

**Appeal of DLCD Order No. 001775 Concerning the City of Bend UGB
Expansion**

HAND DELIVERED

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**LAND CONSERVATION
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I. Introduction

This appeal of DLCD Order No. 001775 ("Director's Report") is submitted to the Department of Land Conservation and Development ("DLCD") by Newland Communities ("Newland") in conformance with OAR 660-025-0150, OAR 660-025-0160 and OAR 660-025-085. Newland has several substantive objections to the Director's Report discussed below under Section IV Deficiencies and Cures. At the outset however, Newland would like to recognize that the Director's Report remands the Bend UGB decision to the City to cure deficiencies in the evidence or order of evidence presented. The Director's Report "agrees with the City and county that a UGB expansion is needed" and that the "overall amount of land identified as needed by the City for residential uses (941 acres) may be reasonable given the City's rapid growth." (*See e.g.*,

Report at pages 3, 35). The Report also agrees that the City's need calculation for 16,681 housing units complies with state law. (Report at page 31).

Despite these conclusions, the Director remands the City's decision largely because the record, in the Director's view, does not seem to provide clear links between the 16,000 pages of evidence and some of the state law requirements for UGB expansions. The evidence may be in the record in some cases, but the findings may not have drawn the necessary and "transparent" connections between the evidence and the legal standards. With this in mind, Newland requests that where evidence was developed during the local process and was not included in the record or where additional existing evidence would help resolve an issue on appeal, the Commission apply OAR 660-025-0085(5)(d) and request new evidence or information from the City of Bend to help the Commission resolve as many issues on appeal as possible. The City of Bend has spent over \$4 million dollars and several years in over 60 public meetings developing the evidence necessary to justify its first major UGB expansion in over 29 years. To the extent the remanded issues can be narrowed or limited by the Commission on appeal, the timelier, more cost effective and successful any future remand may be for the City and its residents. In Section IV, Newland proposes areas where we believe it would be appropriate for the Commission to seek additional evidence.

II. Standing

Pursuant to 660-025-0150(4)(a) and (b), Newland has standing to appeal the Director's decision because Newland filed a valid objection to DLCD of the City's UGB decision and Newland participated orally and in writing at the local level. The record filed with DLCD evidences this standing at pages 2670, 4024, 4418, 4421, 5708, 6128, 7176, 7234, 7450, among others and the Director's Report recognizes Newland's standing at pages 10-11.

III. 21-Day Objection Timely Filed

The Director's Report was issued on January 8, 2010. Pursuant to OAR 660-025-0150(4)(c), Newland filed this appeal at LCDC's Salem office on January 29, 2010, within the 21 day period allowed for appeals.

IV. Deficiencies and Cure

The City's record on the Buildable Lands Inventory and Capacity contains the evidence requested by the Director and can be refined on appeal to address the Director's concerns.

The Bend UGB Order remanded the BLI with directions to the City, on page 27, to:

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.

2. Include as the City's 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 that UAR and SR 2.5 plan districts, as well as the RL, RS, RM and RH districts.
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.

Map or Document

ORS 197.296(4)(c) requires that the City 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. The state law does not require a map; rather it permits the City to create a *map or document*. ORS 197.296(4)(c) provides that the map or document need not be provided for "land that may be used for residential infill or redevelopment."

The Director states that it is impossible to review the quantity and location of buildable land without a map but does not explain why the documents provided by the City do not comply with ORS 197.296(4)(c), the controlling legal standard. In lieu of a map, the City included several documents that identify the lots or parcels that have been determined to be buildable. The documents are found, among other locations, at Exhibit L-1, pages 2040-2045 of the record, 8660-8663 and 8664-8668. The City's analysis of buildable lands was comprehensive using the 2007 BLI G.I.S. database. That database classified all tax lots within the UGB. However it appears that the record does not contain the raw data from the G.I.S. system. To our knowledge the City's database contains over 38,000 records. Pursuant to OAR 660-025-0085(5)(d), the Commission should permit the City to supplement the record with the BLI G.I.S. database that was used in the local proceedings to create the BLI inventory. That data will provide the detailed information the Director is seeking for each lot in the BLI.

BLI Complies with Statutory Requirements

The City conducted an analysis of each residential plan designation for those lands that are "vacant", and for those lands that are "redevelopable" as those terms are used in ORS 197.296(4)-(5) and OAR 660-008-005(6). The summary of the analysis is found at pages 2042-2045 of the record and pages 18-20 of the findings. The City reviewed the RL, RS, RM and RH residential plan designations and established vacant acres and redevelopable acres. The findings on page 19 summarize this data in Table III-3 and III-4. The City shows the current development densities by designation in the record. This analysis is provided at pages 8409-8414

and 8274-8278. The data is narrowed to the period between 1998 and 2005 in the findings at pages 20-23. The City also provided Table III-7 of the findings at page 24 which appears to reflect the existing densities and projects those densities through 2028. The law requires only that the City identify the number, density and average mix of housing types that have occurred. If the evidence already provided in the record is to summary in content, the introduction of the raw data from the G.I.S. database would allow the City to quickly provide the narrow field of data requested by Director.

The City also conducted an analysis of buildable and redevelopable land by plan designation at pages 2040-2045, 8660-8663 and 8664-8668 in addition to the 2005 and 2008 BLIs. The record includes a parcel by parcel evaluation of tax lots, their development potential, density and vacancy status.

The City's BLI therefore conforms to ORS 197.296(4)(c). Newland requests that the Commission either affirm the City's BLI or allow the parties on appeal to provide the additional evidence requested by the Director in compliance with OAR 660-025-0085(5)(d).

Zoning District v. Comprehensive Plan Map Designations

During development of the BLI, DLCDD directed the City to conduct its study using plan designations, rather than zoning district. The City complied. However, the Director's Report's refers to and relies on zoning districts to find alleged omissions in the inventory. The City's zoning districts, in many cases, do not match the plan designations. This has caused confusion. In the action items for the BLI, the Report refers to comprehensive plan designations but requires actions by zoning district. (Report at pages 29 and 45). In action items addressing the BLI Capacity, the Report refers to zoning districts. (Report at page 29).

The confusion between plan designations and zoning districts may have led the Director to incorrect conclusions on the land inventory and the capacity analysis. On appeal, the Commission should seek clarification on the district or designation ruling and recognize the amount of work the City completed based on the plan designation as requested by the Director. It is important to note here that as a general matter the plan designations in Bend permit more density than the zoning district after a showing that there are sufficient public services to accommodate the new density. As a result, the City is making an aggressive assumption on new density within the City by relying, as DLCDD requested, on plan designations rather than zoning designations. It would be more reasonable in Bend to rely on comprehensive plan designations only where the City either: (a) upzones the land so the zoning map matches the comprehensive plan as a part of the UGB expansion; or (b) shows that upzoning is a certainty.

The question here is whether, prior to upzoning, land in a residential zoning district is likely to be redeveloped to the increased density permitted under a more intense comprehensive plan designation. As discussed below, ORS 197.295(1) defines “buildable lands” as lands in urban and urbanizable areas that are suitable, available and necessary for residential uses. It also states that buildable lands include both vacant land and land likely to be redeveloped. The City aggressively assumed that all land with a lower plan designation would be developed at the higher densities contemplated by the plan designation. The Commission should recognize this aggressive assumption in its review of Bend’s BLI and uphold the City’s density assumptions for the development of land inside the City.

Requirement to Include SR 2.5 and UAR Plan Districts in BLI

The Director’s Report requires Bend to include UAR and SR 2-1/2 plan districts, as well as the RL, RS, RM and RH districts. This requirement should be deleted as the lands referred to by the Report are already included in the BLI.

First, the City does not have an SR 2-1/2 plan district. It has an SR 2-1/2 zoning district. The City’s zoning and plan maps show that the SR 2-1/2 zoned land has an RS plan designation. As the City’s BLI used plan designations, these lands are included in the inventory as RS lands.

Second, while the City has a UAR plan designation, the comprehensive plan map shows that no lands inside the City have a UAR plan designation. DLCDD may have been confused by the fact that the City’s zoning map shows some UAR lands inside the City. As the BLI does not rely on zoning, the fact that some lands are zoned UAR does not mean that those lands should be added to the BLI.

On appeal, the Commission should request a clarification of the BLI based on plan designations as previously requested by DLCDD. In the alternative, the City could potentially use its BLI data to reclassify lands by zoning district. In all likelihood, a BLI based on zoning district will show less buildable land in the City than the current BLI based on plan designations.

Further Assumptions About Buildable Lands in City

ORS 197.295(1) defines “buildable lands” as those lands in urban and urbanizable areas that are suitable, available and necessary for residential uses. Buildable lands include both vacant land and developed land likely to be redeveloped. Accordingly, buildable land is both vacant and developed land *likely to be redeveloped* that is *suitable, available and necessary* for residential uses. The 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 Report finds any land to be suitable and available land for housing unless certain enumerated conditions are present. (Report at page 26). These conditions include severe development constraints caused by Goal 7 natural hazards, Goals 5 and 15-18 natural resource protections, slopes of 25% or greater, the presence of the 100 year floodplain, or the inability to provide the land with public facilities. What seems to be missing is that a determination that land is likely to be redeveloped must be made before the criteria in OAR 660-008-0005(2)(a)-(e) are applied.

The rule does not create an exclusive list of suitability factors, as assumed by DLCD. Instead the rule states that land is “generally” considered suitable and available if it does not contain the hazards recounted in the rule. The rule also requires that the City find that the land is “likely to be redeveloped.” The closest guidance for the definition of “likely to be redeveloped” is found in that same section under the definition of “redevelopable land.” There Division 8 defines redevelopable land as “land that 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.” OAR 660-008-0005(6). So land is only likely to be redeveloped if the City finds based on present or expected market forces, there is a strong likelihood that existing densities will increase over the planning period. Further, ORS 197.296 (4)(a) also includes a definition of buildable land that includes “lands that may be used for residential infill or redevelopment.” Subsection (b) states that a City must consider such factors as the presence of a single-family dwelling on the land or the extent that residential development is permitted or restricted by local regulation or ordinance.

The Director’s report de-emphasizes the “likely to be redeveloped” portion of the definition by stating, for example, that the City’s .5 acre constraint and land value to improvement value ratio are not expressly listed under the definition of buildable and therefore are inappropriate constraints. That is not a correct conclusion. The .5 acre constraint and the land value constraint are directly responsive to the “likely to be redeveloped” condition contained within the definition of buildable. We can find no authority, nor has the Director cited any, that would permit the Director to read the term “likely to be developed” out of the definition of buildable. The City used the definition of “likely to be developed” to determine that based on existing and predicted market forces in the City of Bend, the specific location of homes on lots and the value of the improvements, a certain identified number of acres within the City are not likely to be redeveloped. That conclusion is based on substantial evidence in the G.I.S. database and is a permissible conclusion under OAR 660-008-0005.

To the extent the City’s findings are too summary in nature for the Director to review, the appeal will present the full evidence in the record that supports the City’s conclusion. To the extent additional evidence is required, the Commission should invoke OAR 660-025-0085(5)(d) to review that evidence.

On page 26 of the Report, the Director appropriately recognizes that the presence of CC&Rs and land improvement values are relevant to whether a lot will redevelop. (Report at page 26). The Director finds that the City did not, however, provide a finding of “strong likelihood” as required by OAR 660-008-0005(6)). The City goes through a lot by lot analysis on subdivisions and the CC&Rs on each subdivision. The record contains which subdivisions have constraints on further division, which lots are developed at expected and projected densities and the likely market forces that will either maintain those subdivisions at current densities or allow densities to increase. The City has done the same for land value versus improvement value and for lots that already contain a dwelling. If necessary on appeal, this data could be “re-compiled” to demonstrate to the Commission that the City has made a determination based on substantial evidence on the record that certain properties do not have a strong likelihood that they will redevelop in the planning period.

Open Space, Parking Lots, Private Rights of Way

The Report claims that the City is in error for excluding such lands as open space and parking lots from residential lots in violation of OAR 660-008-0005(6)’s definition of “redevelopable land.” The City cannot reasonably include these lands in the BLI unless there is a strong likelihood they will redevelop. Open space in planned developments is committed to remain in that use by virtue of land use approvals or other commitments. *See e.g., Mountain High HOA v. Ward*, 228 Or App 424, 209 P3d 347 (2009)(required the Ward’s to maintain mine holes of golf course for the benefit of planned development homeowners). *See also, Frankland v. City of Lake Oswego*, 267 Or 452, 517 P2d 1042 (1973)(development must occur as promised in planned development proposal). Similarly, parking lots are typically required as a condition of land use approval. Whether there is a strong likelihood such a lot will redevelop is a fact-specific issue. The City addressed these circumstances in its findings and record. To the extent DLCD disagrees with the evidence presented by the City, the Commission should permit a clarification of the strength of the evidence on appeal.

On appeal the fundamental issue is whether the City exercised the right judgment when it reviewed each parcel of land within a plan designation and determined whether it was “likely to redevelop.” The City may have made the right judgment. DLCD would like the City to further elaborate on how it reached its final conclusion. The standard of review on this issue is a substantial evidence standard. Substantial evidence is evidence a reasonable person would rely upon to support a conclusion. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). The Commission must view the City’s evidence through this standard. If a reasonable person could draw the conclusion drawn by the City, the decision must be upheld. Newland therefore requests that the Commission review the City’s findings and the entirety of the record and uphold the City’s BLI if it determines that a reasonable person could have drawn the same conclusions. If more

evidence is necessary to reach that conclusion, Newland requests that the Commission hear that additional evidence under OAR 660-025-0085.

Capacity

The Bend UGB Order remanded the BLI with directions to the City, on page 29, to:

1. 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.
2. 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; and
3. 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.

The Director's dominant disagreement with the City is the level of density projected through the 20 year planning period. The Director observes that the City's assumption that all buildable lands in the City will be developed is very aggressive, but that the density projections are underestimated. (Report at pages 28). State law does not require any specific minimum level of density. Rather ORS 197.296(5)(a) bases housing capacity on density that has actually occurred in the City, trends in housing mix and density, demographic and population trends and the number, density and type of housing units that have occurred on the buildable lands. The Director acknowledges this but asks the City to better connect the capacity analysis to the above-referenced factors. The findings contain the data necessary to satisfy the Director's request particularly if the raw G.I.S. data is included in the record. The City analyzed each of the factors in the record. The City found that density has slowly increased in the City since 1981. For example, the City's density increased from 3.8 units per acre before 1998, the date of the last periodic review, to 5 units per acre presently. The UGB expansion assumes a further increase in overall residential density to 6 units per acre. There is a volume of data in the record showing these density trends, detailing the housing mix, studying the demographic and population trends and identifying the number, density and type of housing units that have occurred on buildable lands.

To the extent there is no pre-determined or required density level for the City of Bend, the City's housing needs and capacity analysis is the sole determinant of an appropriate level of housing types and densities within the new UGB. If the City's data suggests that more housing is needed for low income residents, land for low income residents must be included in the UGB. However, the state law does not require or dictate in what kind of unit that person will live. It is not necessarily so that low-income residents should only be provided multi-family apartments if the City's trend analysis shows that MF housing will not be built or be marketable. The same is true with the second home analysis. If the City's data supports a conclusion that the past and future trends for second homes in Bend is a single-family detached home at 6 units per acre, ORS 197.296(5)(a) and OAR 660-024-0010 would support the City's decision to accommodate second homes on 6 units per acre rather than on condominiums in the City's core.

Newland requests that the Commission review the City's housing needs and capacity data and uphold the data and conclusions that are consistent with ORS 197.296(3) and (5)(a). To the extent further information is needed to better connect the compiled data to the conclusions reached by the City, the Commission should allow the City and any party to the appeal to clarify that evidentiary connection on appeal.

Efficiency Measures

The Director asks the City, at page 39 of the Order, to consider measures to encourage needed housing types within additional areas of the City, including rezoning of areas along transit corridors and in neighborhood centers. Particularly, the Director requests that the City:

1. 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.
2. In areas where the City is planning significant public investments, consider up-zoning as a means to help spread the costs of such investments.
3. Consider strengthening the minimum density provision in the existing UAR and SR 2.5 zones by eliminating PUDs and other clustering tools.
4. 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.

The Director relies on OAR 660-024-0050(4) and ORS 197.303(3) and 197.296(7) to require the City to adopt additional efficiency measures. Subsection (4) states that if the need cannot be accommodated in the UGB, the City must satisfy the need deficiency *either* by increasing the

development capacity of land already in the UGB *or* by expanding the UGB, *or* both. The subsection continues “prior to expanding the UGB a local government must demonstrate that the estimated needs *cannot reasonably* be accommodated on lands inside the UGB.” ORS 197.296(6) and (7) state that the City is allowed to take “one or more of the following actions” to accommodate needed housing. Those actions include amending the UGB, adopting new measures that demonstrably increase the likelihood that development will occur at densities that will accommodate the need without expansion of the UGB, or both.

Consistent with these provisions, the City chose to both apply reasonable efficiency measures and expand. Thus, the City need only further demonstrate that it cannot reasonably accommodate more growth inside the UGB after the application of its efficiency measures. Using the efficiency factors in ORS 197.296(9), the findings address efficiency measures at pages 30-33. The City demonstrates that with existing efficiency measures density has increased from 3.8 units per acre prior to 1998 to 5 units per acre in 2005. Bend applies this trend to future development and uses an overall density of 6 units per acre for the new UGB. Table III-13 then provides the efficiency measures contained in the 2006 development code. There is no prohibition that we are aware of that would preclude the City from using recently adopted and acknowledged efficiency measures to comply with OAR 660-024-0050(4). In fact, if such measures were precluded, it would provide an ironic disincentive for cities to update their zoning codes to increase efficiency measures, instead waiting for a UGB amendment to get “credit” for the measures.

To these measures, the City added two more in the UGB proposal related to units in the Central Area Plan and along transit corridors. The Report declined to view these two new measures as efficiency measures because the Director believes that they will not “demonstrably increase the likelihood” that the additional residential density would actually occur. The City, for its part, committed to adopt these measures during the planning period. The City’s findings conclude that additional measures are not reasonable due to the existing pattern of zoning and pattern of land divisions in the current UGB. The City therefore added RM and RH zoning in the UGB expansion area to provide higher density SF and MF housing. The Director finds these measures inadequate, finds that the City did not adopt the two new measures as part of its Comprehensive Plan and did not show why additional measures were not reasonable.

The City adopted efficiency measures that will reasonably accommodate more growth inside the UGB. The City is not required to demonstrate why each measure proposed by the Director is not reasonable. Rather, ORS 197.296(9) provides a non-exclusive and non-mandatory list of measures the City can consider. The operative language of the rule states: “Actions or measures or both, may include, but are not limited to: . . .” There can be no legitimate reading of the statute that sets out these factors as mandatory or exclusive. Further, the threshold for adopting an efficiency measure is stated in ORS 197.296(6)(b). There the statute states that new measures

must be shown to “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.” In other words, the standard is designed as a shield to UGB expansion when a City declares no need for an expansion. It is a high burden to demonstrate that efficiency measures can demonstrably increase the likelihood of what would be in Bend’s case significantly higher densities than currently exist in the UGB. DLCD has agreed that the Bend UGB expansion requires an additional 16,681 units. Bend’s decision accommodates over 2/3 or 11,000 of these units in the existing UGB, increasing densities in existing neighborhoods and along transit lines. Only 1/3 or about 5,500 units are provided for outside of the City.

The City’s efficiency measures are the only measures the City deemed would demonstrably increase the likelihood of additional residential density in the existing UGB through the accommodation of over 11,000 new housing units. It is this judgment that is subject to the substantial evidence standard. Nothing in the DLCD Report presents any substantial evidence to the contrary. Therefore, the City’s efficiency measures should be upheld by the Commission.

The City’s PFP is consistent with Statewide Planning Goals 11 and 14 as well as Division 24 and should be approved by the Commission and not remanded to the City. If the PFP is remanded, the Commission should narrow the remand to cure any identified inconsistencies but should not direct any substantive amendments to the PFP.

Statewide Planning Goal 11 with its implementing administrative rules found under OAR 660-011 is the primary state law governing a local government’s adoption of a public facility plan. OAR 660-011-0005 defines a PFP as a support document or documents to a comprehensive plan that describes the water, sewer and transportation facilities that support the land uses designated in an acknowledged comprehensive plan within an UGB containing a population of more than 2,500 persons. Further, OAR 660-011-0040 provides that “portions of the public facility plans adopted as part of comprehensive plans prior to the responsible jurisdiction’s periodic review will be reviewed pursuant to OAR Chapter 660, Division 18, “Post Acknowledgement Procedures.”

OAR 660-018-0060 then contains the appeal procedures for Post Acknowledgement Plan Amendments (PAPAs) and provides that “eligibility for appeal of a local government decision to adopt or amend a comprehensive plan or land use regulation is governed by ORS 197.620.” In turn, ORS 197.620 provides that persons who participated orally or in writing in the local government proceedings leading to the adoption of an amendment to a comprehensive plan “may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845.” Under either Division 11 or Division 18, the only right of appeal a PAPA outside of periodic review is

to LUBA. There is no right to appeal a PAPA to DLCD and there is no provision in ORS 197.620 or 197.830 to 197.845 that vests jurisdiction over PAPAs in DLCD.¹

Despite these jurisdictional lines, DLCD is exercising jurisdiction over the PFP under ORS 197.825(2)(c)(A), asserting that the PFPs arise out of the UGB decision. We previously argued that this exception did not apply here for a number of reasons. First, the PFPs were adopted as separate ordinances from the UGB and were based on separate findings. Second, because the sewer treatment facility is located outside of the current UGB, system upgrades and new lines will necessarily cross lands currently located outside of the UGB. The PFPs do not, by themselves, grant even an implied approval to urbanize those lands without first bringing those lands into the UGB through the Division 24 process currently underway. With limited exceptions not applicable here, both Goal 14 and Goal 11 would prohibit the actual extension of sewer to serve rural lands until those lands are formally brought into an acknowledged UGB.

Lastly, we argued that the Collections System Master Plan (“CSMP”) (*see eg*, Record at pages 385-516), as supplemented by Addendums 1 through 3 (Record at pages 517-704) is also a document of City-wide applicability and that some major plan elements, such as the Water Reclamation Facilities Plan (2008) and Airport Water System Master Plan (2007), do not apply to land included in the UGB expansion area. As such, the PFP cannot be said to arise out of the City’s UGB expansion. New sewer interceptor lines authorized by the PFP Ordinance are needed to serve over 4,000 households inside the City of Bend that lack sewer service or that are overcapacity. (Record at pages 493-494,² 723). Over 53% of the land within the City of Bend is not currently served by the City’s sewer system. (Record at page 406). Nearly 42% of the properties that lack sewer service are developed. (Record at page 406).

The City therefore requested, and Newland supports, partial acknowledgement of the CSMP to serve lands already inside the City so that the City can begin to cure deficiencies in its public facilities prior to final acknowledgment of the UGB. Commencing on the Report at page 70, the Director denies this request based in part on inconsistencies between the UGB expansion area and the area served by the CSMP and inconsistencies in costs or selected alignments. The Director also acknowledged that these evidentiary connections would be “easy to clarify” and could be corrected on appeal.

DLCD’s review of the CSMP is subject to and limited by OAR 660-011-0050. Division 11 provides that DLCD shall evaluate the following when reviewing PFPs:

¹ While the City’s UGB expansion decision is subject to the same procedures as periodic review under ORS 197.626, the City is not in periodic review for purposes of OAR 660-011-0040. Rather, the City adopted the PFPs as a comprehensive plan update and amendment outside of periodic review. (Record at 5-11).

² These are the plant interceptor and Southeast interceptor lines.

- (1) Those items specified in OAR 660-011-0010(1);
- (2) Whether the plan contains a copy of all agreements required under OAR 660-011-0010 and 660-011-0015; and
- (3) Whether the public facility plan is consistent with the acknowledged comprehensive plan.

OAR 660-011-0010(1) provides seven categories of information, each of which is repeated on page 83 of the Report. The CSMP provides an inventory and assessment of the failing condition of the sewer systems serving the City and all land uses that are currently designated in the acknowledged comprehensive plan. The City's findings under Exhibit B to Ordinance NS-2111 also detail each of the seven categories and present evidence in the record demonstrating full compliance with each of the required categories. (Record at pages 213-216; *see also* Supp. Record at 2799-2824).

Under Subsection (2), PFPs must contain a copy of any agreements required under OAR 660-011-0010 and -0015. (Record at 217, 223). The only required agreement for Bend is the urban management agreement with Deschutes County. There are no special districts that also provide urban water and sewer service within the UGB so no such agreements are needed. Under the Joint Management Agreement ("JMA") with Deschutes County, the City is authorized to prepare and adopt PFPs. A copy of the JMA is referred to in the record at page 217 of the record and included with the PFPs.

Under Subsection (3), the City adopted findings of conformance the City's comprehensive plan under Exhibit B to Ordinance NS-2111. Page 223 of the record summarizes the findings of consistency with the City's comprehensive plan. In short, the City's findings are consistent with the comprehensive plan by identifying the expected type, location, cost and financing mechanisms for various public water and sewer facilities that are necessary to serve expected population growth under the City's acknowledged population forecast.

The Director's Report questions why capacity planned for the sewer system differs from the housing capacity planned for lands inside the existing UGB. At page 81 for example, the Report states that the housing "needs analysis numbers are inconsistent with those used by the CSMP." From this, the Director concludes that the "City's needs analysis density is significantly less than that of the CSMP, which from a sewer service perspective, effectively leaves more development capacity inside the UGB than reported by the City." (Report at page 81). This is an important assumption and conclusion in the Report that forms the basis for the Director's belief that the City is not reasonably increasing density within the City limits. This assumption also leads the Director in part to find inconsistencies in the PFP.

The Director's assumption on the PFP also impacts the Director's decision on whether DLCD is prepared to expand the eastern UGB on lower priority lands. As mentioned below, while the

Director believes that the City has begun to make the case that lower priority lands on the eastside can be included in the UGB, he is unable to acknowledge those lands until the “problems” with density and the PFP are clarified on appeal or remand. (Report at pages 116 and 135).

The Director’s density and capacity assumption on the PFP is in error. The CSMP is reflected in the City’s General Plan at Chapter 8. There the City makes clear that the capacity of the sewer system should exceed the capacity of built density for a number of reasons. First, as stated in Chapter 8, “most of these [CSMP] facilities have a longer planning horizon than the general plan.” The City’s Public Works Director repeated this policy in the public testimony in the record; specifically, that major sewer facilities have a planning and operational life of between 100-150 years, well beyond the immediate needs of the UGB and UAR. As a prime example of this extended life, the existing McGrath Treatment Plant began service in 1981, well over 20 years ago. If the sewer facilities are only planned with a 20-year horizon, the City will be required to effectively rebuild its system every 20 years to accommodate whatever growth is approved through the UGB amendment process. This kind of mandate on the construction of public facilities would impose enormous and unnecessary costs on cities and counties who would be forced to upsize on a 20-year cycle instead of a 100 to 150-year cycle. The General Plan at Chapter 8 further states that the CSMP is intended to serve not only UGB lands but lands within the Urban Area Reserve, utilizing some of the planned capacity of the CSMP system.

Further, the Report’s assumptions on the “extra density” that can be accommodated inside the UGB based on sewer capacity does not adequately take into account the existing 9,468 acres within the existing UGB that does not have sanitary service, the 2,909 acres of vacant and developable residential land in the current UGB and the 4,200 residents that are unserved with either sewer transmission or treatment facilities. As to the 3,000 acres of land unsuitable for urban development outside the existing UGB, the vast majority of this land contains large old subdivisions on the periphery of the City that are being brought in specifically for the purpose of serving them with sanitary transmission and service. (Report at pages 51 and 115). The City has made a determination based on substantial evidence in the record that these old subdivision cannot accommodate more density and are not therefore suitable or buildable for UGB expansion purposes.

Existing City residents and unserved residents adjacent to the City need sanitary sewer service to replace septic systems that are a likely source of non-point nitrogen pollution – a major threat to the local ground water environment. (Bend General Plan, Chapter 8). To comply with State of Oregon DEQ regulations, the City of Bend is planning to expand its sanitary sewer system to handle major storm runoff. The volcanic geologic structure of Bend (solid underlying rock) prevents the adequate percolation of ground water. Thus the City’s sanitary sewer system is forced to pick up seasonal and periodic major peak event loads of storm water infiltration, from

time to time, that cannot be ground infiltrated. These peaks loads are discussed in the CSMP and are an important assumption in the CSMP capacity analysis. (Public Facilities Plan-Water Reclamation Facilities Plan, Section 3.4 at page 11).

Finally, the City has 80 pump stations for sanitary sewer transmission. This is greater than the number of pump stations in the City of St Louis. (Testimony of Paul Rehault, Public Works Director, to the Planning Commission during UGB proceedings). A stated goal of the CSMP is to serially eliminate the expensive operating and maintenance cost of sewer pump stations in favor of a gravity system. Thus, a primary function of new capacity to be built under the CSMP is to simply replace existing, inefficient, expensive and poorly-planned public facilities. A substantial part of the new capacity is therefore a replacement for existing capacity.

The Report does not take these capacity factors into account. Instead, the Report views the capacity of the sewer system through the narrow lens of new density over the next 20 years. The CSMP, by itself, does not allow new density. Instead, it is designed to be able to serve urban density development when it is approved through a UGB amendment. The CSMP is planned to accommodate a 100 to 150-year horizon, provides plans to replace parts of the existing sewer system, serves lands inside the City that lack sewer service, accommodates peak sanitary and stormwater loads, serves developed residential lands in the UGB expansion area that are unsuitable lands for urban development or redevelopment, as well as provides capacity for the 16,681 new housing units that will be built in Bend through 2028.

Through this broader lens, the Commission should review the City's record on the PFP and find that all of the required elements of a PFP under Goal 11 and its implementing rules are present and supported by a substantial evidentiary basis. There is no state law or implementing regulation that would limit the City's PFP/CSMP to a 20-year planning horizon. Rather, Goal 11 requires the City to ensure "timely, orderly and efficient arrangement of public facilities." To plan to replace a 100-year system every 20 years is none of these. To the extent new evidence or clarifying evidence is required to reach this determination or to render the PFP more consistent with the UGB expansion area, Newland requests that the Commission invoke its authority under OAR 660-025-0085(5)(d) to accept that evidence and timely resolve the City's PFP/CSMP. This timely resolution will assist the City in quickly implementing the sewer upgrades that are currently needed to address existing system deficiencies.

The City correctly included lower priority lands within the UGB under ORS 197.298(3) and related case law.

At page 116, the Report concludes, "the City has begun to make an adequate showing that expansion onto some agricultural lands to the east may be necessary to provide public services to higher priority lands. . ." (ORS 197.298(3)). (Report at page 116). Given the uncertainty the Director cited on the housing needs analysis and the PFP, the Director found he could not

acknowledge these lands as a part the UGB until the needs analysis is further verified on appeal or remand. (Report at 116). While Newland agrees with the Director’s conclusion that the inclusion of lower priority land in the east part of Bend in the UGB is consistent with ORS 197.298(3), we disagree with the Report’s legal analysis. We believe the Report exclusively relies on an impermissibly narrow statutory construction of the subsection (3) exceptions and ignores recent, controlling Oregon Court of Appeals case law that supports and strengthens the Director’s conclusion to include lower priority lands.

The Director makes a number of findings relative to the priority of land for UGB expansions and the order of evidence required to make land priority findings. First, the Director concludes that:

“ORS 197.298(3) allows a City or county to exclude higher priority parcels from consideration up-front, before the City selects suitable parcels in that priority; and, if the land supply in that priority category exceeds need, before the City applies the Goal 14 location factors.”

We agree with the Director that ORS 197.298(3) and DLCD’s implementing regulations provide an explicit exception to land priority in a UGB expansion. OAR 660-024-0060(1)(d) states in full:

“Notwithstanding subsection (a) through (c) of this section [land priority], a local government may consider land of lower priority as specified in ORS 197.298(3).” (Emphasis added).

ORS 197.298(3) then provides:

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

- (a) Specific types of identified land needs cannot reasonably be accommodated on higher priority lands;
- (b) Future urban services could not reasonably be provided to the higher priority lands due to topographical or physical constraints; or
- (c) Maximum efficiency of land uses within a proposed urban growth boundary requires inclusion of lower priority lands in order to include or to provide services to higher priority lands.” (Emphasis added).

The administrative rule unequivocally states that despite or “notwithstanding” the order of priority consideration contained in the rule, the City of Bend may consider land of lower priority

under the factors in ORS 197.298(3). This language is clear on its face: regardless of the order of priority, the subsection (3) factors may be applied during the suitability analysis to determine whether a higher priority land should be included in the UGB. This reading is also consistent with the plain language of subsection (3) itself which states that land of lower priority may be included in the UGB if higher priority land is found to be inadequate for one or more of the 3 reasons stated in the statute.

The problem with the Director's Report is it espouses a "narrow construction" to the ORS 197.298(3) exception and a "high threshold" to exclude higher priority land. There is no language in ORS 197.298(3) or OAR 660-024-0060(1)(d) that implies or requires a narrow construction or a high threshold. In fact, Subsection (1)(d) contains language that is contrary to the Director's narrow construction. Subsection (1)(d) introduces the land priority exception with the word "notwithstanding." We are required to give every word in a statute meaning and we are not permitted to construe a statute in a manner that excludes its express language. ORS 174.010; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). "Notwithstanding" is commonly understood as meaning "despite" or "regardless of." (Merriam-Webster Online Dictionary). Accordingly, regardless of land priority, a City may include lower priority land in an urban growth boundary if it meets one or more of the exception criteria of ORS 197.298(3).

Because there is no support for the narrow construction in statute, the Report relies mainly on two LUBA cases: *DLCD v. Douglas County*, 36 Or LUBA 26 (1999) and *1000 Friends of Oregon, et al v. Metro*, 38 Or LUBA 565 (2000). (Report at pages 110-111). This reliance is misplaced. Neither of these cases creates a higher threshold for ORS 197.298(3). Neither requires a narrow construction of ORS 197.298(3). Rather, both cases applied a substantial evidence test and looked to see if "adequate evidence" supported approval of an exception to land priorities.

In *Douglas County*, a quasi-judicial applicant requested an 8.3-acre amendment to the UGB to accommodate a restaurant, mini-mall, professional offices, retail store and a hotel. The land was zoned EFU and contained Class I agricultural soils. *Id.* at 33. In denying the expansion, LUBA found that:

"All the county has demonstrated is that a commercial development on the subject property would have an easier time attracting investment capital and would be in a better position to attract potential customers traveling on I-5."

The only standard of review or burden of proof addressed by LUBA in the *Douglas County* case was the substantial evidence standard. *Id.* at 41. Given the very low level of proof offered by the county in *Douglas County*, it is difficult to conclude that LUBA set a high threshold or narrowly construed ORS 197.298(3) in that case.

Similarly, in another case cited by the Director, *1000 Friends of Oregon v. Metro*, 38 Or LUBA 565 (2000), LUBA upheld the inclusion of lower priority agricultural land over objections that the evidence in the record was not sufficient to demonstrate that the land qualified for one of the exceptions to ORS 197.298(3). There, LUBA agreed with Metro that the evidence supported a conclusion that “it would not be economically reasonable to extend sewer service without extending the trunk line through” lower priority resource lands. *Id.* at 611. Metro found:

“On balance, the case has been made that it is unreasonable to expect any type of efficient urbanization of the exception areas without including and first developing the [lower priority areas].”

LUBA upheld Metro’s finding that “adequate” evidence existed to allow it to include lower priority lands in an urban area. LUBA did not imply or express a higher evidentiary burden for seeking an ORS 197.298(3) exception.

The Court of Appeals recently confirmed this evidentiary standard. In *Hildenbrand v. City of Adair Village*, 217 Or App 623, 177 P3d 40 (2008), the City approved a 142-acre expansion on agricultural land south of the City. Opponents contended that ORS 197.298 prevented the City from including agricultural land within the new UGB boundary because suitable nonagricultural land was available as an alternative. *Id.* at 633. Opponents also argued that the City and LUBA erred in allowing the addition of lower priority land without proof that the quantity of all types of higher priority lands was inadequate. *Id.* at 634.

The Court of Appeals rejected these arguments. The Court held that the statutory reference to “inadequate” land addresses the relative suitability not just quantity of higher priority land. *Id.* at 634-35. Thus, the Court concluded that:

“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).” (Emphasis added). *Id.* at 635.

In this holding the Court unequivocally found that land priority and the qualitative factors are viewed together to determine appropriate inclusions in the UGB. In addressing the City’s arguments to exclude higher priority land, the Court found that it was too costly to extend urban services across a highway to reach higher priority land and that development of higher priority land was contrary to acknowledged plan policies interpreted by the City. *Id.* at 634. Most specifically, the *Hildenbrand* court left no room for doubt on the import of ORS 197.298(3) when it held “ORS 197.298(3) relaxes the prioritization requirements in certain circumstances.” *Id.* at 633. Those circumstances occur when a City can demonstrate that higher priority land is inadequate as compared to lower priority land under the factors articulated in subsection (3).

The *Hildenbrand* court did not apply a higher burden of proof to the exception criteria. Rather, the Court found that the ranking of land is equally a function of its classification under ORS 197.298(1) as well as an application of the exception factors in ORS 197.298(3). *See also City of West Linn v. LCDC*, 201 Or App 419, 444, 119 P3d 285 (2005) (adequate justification for ORS 197.298(3) exception can rest on a combination of factors, including, the conclusion that higher priority lands cannot efficiently be provided with services without also including lower priority resource land in the UGB).

A review of the case law and statutory language demonstrates that there is no established rule of law that would impose a narrow construction on the exceptions of ORS 197.298(3).

Lastly, the Report cites *D.S. Parklane Development v. Metro*, 35 Or LUBA 516 (1999) to support a narrow view of the land priority statute. (Report at pages 122, 132 and 135). *D.S. Parklane* is an appeal of a Metro decision on Urban Area Reserves (UARs). It is not a UGB amendment case. In *D.S. Parklane*, LUBA and the Court of Appeals addressed the rules specific to UARs:

“OAR 660-021-0030 contains recurring language that indicates that its numbered provisions are to be applied sequentially, that the properties of subsection (3) are to be determined and are to be the governing consideration in designating urban area reserves, and that the exceptions in subsection (4) can only be applied—if at all—to lands that have been prioritized in accordance with subsection (3).” *D.S. Parklane*, 165 Or App 1, 20, 994 P2d 1205 (2000).

The court goes on to address the specific language of OAR 660-021-0030(2) to conclude that the UAR priorities are subject to the strict hierarchy of land priority found in subsection (3) which precludes a look at lower priority land until all higher priority land is exhausted.

The problem with relying on this language is that *D.S. Parklane* was interpreting a different rule than is at issue in this case. It interpreted OAR 660-021-0030(4), a rule that lists the exceptions from land priority for UARs. The urban growth boundary rule, OAR 660-024-0060(1)(d), contains different language. As distinguished from the UAR rule, the UGB rule says that “notwithstanding” the land priority rules, one can include and evaluate lower priority land at the same time and with the same weight as higher priority land if the exception criteria are adequately justified. The Director’s Report concedes this point in footnote 60 at page 110 when it states that ORS 197.298(3) allows a City or county to exclude higher priority parcels from consideration up-front.

Further, reliance on *D.S. Parklane* is inconsistent with the Court of Appeals more recent ruling in *Hildenbrand* which specifically addresses the land priority rules and exceptions for UGB amendments. In *Hildenbrand*, the 2006 Court of Appeals, six years after *D.S. Parklane*, found that ORS 197.298(3) relaxes the prioritization requirements in the specific certain circumstances

set out in the statute. The Court of Appeals found conversely to *D.S. Parklane* that the ranking of land under ORS 197.298(1) is a function of its prior classification as well as the application of the qualitative factors under ORS 197.298(3). (Emphasis added). There can be no doubt from this language that the *Hildenbrand* court limited the application of *D.S. Parklane* to cases involving UARs.

Therefore, on appeal, we request that the Commission uphold the determination that the record establishes a justification to include lower priority land in the eastern UGB expansion based on the exceptions criteria of ORS 197.298(3) but that it reject language in the Report that imposes a narrow construction of ORS 197.298(3).

Newland additionally incorporates by reference pages 4-22 of Newlands previous objections to the City's UGB decision filed with DLCD. The narrative on pages 4-22 of our previous objection provides substantial evidence that supports the City's decision to include lower priority resource land in the eastern Bend UGB under ORS 197.298(3). The Director's Report states that "the City has begun to make an adequate showing that expansion onto some agricultural lands to the east may be necessary to provide public services to higher priority lands. . ." (ORS 197.298(3); Report at page 116).

However, the Director's Report could not acknowledge the eastern UGB expansion until the questions on the housing needs analysis are resolved and until the PFP is clarified on appeal or remand. (Report at pages 116 and 135). The Director also requested that the City include the following additional technical evidence:

1. A map or description of all resource parcels in the study area and their soil classification;
2. A map or description of all exception parcels in the study area including those deemed "unsuitable" for development.

To our knowledge, the City has either already prepared this information in its multi-year process or can easily deduce the evidence from the record. Pursuant to OAR 660-025-0085(5)(d), Newland requests that the Commission request and accept the new evidence proposed by the Director under this appeal issue. This evidence, together with the evidence proposed above under the PFP/CSMP, could resolve significant issues on appeal and appropriately limit the work tasks on remand.

Locational Boundary Analysis

Newland incorporates by reference here its prior submission of objections to the City's UGB decision filed with DLCD. The Director's Report recites the order of analysis for a local government considering alternative UGB boundary locations. (Report at page 109). While the Director recognizes that:

“The analysis does reflect a substantial effort to examine what lands are best suited for the addition to the UGB, ...the methodology and approach used improperly excluded a substantial amount of land planned and zoned as exception lands (including a significant amount of land in existing urban subdivisions, many of which rely on septic systems) from consideration for inclusion in the UGB.” (Report at page 115).

The Director then concludes that this result stems from the City's misapplication of suitability criteria some of which did not respond to future housing needs and some of which did not comply with state law. (Report at page 115). The Director then rejects some of the City's suitability factors at pages 118-122 of the Report finding that they do not comply with state law.

The Director's conclusion is overly broad and seems to ignore the definition of “not likely to be redeveloped” under OAR 660-008-0005(2). For instance, the City found to be unsuitable, land that was located within an existing landfill. The City also found land in a private right of way or open space unsuitable because it was not likely to redevelop. Land that is not likely to redevelop is a permissible suitability screen for residential land under OAR 660-008-0005(2). However the Director rejects this permissible screen at page 119 of the Report by stating, for example, “private right of way and open space land is generally considered suitable and available.” That conclusion is overly broad. Such land is not suitable if it is not likely to redevelop.

The Director compounds this misinterpretation by assuming that large amounts of exception areas were excluded from the UGB boundary through the use of impermissible suitability criteria, leading to an “artificial shortage of first priority exception lands.” (Report at page 122). Of most import here is the City's exclusion of a significant amount of land found in urban subdivisions currently relying on septic. The City found these lands were not likely to be redeveloped with additional density either based on the current parcelization pattern, CC&Rs that preclude further division, or market forces, among other reasons. The City also found that these lands should be brought into the UGB so that they could be served with sanitary sewer service. This is a permissible conclusion under OAR 660-008-0005(6) which defines redevelopable land as “land that 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.”

If the City's analysis provides substantial evidence in the record establishing the lack of suitability of these parcels, the Commission is obligated to review that evidence to determine if a

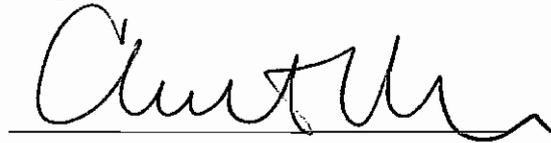
reasonable person could draw the same conclusion. If so, the City's decision must be upheld. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988).

Newland requests that the Commission independently review the City's analysis of suitability, applying the definition of "not likely to be redeveloped" and find that the City properly applied the suitability criteria to alternative UGB expansion parcels consistent with state law. If the analysis of suitability "lacks clear explanations" then it would be appropriate for the Commission to permit parties on appeal to make the transparent connections the Director seeks either on the record or through the addition of new evidence. ORA 660-025-0085(5)(d).

Conclusion

The Commission should uphold the City's UGB decision. To the extent the Commission finds that additional evidence would be helpful in resolving the appeal, in the interests of expediency and cost, Newland requests that the Commission liberally invoke ORS 660-025-0085 to resolve as many legal and factual issues on appeal as reasonably possible.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "Christen C. White", written over a horizontal line.

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