



# Oregon

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February 25, 2010

TO: Land Conservation and Development Commission

FROM: Richard Whitman, Director

SUBJECT: **Agenda Item 9, March 17–19, 2010 LCDC Meeting**

**APPEAL OF DIRECTOR'S REMAND OF  
BEND AND DESCHUTES COUNTY'S  
AMENDMENT TO THE BEND URBAN GROWTH BOUNDARY**

**I. AGENDA ITEM SUMMARY**

The City of Bend and Deschutes County jointly adopted an amendment to the Bend urban growth boundary (UGB) to provide for a 20-year supply of urban land needs. The jurisdictions submitted the amendment and associated implementation to the Department of Land Conservation and Development (DLCD, or "the department") for review in the manner of periodic review. The department reviewed the submittal, and the director issued an order remanding the UGB amendment package.

This item is before the Land Conservation and Development Commission (the commission) on appeal of the director's remand (Order 001775).

**A. Type of Action and Commission Role**

This item is before the commission because of appeals by the City of Bend and 10 other parties.

The commission's role is to consider arguments regarding why the director's decision is or is not correct on a variety of issues, deliberate on the policy and legal implications of the various arguments, and decide to: (1) uphold the director's decision; (2) agree with portions of the director's decision and disagree with others, also resulting in a remand; or (3) overturn the director's decision and approve the UGB amendment and associated implementation.

## **B. Staff Contact Information**

If you have questions about this agenda item, please contact Mark Radabaugh, DLCD Regional Representative, at (541) 318-2899 or mark.radabaugh@state.or.us.

## **II. SUMMARY OF RECOMMENDED ACTION**

The department recommends that commission deny most of the appeals, but uphold several, resulting in revised instructions to the local jurisdictions on required actions to comply with the remand. The department has worked with the City of Bend since issuance of the Director's Decision to clarify areas of agreement and disagreement, and this work has substantially narrowed the scope of differences between the department and the city.

## **III. BACKGROUND**

### **A. History of Action**

This is the first time this UGB amendment has been before the commission. The city submitted the package of amendments, after city and county adoption, on April 16, 2009. A second and related package of amendments were submitted to the department on June 12, 2009 that included the city's public facilities plans. The DLCD director remanded the UGB amendment package and public facilities plans on a number of grounds on January 8, 2010 (see Order 001775).

As provided by administrative rule, the city and 10 other parties appealed the director's decision on a number of grounds, discussed in section V of this report.

### **B. Major Legal and Policy Issues**

**Issue Area 1 – Required Findings and Standard of Review:** What level of detail is required in a UGB amendment decision that comes to DLCD and LCDC for review?

**Issue Area 2 – Amount of Residential Land Need and Needed Housing:** Did the city correctly analyze its housing needs and the capacity of its prior UGB to provide additional housing over the next 20 years, and has the city planned to provide lands for the types of housing it has found are needed?

**Issue Area 3 – Efficiency Measures:** Did the city show that it has reasonably accommodated its housing and other land needs within the prior UGB before adding lands to the UGB?

**Issue Area 4 – Other (Non-employment) Land Need:** Is the city's estimate of the amount of land needed for other uses consistent with state requirements?

**Issue Area 5 – Employment Land Need:** Did the city's projection of the amount of land needed for employment uses over the next twenty years comply with state requirements, and may the city add land to its long-term supply to provide additional market choice (beyond what it plans for short-term needs)?

**Issue Area 6 – Goals 5 and 7 - Natural Resources and Hazards:** To what extent is the city required to inventory and plan for natural resource areas in the expansion area, and to what extent, if any, is the city required to consider wildfire risk in determining where to expand its UGB?

**Issue Area 7 – Goal 11 – Public Facilities Planning:** Do the city's public facilities plans comply with state requirements, and may the city adopt plans only for its prior UGB area?

**Issue Area 8 – Goal 12 - Transportation Planning:** What are the city's obligations to plan for reduced use of automobiles in conjunction with its UGB decision?

**Issue Area 9 – UGB Location:** Under what circumstances may the city justify expanding its UGB onto farm land instead of rural residential areas?

**Issue Area 10 – Other Issues**

## **IV. REVIEW CRITERIA AND PROCEDURES**

### **A. Decision-making Criteria**

The criteria applicable to the amendment of a UGB are found in a number of state statutes, LCDC Goals, and LCDC Rules. Statewide Planning Goal 14 is: “To provide for an orderly and efficient transition from rural to urban land use.” This goal requires cities to have a UGB to separate urban and urbanizable land from rural land. Amendment of a UGB is based on consideration of the following criteria for need under Goal 14:

1. Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments; and
2. Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2).

Compliance with these criteria is guided by administrative rules regarding housing (Oregon Administrative Rule (OAR) 660, division 8), economic development (OAR 660, division 9), and urban growth boundaries (OAR 660, division 24). Relevant considerations for planning expanded UGBs are also found in the administrative rules regarding public facilities planning (OAR 660, division 11), transportation (OAR 660, division 12), and natural resources (OAR 660, division 23). Certain cities, including

Bend, also must comply with the requirements in ORS 197.296 and the other needed housing statutes regarding residential land supply.

Once need has been established, determining where to expand the boundary is directed by the priority of lands and exceptions in ORS 197.298. The priorities, in order, are:

1. Lands designated as an urban reserve;
2. “Nonresource” lands or “exception” lands which have rural residential or other development;
3. “Marginal lands” designated pursuant to ORS 197.247;
4. Lower quality farmlands; and
5. Higher quality farmlands.

To the extent there are more than enough lands in any one priority category to satisfy a community's need for additional land within the UGB, four locational factors in Goal 14 are used to determine which of the lands in that priority category are included:

1. Efficient accommodation of identified land needs;
2. Orderly and economic provision of public facilities and services;
3. Comparative environmental, energy, economic and social consequences; and
4. Compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB.

Application of these requirements is guided by OAR 660, division 24.

The content of the Public Facilities Plans is governed by Goal 11 and OAR 660, division 11.

## **B. Procedural Requirements**

OAR 660-025-0160(5) states: “The commission shall hear appeals based on the record unless the commission requests new evidence or information at its discretion and allows the parties an opportunity to review and respond to the new evidence or information.” OAR 660-025-0085(5) provides commission hearing procedures.<sup>1</sup>

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<sup>1</sup> Commission hearings will be conducted using the following procedures:

- (a) The chair will open the hearing and explain the proceedings;
- (b) The director or designee will present an oral report regarding the nature of the matter before the commission, an explanation of the director's decision, if any, and other information to assist the commission in reaching a decision. If another state agency participated in the periodic review under ORS 197.637 or 197.638, the agency may participate in the director's oral report.
- (c) Oral argument will be allowed. The local government or governments whose decision is under review and parties who filed objections or an appeal may present oral argument. Oral argument will not be an opportunity to present new evidence regarding the matter before the commission. The local government that submitted the task may provide general information on the task submittal and address those issues raised in the department review, objections and the appeal. Persons who submitted objections or an appeal may address only those issues raised in objections or the appeal. Other affected local governments may address only those issues raised in objections or the appeal.

## **C. The Written Record For This Proceeding**

### 1. UGB submittal:

- a. City ordinance no. NS-2111
- b. City ordinance no. NS-2112
- c. City ordinance no. NS-2113
- d. County ordinance no. 2009-01
- e. County ordinance no. 2009-02
- f. Public Facilities Plans (Record 225-1049)
- g. Amendments to Bend Area General Plan (Record 1226-1497)
- h. Economic Opportunities Analysis (Record starting at 1498)
- i. Housing Element Targets, Strategies and Benchmarks (Record starting at 1728)
- j. Coordinated Population Forecast (Record starting at 1980)
- k. Housing Needs Analysis (Record starting at 2046)
- l. Residential Lands Study (Record starting at 2114)
- m. Rights-of-Way Methodology (Record starting at 2168)
- n. Other Land Needs Memo (Record starting at 2180)
- o. DKS Transportation Tech Memos (Record starting at 2184)
- p. Goal 14 Analysis Maps (Record starting at 2304)
- q. UGB Alternative Maps and Findings (Record 2332)

### 2. Objections to the city's submittals

### 3. DLCD director's decision (Order 001775)

### 4. Appeals of the director's decision:

- a. City of Bend
- b. Bend Metropolitan Parks and Recreation District
- c. Bend-La Pine School District
- d. Swalley Irrigation District

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(d) The commission may request new evidence or information at its discretion and will allow the parties an opportunity to review and respond to the new evidence or information, subject to the time limits in section (2) of this rule.

(e) The director or commission may take official notice of law defined as:

(A) The decisional, constitutional and public statutory law of Oregon, the United States and any state, territory or other jurisdiction of the United States.

(B) Public and private official acts of the legislative, executive and judicial departments of this state, the United States, and any other state, territory or other jurisdiction of the United States.

(C) Regulations, ordinances and similar legislative enactments issued by or under the authority of the United States or any state, territory or possession of the United States.

(D) Rules of court of any court of this state or any court of record of the United States or of any state, territory or other jurisdiction of the United States.

(E) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(F) An ordinance, comprehensive plan or enactment of any local government in this state, or a right derived therefrom.

(f) The commission must make a decision on the appeal or referral as provided in this division.

- e. Newland Communities
  - f. Shevlin Sand and Gravel Inc.
  - g. Rose & Associates, LLC
  - h. Toby Bayard
  - i. Central Oregon LandWatch
  - j. Hunnell United Neighborhoods
  - k. Terry Anderson
  - l. Hilary Garrett
5. This DLCD staff report with responses to appeals
6. Any valid exceptions to the department’s report and response from the department

## **V. ANALYSIS**

The analysis of the appeals is included as Attachment A.

## **VI. COMMISSION OPTIONS**

Pursuant to OAR 660-025-0160(6), the commission has four options for a decision on a periodic review work task:

- Overturn the director’s decision and approve the submittal;
- Partially uphold the director’s decision and partially approve the submittal and remand the remainder of the task;
- Remand the submittal, upholding all or a portion of the remand items from the director’s decision; or
- Approve the submittal with specific amendments required.

## **VII. DEPARTMENT RECOMMENDATION AND DRAFT MOTIONS**

There are a variety of recommendations included in section V, which we will not reiterate here. These recommendations are based on the content of appeals without the benefit of having completed the public hearing, and arguments made before the commission may influence some of the recommendations. Generally, the department recommends the commission uphold the director’s remand of the UGB expansion, but some of the specific remand items are proposed for modification relative to the director’s decision.

The nature of the proceedings will result in consideration by the commission of a variety of issues, arguments and positions with complex deliberations. The commission is likely to conduct “straw votes” on these discrete topics over the course of the hearing, and bring them together for a final vote at the conclusion of the process for a final vote.

Because the outcome of this process will necessarily be influenced by the participants in the hearing, and dictated by the determinations of the commission interspersed throughout the process, formulation of motions at this time is impractical.

**ATTACHMENT**

- A. Section V, Analysis

**EXHIBITS**

1. Buildable Lands Inventory maps
2. Periodic Review Remand Order 001291 on Bend TSP