence on the date initially scheduled for completion of the appropriate work task. If the UGB analysis or amendment is conducted as a post-acknowledgement plan amendment under ORS 197.610 to 197.625, the 20-year planning period must commence either:

(a) On the date initially scheduled for final adoption of the amendment specified by the local government in the initial notice of the amendment required by OAR 660-018-0020; or

(b) If more recent than the date determined in subsection (a), at the beginning of the 20-year period specified in the coordinated population forecast for the urban area adopted by the city and county pursuant to OAR 660-024-0030, unless ORS 197.296 requires a different date for local governments subject to that statute.

(3) A local government may review and amend the UGB in consideration of one category of land need (for example, housing need) without a simultaneous review and amendment in consideration of other categories of land need (for example, employment need).

(4) The determination of 20-year residential land needs for an urban area must be consistent with the adopted 20-year coordinated population forecast for the urban area, and with the requirements for determining housing needs in Goal 10, OAR 660, division 7 or 8, and applicable provisions of ORS 197.295 to 197.314 and 197.475 to 197.490.

(5) Except for a metropolitan service district described in ORS 197.015(14), the determination of 20-year employment land need for an urban area must comply with applicable requirements of Goal 9 and OAR 660, division 9, and must include a determination of the need for a short-term supply of land for employment uses consistent with OAR 660-009-0025. Employment land need may be based on an estimate of job growth over the planning period; local government must provide a reasonable justification for the job growth estimate but Goal 14 does not require that job growth estimates necessarily be proportional to population growth.

(6) The determination of 20-year land needs for transportation and public facilities for an urban area must comply with applicable requirements of Goals 11 and 12, rules in OAR 660, divisions 11 and 12, and public facilities requirements in ORS 197.712 and 197.768. The determination of school facility needs must also comply with ORS 195.110 and 197.296 for local governments specified in those statutes.

(7) The following safe harbors may be applied in determining housing needs:

(a) Local governments may estimate persons per household for the 20-year planning period using the persons per household for the urban area indicated in the most current data for the urban area published by the U.S. Census Bureau.

(b) If a local government does not regulate government-assisted housing differently than other housing types, it is not required to estimate the need for government-assisted housing as a separate housing type.

(c) If a local government allows manufactured homes on individual lots as a permitted use in all residential zones that allow 10 or fewer dwelling units per net buildable acre, it is not necessary to provide an estimate of the need for manufactured dwellings on individual lots.

(d) If a local government allows manufactured dwelling parks required by ORS 197.475 to 197.490 in all areas planned and zoned for a residential density of six to 12 units per acre, a separate estimate of the need for manufactured dwelling parks is not required.

(8) The following safe harbors may be applied in determining employment needs:

(a) The local government may estimate that the current number of jobs in the urban area will grow during the 20-year planning period at a rate equal to either:

(A) The county or regional job growth rate provided in the most recent forecast published by the Oregon Employment Department; or

(B) The population growth rate for the urban area in the adopted 20-year coordinated population forecast specified in OAR 660-024-0030.

(b) A local government with a population of 10,000 or less may assume that retail and service commercial land needs will grow in direct proportion to the forecasted urban area population growth over the 20-year planning period. This safe harbor may not be used to determine employment land needs for sectors other than retail and service commercial.

(9) As a safe harbor during periodic review or other legislative review of the UGB, a local government may estimate that the 20-year land needs for streets and roads, parks and school facilities will together require an additional amount of land equal to 25 percent of the net buildable acres determined for residential land needs under section (4) of this rule. For purposes of this rule, a "Net Buildable Acre" consists of 43,560 square feet of residentially designated buildable land, after excluding present and future rights-of-way, restricted hazard areas, public open spaces and restricted resource protection areas.

Stat. Auth.: ORS 197.040, Other Auth.: Statewide Planning Goal 14  
Stat. Implemented: ORS 195.015, 195.036, 197.295 - 197.314, 197.610 - 197.625,  
197.764

Hist.: LCDD 8-2006, I 10-19-04, cert. cl. 4-5-07

#### 660-024-0050

##### Land Inventory and Response to Deficiency

(1) When evaluating or amending a UGB, a local government must inventory land inside the UGB to determine whether there is adequate development capacity to accommodate 20-year needs determined in OAR 660-024-0040. For residential land, the buildable land inventory must include vacant and redevelopable land, and be conducted in accordance with OAR 660-007-0045 or 660-008-0010, whichever is applicable, and ORS 197.296 for local governments subject to that statute. For employment land, the inventory must include suitable vacant and developed land designated for industrial or other employment use, and must be conducted in accordance with OAR 660-009-0015(3).

(2) As safe harbors, a local government, except a city with a population over 25,000 or a metropolitan service district described in ORS 197.015(14), may use the following assumptions in inventorying buildable lands to accommodate housing needs:

(a) The infill potential of developed residential lots or parcels of one-half acre or more may be determined by subtracting one-quarter acre (10,890 square feet) for the existing dwelling and assuming that the remainder is buildable land;

(b) Existing lots of less than one-half acre that are currently occupied by a residence may be assumed to be fully developed.

(3) As safe harbors when inventorying land to accommodate industrial and other employment needs, a local government may assume that a lot or parcel is vacant if it is:

(a) Equal to or larger than one-half acre, if the lot or parcel does not contain a permanent building; or

(b) Equal to or larger than five acres, if less than one-half acre of the lot or parcel is occupied by a permanent building.

(4) If the inventory demonstrates that the development capacity of land inside the UGB is inadequate to accommodate the estimated 20-year needs determined under OAR 660-024-0040, the local gov-

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ernment must amend the plan to satisfy the need deficiency, either by increasing the development capacity of land already inside the city or by expanding the UGB, or both, and in accordance with ORS 197.296 where applicable. Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB. Changes to the UGB must be determined by evaluating alternative boundary locations consistent with OAR 660-024-0060.

(5) 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.

Stat. Auth.: ORS 197.040, Other Auth. Statewide Planning Goal 14  
Stats. Implemented: ORS 195.015, 195.036, 197.203 - 197.314, 197.610 - 197.630,  
197.764  
Hist.: LCDD 8-2006, I, 10-19-06, cert. of. 4-5-07

#### 660-024-0060

##### 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.

(2) Notwithstanding OAR 660-024-0050(4) and subsection (1)(c) of this rule, except during periodic review or other legislative review of the UGB, a local government may approve an application under ORS 197.610 to 197.625 for a UGB amendment proposing to add an amount of land less than necessary to satisfy the land need deficiency determined under OAR 660-024-0050(4), provided the amendment complies with all other applicable requirements.

(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, those 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

(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.

Stat. Auth.: ORS 197.040, Other Auth. Statewide Planning Goal 14  
Stats. Implemented: ORS 195.015, 195.036, 197.295 - 197.314, 197.610 - 197.630,  
197.764  
Hist.: LCDD 8-2006, I, 10-19-06, cert. of. 4-5-07

#### 660-024-0070

##### UGB Adjustments

(1) A local government may adjust the UGB at any time to better achieve the purposes of Goal 14 and this division. Such adjustment may occur by adding or removing land from the UGB, or by exchanging land inside the UGB for land outside the UGB. The requirements of section (2) of this rule apply when removing land from the UGB. The requirements of Goal 14, this division, and ORS 197.298 apply when land is added to the UGB, including land added in exchange for land removed. The requirements of ORS 197.296 may also apply when land is added to a UGB, as specified in that statute. If a local government exchanges land inside the UGB for land outside the UGB, the applicable local government must adopt appropriate rural zoning designations for the land removed from the UGB before the local government applies ORS 197.298 and other UGB location requirements necessary for adding land to the UGB.

(2) A local government may remove land from a UGB following the procedures and requirements of ORS 197.764. Alternatively, a local government may remove land from the UGB following the procedures and requirements of ORS 197.610 to 197.650, provided it determines:

(a) The removal of land would not violate applicable statewide planning goals;

(b) The UGB would provide a 20-year supply of land for estimated needs after the land is removed, taking into consideration land added to the UGB at the same time;

(c) Public facilities agreements adopted under ORS 195.020 do not provide for urban services on the subject land, unless the public facilities provider agrees to removal of the land from the UGB;

(d) Removal of the land does not preclude the efficient provision of urban services to any other buildable land that remains inside the UGB; and

(e) The land removed from the UGB is planned and zoned for rural use consistent with all applicable laws.

(3) Notwithstanding sections (1) and (2) of this rule, a local government considering an exchange of land may rely on its acknowledged population forecast and land needs analysis, rather than adopt a new forecast and need analysis, provided the land added to the UGB is planned for the same uses and at the same housing or employment density as the land removed from the UGB, and provided:

(a) For residential land, the amount of buildable land added to the UGB is substantially equivalent to the amount of buildable land removed; or

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(b) For industrial or other employment land, the amount of suitable land added to the UGB is substantially equivalent to the amount of suitable land removed.

Stat. Auth.: ORS 197.040, Other Auth. Statewide Planning Goal 14  
Stats. Implemented: ORS 195.015, 195.036, 197.295 - 197.314, 197.610 - 197.650, 197.764  
Hist.: LCDD 8-2006, f. 10-19-06, cert. of. 4-5-07

### DIVISION 25

### PERIODIC REVIEW

#### 660-025-0010

##### Purpose

The purpose of this division is to carry out the state policy outlined in ORS 197.010 and 197.628. This division is intended to implement provisions of ORS 197.626 through 197.646. The purpose for periodic review is to ensure that comprehensive plans and land use regulations remain in compliance with the statewide planning goals adopted pursuant to ORS 197.230, and that adequate provision for needed housing, economic development, transportation, public facilities and services, and urbanization are coordinated as described in ORS 197.015(5). Periodic Review is a cooperative process between the state, local governments, and other interested persons.

Stat. Auth.: ORS 183 & 197  
Stats. Implemented: ORS 197.628 - 197.646  
Hist.: LCDC 1-1992, f. & cert. of. 1-28-92; LCDD 3-2000, f. & cert. of. 2-14-00; LCDD 3-2004, f. & cert. of. 3-7-04; LCDD 4-2006, f. & cert. of. 3-15-06

#### 660-025-0020

##### Definitions

For the purposes of this division, the definitions contained in ORS 197.015, 197.303, shall apply unless the context requires otherwise. In addition, the following definitions apply:

(1) "Economic Revitalization Team" means the team established under ORS 284.555.

(2) "Filed" or "Submitted" means that the required documents have been received by the Department of Land Conservation and Development at its Salem, Oregon, office.

(3) "Final Decision" means the completion by the local government of a work task on an approved work program, including the adoption of supporting findings and any amendments to the comprehensive plan or land use regulations. A decision is final when the local government's decision is transmitted to the department for review.

(4) "Metropolitan planning organization" means an organization located wholly within the State of Oregon and designated by the Governor to coordinate transportation planning in an urbanized area of the state pursuant to 49 USC 5303(c).

(5) "Objection" means a written complaint concerning the adequacy of an evaluation, proposed work program, or completed work task.

(6) "Participated at the local level" means to have provided substantive comment, evidence, documents, correspondence, or testimony to the local government during the local proceedings regarding a decision on an evaluation, work program or work task.

(7) "Work Program" means a detailed listing of tasks necessary to revise or amend the local comprehensive plan or land use regulations to ensure the plan and regulations achieve the statewide planning goals. A work program must indicate the date that each work task must be submitted to the department for review.

(8) "Work Task" or "task" means an activity, that is included on an approved work program and that generally results in an adopted amendment to a comprehensive plan or land use regulation.

Stat. Auth.: ORS 183 & 197  
Stats. Implemented: ORS 197.015 & 197.628 - 197.646  
Hist.: LCDC 1-1992, f. & cert. of. 1-28-92; LCDC 6-1995, f. & cert. of. 6-16-95; LCDD 3-2000, f. & cert. of. 2-14-00; LCDD 4-2006, f. & cert. of. 3-15-06

#### 660-025-0030

##### Periodic Review Schedule

(1) The commission must approve, and update as necessary, a schedule for periodic review. The schedule must include the date when each local government must be sent a letter by the department requesting the local government to commence the periodic review process.

(2) The schedule developed by the commission must reflect the following:

(a) A city with a population of more than 2,500 within a metropolitan planning organization or a metropolitan service district shall conduct periodic review every seven years after completion of the previous periodic review.

(b) A city with a population of 10,000 or more inside its urban growth boundary that is not within a metropolitan planning organization shall conduct periodic review every 10 years after completion of the previous periodic review.

(c) A county with a portion of its population within the urban growth boundary of a city subject to periodic review under this section shall conduct periodic review for that portion of the county according to the schedule and work program set for the city.

(d) Notwithstanding subsection (c) of this section, if the schedule set for the county is specific as to that portion of the county within the urban growth boundary of a city subject to periodic review under this section, the county shall conduct periodic review for that portion of the county according to the schedule and work program set for the county.

(3) The commission may establish a schedule that varies from the standards in section (2) of this rule if necessary to coordinate approved periodic review work programs or to account for special circumstances. The commission may schedule a local government's periodic review earlier than provided in section (2) of this rule if necessary to ensure that all local governments in a region whose land use decisions would significantly affect other local governments in the region are conducting periodic review concurrently, but not sooner than five years after completion of the previous periodic review.

(4) The director must maintain and implement the schedule. Copies of the schedule must be provided upon request.

Stat. Auth.: ORS 197.040 & 197.633  
Stats. Implemented: ORS 197.628 - 197.646  
Hist.: LCDC 1-1992, f. & cert. of. 1-28-92; LCDD 3-2000, f. & cert. of. 2-14-00; LCDD 4-2006, f. & cert. of. 3-15-06

#### 660-025-0035

##### Initiating Periodic Review Outside the Schedule

(1) A local government may request, and the commission may approve, initiation of periodic review not otherwise provided for in the schedule established under OAR 660-025-0030. The request must be submitted to the commission along with justification for the requested action. The justification must include a statement of local circumstances that warrant periodic review and identification of the statewide planning goals to be addressed.

(2) In consideration of the request filed pursuant to section (1), the commission must consider the needs of the jurisdiction to address the issue(s) identified in periodic review, the interrelationships of the statewide planning goals to be addressed in the periodic review project, and other factors the commission finds relevant. If the commission approves the request, the provisions of this division apply, except as provided in section (3) of this rule.

(3) The Economic Revitalization Team may work with a city to create a voluntary comprehensive plan review that focuses on the unique vision of the city, instead of conducting a standard periodic review, if the team identifies a city that the team determines can benefit from a customized voluntary comprehensive plan review. In order for a voluntary comprehensive plan review to be initiated by the commission, the city must request initiation of such a modified periodic review. The provisions of this division apply except as follows:

(a) If the city is subject to the periodic review schedule in OAR 660-025-0030, the periodic review under this section will not replace or delay the next scheduled periodic review;

(b) If the city misses a deadline related to an evaluation, work program or work task, including any extension, the commission must terminate the evaluation, work program, or work task or impose sanctions pursuant to OAR 660-025-0170(3).

(4) If the commission pays the costs of a local government that is not subject to OAR 660-025-0030 to perform new work programs and work tasks, the commission may require the local government to complete periodic review when the local government has not completed periodic review within the previous five years if:

(a) A city has been growing faster than the annual population growth rate of the state for five consecutive years;

**APPEAL BY THE CITY OF BEND**  
**OF**  
**THE DIRECTOR'S DECISION**  
**ON**  
**THE ADOPTION OF BEND'S**  
**REVISED URBAN GROWTH BOUNDARY**  
**EXHIBIT B**

## Exhibit B

**OAR 660-025-0140**

### **Notice and Filing of Objections (Work Task Phase)**

- (1) After the local government makes a final decision on a work task, the local government must notify the department and persons who participated at the local level orally or in writing during the local process or who requested notice in writing. The local government notice must contain the following information:
  - (a) Where a person can review a copy of the local government's final decision, and how a person may obtain a copy of the final decision;
  - (b) The requirements listed in section (2) of this rule for filing a valid objection to the work task; and
  - (c) That objectors must give a copy of the objection to the local government.
- (2) Persons who participated at the local level orally or in writing during the local process leading to the final decision may object to the local government's work task submittal. To be valid, objections must:
  - (a) Be in writing and filed with the department's Salem office no later than 21 days from the date the notice was mailed by the local government;
  - (b) Clearly identify an alleged deficiency in the work task sufficiently to identify the relevant section of the final decision and the statute, goal, or administrative rule the task submittal is alleged to have violated;
  - (c) Suggest specific revisions that would resolve the objection; and
  - (d) Demonstrate that the objecting party participated at the local level orally or in writing during the local process.
- (3) Objections that do not meet the requirements of section (2) of this rule will not be considered by the director or commission.

## Objection to the UGB Adoption

Objector	Date Received	Summary of Issues Raised	Valid / Invalid Objection Consistent with 660-025-0140
David Allen for Tumalo Creek Development, LLC.	5/07/09	1) The City impermissibly "re-zoned" lands within the proposed UGB by adopting the framework plan (economic lands & ASI's); Violation of Goal 2. 2) ASI's do not meet Goal 5 for designation. 3) The City's PFP did not consider more cost effective alternatives.	<b>Valid</b> - Not all issues addressed identify specific statute or goal of alleged violation. Nonetheless, it is possible to determine the issue of concern.
Corinne Sherton for Shevlin Sand and Gravel	5/07/09	City does not provide Goal 2 factual basis for designating portions of the SSG's property for Surface Mining when the designated areas cannot legally be mined.	<b>Valid</b>
Gary L. Vrooman for DSL	5/07/09	1) City failed to demonstrate that the Comp. Plan and proposed UGB provide sufficient buildable land to accommodate the projected housing need. 2) The inclusion of UGB lands does not comply with priority requirements in ORS 197.298. 3) City failed to conduct Goal 5 inventories and analysis. 4) Transportation analysis for UGB was improperly implemented and is incomplete.	1) <b>Invalid</b> - Does not comply with 660-025-0140(2)(c); did not suggest specific revisions to resolve objection, only to conduct an analysis as required in ORS, OAR and by the DLCD. 2) <b>Valid</b> 3) <b>Valid</b> 4) <b>Valid</b>
Andrew Stamp for Mark Anderson	5/07/09	City's proposal understates the land need for right of way and therefore fails to comply with land need requirements of OAR 660-040-0040.	<b>Valid</b>
Harold Simpson	5/07/09	Property was originally in the boundary and was taken out without reason.	<b>Invalid</b> - Does not comply with 660-025-0140(2)(b) or (c); did not identify relevant goal or policy that is violated by the proposal and does not suggest specific revisions to resolve the objection. No record that the objector has standing.

Objector	Date Received	Summary of Issues Raised	Valid / Invalid Objection Consistent with 660-025-0140
Paul Dewey for Central Oregon Landwatch	5/07/09	<ol style="list-style-type: none"> <li>1) City violates Goal 1 and it's own public process by failing to allow the public to comment on information submitted into the record.</li> <li>2) Inadequate factual base under Goal 2.</li> <li>3) The residential and economic land need is grossly overstated.</li> <li>4) The City improperly applied the land priority criteria. <ul style="list-style-type: none"> <li>• Lands were improperly treated as "exception" lands;</li> <li>• City failed to prioritize inclusion of lands with lower quality soils; and</li> <li>• City failed to recognize that other needs can override priority criteria.</li> </ul> </li> <li>5) City failed to properly take into account economic factors and to assess differences in costs of the various alternatives.</li> <li>6) Failed to meet Goal 5.</li> <li>7) Failed to show compatibility with nearby farm and forest lands.</li> <li>8) City failed to provide adequate affordable housing.</li> <li>9) Failed to include PFP as part of review and lacks adopted and acknowledged TSP.</li> <li>10) Failed to comply with Goal 7 (Natural Hazards).</li> </ol>	<ol style="list-style-type: none"> <li>1) <b>Valid</b></li> <li>2) <b>Valid</b> - although the resolution is vague.</li> <li>3) <b>Invalid</b> - Does not comply with 660-025-0140(c).</li> <li>4) <b>Valid</b></li> <li>5) <b>Invalid</b> - Does not comply with 660-025-0140(c).</li> <li>6) <b>Valid</b></li> <li>7) <b>Invalid</b> - Does not comply with 660-025-0140(c).</li> <li>8) <b>Invalid</b> - Does not comply with 660-025-0140(c).</li> <li>9) <b>Invalid</b> - Does not comply with 660-025-0140(c).</li> <li>10) <b>Valid</b></li> </ol> <p>The objector makes a general statement at the start of the objection to remand and re-do the UGB to be consistent with statutes, goals, rules and policies and to update data. The conclusion is more vague, requiring the state to remand the UGB and for the City to correct the problems identified. Several times the objector relies on the statements of another objector as satisfying 660-025-0140.</p>

Objector	Date Received	Summary of Issues Raised	Valid / Invalid Objection Consistent with 660-025-0140
Wendy Kellington for Swalley Irrigation	5/07/09	1) Objects to DLCD as the jurisdiction for this matter. 2) Process violation for notice submittal for April 16, 2009. <ul style="list-style-type: none"> <li>• Violation of Goal 1, objects to local process leading to submitted decision; and</li> <li>• Failure to comply with Goal 2 coordination obligation.</li> </ul> 3) Violation of ORS 197.298 by determining UAR land to be acknowledged exception land. 4) City failed to apply urbanization standards to UAR areas. 5) Failure to prioritize lands based on soil types. 6) Improperly applied ORS 197.298 resulting in goal violations. 7) The amount of land determined to be needed is too high and the amount within the adopted boundary exceeds the determined need. 8) Improper analysis and alternatives analysis. 9) Failure to perform Goal 12 and TPR analysis. 10) Failure to propose proper plan and code amendments; <ul style="list-style-type: none"> <li>• City zoning amendments improperly take exceptions to Goal 3 for lands know as UAR without applying Goal 3 exception analysis;</li> <li>• Object to plan references to the Framework Plan;</li> <li>• City and County zones do not adequately protect irrigation service, irrigation infrastructure and agriculture;</li> <li>• Chapter 6 includes policies, aspirations and programs that have been improperly adopted, lack adequate evidentiary support; and</li> <li>• Plan and zone amendments are inadequate for protecting environmental and natural resources.</li> </ul> 11) Object to Public Facility Plans.	Valid
Terry Anderson	5/07/09	The City did not follow state guidelines for determine UGB boundary and failed to bring in the Buck Canyon area.	Invalid - The objector does not comply with 660-025-0140(b) and (c).

Objector	Date Received	Summary of Issues Raised	Valid / Invalid Objection Consistent with 660-025-0140
Robert Lovlien for Roses and Associates	5/07/09	1) The City improperly prioritized "urban reserve" lands. 2) When applying Goal 14, the City did not consider orderly and economic provision of public facilities and services as required. Also, the City failed to consider alternatives to gravity sewer and incorrectly claimed that areas in the southeast lacked serviceability. 3) The City failed to comply with Goal 1 by adopting the Public Facility Plans without a separate hearing. 4) The proposal fails to compare EISE consequences. 5) The proposed UGB conflicts the adopted General Plan by extending development east along Hwy 20. 6) The City made errors based on incorrect information about sewer serviceability.	Valid
Neil Bryant for the Bend Park and Rec.	5/07/09	The City failed to provide adequate Goal 5 analysis and inappropriately defers the Goal 5 work until after the adoption of the UGB.	Valid
Helen Eastwood for Bend La Pine Schools	5/07/09	Lack of planning and coordination between the Redmond School District and the Bend La Pine Schools resulting in a UGB that includes property within both districts.	Valid
Barbra McAusland	5/06/09	Objects to expansion to the west due to infrastructure costs and impacts to wildlife. Disagrees with the land need assumptions for second homes. Second homes are not a "need but a want." The City has proposed excessive amounts of economic lands that cannot be supported.	Valid

<b>Objector</b>	<b>Date Received</b>	<b>Summary of Issues Raised</b>	<b>Valid / Invalid Objection Consistent with 660-025-0140</b>
Christe C. White for Newland Communities	5/06/09/ email 5/07/09 mail	Objects to the methodology used for determining residential land need under ORS 197.296(3)(b). The City underestimated the land need within the UGB. Objects to the Housing mix assumption of use and believes the City should use the forecasted split. Objects to the incomplete analysis of the legal and factual basis in the findings. Objects to the reference of "surplus land" and believes the 519 acres is needed land to support economic and residential uses.	<b>Valid</b>
Elaine Albrich for Miller Tree Farm, LLC.	5/06/09	City did not properly prioritize land for inclusion under ORS 197.298. The City classified UAR as priority 2 rather than first priority land.	<b>Valid</b>
Bruce White/for Carpenter, McGilvary	5/05/09	Fails to comply with OAR 660-040-0040 with regard to land need for right-of-way. The City did not account for additional land needed for stormwater retention.	<b>Valid</b>
Paul Shonka	5/05/09	These two letters are identical. The adopted UGB is inconsistent with Goal 14 and ORS 197.298. The boundary includes too much EFU land and excludes suitable exception land. Boundary creates compatibility conflicts with rural farm land to the east. Not an efficient accommodation of lands.	<b>Valid</b>
Cindy B. Shonka	5/05/09		<b>Valid</b>
E. M. Holliday / Diamond H Holdings	5/05/09	Goal 14 issue – use of "tax lot" as a criterion for land use determination is inappropriate. There are inconsistencies in the application of the rule. The proposed sewer interceptor is located along the south boundary resulting in an impact to the existing pond and irrigation system. Major roads are proposed along the east and south boundaries of the property.	<b>Invalid</b> - Does not comply with 660-025-0140(b) or (c).
Chuck McGraw for Tony & Cyllene King	5/05/09 / email 5/06/09 / mail	Inconsistent with Goal 14 and ORS 197.298. The adopted boundary includes too much EFU land and excludes suitable exception land. Boundary creates compatibility conflicts with rural farm land to the east.	<b>Valid</b>

Objector	Date Received	Summary of Issues Raised	Valid / Invalid Objection Consistent with 660-025-0140
Jeffrey Condit for Brooks Resources Corp.	5/04/09	<p>The location of the economic lands shown on the Framework Plan is flawed.</p> <ul style="list-style-type: none"> <li>• Land within the existing UGB could have been rezoned to accommodate much of the forecasted need whereby violating Goal 14;</li> <li>• Designation conflicts with Goal 9 by locating the economic lands in areas that are better suited for residential development; and</li> <li>• Conclusions are not supported by an adequate factual base and are inconsistent with policies in the adopted Plan whereby violating Goal 2.</li> </ul>	<b>Valid</b>
Tony Asceti	5/04/09	City violated Goal 14 by including EFU lands to the east instead of available exception lands to the south.	<b>Valid</b>
Toby Bayard	4/29/09 / email	<ol style="list-style-type: none"> <li>1) The City violates Goal 1 - citizen involvement.</li> <li>2) The City violated Goal 2.</li> <li>3) The City violated Goal 5.</li> <li>4) Excessively large UGB.</li> <li>5) The City underestimated the land need for affordable housing.</li> </ol>	<ol style="list-style-type: none"> <li>1) <b>Invalid</b> - Does not comply with 660-025-0140(c) except to remand the package back to the city and rely on the State to prescribe the solution.</li> <li>2) <b>Invalid</b> - Does not comply with 660-025-0140(c).</li> <li>3) <b>Invalid</b> - Does not comply with 660-025-0140(b) The OAR cited as being violated has no statutory requirements.</li> <li>4) <b>Valid</b></li> <li>5) <b>Invalid</b> - Does not comply with 660-025-0140(b) or (c).</li> </ol>

Objector	Date Received	Summary of Issues Raised	Valid / Invalid Objection Consistent with 660-025-0140
Ed Elkins	4/28/09	1) Objects to use of "available" land to meet described need. Specifically, he objects to the potential unidentified Goal 5 and open-space acres that were used to determine the boundary. 2) Objects to the assumption that lands in Gopher Gulch will be constrained under Goal 5 without doing the analysis.  Recommends remand to the City to complete Goal 5 inventory.	<b>Valid</b>
Keith Spencer on behalf of Anna Morrison Spencer	4/27/09	Never received notice of record closing. Was unable to attend final meetings and was unaware of the map changes and deadlines for comment.	<b>Invalid</b> - Does not comply with 660-025-0140(b) or (c); relies on previously submitted information to make argument.
Hilary Garret	4/22/09	1) Opposes the inclusion of the Boe and Newland properties. In general, opposes expansion east of Hamby. <ul style="list-style-type: none"> <li>• Flawed prioritization, ignores City's need to serve properties already in the City limits;</li> <li>• Arbitrary inclusion of small parcels while excluding others; and</li> <li>• Ignores Goal 1 – citizen involvement.</li> </ul>	<b>Invalid</b> - Does not comply with 660-025-0140(c)
John Driscoll	2/19/09	The proposed UGB is unwarranted. Central Oregon is in an economic recession.	<b>Invalid</b> - Does not comply with 660-025-0140(1) or (2). There is no record that the Objector has standing; did not address a specific issue or provide a resolution.

(Objection from Fred and Katy Boos was not considered because it was received on May 19<sup>th</sup> after the appeal period had ended.)

## Objections to Public Facilities Plans

Objector	Date Received	Summary of Issues Raised	Valid / Invalid Objection Consistent with 660-025-0140
Paul Dewey for Central Oregon Landwatch	07/06/09	<ol style="list-style-type: none"> <li>1) Violated Goal 1 and own City process requirements.</li> <li>2) Lacks adequate Factual base under Goal 2.</li> <li>3) Failed to follow Goal 5.</li> <li>4) Failed to take into account Goal 14 economic factors and differences in costs of alternatives.</li> <li>5) Apparently no adoption of an ordinance by Deschutes County.</li> </ol>	<ol style="list-style-type: none"> <li>1) – <b>Invalid</b> - Does not comply with 660-025-0140(b) or (c); objector relies on the statements of another objector as satisfying 660-025-0140.</li> <li>2) – <b>Invalid</b> - Does not comply with 660-025-0140(b) or (c) objector relies on the statements of another objector as satisfying 660-025-0140.</li> <li>3) – <b>Invalid</b> - Does not comply with 660-025-0140(b) or (c) objector relies on the statements of another objector as satisfying 660-025-0140.</li> <li>4) – <b>Invalid</b> - Does not comply with 660-025-0140(b) or (c) objector relies on the statements of another objector as satisfying 660-025-0140.</li> <li>5) – <b>Invalid</b> - Does not comply with 660-025-0140(b) or (c) objector relies on the statements of another objector as satisfying 660-025-0140.</li> </ol>
Hilary Garrett	07/06/09	Objects to Hamby Road Interceptor as a means of including priority 4 lands into the UGB.	<b>Valid</b>
Michel Bayard - Hunnell United Neighbors	07/02/09	<ol style="list-style-type: none"> <li>1) Goal 1 violation.</li> <li>2) Goal 11 violation.</li> </ol>	<b>Valid</b>

<b>Objector</b>	<b>Date Received</b>	<b>Summary of Issues Raised</b>	<b>Valid / Invalid Objection Consistent with 660-025-0140</b>
Toby Bayard	07/02/09	1) Goal 1 violation. 2) Goal 5. 3) Goal 11. 4) Goal 14.	<b>Valid</b>
Timothy Elliott for Anderson Ranch	07/01/09	Adoption of PFP violated Goal 1.	<b>Invalid</b> - Does not comply with 660-025-0140 (c).
Robert S. Lovlein for Rose and Associates	07/01/09	1) Goal 1. 2) Goal 11.	<b>Invalid</b> - Does not comply with 660-025-0140 (c).
Jan Ward	06/24/09	Adopted plans are inconsistent with the adopted UGB boundary.	<b>Invalid</b> - Does not comply with 660-025-0140(b) or (c).

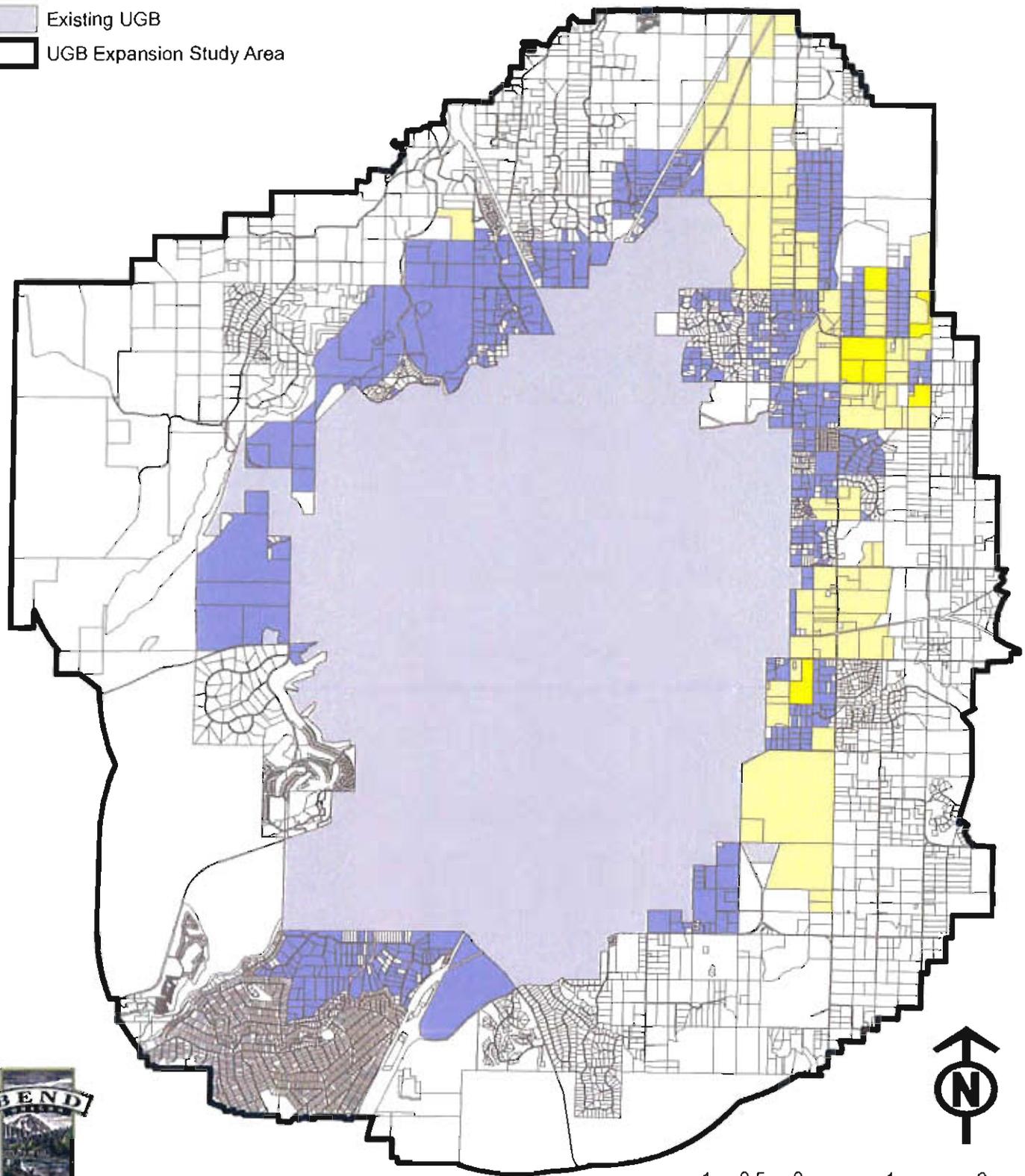
**APPEAL BY THE CITY OF BEND**  
**OF**  
**THE DIRECTOR'S DECISION**  
**ON**  
**THE ADOPTION OF BEND'S**  
**REVISED URBAN GROWTH BOUNDARY**  
**EXHIBIT C**

## **Exhibit C**

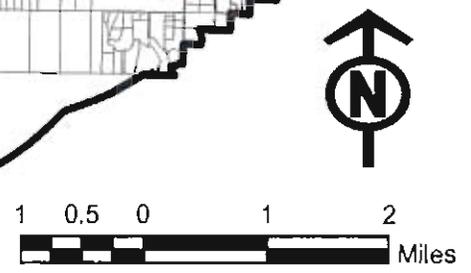
- Suitable/Available Lands in UGB Expansion Study Area by Priority Class (Rec. 155)
- Alternative 4A – Suitable/Available Urban Reserve Lands (Rec. 163)
- Alternative 4A – Suitable/Available Non-UAR Priority 2 (Exception) Lands (Rec. 164)
- Alternative 4A – Suitable/Available Resource Lands (Rec. 165)

# Suitable/Available Lands in UGB Expansion Study Area by Priority Class

-  Suitable & Available Priority 2 Lands (UAR & Exception)
-  Suitable & Available Priority 4 Lands (Resource)
-  Commercial Farms, but Available and Otherwise Suitable Resource Lands
-  Existing UGB
-  UGB Expansion Study Area

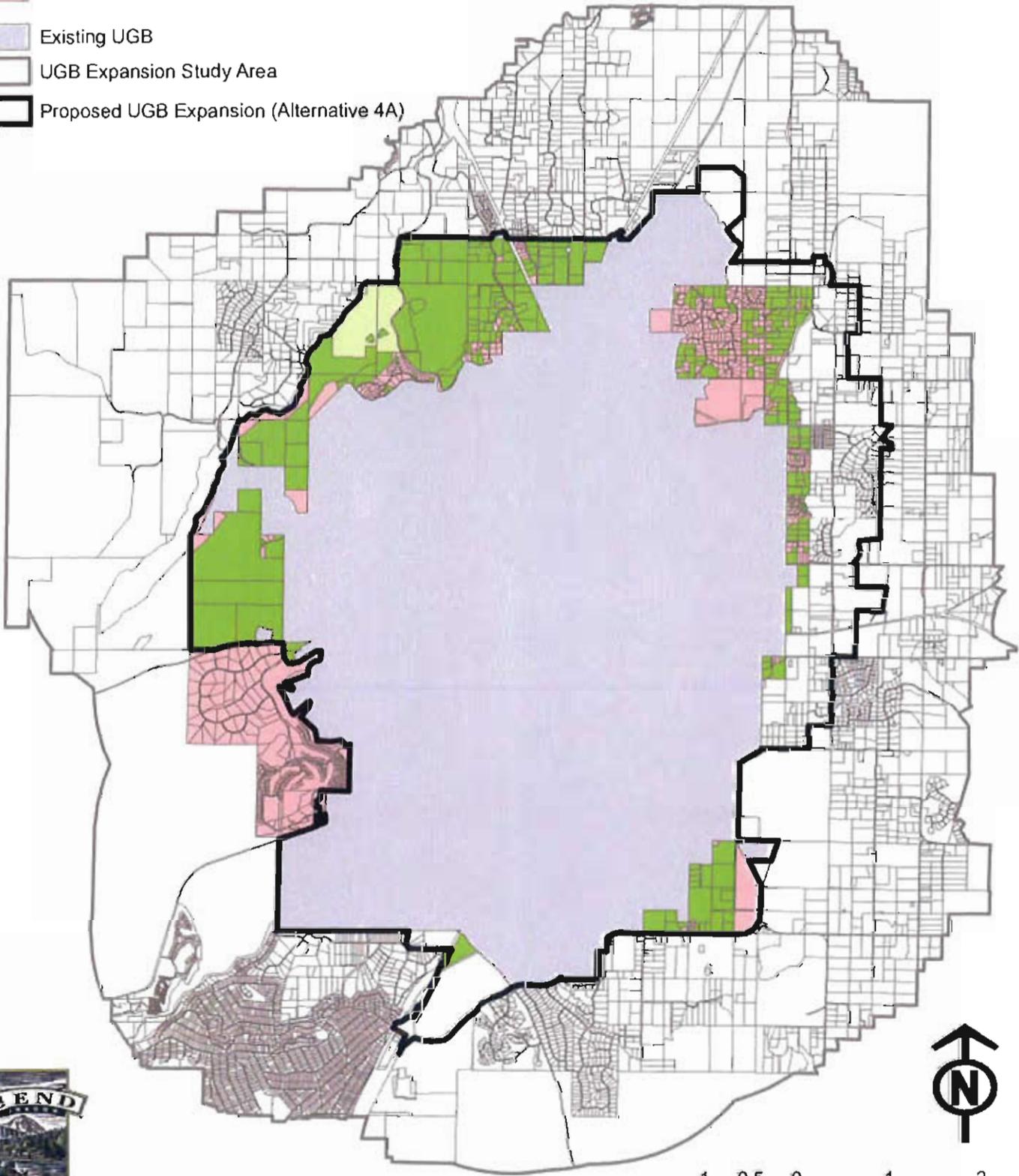


Map prepared 10/23/2008

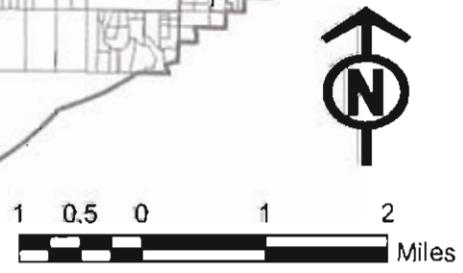


# Alternative 4A - Suitable/Available Urban Reserve Lands

-  Suitable & Available Urban Reserve Lands
-  Suitable, but Unavailable Urban Reserve Lands
-  Unsuitable Urban Reserve Lands
-  Existing UGB
-  UGB Expansion Study Area
-  Proposed UGB Expansion (Alternative 4A)

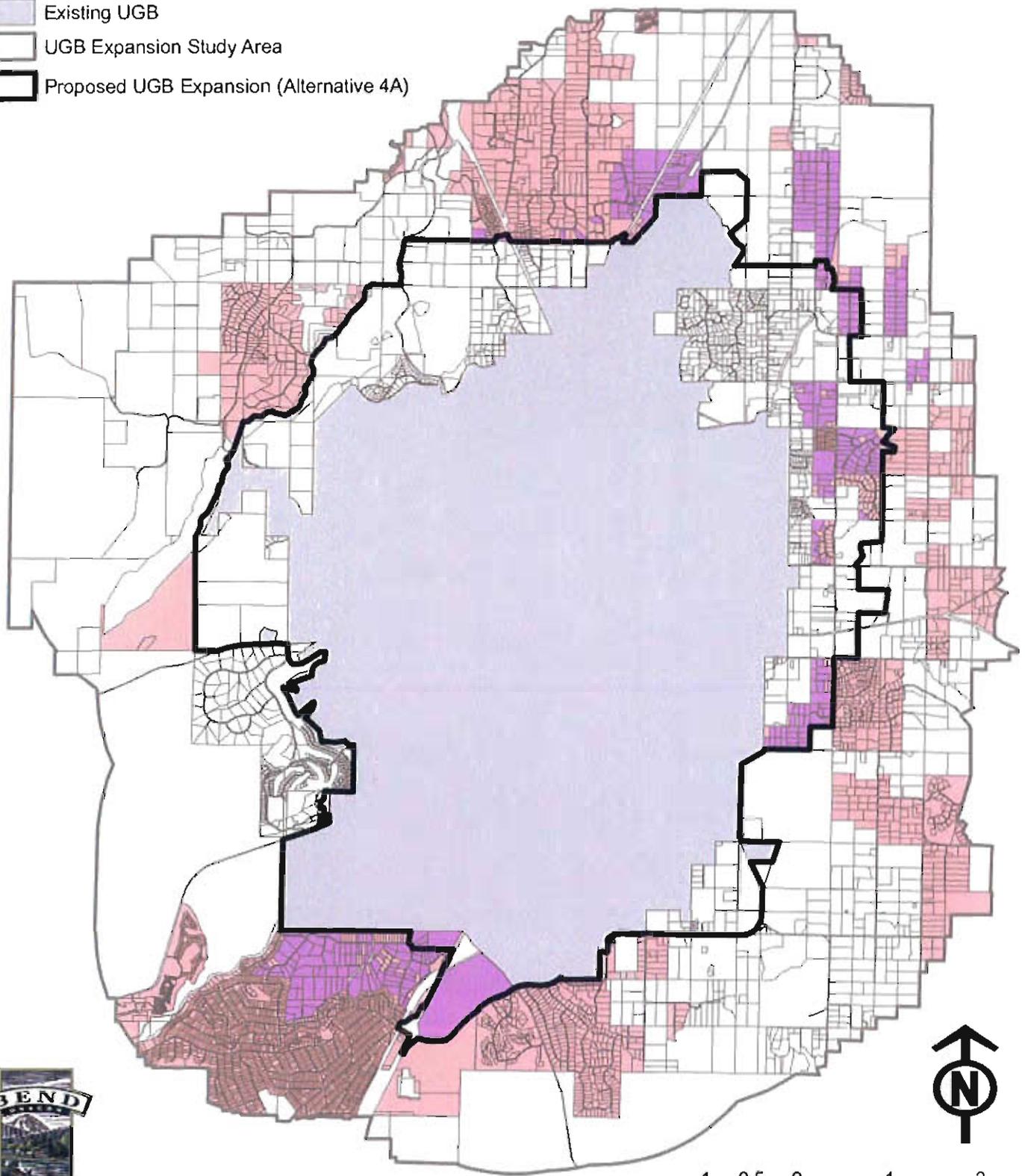


Map prepared 12/10/2008

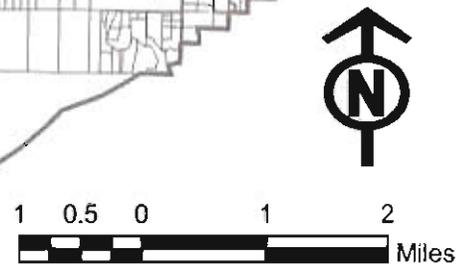


# Alternative 4A - Suitable/Available Non-UAR Priority 2 (Exception) Lands

-  Suitable & Available Non-UAR Priority 2 (Exception) Lands
-  Unsuitable Non-UAR Priority 2 (Exception) Lands
-  Existing UGB
-  UGB Expansion Study Area
-  Proposed UGB Expansion (Alternative 4A)

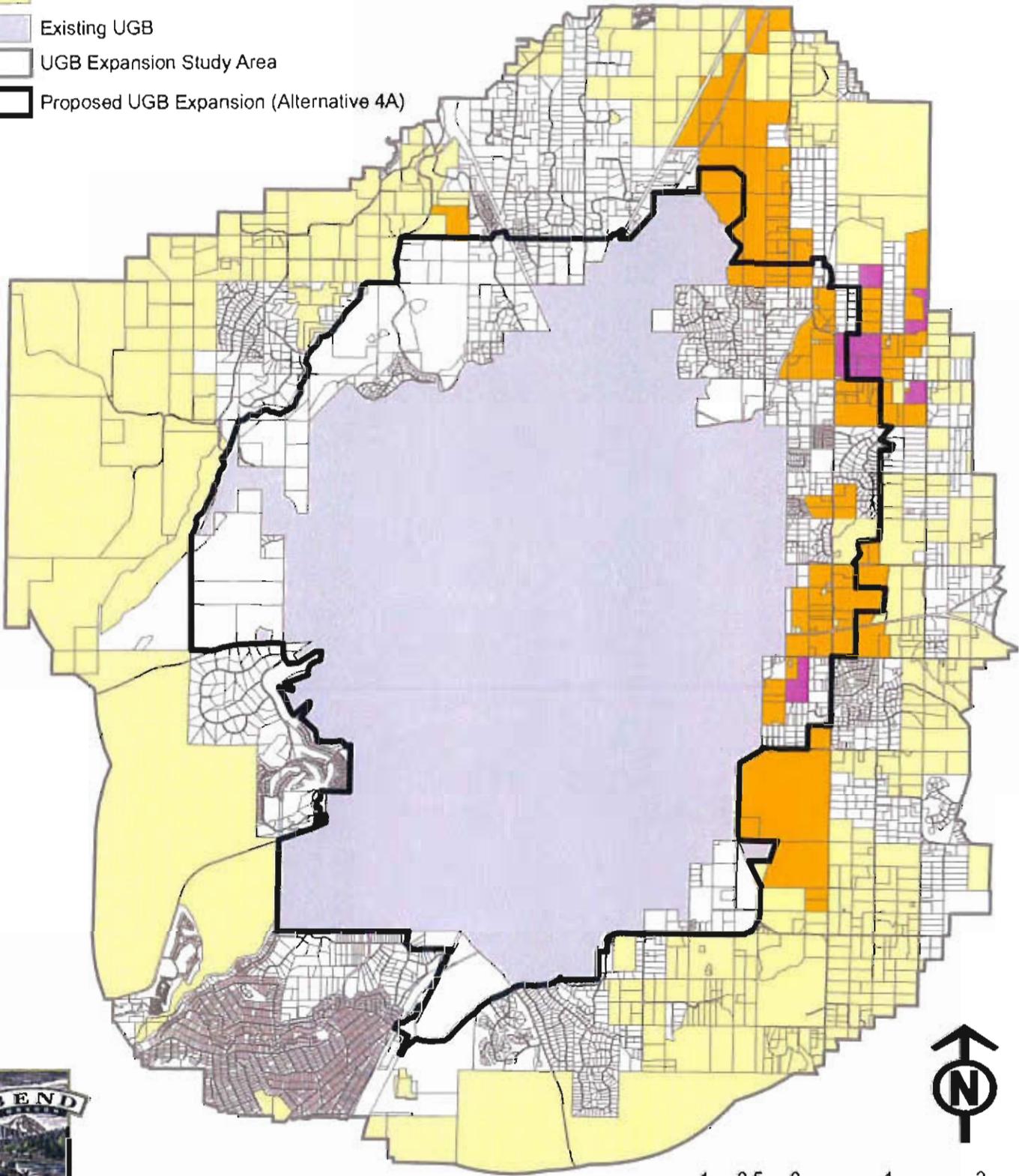


Map prepared 12/10/2008



# Alternative 4A - Suitable/Available Resource Lands

-  Suitable & Available Resource Lands
-  Commercial Farms, but Available and Otherwise Suitable Resource Lands
-  Unsuitable Resource Lands
-  Existing UGB
-  UGB Expansion Study Area
-  Proposed UGB Expansion (Alternative 4A)



Map prepared 12/10/2008





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