

DEPARTMENT OF LAND CONSERVATION & DEVELOPMENT

**REPORT ON BEND AND DESCHUTES COUNTY'S
AMENDMENT TO THE BEND URBAN GROWTH BOUNDARY**

DLCD ORDER 001775

January 8, 2010

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I. EXECUTIVE SUMMARY

The City of Bend is nationally recognized as a high-quality, desirable place to live and work. Bend is the seventh largest city in Oregon, and is one of the fastest growing communities in the state. Over the next twenty years, close to forty thousand new residents are expected in the city. Planning for the homes and jobs that current and future citizens will need is an important responsibility, and the decisions made now will have long-term consequences for the city and region.

The city and Deschutes County have made a substantial effort to plan for the future of the area in their decisions on the Bend urban growth boundary (UGB). The UGB establishes where the city will grow over the next twenty years. Setting this boundary and planning for the lands inside of it directly influences what types of housing are likely to be built, what employment opportunities the city is prepared for, and the future costs of public facilities. It also has important long-term consequences for where people live and work in the region, and the extent to which they need to drive to get from homes to jobs to shopping and other destinations.

This is a decision by the Director of the Oregon Department of Land Conservation and Development about whether the City of Bend and Deschutes County's UGB expansion complies with state land use laws. The decision is to remand the UGB expansion (along with a related amendment to the city's public facilities plan) back to the city and county for revisions needed for the decisions to conform with state requirements.

The director agrees with the city and county that a UGB expansion is needed, but the size of the expansion is over four square miles larger than the amount of land the local governments determined is needed. The director also agrees with the city and county that they have appropriately shown a need for land for a new university site and for a large-site general industrial area. However, the local governments need to complete technical work to document that lands for these important future uses can't be found within the existing city limits.

The director also determines that the city has not done an adequate job of planning for needed housing for current and future residents of Bend and the region. The city has documented a real need for more affordable housing, and for housing for people who work in Bend – to reverse the trend of workers leaving the city to find affordable housing. However, the city's planning for future residential development does not lay the groundwork for these types of housing to be developed in Bend.

State land use laws require cities to work to encourage growth to occur on vacant and underutilized lands within urban areas before expanding into rural areas. Bend has taken tentative steps in this direction, but its indefinite plans do not demonstrate that the city will meet its housing needs over the next twenty years.

Finally, the city and county decisions regarding where to expand the Bend UGB fail to explain (adequately) why certain lands are included, while others are not. An important aspect of this decision is the location of future sewer system investments, and the Director agrees that the planning for those system improvements is an important consideration in deciding where to locate the boundary. However, the findings and technical work supporting the decision are conflicting in some aspects, and do not appear to provide decision-makers with an adequate basis for making decisions about the long-term cost implications of expanding the boundary in particular locations.

The Department of Land Conservation and Development has committed a substantial amount of staff time and funding to working with the city and county to plan for the community's future. This decision is designed to help move that effort forward, and the department will continue to offer its assistance as Bend plans for its future.

II. BACKGROUND AND DESCRIPTION OF UGB PROPOSAL

The City of Bend adopted an 8,462-acre UGB expansion and supporting plan and code amendments on January 5, 2009. (See Figure 1, UGB Map, on the following page.) Deschutes County co-adopted the same UGB expansion along with its own supporting plan and code amendments on February 11, 2009. The city and county decisions were submitted to the department for review on April 16, 2009. In its submittal to the department, the city summarized its proposal as follows:

The adopted UGB amendment is substantially different from previous submittals dated June 11, 2007 and October 8, 2008. Lands proposed to be included to the west and north are exception lands. Lands proposed to be included to the northeast and due east are a combination of exception and resource lands; lands to the south and southeast are exception lands. [Notice of Adoption of an UGB Amendment form dated April 16, 2009]

A. Background

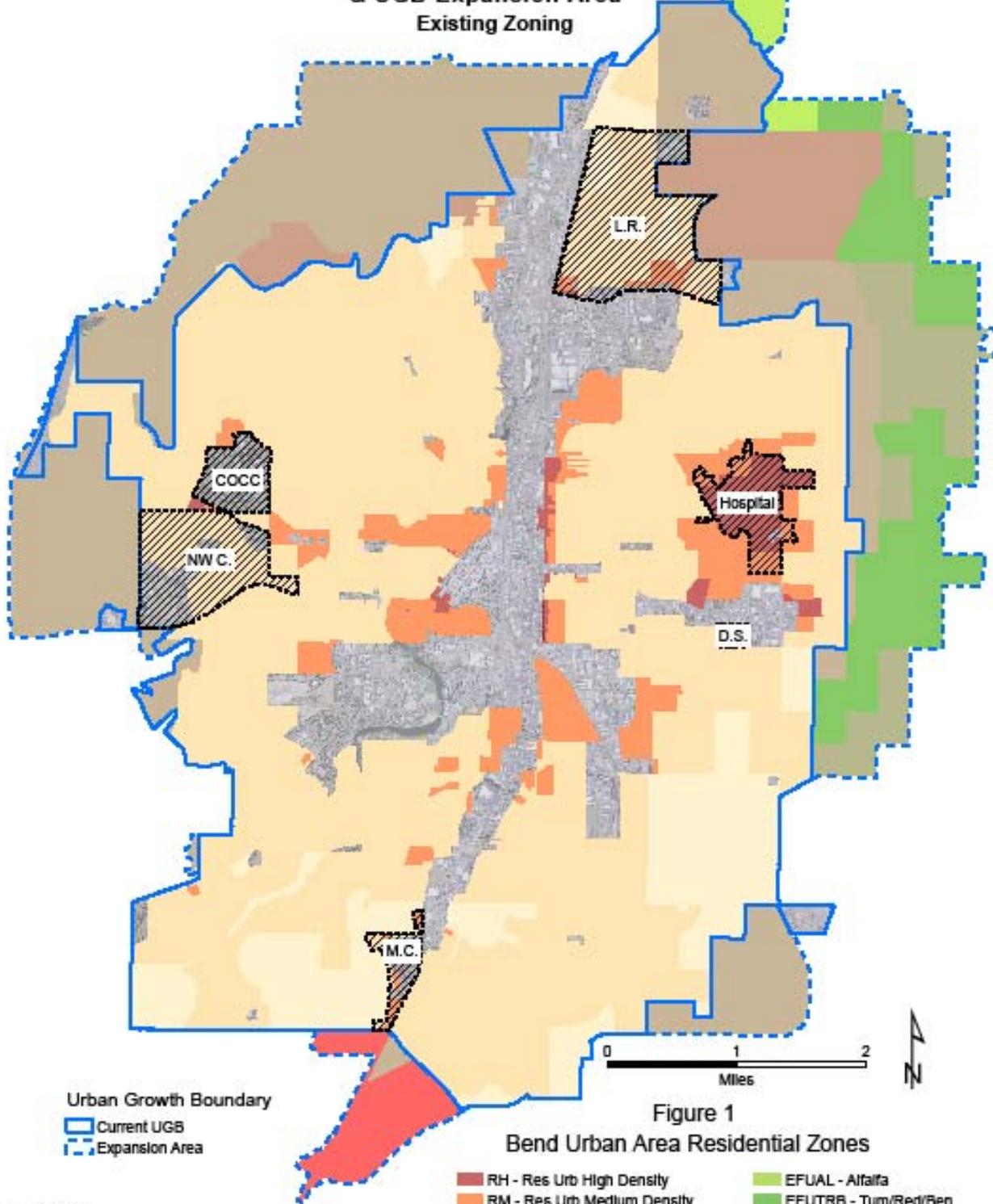
The city began review of its need for additional land for housing in 2004, and later added an evaluation of its employment land needs as part of its UGB review. On June 11, 2007, the city submitted a notice of a proposed 4,884-acre UGB expansion to the department through a 45-day post-acknowledgement plan amendment notice. The notice also included a 14,775-acre urban reserve proposal, which was withdrawn from further consideration shortly thereafter. Following joint public hearings by the city and county planning commissions, it was decided locally that further work was needed on the UGB expansion proposal.

On October 8, 2008, the city submitted notice of a revised UGB expansion proposal that included 8,943 acres, 83 percent larger than the June 11, 2007 proposal. A joint planning commission hearing occurred on October 27, 2008, followed the next day by an adoption recommendation by the Bend Planning Commission. The Bend City Council and Deschutes County Board of Commissioners held a joint public hearing on the proposal on November 24, 2008 and considered certain changes to it. The written public hearing record remained open until December 1, 2008. After deliberation during December, 2008, the city council adopted the proposal on January 5, 2009.¹

The Deschutes County Planning Commission forwarded its recommendation on November 13, 2008 and Board of Commissioners co-adopted the UGB expansion and

¹ The Bend City Council approved Ordinance NS-2111 related to amendments to sewer and water public facility plans involved with the UGB proposal, Ordinance NS-2112 related to justification of the UGB expansion and amendments to the Bend Area General Plan, and Ordinance NS-2113 concerning UGB-related amendments to the Bend Development Code.

**Urban Residential Lands
& UGB Expansion Area
Existing Zoning**



Urban Growth Boundary
 [Solid Blue Line] Current UGB
 [Dashed Blue Line] Expansion Area

0 1 2
Miles

Figure 1
Bend Urban Area Residential Zones

- RH - Res Urb High Density
- RM - Res Urb Medium Density
- RS - Res Urb Standard Density
- RL - Res Urb Low Density
- Other City Zones (Employ., Mix Use, & Pub. Use)
- EFUAL - Aitfall
- EFUTRB - Tum/Red/Ben
- MUA10 - Multi Use Ag
- UAR - Urban Area Reserve
- SR2.5 - Res Sub Low Density
- RR10 - Rural Residential
- Overlay or Refining Zones

Oregon
Department of Land
Conservation & Development

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

Aerial Image: 2009 NMAP
 UGB and zoning information extracted from maps provided by City of Bend and Deschutes County
 DLCD 060 000 00000
 Bend Oregon 97701

related amendments to the county comprehensive plan and county zoning code on February 11, 2009.²

The city provided notice and submittal of the UGB expansion to the department on April 16, 2009. The submittal contained an approximately 14,000-page record, including the adopted ordinances NS-2112 and NS-2113. The submittal did not include Ordinance NS-2111, which adopted an amended public facility plan, although a copy of Ordinance NS-2111 was included in the April 16, 2009 submittal materials.

The 21-day objection period for the April 16, 2009 submittal ended on May 7, 2009, with 27 parties filing objections. Also on May 7, 2009, the department sent the city notice that the submittal was incomplete. The city responded to the department's notice on June 5, 2009.

On June 12, 2009, the city provided notice and submittal of its adoption of the public facility plans related to the UGB expansion, including the notice of adoption for Ordinance NS-2111. This submittal started a second 21-day objection period. This second objection period ended on July 6, 2009 with nine objecting parties, including some who had objected during the objection period for the UGB submittal.

The department determined that the city's submittals were complete on August 28, 2009, and consolidated the record for review in the manner of periodic review. This began the department's 120-day review period to prepare a decision on the consolidated submittal. The 120-day review period was extended to January 8, 2010 by agreement of the city, in response to a request from the department on December 15, 2009.

B. Summary of the UGB expansion

The UGB expansion adds 8,462 acres to the existing 21,247-acre Bend UGB, an approximately 40 percent increase. The expansion includes 2,866 acres for housing needs and related uses and 2,090 acres for employment needs and related uses, for a total land need of 4,956 acres. [R. at 1054, 1057-1058] The amendment includes 5,475 acres considered "suitable" and available for development, leaving a theoretical "surplus" of 519 acres. [R. at 1054] In addition to the 519-acres, the UGB amendment includes 2,987 acres considered unsuitable for satisfying housing and employment land needs.

Of the 5,475 acres considered "suitable" and available for development, 4,069 acres are exception lands, which (under state law) are the highest priority lands for UGB expansions. ORS.197.298. The remaining 1,407 acres are resource (farm) lands, which are the lowest priority lands for UGB expansions. [R. at 1058] The findings do not indicate the land priority of the 3,506 acres of land that have been included in the UGB expansion, but that are either unsuitable for housing and employment land, or are

² The Deschutes County Board of Commissioners approved Ordinance No. 2009-01, related to co-adoption of the proposed Bend UGB and associate comprehensive plan policies and Ordinance No. 2009-02, related to the county zoning map and zoning ordinance text for areas within the Bend UGB.

"surplus" according to the findings. These 3,506 acres represent 41.4 percent of the UGB expansion area.

In 2008, the population living within the prior UGB was reported to be 76,551. The city's 2028 planning year population is projected to be 115,063. [R. at 1302]

The city's housing needs analysis identifies a need for 16,681 new dwelling units over the 20-year planning period, of which 11,159 dwelling units would be accommodated in the prior UGB. [R. at 1070-1071, 1083] According to the decision, this leaves the need for 5,522 new dwelling units to expand on 941 net acres of expanded UGB area.³ [R. at 1080, 1082]

The city projects that non-shift employment in 2028 will include 60,607 jobs citywide, of which 29,602 will be new employees. [R. at 1108, 1140] 2,090 acres of land were included in the UGB expansion to provide the sites necessary for this expanded employment base.

³ Second homes and vacant homes are not included in these housing needs numbers.

III. OBJECTIONS AND ANALYSIS

A. Organization of Review

Due to the size of the submittals included in this proceeding, the large number of objections provided by objectors and the range of issues subject to objections, the department has consolidated its review of objections by major compliance topics. This review starts in section III.E.

Sections III.B and C address the status of the objectors, determining whether they meet the legal requirements for objections, and whether their objections meet the requirements for valid objections. Section III.D addresses objections to Department of Land Conservation and Development's jurisdiction to review a portion of the submittal – the City of Bend's adoption of Ordinance NS-2111, adopting amended public facilities plans that relate to and are used as one basis for the city and county decisions on the Bend UGB.

Starting with Section III.E, review of each consolidated compliance topic includes (a) a summary of the applicable legal requirements relating to that set aspect of the decisions, (b) a summary of the local government actions, (c) a summary of relevant objections and previous department comments, and (d) the director's analysis and conclusions. The analysis and conclusions in each section are collected together and repeated in the report's final section, which contains the director's conclusions and decision. In the event of any conflict between the conclusions in Section III. and the conclusions in Section IV, those in Section IV will control.

B. Objectors and Status

Persons who participated at the local level orally or in writing during the local process leading to the final decision may file an objection to the local government's UGB expansion with the department, which then must review the expansion decision or refer it to the Land Conservation and Development Commission (LCDC) for review. Pursuant to OAR 660-025-0140(2), 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 of the submittal to the department was mailed by the local government;
- (b) Clearly identify an alleged deficiency in the UGB expansion, 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.

On May 7, 2009, the 21-day objection period for the city's April 16, 2009 submittal ended with the following 26 parties filing timely objections with the department. The

parties listed all participated at the local level according to materials submitted to the department, with the exception of Mr. and Mrs. Harold Simpson, as set forth in more detail in the next subsection. This list presents objectors in roughly the same order that they were received by the department.

1. Swalley Irrigation District
2. Tony Aceti
3. Terry L. Anderson
4. Toby Bayard
5. Bend-La Pine School District
6. Bend Metro Park and Recreation District
7. Brooks Resources Corporation
8. Richard and Jelinda Carpenter, Jack McGilvary (trustee)
9. Central Oregon LandWatch
10. Cindy Shonka
11. Edward J. Elkins, Doris E. Elkins
12. Fred and Katy Boos
13. Hillary Garrett
14. E. M. Holiday
15. Mark Anderson
16. Barbara I. McAusland
17. Tony and Cyllene King
18. Miller Tree Farm, LLC (Charlie Miller)
19. Newland Communities
20. Oregon Department of State Lands
21. Paul J. Shonka
22. Rose and Associates, LLP
23. Shevlin Sand and Gravel, Inc.
24. Mr. and Mrs. Harold Simpson
25. Keith Spencer
26. Tumalo Creek Development, LLC

On July 6, 2009, the 21-day objection period for the city's June 12, 2009 submittal ended with the following nine parties filing timely objections with the department. The parties listed all participated at the local level according to materials submitted to the department. This list presents objectors in roughly the same order that they were received by the department.

1. Toby Bayard
2. Hunnel United Neighbors
3. Newland Communities
4. Swalley Irrigation District
5. Anderson Ranch
6. Central Oregon LandWatch
7. J. L. Ward Company
8. Rose and Associates, LLC

9. Tumalo Creek Development

C. Validity of Objections

Objections must satisfy the requirements of OAR 660-025-0140(2) in order to be valid and considered by the director. This rule states:

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.

Some objectors have provided numerous or multiple objections covering a range of compliance issues, while others focus on a single objection. All of the objectors listed in section III.B filed their objection(s) in a timely matter, satisfying the requirements of OAR 660-025-0140(2)(a).

The objection of Mr. and Mrs. Harold W. Simpson (dated May 1, 2009) does not establish a clearly identified deficiency in the submittal as required by OAR 660-025-0140(2)(b). The objector attached a letter dated December 15, 2008, which apparently was originally sent by another party to the city, but after the City of Bend closed the public record on the matter on December 1, 2008. The objectors have not demonstrated that they participated orally or in writing at the local level as required by OAR 660-025-0140(2)(d). The Simpsons' objections are not valid.

The objection of Keith Spencer (dated April 23, 2009) does not establish a clearly identified deficiency in the submittal, as required by OAR 660-025-0140(2)(b). As a result, Mr. Spencer's objections are not valid.

The remaining objectors provided one or more valid objections. However, as set forth in more detail in the director's analysis section later in this report, specific objections may be found to be invalid based on criteria in OAR 660-025-0140(2)(b) or OAR 660-025-0140(2)(c).

Objections not addressed in the analysis sections of this report are denied.

D. DLCD Jurisdiction

Objector Swalley Irrigation District (Swalley) contends that the Land Use Board of Appeals (LUBA or the Board), and not this department has jurisdiction over the city’s submittal. Swalley rests the objection upon (1) the “tardiness” of the city’s submittal, and (2) the contention that the submittals are not and do not arise from UGB amendments within the department’s jurisdiction under ORS 197.825(2)(c)(A). Swalley objects that in order to invoke the exception to LUBA jurisdiction under ORS 197.825(2)(c)(A), a local government submittal to the department must occur closer to the time of adoption than occurred in this matter. Swalley objects that the city’s submittal is not timely for purposes of ORS 197.825(2)(c)(A) because it occurred after the time for filing a LUBA appeal or intervention. Objector Swalley contends this is because transfers to LUBA can only occur within certain statutory limits, citing ORS 197.830(9). Objector Swalley expounds that under ORS 197.825(2)(c)(A), the director can only transfer a matter to LUBA within the 21-day period in which a notice of intent to appeal a land use decision may be filed under ORS 197.830(9). Swalley argues “DLCD director’s transfer authority is only exercisable and thus necessarily must occur in the LUBA 21 day appeal period.” [Swalley Objection 1, at 14]

a. Legal Standard

Under ORS 197.825, LUBA has exclusive jurisdiction to review any land use decision of a local government with specific statutory exceptions.⁴ One exception to the exclusive jurisdiction of the board is for certain matters submitted to the department. ORS 197.825(2) provides in part:

The jurisdiction of the board:

* * * * *

(c) Does not include a local government decision that is:

(A) Submitted to the Department of Land Conservation and Development for acknowledgment under ORS 197.251, 197.626 or 197.628 to 197.650 or a matter arising out of a local government decision submitted to the department for acknowledgment, unless the Director of the Department of Land Conservation and Development, in the director’s sole discretion, transfers the matter to the board[.]”

ORS 197.825(2)(c)(A) excludes submittals pursuant to ORS 197.626, which provides:

⁴ ORS 197.825(1) provides:

Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

[A] city with a population of 2,500 or more within its urban growth boundary that amends the urban growth boundary to include more than 50 acres or that designates urban reserve under ORS 195.145, or a county that amends the county's comprehensive plan or land use regulations implementing the plan to establish rural reserves designated under ORS 195.141, shall submit the amendment or designation to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.650. (Emphasis added.)

The commission adopted OAR 660-025-0040⁵ to implement its exclusive jurisdiction under the statute and OAR 660-025-0250⁶ to provide for transfers of matters to LUBA.

⁵ OAR 660-025-0040 provides:

(1) The commission, pursuant to ORS 197.644(2), has exclusive jurisdiction to review the evaluation, work program, and all work tasks for compliance with the statewide planning goals and applicable statutes and administrative rules. Pursuant to ORS 197.626, the commission has exclusive jurisdiction to review the following land use decisions for compliance with the statewide planning goals:

- (a) If made by a city with a population of 2,500 or more inside its urban growth boundary, amendments to an urban growth boundary to include more than 50 acres;
 - (b) If made by a metropolitan service district, amendments to an urban growth boundary to include more than 100 acres;
 - (c) plan and land use regulations that designate urban reserve areas.
- (2) The director may transfer one or more matters arising from review of a work task, urban growth boundary amendment or designation or amendment of an urban reserve area to the Land Use Board of Appeals pursuant to ORS 197.825(2)(c)(A) and OAR 660-025-0250.

⁶ OAR 660-025-0250 provides:

- (1) When the department receives an appeal of a director's decision pursuant to OAR 660-025-0150(4), the director may elect to transfer a matter raised in the appeal to the Land Use Board of Appeals (board) under ORS 197.825(2)(c)(A).
- (2) Matters raised in an appeal may be transferred by the director to the board when:
 - (a) The matter is an urban growth boundary expansion approved by the local government based on a quasi-judicial land use application and does not require an interpretation of first impression of statewide planning Goal 14, ORS 197.296 or 197.298; or
 - (b)(A) The matter alleges the work task submittal violates a provision of law not directly related to compliance with a statewide planning goal;
 - (B) The appeal clearly identifies the provision of the task submittal that is alleged to violate a provision of law and clearly identifies the provision of law that is alleged to have been violated; and
 - (C) The matter is sufficiently well-defined that it can be separated from other allegations in the appeal.
- (3) When the director elects to transfer a matter to the board, notice of the decision must be sent to the local jurisdiction, the appellant, objectors, and the board within 60 days of the date the appeal was filed with the department. The notice shall include identification of the matter to be transferred and explanation of the procedures and deadline for appeal of the matter to the board.
- (4) The director's decision under this rule is final and may not be appealed.

b. Summary of Local Actions

The city submitted notice of the city's and county's adoption of four ordinances to the department on April 16, 2009. Those four ordinances were the city's ordinances adopting the amended UGB and amending the city's development code in certain respects (Ordinances Nos. NS-2112 and NS-2113), and the county's ordinances co-adopting the amended UGB and making certain amendments to the county's comprehensive plan map and text for the lands within the UGB expansion area. [R. at 1050-1051 (city ordinance NS 2112 - UGB); R. at 1836-1844 (city ordinance NS 2113 – development code); [county ordinance 2009-1 – UGB map and DCC and TSP map]; [county ordinance 2009-2 – zoning map and certain DCC amendments]. The city did *not* submit ordinance NS 2111, amending the city's Public Facilities Plan element of its General Plan, to the department on April 16, 2009 (although the city included a copy of this ordinance, which the city adopted immediately before the UGB amendment ordinance, in the record for the submittal of the UGB ordinance (NS 2112), and the city submitted a separate notice of adoption of the Public Facilities Plan on January 9, 2009). However, on June 12, 2009, following LUBA's decision in *Swalley Irrigation District v. City of Bend*, ___ Or LUBA ___ (LUBA Nos. 2009-012, 2009-013, 2009-31 and 2009-032 , May 8, 2009) and order in *Swalley Irrigation District v. City of Bend*, ___ Or LUBA ___ (LUBA Nos. 2009-010, 2009-011, and 2009-020, May 8, 2009) the city separately submitted ordinance NS 2111 to the department, and provided notice to the objectors, as required by OAR 660-025-0175(3) and (4) and OAR 660-025-0130 and -0140.

c. Analysis

The director concludes that this objection is not well-taken. Nothing in ORS 197.830(9) addresses department transfers to LUBA. Nothing in ORS 197.825(2)(c)(A) or its statutory context prescribes a time frame in which the director must act to transfer some or all of a local government submittal to LUBA. In construing ORS 197.825(2)(c)(A), the department may not insert what the legislature has omitted – in this circumstance a 21-day time frame that constrains the director's statutory authority to otherwise transfer a matter to LUBA. ORS 174.010. Nor can the director read ORS 197.830(9) as context in such a manner as to give no effect to ORS 197.825(2)(c)(A) in the circumstances presented here. *Id.*

The director notes that LUBA had not issued its orders on the jurisdictional issues at the time of Swalley's objections. Swalley Objection 1, at 4. LUBA has subsequently ruled on substantively the same jurisdictional arguments presented in this objection. The Board held, "ORS 197.825(2)(c)(A) and ORS 197.626, and the implementing rules adopted by DLCD make clear that after the City of Bend submitted NS-2112 and NS-2113 to DLCD for review under the statutes governing periodic review, LUBA ceased to have jurisdiction over those submitted decisions or over matters arising out of those submitted decisions unless the director of DLCD transfers matters to LUBA pursuant to OAR 661-025-0250(2)." *Swalley Irrigation District*, ___ Or LUBA ___ (LUBA Nos. 2009-012, 2009-013, 2009-31 and 2009-032 , May 8, 2009) (Slip op at 8). The Board also has dismissed challenges to County Ordinances 2009-01 and 2009-02 submitted to the department on

April 16, 2009. *Swalley Irrigation District v. City of Bend*, __ Or LUBA __ (LUBA Nos. 2009-33 and 2009-034, July 1, 2009).

Swalley also asserts that the City of Bend's ordinance NS-2111, adopting the city's water public facilities plans and the sewer public facilities plans as amendments to the city's comprehensive plan, is not itself an amendment of the city's UGB or "a matter arising out of" the city's UGB amendment. ORS 197.825(2)(c)(A). The director does not agree. The decision concerning where to expand its UGB relies heavily on the amendments to the public facilities plans as a factor in determining where to expand the UGB. See, e.g., R. at 1192 (Collection System Master Plan, and exclusion of exception lands to the southwest due to the feasibility of providing sewer service during the planning period). The city's 45-day notice also identified amendments to its Public Facilities Plan as being a part of its proposed adoption of an amended UGB. As a result, the director finds that Ordinance NS-2111 "arises out of" the city's UGB amendment, declines to transfer jurisdiction for review to LUBA, and determines that the director has jurisdiction to review the ordinance.

d. Conclusion

The director denies this objection. Consistent with LUBA's decisions and orders regarding jurisdiction over the city and county submittals, unless and until the matters are transferred to LUBA pursuant to OAR 661-025-0250(2), jurisdiction lies with the department.

E. Residential and Related Land Need

The City of Bend is the seventh largest city in Oregon, and from 2000 to 2005 the city grew rapidly—more rapidly than projected by the city at the last major update of its comprehensive plan (in 1998). [R. at 2116, 1059] Deschutes County completed a coordinated 20-year population forecast for the cities of Bend, Redmond and Sisters and the remainder of the county in 2004. [R. at 1981] That forecast projects the population of Bend to grow from 52,800 in 2000 to 109,389 in 2025. [R. at 1981] As the first step in its analysis of the capacity of its urban growth boundary (UGB), the city extrapolated the county’s population forecast to 2028 (in order to have a 20-year forecast for its review of its UGB). The forecast includes a 2028 population for Bend of 115,063. [R. at 1067, 1301] [ORS 195.034(1)] The city initiated a process for formal analysis of its UGB capacity and the consideration of a potential UGB amendment on June 11, 2007 by mailing notice of its initial evidentiary hearing to the department. [R. at 1053] The city adopted an amendment to the UGB and supporting analysis and related comprehensive plan amendments on (January 5, 2009).

This section of the directors report and decision addresses whether the UGB amendment complies with applicable state laws that guide local governments in determining: (1) the amount of land needed inside a UGB over the 20-year period for housing and other land uses (except for employment-related land need, which is addressed in section III.F of this report), (2) how much of this land need could be provided on land already inside the UGB, and (3) how much of this land need can be met only through expansion of the current UGB. The final subsection addresses the relation between the city’s UGB amendment and existing policies in the acknowledged Bend General Plan concerning needed housing.

The director’s analysis and decisions are based on his evaluation of the city and county decisions and the objections to those decisions, as well as the information and findings provided in the submittal.

1. The Quantity of Land Required for Needed Housing

a. Legal standards

ORS 197.295–197.314, 197.475–197.492 and 197.660–197.670, Statewide Land Use Planning Goals 10 and 14, and OAR 660, divisions 8 and 24 are the applicable state laws.¹

The fundamental requirement of these state laws is that cities over 25,000 in population must periodically demonstrate that their comprehensive plans provide for sufficient buildable lands within their urban growth boundary to accommodate needed housing for 20 years. A city meets this requirement by:

1. Forecasting what the population within the UGB will be in 20 years, usually relying on a coordinated population forecast adopted by the county; [ORS 195.036; 195.034; OAR 660-024-0030(3) and (4)]
2. Inventorying the supply of “buildable lands”⁷ within the existing UGB and determining the capacity of those lands for additional residential development over the 20-year period under current zoning [ORS 197.296(3)(a)];
3. Determining what is “needed housing” (ORS 197.303⁸ and OAR 660-024-0010(3)⁹) for the community by “housing type”¹⁰ and density, and determining the number of

⁷ Under Statewide Land Use Planning Goal 10, the term “buildable lands – refers to lands in urban and urbanizable [lands within a UGB that still have rural zoning] areas that are suitable, available and necessary for residential use.” See also, ORS 197.295(1) (same). The term is further defined by LCDC rule as:

residentially designated land within the urban growth boundary, including both vacant and developed land likely to be redeveloped, that is suitable, available and necessary for residential uses. Publicly owned land is generally not considered available for residential uses. Land is generally considered “suitable and available” unless it:

- (a) Is severely constrained by natural hazards as determined under Statewide Planning Goal 7;
- (b) Is subject to natural resource protection measures determined under Statewide Planning Goals 5, 15, 16, 17, or 18;
- (c) Has slopes of 25 percent or greater;
- (d) Is within the 100-year floodplain; or
- (e) Cannot be provided with public facilities.

[OAR 660-008-0005(2); OAR 660-024-0010 (definitions for UGB management)]

⁸ ORS 197.303 provides:

(1) As used in ORS 197.307 * * * “needed housing” means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. * * * “[N]eeded housing” also means:

- (a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
 - (b) Government assisted housing;
 - (c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and
 - (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions.
- * * * *

The housing types listed in the statute, namely “attached single family housing,” “detached single family housing,” and “multiple family housing” also are defined by LCDC rule. OAR 660-008-0005.

⁹ OAR 660-024-0010(3) provides that:

- (3) “Housing need” or “housing need analysis” refers to a local determination as to the needed amount, types and densities of housing that will be:
 - (a) Commensurate with the financial capabilities of present and future area residents of all income levels during the 20-year planning period;
 - (b) Consistent with any adopted regional housing standards, state statutes regarding housing need and with Goal 10 and rules interpreting that goal; and

housing units needed and the amount of land needed for each needed housing type for the 20-year period; [ORS 197.296(3)(b)]

4. If a city determines that its housing need (third step) exceeds its UGB's capacity (second step), the city must first determine whether land inside the UGB can be rezoned to accommodate the additional need. If so, the city must also amend its land use regulations to add new measures that demonstrably increase the likelihood that lands within the existing UGB will accommodate the remaining need. If the city determines it must add lands to its UGB to meet some or all of its projected housing needs, it may do so only after demonstrating that those needs cannot reasonably be accommodated on land already inside the UGB. Statewide Land Use Planning Goal 14.¹¹
5. As part of step 4, a city must determine the density and mix of needed housing types that must occur to meet projected overall housing needs for the 20-year planning period. If that planned density is greater than the actual density of development that has occurred within the UGB since the last periodic review (1998 in the case of Bend), the city must adopt measures to demonstrably increase the likelihood that future residential development in the UGB will occur at the density required to meet the projected housing needs. Similarly, if the overall mix of needed housing types during the 20-years planning period is different from the actual mix that has occurred within the UGB since the last periodic review (1998 for Bend [R. at 1074]), the city must adopt measures to demonstrably increase the likelihood that future residential development will occur in a manner that meets projected housing needs. [ORS 197.296(7)-(9)]
6. If the city determines that some or all of its additional need cannot be met by rezoning and other efficiency measures inside the current UGB (steps 4 and 5), the city must add land to its UGB to accommodate the remaining need. [See ORS 197.296(6)]

The needed housing statutes at ORS 197.295 to 197.314 and Statewide Land Use Planning Goal 10 require cities to *plan* for an adequate supply of land for needed housing. For the most part, they do not directly require cities to *ensure* that needed housing will be developed; that will depend on the market and other programs such as public and non-profit housing programs, tax incentives, and government subsidies.

(c) Consistent with Goal 14 requirements.

¹⁰ The housing types that must be analyzed include, but are not limited to, owner and renter occupied: attached single-family housing, detached single-family housing, and multiple family housing, along with the other three housing types listed in ORS 197.303(1)(b)-(d)) (in footnote 2, above).

¹¹ Statewide Land Use Planning Goal 14 provides, in pertinent part, that: "Prior to expanding an urban growth boundary, local governments shall demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary."

Two other important aspects of Goal 10 and the needed housing statutes and rules bear emphasis in this regard. They are: (a) that the Goal 10 rule requires cities and counties to consider the needs of the relevant *region* in arriving at a fair allocation of housing types within the UGB [OAR 660-008-0030]—in other words, the planning requirements of these laws apply regionally to some degree; and (b) ORS 197.296(7) not only requires planning—it requires “measures that demonstrably increase the likelihood that residential development will occur [at particular density levels, and in particular forms or types].” [ORS 197.296(7)] Such measures may include land use planning actions, but may also include financial incentives, density bonus incentives, redevelopment and infill strategies (such as urban renewal), authorization of new housing types, etc. [ORS 197.297(9)]

b. Summary of Local Actions

On January 5, 2009, the City of Bend adopted three ordinances. The first ordinance (Ordinance NS-2111) amended the city’s Public Facilities Master Plan. [R. at 35]. The second ordinance (Ordinance NS-2112) amended the city’s comprehensive plan map, including its map of its UGB, along with certain provisions of the urban area comprehensive plan text. [R. at 1050-1051] The third ordinance amends the city’s development code in certain respects to implement ordinance NS-2112 (the UGB amendment). [R. at 1836-1837]

The city initiated the evaluation and amendment of its UGB in June of 2007. The first step was to develop an estimate of the total number of new housing units needed over the planning period (from 2008 to 2028). [R. at 1069] The city utilized some of the safe harbors set forth in OAR 660, division 24 in projecting the number of new households, and used a vacancy factor based on 2000 census data. [R. at 1069] The total number of projected households, and thus the number of housing units, that the city found is needed for the 2008–2028 period is 16,681. [R. at 1070]

The city also produced several iterations of a buildable lands inventory (BLI), beginning in 2005, and updated several times through October of 2008. Based on the BLI, the city determined that there were 2,909 acres of vacant or redevelopable residential land within the UGB (prior to the expansion). [R. at 1071] The city then determined that buildable lands within the UGB had the capacity to accommodate 11,159 housing units (or 67 percent of the projected housing units needed for the 2008–2028 planning period) [R. at 1071-1072], leaving 5,522 units needed, to be accommodated by expanding the UGB.

The city prepared three alternate housing needs assessments: the “2709 Trend Forecast,” the “Goal 10 Housing Need Forecast,” and the “Transition Forecast.” [R. at 1075-1078] The findings state that the Transition Forecast satisfies Goal 10. [R. at 1078] The Transition Forecast projects a need for 10,843 (65 percent) detached units and 5,838 (35 percent) attached units for the 2008–2028 planning period.¹² The city then derived a

¹² The city *adopted* a housing *type* mix of 65 percent detached and 35 percent attached, because this was the built mix in 2008. [R. at 1306-07] The city didn’t adopt a separate housing *tenure* mix because it considered the housing type mix of 65 percent detached and 35 percent attached to be “a surrogate measure for tenure.” [R. at 1306]

“need” for additional residential land in an expanded UGB totaling 941 acres, based on the projected 65/35 housing type mix, using the same allocation of planning designations for the new units that exists in the current UGB (52 percent RS, 35 percent RM, and 13 percent RH) [R. at 1079-1080] The city’s estimate of land need reflects some projected increase in average density within these zones, from approximately four units per net acre within the existing UGB to approximately six units per net acre on the lands added to the UGB for residential purposes. [R. at 1080, 1081]

The city has taken several actions to increase the capacity for residential development within the existing UGB. [R. at 1083-1084] These include amendments to the Bend Development Code in 2006, as well as two new efficiency measure proposed in this amendment (beginning to *plan* for 500 units of attached housing in the Central Area Plan, and plan for 600 units of additional housing along transit corridors). [R. at 1085] These two new efficiency measures are reflected in amendments to Chapter 5 of the city’s General Plan. [R. at 1085, note 48; see also R. at 1311 (transit corridor planning to be done prior to 2012, no date is provided for Central Area planning)]

The city also estimated land need for several other uses related to residential use. First, the city prepared a separate estimate of land needed for second homes. [R. at 1086-1088] The city estimates that 18 percent of the number of the total additional housing units projected as needed for the planning period from 2008 to 2028 will be needed for second homes, or an additional 3,002 units. The city also projected that these second-home units will develop at a net density of six units per acre, leading to a land need of 500 acres for second homes. The city estimated that 377 acres of land were consumed over the prior seven years by second home development. [R. at 1086]

The city also estimated land need for schools (192 acres) [R. at 1089], parks (474 acres) [R. at 1090], private open space and private rights-of-way and institutional uses (other than schools and parks). Based on data for the land area of these uses within the existing UGB, the city added 15 percent to the amount of land need for housing to account for these uses. [R. at 1091] Finally, the city added another 21 percent for land needed for streets and other public rights-of-way. [R. at 1092]

The city adopted a Framework Plan Map as part of its UGB expansion. The map identifies seven master plan areas. The General Plan states, “The framework plan functions somewhat like a general plan map by indicating general locations, land use types, and densities of a variety of future urban uses,” [p. 1-5] and, “* * * Owners of large parcels will be required to demonstrate how projects will be developed after annexation in ways that are consistent with the illustrations of the framework plan and the identified land need.” [p. 1-6]

The following table, which is a copy of table III-14 from the city’s findings, summarizes the amount of land the city found was needed for expansion of its UGB for residential and other non-employment purposes during the 2008-2028 planning period. [R. at 1092]

Table 1. Summary of UGB Expansion Needed for Housing and Related Uses (2028)

Acres for new housing units	941
Acres for public schools	192
Acres for public parks and trails	474
Acres for second homes	500
Subtotal	2,107
Acres for other land uses (institutional, private open space, private ROW)	442
Acres for public rights of way	316
Estimate of Total Acres Needed	2,886

The city also included almost 3,000 acres of land in the UGB expansion that are not identified as being needed for housing or employment, or any other land need. [R. at 1054] While it appears that the city considers these acres to be unsuitable for any urban land needs, the city does not explain why these additional lands are included within the UGB if they cannot serve an urban need for land. There are no findings addressing these lands other than the two sentences at R. 1054.

c. Objections

The following subsection summarizes and paraphrases objections filed relating to the amount of land in the UGB expansion area for residential and other non-employment uses. The department also commented on these issues in letters to the city dated October 24, 2008 and November 21, 2008. Responses to these objections are provided in subsections 1.e and 2.e, below.

Anderson – The city and county underestimate the amount of land needed for right-of-way, and therefore fail to comply with OAR 660-024-0040(1). Specifically, the estimate is based on land use within the existing UGB, and fails to account for substandard existing rights-of-way and for needs attributable to stormwater management. [May 7, 2009 letter from Andrew Stamp]

Toby Bayard – The proposal doesn’t plan for needed housing types to meet the housing needs of all residents as required by Goal 10, particularly lower income and multifamily housing. The proposal underestimates the land need for housing for lower income households.

The UGB amendment includes approximately 3,500 acres above the city’s projected land needs, evidently including a variety of lands that are not suitable for urban uses. These lands include land in rural subdivisions, and appear to include lands that contain Goal 5 resources, but none of the reasons for inclusion are contained in the city’s findings. State law does not allow a buffer or cushion (the city included a cushion of 519 acres).

The city has failed to show that residential uses cannot be reasonably accommodated within the existing UGB. The city estimates a potential capacity within the UGB of 44,738 units, but assumes that only 25 percent of this capacity will be utilized. Existing residential density in Bend is less than half that of other Oregon cities of the same size.

The city fails to plan for efficient use of the lands added to the UGB, by assuming that 76 percent of that land will be zoned RS (average density of 4 du/acre). Only 33 acres of the total 941 acres is assumed to be zoned RH (average density of 22 du/acre).

Bend's 1998 General Plan projected a housing mix of 55 percent single-family and 45 percent multi-family (including 10 percent mobile home parks), but actual development since 1998 has been 77 percent single-family and 23 percent multi-family (with 0 percent mobile home parks). The city assumes that housing density and mix will continue to produce the same housing types, without regard for current and future housing needs of the city's population over the next 20 years. The 1998 planned mix of 55/45 percent is identical to the mix provided by the Oregon Housing and Community Services Department's Housing Needs Model, which the city rejected and replaced with a much higher percentage of single-family housing and a much lower percentage of multi-family housing. The city also changed to a different type of housing mix, "detached percent and attached percent" instead of "single-family percent and multi-family percent," which includes single-family housing in the form of high end, low density detached housing, and attached housing in the form of attached housing in the form of high end townhomes, condos, and resort communities. The new mix terminology does less to ensure that both detached and attached housing types more affordable to lower and middle income households are likely to develop. The proposal includes medium and high density development only in the Central Area and on Transit Corridors without demonstrating that this will meet the 20-year housing needs of all residents.

The city has reduced the density in the RL (Residential Low Density) and RS (Residential Standard Density) zones.

The city's estimate of land need for second homes is too high, and is not supported by the evidence in the record.

The city's estimate of land need for public right-of-way is too high.

The city did not sufficiently consider efficiency measures inside the existing UGB as required by ORS 197.296(9). The efficiency measures that were adopted lack documentation to assure that they will be effective. [April 29, 2009 letter]

Carpenter/McGilvary – The city and county underestimate the amount of land needed for right-of-way, and therefore fails to comply with OAR 660-024-0040(1). Specifically, the estimate is based on land use within the existing UGB, and fails to account for substandard existing rights-of-way and for needs attributable to stormwater management. [May 5, 2009 letter from Bruce White]

Central Oregon LandWatch – The city does not explain how or why unsuitable lands are added to the UGB to arrive at a gross acreage total of 8,462 acres. The city's findings do not explain why some lands are considered unsuitable, nor why they are nevertheless added to the UGB. The city's determination that lots less than 3 acres in size are

unsuitable if they have existing development is not explained, not does it comply with Goal 14.

The city has not complied with OAR 660-015-0000(14)(2), in that it has not demonstrated that its projected needs cannot be met within the existing UGB.

The city's projected land need of 500 acres for second home development is not justified and is based on incorrect data.

The city's projected land need of 474 acres for parks is not justified, and is based on plans not incorporated into the city's comprehensive plan. In addition, the city fails to account for the fact that some of this need is and will continue to be met on lands outside of the UGB.

Regarding land need for public right-of-way, the city's estimate is based on existing development patterns and does not consider provisions for skinny streets that can and have reduced the amount of land required in newer developments in the city.

Regarding land needed for private rights-of-way and open space, there is no showing of why this type of private land use is needed under Goal 14, when public parks are already provided.

The city misconstrues 660-024-0040(1) in including a "buffer" of 519 acres over and above its demonstrated land need for residential use.

The city fails to consider the approval of the Tetherow destination resort and its effect on land need within the UGB for this type of use.

The city relied on current market conditions as the basis for determining that a greater degree of redevelopment will not occur within the 20-year planning period. The proposed housing mix of 65 percent single-family detached and 35 percent multi-family will not correct a historic shortfall of land for medium and higher density housing types. The city has not done enough to promote infill and redevelopment within the existing UGB, and must adopt more measures to plan for more multi-family housing. [May 7, 2009 letter from Paul Dewey]

Barbara I. McAusland – Bend's Development Code lacks incentives needed for the construction of affordable housing. Providing for second homes in the residential lands need consumes residential land without providing for the primary affordable housing needs of residents. Too much land is added to the UGB. [May 5, 2009 letter]

Newland Communities – The city underestimates the residential land need through the planning period. The assumptions used by the city concerning redevelopment and infill are overly optimistic, and do not account for various livability land needs such as parks and schools. The city also did not adjust its capacity analysis to reflect infrastructure of lot configuration constraints. The city failed to consider the presence of dwellings on lots

in its capacity analysis. The proposed expansion improperly provides less “room” or “livability” per person than existed during the period 1981–2008. The buildable land inventory within the existing UGB is overly conservative and likely overestimates the number of residential units that could be accommodated within the existing UGB and underestimates the amount of land needed within the proposed UGB.

The city’s use of the Oregon Housing and Community Services Department’s Housing Needs Model is in error, and will likely result in an underestimate of land need outside the existing UGB during the planning period. The Housing Needs Model should not be used in a UGB expansion, and Bend’s use of it should be disregarded. The state should disregard the city’s discussion or application of the Housing Needs Model and rely on actual trends (77/23 split) or the transition forecast of 65/35. The city must use the 1998-2005 housing mix and densities as required by HB 2709. [ORS 197.296]

The city is required to project housing density and mix, not housing tenure, and not a particular single family/multi-family split.

The theoretical surplus of 519 acres is needed to fulfill land needs, and to provide for effective delivery of infrastructure and complete communities. [May 7, 2009 letter from Christie White]

Oregon Department of State Lands – The city did not properly analyze housing need by type and density as required by ORS 197.296(3)(b) and failed to plan for needed housing as required by ORS 197.303. The city’s conclusion concerning a 65/35 detached/attached housing mix is too generalized to comply with the specificity required under ORS 197.296(3)(b), 197.296(9) and 197.303 for a determination of the number of units and amount of land needed for each housing type (attached and detached single-family housing, and multiple family housing, each for both owner and renter occupancy) for the next 20 years.

The city also fails to adequately consider regional housing needs and a fair allocation of housing types, as required by OAR 660-008-0030.

As a result of these deficiencies, the proposal fails to demonstrate that the UGB will provide sufficient buildable land to accommodate projected housing needs for 20 years. [May 7, 2009 letter from Gary Vrooman]

Swalley Irrigation District – The city and county violated Goal 10 by failing to show that there are measures to achieve needed housing types.

The amount of land determined to be needed is too large and beyond what the city determined was needed. The 519-acre cushion must be removed.

The buildable land inventory does not include all buildable land as defined in ORS 197.295, *e.g.*, by excluding vacant land accessed by private road, by very narrowly defining “redevelopable” land, by excluding “split-zoned” parcels, and by not including

all “partially vacant” land planned or zoned for residential use. The city’s buildable land inventory and housing need analysis ignores or minimizes manufacture home parks as a needed housing type without a factual basis. The city ignores, contrary to Goal 10, the shortage of workforce housing. The city double-counts land need for open space, parks and schools. Parcels 3 acres or smaller with a house are arbitrarily rejected as “unsuitable” for future infill or redevelopment.

The city has selected the most expensive lands to serve with public facilities, making it impossible for affordable housing to be provided.

The city ignored the housing that is planned within two destination resort sites in its housing needs assessment.

The city has failed to include efficiency measures for the existing UGB as required by Goal 14 and ORS 197.296. [May 6, 2009 letter from Wendie Kellington, pp. 63-65, 72, 77-78]

d. Analysis and Conclusions

Population (Statewide Planning Goal 14, Factor 1; and OAR 660-024-0030). The city’s extension of Deschutes County’s acknowledged population forecast, from 2025 to 2028 complies with relevant state law. [ORS 195.036; 195.034] The city used a 1.7 percent annual growth rate for the 2025–2028 period, which is the same average annual growth rate that the County forecast for Bend for 2025. [ORS 195.034(1); R. at 1067-1068]

Buildable Lands Inventory/Capacity Analysis (ORS 197.296(3)–(5); Statewide Planning Goal 10; OAR 660-024-0050; OAR 660-008-0010).

Quantity of Buildable Lands Within the Prior UGB – OAR 660-008-0010 requires that the BLI document the amount of buildable land in each residential plan designation. The BLI must further break down the analysis into the amount of land in each plan designation that is vacant, and the amount that is redevelopable. [OAR 660-024-0050(1)] Buildable lands are residentially designated lands within the UGB that are suitable, available and necessary for residential uses. [OAR 660-008-005(2)] Lands are generally considered suitable and available unless severely constrained by natural hazards, subject to protection measures such as those required by Goal 5, have slopes over 25 percent, are within the 100-year floodplain, or cannot be provided with public facilities. [OAR 660-008-005(2)] In addition, “redevelopable lands” are lands zoned for residential use that are already developed, but where there is a strong likelihood that existing development will be converted to more intense residential uses during the planning period. [OAR 660-008-0050(6)]

Buildable lands include lands that may be used for a mix of residential and employment uses. [ORS 197.296(4)(a)] Finally, the city must create a map or document to verify and identify specific lots or parcels that have been determined to be buildable. [ORS 197.296(4)(c)]

The findings do not clearly explain how the city determined the amount of land that is redevelopable or vacant (the total quantity of vacant and redevelopable lands is determined to be 2,909 acres). [R. at 1071] Generally, the city indicates that the BLI is based on a parcel-level database, where city staff reviewed each tax lot to determine its development status (vacant, vacant platted, vacant with constraints, and redevelopable). [R. at 1071] The city included a summary of the BLI in its newly adopted Chapter 5 of the Bend Area General Plan. [R. at 1288, Table 5-4] However, there does not appear to be a map of the lands determined to be buildable in the record—making it impossible to identify the quantity or location of redevelopable or vacant lands. In addition, the city’s most recent BLI indicates in notes that:

- (a) Developed residential lots contain existing dwellings and do not meet the [redevelopment] criteria below, or are used for employment, schools, parks, open space, institutional uses, or parking lots[;] and
- (b) Redevelopable residential lots can double the number of dwelling units on the lot, are greater than 0.5 acre, have a land value greater than improvement value, [and] have no CC&Rs prohibiting future land division[;] and
- (c) Constrained lots are those with development constraints (no public road access) or with physical constraints over 50% of the lots (includes slopes greater than 25%, areas of special interest, and floodplains. [R. at 2042]

Based on these notes from the most recent BLI, it appears that the city excluded “constrained” lands that may qualify as “buildable land” under OAR 660-008-005(2). That rule provides that lands are generally considered suitable unless they meet certain specific criteria. It also appears that the city concluded that no redevelopment will occur on lots unless they contain at least 0.5 acres and have a land value exceeding improvement value. The criteria in the rule do not correspond to the criteria used by the city.

It also appears that the city considered some lands as “developed residential lots” that could be redeveloped, such as lands used for open space or parking lots. The criteria for “redevelopable residential lots” do not appear to comply with OAR 660-008-0005(6). Although consideration of land and improvement values and CC&Rs is relevant to the likelihood of existing development being converted to more intense residential uses over 20 years, there is no finding or reasoning in the city’s decision that documents the determination required by the rule (i.e., that there is a strong likelihood that existing development will be converted to the capacities the city projects).

Finally, the BLI does not include consideration of potential development in lands that may be used for a mix of residential and employment uses. [R. at 2129] In sum, the department is unable to determine whether the *amount* of vacant and redevelopable land projected by the city for each residential plan designation complies with OAR 660-008-0005, 660-008-0010, 660-024-0050, and ORS 197.295 and 197.296(3) and (4). The director remands the city and county decisions with direction 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 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.
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.

Capacity Analysis for the Prior UGB – In determining the capacity of buildable lands, the city estimated that *all* vacant and redevelopable land will develop during the planning period. [R. at 1071] However, the city also bases its capacity analysis on the assumption that development in the RL, RS and RM plan designations will occur at the minimum density allowed by zoning for vacant lands in these districts, and that development in the RH district will occur at a lower density than the minimum allowed due to parcelization patterns. [R. at 1071] Most of the buildable lands capacity is estimated to be vacant lots and parcels rather than from lands that might redevelop. [R. at 1071, Table III-4]

The findings refer to a March 3, 2008 memorandum as providing the detail for the city’s assumptions on buildable land capacity. [R. at 1071, 8408-8414] That memorandum indicates the city used the following assumptions regarding the projected density of new housing units per *acre* through *redevelopment*: one unit per acre for RL; two units per acre for RS; five units per acre for RM; and essentially no redevelopment for RH lands. For *vacant* lands that are *already platted* (or in the process of division), the assumed densities per *lot* are: one unit per lot for RL and RS, and two units per lot for RM and RH. For *vacant acreage*, the densities per *acre* are: two units per acre for RL, four units per acre for RS; eight units per acre for RM; and fourteen units per acre for RH. These calculations net out land for right-of-way (at 31 percent; later changed to 21 percent). [R. at 8409-8410; 1072] The findings do not include an analysis of lands zoned UAR or SR 2½ within the prior UGB (there appear to be UAR areas at Cooley Road, and at Juniper Ridge, and SR 2 ½ areas north of Roper Road, as well as other scattered UAR areas on the west side of the city, all within the prior UGB).

The city’s minimum densities for its residential plan designations per its Development Code (Section 2.1.600), and the total acreage within the prior UGB for each as reported by the city, [R. at 8412] are:

- Urban Area Reserve (UAR) one unit per ten gross acres (acreage not listed)

- Suburban Low Density Residential (SR 2½) one unit per 2½ gross acres (single family detached housing) (acreage not listed)
- Low Density Residential (RL) 1.1 units per gross acre (single family detached housing) (1,527 total acres)
- Standard Density Residential (RS) 2.0 units per gross acre (single family detached housing) (9,611 acres)
- Medium Density Residential (RM-10) 6.0 units per gross acre (manufactured homes and attached housing) Note that single-family detached housing is a permitted use in this zone, with no apparent minimum density. (1,336 acres, include RM)
- Medium Density Residential (RM) 7.3 units per gross acre (attached multi-family housing) Note that single-family detached housing is a permitted use in this zone, with no apparent minimum density.
- High Density Residential (RH) 21.7 units per gross acre (attached multi-family housing) (316 acres) [R. at 8411]

While the assumption that *all* buildable lands will be developed during the planning period is aggressive, assumptions regarding the amount of development that will occur on those lands is quite conservative, particularly given the predominance of land planned for lower density within the existing UGB (RL and RS, with the latter allowing a minimum lot size of one-half acre and the former a minimum lot size of just under one acre). In addition, the city apparently failed to analyze lands zoned UAR or SR 2½ at all in terms of development capacity. The final determination of capacity within the existing UGB, which uses these assumptions, yields a total of 10,059 units (before new efficiency measures are considered). [R. at 1071, Table III-4]

Under ORS 197.296(3) and (5)(a), the determination of capacity must be based on data relating to land within the UGB that has been collected since the last periodic review (the city completed its last periodic review in 1998). More specifically, ORS 197.296(5)(a) requires that the determination of housing capacity be based on:

- (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.

The findings do not relate the capacity analysis to the factors that the statute requires. Although some of the city's earlier efforts were based on actual infill and redevelopment

data from 1998 to 2008,¹³ the decision simply uses assumptions based on minimum allowed density.¹⁴ The analysis also leaves out any analysis of the extent to which lands have been, or are likely to be, rezoned to higher densities. As a result, the director determines that the city's capacity analysis does not comply with Goal 10 or ORS 197.296(3) or 197.296(5)(a). The director remands the city and county decisions with direction 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.

Housing Needs Analysis (ORS 197.296(3)(b)(5); Statewide Planning Goal 10; OAR 660-024-0040 and 0050; OAR 660-008-0005, 0010 and 0030; Goal 14). Like the statutorily required analysis of housing capacity within the existing UGB, the scope and basis for the housing needs analysis is largely dictated by state statute. ORS 197.296(3)(b) and (5) require that the city:

Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed *for each needed housing type* for the next 20 years.” ORS 197.296(3)(b)(emphasis added); and that

The determination of housing * * * need pursuant to subsection (3) of this section must be based on data relating to land within the urban growth boundary that has

¹³ Using 1998-2005 built densities and the current distribution of residential land among the different residential zones would appear to result in a capacity of 12,280 housing units within the existing UGB rather than 10,059 units as the city ended up finding. [Table 13, R. at 2132] The low average built densities in the RL zone (two units per net acre) and RS zone (four units per net acre), and the predominance of those zones (84 percent of the city's total residentially-designated land is RL or RS [Table 5-4, R. at 1288] results in a lower capacity within the existing UGB.

¹⁴ It also appears that the city excluded certain developed lands from consideration for redevelopment potential. Even developed lands must be considered for redevelopment under Goal 10. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 693-695 (1995).

[sic] 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. [ORS 197.296(5)] [emphasis added]

In addition, ORS 197.303 defines “needed housing” as:

* * * housing types determined to meet the need shown for housing within an urban growth boundary *at particular price ranges and rent levels*. On and after the beginning of the first periodic review of a local government’s acknowledged comprehensive plan, “needed housing” also means:

- (a) Housing that includes, but is not limited to, *attached and detached single-family housing and multiple family housing for both owner and renter occupancy*;
- (b) Government assisted housing;
- (c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490; and
- (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions.” [ORS 197.303(1)] [emphasis added]

OAR 660-008-0005 defines several terms used in the preceding statutes that are pertinent to the scope of a city’s required housing needs analysis, including: “attached single family housing,” “detached single family housing,” “housing needs projection,” and “multiple family housing.” In particular, the term “housing needs projection” (which is the same as the “housing needs analysis” under 197.296(3)) is:

* * * a local determination, justified in the plan, of the mix of housing types and densities that will be:

- (a) *Commensurate with the financial capabilities of present and future area residents of all income levels during the planning period*;
- (b) Consistent with any adopted regional housing standards, state statutes and Land Conservation and Development Commission administrative rules; and
- (c) Consistent with Goal 14 requirements. [OAR 660-008-0005(4)] [emphasis added]

The city must estimate housing need for each housing type for *both* owner and renter occupancy. ORS 197.303(1)(a). Needed housing also requires that the city evaluate the need for housing at particular price ranges (owner occupancy) and rent levels (renter occupancy), and (as noted above) commensurate with the financial capabilities of *current and future* residents. [Statewide Planning Goal 10, Goal 10 definition of “Needed Housing Units;” OAR 660-008-0005(4) (definition of “housing needs projection”)] Finally, OAR 660-008-0010 and ORS 197.307(3) require that “[s]ufficient buildable lands shall be designated on the comprehensive plan map to satisfy housing needs by type and density range as determined in the housing needs projection.” See generally, *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

OAR 660-024-0040(7) provides several safe harbors used by the city, under which a city is not required to separately estimate the need for certain housing types (government-assisted housing, manufactured dwellings on individual lots, manufactured dwelling parks).

The collective result of these requirements as applied to the City of Bend is that the city is required to estimate housing need for at least three housing types:

- Attached single family housing (common-wall dwellings or rowhouses where each dwelling unit occupies a separate lot, OAR 660-008-0005(1));
- Detached single family housing (a housing unit that is free standing and separate from other housing units, OAR 660-008-0005(3); and
- Multiple family housing (attached housing where each dwelling unit is not located on a separate lot, OAR 660-008-0005(5)).

In addition, the city must estimate housing need for each of these three housing types for *both* owner and renter occupancy. [ORS 197.303(1)(a)] This estimate must be based both on data concerning the development that has actually occurred since the last periodic review, and on demographic and housing trends. [ORS 197.296(5)(a)] The city must consider the housing needs of both present and future residents. OAR 660-008-0005(4) and OAR 660-008-0010. See generally, *DLCD v. City of McMinnville*, 41 Or LUBA 210 (2001).

Projected Overall Need for Housing Units – The city projected its overall need for housing during the planning period by dividing the total forecasted population increase (less persons in group quarters) by its projected household size (based on the 2000 census) to derive a forecast for needed new housing units. [R. at 1070, Table III-2] The city utilized several safe harbor provisions of OAR 660-024-0040 in making these forecasts. The findings show that it is qualified to use of these safe harbor provisions, and that the forecast of new housing units needed in the 2008–2028 period complies with state laws. The total of new housing units needed during the planning period is 16,681. [R. at 1070] The director finds that the city’s projection of overall need for housing units complies with applicable state law.

Projected Need by Density and Housing Type – The city carried out three different housing needs analyses: a “HB 2709 Forecast;”¹⁵ a “Housing Needs Model;” and a “Transition Forecast.” [R. 1074-1078]. It appears that the city relied on the “Transition Forecast” for its final decision. [R. at 1078 (“The city finds that this final forecast (aka transition forecast) will meet Goal 10.”)] However, the city *adopted* as its final housing need analysis a new Chapter 5 of its General Plan. [R. at 1050, 1280-1315 (“This section of Chapter 5 represents Bend’s Housing Needs Analysis.” R. at 1285)] Nevertheless, the city’s findings refer to the three prior analyses rather than to Chapter 5, for reasons that are not clear. As a result, it is extremely difficult to understand the city’s reasoning.

The beginning of the newly adopted General Plan Chapter 5 includes a series of important findings, including:

- “The inadequate supply of land has led to a lack of multi family units * * *.”
- “Central Oregon has the highest net migration in the state. The inadequate supply of land has led to a lack of multi-family units.”
- “The rapid increase in population has resulted in a growth in demand for workforce housing that has outpaced the production of workforce housing units. Between 2000 and 2005, job growth created a demand for 9,057 units of workforce housing while only 8,230 units were produced.”
- “* * * [M]ore affordable forms of housing, such as multi-family units, are currently being priced out of the Bend market.”
- “Affordable housing for service workers, both for individuals and families, is in short supply in Bend. * * * * While the cost of rental housing has not increased as rapidly as house prices, recent rent increases are starting to place additional

¹⁵ The city states that its “House Bill 2709 trend forecast” -- an “extrapolation of actual housing mix and density trends between 1998 and 2005” [R. at 2121] -- is consistent with ORS 197.296. The department does not agree. ORS 197.296(5) sets out the state’s UGB housing capacity and need methodology for cities like Bend that have 25,000 or more people in their UGBs. The UGB data on which the city must rely include:

- The number, density and average mix of housing types of urban residential development that have actually occurred;
- Trends in density and average mix of housing types of urban residential development;
- Demographic and population trends;
- Economic trends and cycles; and
- The number, density and average mix of housing types that have occurred on the buildable lands described in subsection (4)(a) of this section. [ORS 197.296(5)(a)]

Only two of these data sources, the first and last, address *past* housing development; the others address future housing *trends*. This means that the city cannot rely exclusively on past data to determine housing need and capacity within the existing UGB. The analysis must also be based on current and future trends.

pressure on low-income households. Further complicating the issue is the seasonality of many jobs in the region * * * making it difficult for the region to meet peak housing needs. * * *

- “The lack of affordable housing for the workforce has a negative affect on employers in Central Oregon. * * *
- “The increasing lack of housing affordable to low and moderate income households is resulting in many area workers purchasing homes and living in other communities, including Redmond, Prineville and others. * * * This is exacerbating traffic congestion and other issues caused by rapid growth in the community. It also affects the ability of area employers to attract workers for jobs at many income levels, including service and professional workers.” [R. at 1282-1284].¹⁶
- “In 2000, there were 2,087 and 2,285 very low and low income households, respectively, in Bend. There were only approximately 1,300 housing units available at prices at or under 30% of these households’ monthly income * * *. Over 90% of these were rental units.” [R. at 1309]

The city analyzed the housing development that occurred within its prior UGB between 2000 and 2008 for two housing types: attached and detached. [R. at 1286] There is no separate analysis of single family attached housing (the data for this housing type are combined with the detached single family housing data). The data show that the proportion of single family housing within the UGB has increased from 70 percent to 78 percent of all units over this period, while the proportion of multi-family housing has held steady (at 20 percent). The proportion of housing in manufactured home parks has decreased rapidly. [R. at 1286, Table 5-3 (note, there are math errors in the cited percentages)] The city also (in narrative, summary form) analyzed the change in density for single family and multi-family housing, finding that single family housing density has increased by 54 percent since 1999, and that the density of some types of multi-family housing has increased by 10 percent (there is no narrative regarding apartments or condominiums). [R. at 1289-1290] The findings also show a significant *decrease* in rental housing as a proportion of the total between 1990 and 2000. [R. at 1290, Table 5-7].

Like Chapter 5, the findings concerning the Transition Forecast consider housing need only for two categories: detached units and attached units. [R. at 1078, Table III-10] The projected housing mix of these two categories is 65 percent detached, and 35 percent attached. The findings indicate that most detached units will be owner-occupied, and that 38 percent of the attached units also are currently owner-occupied, with that percentage

¹⁶ “It is clear that the city has a shortage of land in the higher density zones. A comparison of the land need and land supply by zones shows an overall deficit of about 250 net acres in the RM zone and a deficit of about 200 acres in the RH zone. From a planning perspective, it doesn’t make sense to expect that this shortage of RM and RH land will be met entirely in the UGB expansion area(s).” [R. at 2133, City of Bend, Residential Lands Study, April 25, 2005]

expected to increase. [R. at 1078-1079] In other words, the Transition Forecast assumes that at least 78 percent of the housing needed between 2008 and 2028 will be owner-occupied (65% + 38% of 35%).

There are two main problems with the analysis. First, the lack of a clear connection between the findings and its adopted housing needs analysis (Chapter 5), along with the collapsing of housing types into two summary categories (attached and detached), makes it effectively impossible to determine whether the amendment complies with the substantive requirements of Goal 10 and ORS 197.296 to designate sufficient lands to satisfy housing needs by housing type and density. As a result of the use of varying categories and terminology, the director is unable to determine whether the housing needs analysis complies (in form) with ORS 197.296 and Goal 10.

This is not simply a technical problem; the use of varying housing type categories and labels in the findings makes it impossible to evaluate whether they comply with Goal 10 and ORS 197.296 (compare Tables III-5, III-6, III-8, III-9 and III-10). The terminology also makes it impossible to determine whether and how the city's residential zones provide for various housing types as contemplated by OAR 660, division 8. The "transition forecast," which blends actual development with future needs, provides an estimated future housing *type* mix of 54 percent detached and 46 percent attached. [R. at 2130] It is impossible for the director to compare this result with the other two forecasts, the 1998–2005 built mix, and with the 1998 planned mix, because the findings express housing mix in terms of single-family vs. multi-family housing types, not detached versus attached housing types.

More substantively, it is clear from the findings that there is a current and projected future shortage of land for multi-family housing. [R. at 1075] In addition, the city has identified a significant need for additional workforce housing to reduce the growing trend of commuting into Bend from surrounding communities [R. at 1282], and a need for additional seasonal worker housing. [R. at 1282] Neither the findings nor the Housing Needs Analysis explain how the current and future planning designations of land will provide for these housing needs. Instead, the decision simply assumes (and does not attempt to alter) the recent trends that have created these housing needs.

Specifically, the city has planned most of its residential lands (87 percent) within the prior UGB for low-density, single family residential use (RL (1.1 dwelling per gross acre minimum density) and RS (2.2 dwellings per gross acre minimum density)). Multi-family housing (buildings with more than 3 units) is not allowed within the RL and RS zones (duplexes and triplexes are conditional uses in the RS zone). [Bend Code section 2.1.200, R. 1287-1288].

Further, the city is planning for an equivalent distribution of lands among residential districts for the lands the UGB expansion area. [R. at 1079; 1080] (Table III-12 shows 76 percent of the total acreage as being in the RS zone; note that lands in the RL zone are not included in this table at all because, according to the city, this zone will not provide

needed housing.) [R. at 1079; see also R. at 1098 (Framework Plan¹⁷ allocates 84 percent of (non-employment) lands added to the UGB as RS)]. The record lacks findings on why the existing distribution by zone is appropriate for the expansion area, and why it is appropriate for the 20-year planning period, especially in light of other findings in the record about demographic, household income, and housing affordability trends for the Bend area that indicate the existing distribution is not appropriate for the future.¹⁸

Conversely, previous planning decisions may have undermined the city's ability to provide needed multi-family and high density housing. The city's 2008 BLI reports that there are 341 acres designated as high density residential (RH), which contained 1,246 dwelling units, of which 172 units are single family dwellings. [Table 5-4, R. at 1288, Table 5-5, R. at 1289] This amounts to a gross density of 3.65 dwelling units per acre for the 341-acre inventory of RH-designated land.

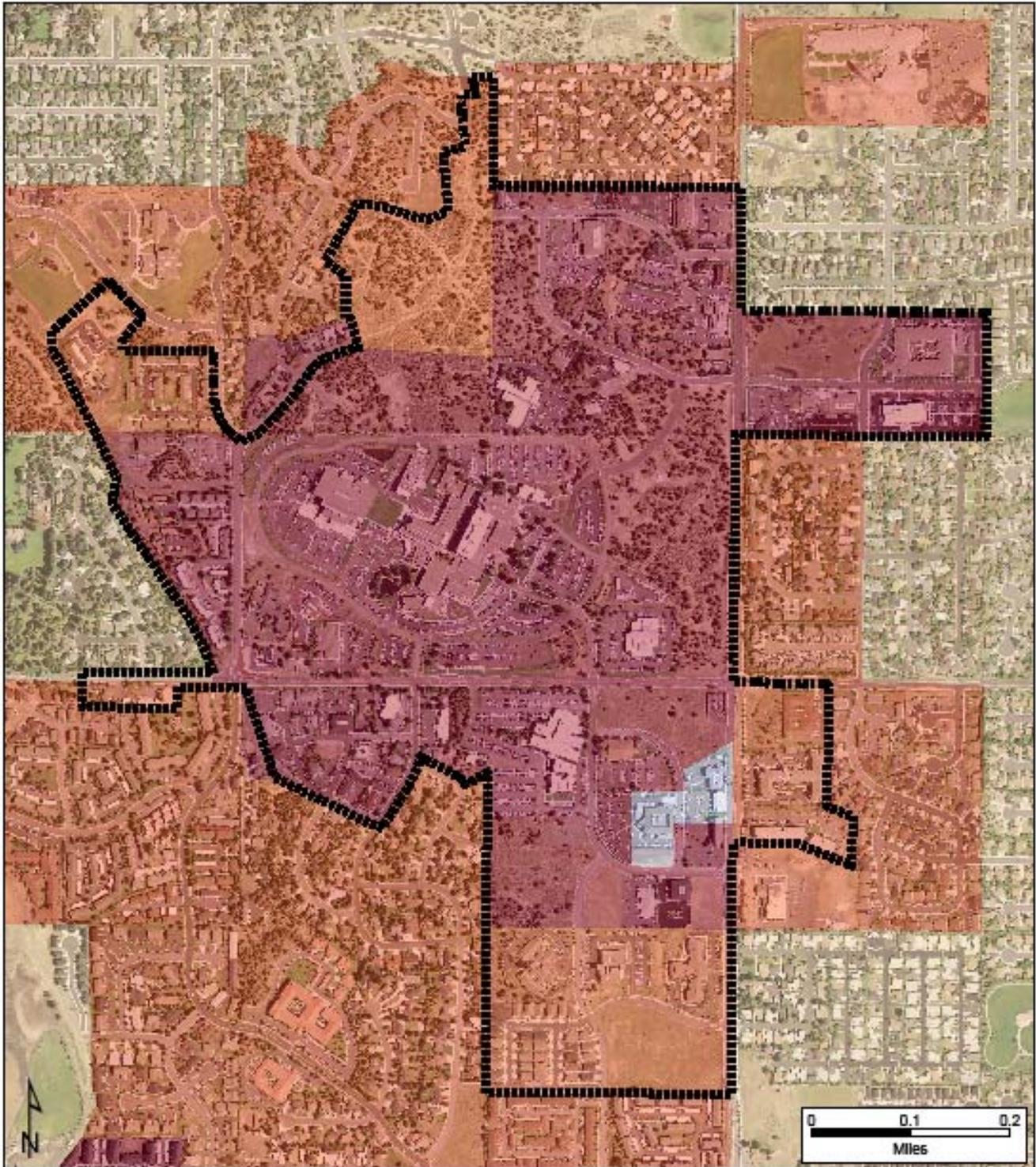
In attempting to understand the low unit per acre yield from the RH inventory, the department has determined that approximately 215 acres of the 341 RH inventory is included within the Medical District Overlay Zone, which is anchored by St. Charles Hospital. (See Figure 2 on the following page). A review of existing land uses within the overlay zone's RH-designated area shows that a majority is devoted to the hospital and related medical uses, including satellite facilities and offices, as well as what appears to be a potential hospital expansion area. Most of the assisted living and nursing home units within the overlay district are actually located on medium density (RM) designated and zoned land. Very little high density housing is found in the approximately 215-acre area of RH. This is partially confirmed by the 2008 BLI, which shows only 29 nursing home dwelling units in the city's RH inventory.

It can be fairly concluded from this data that these approximately 215 acres of RH lands have and will yield very little actual multi-family housing. This "non-yielding" area represents 63 percent of the city's entire RH inventory, leaving only 126 acres of RH land citywide to meet the needs of this needed housing type.

Housing densities within the city appear to have increased to some extent since the last periodic review, and in this sense the city may be moving toward compliance with the intent of Goal 10, OAR 660-008-0020, ORS 197.296 and ORS 197.307(3). Further, 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. However, without findings that connect the identification of housing needs with a showing that sufficient lands have been

¹⁷ The Framework Plan referred to in the findings at R. 1098 is referred to elsewhere as the draft Framework Plan. R. 1056]. The Framework Plan is referenced in the City's General Plan, but it is not clear that the city has adopted the Framework Plan.

¹⁸ The city adopted a housing *type* mix of 65 percent detached and 35 percent attached because this was the built mix in 2008. [R. at 1306-07] It is not clear whether this mix applies to the entire amended UGB, or only to the expansion area.



Medical District Overlay Zone

Figure 2



Oregon
Department of Land
Conservation & Development

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

- RH - Res Urb High Density
- RM - Res Urb Medium Density
- RS - Res Urb Standard Density

- Other City Zones (Employ, Mo Use, & Pub. Fac)
- Overlay Zone Boundary

Aerial image: 2009 NADP
LIDAR and zoning information extracted
from maps provided by City of Bend
and Deschutes County
DLCD GIS and Planning
Hospital of Bend

provided to meet those needs, the director is unable to conclude that the city's decision complies with Goal 10, the Goal 10 rules, the needed housing statutes, or Goal 14 and OAR 660, division 24.

For the foregoing reasons, the director remands the city and county decisions, with direction to:

1. 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 *current and future* 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));
2. 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.

Amount of Land Added to the UGB for Residential Land Need – The amendment includes a conclusion that there is a need for 941 acres of additional land for needed housing, for 5,522 dwelling units that cannot be accommodated within the prior UGB. [R. at 1082] As noted above, without findings that connect this amount to needed housing types as identified by the city in its own findings, and as required by state law, the director is unable to determine whether the amount of land added to the UGB is lawful.

A final key assumption used by the city to determine the quantity of land required in an expansion area for needed housing is that new residential development in the expansion area will occur at an overall density of six units to the net acre, not including lands planned for low density development. [R. at 1079, 1080]¹⁹ The findings state that this density:

* * * would be higher than densities seen in recent development because the 2006 Development Code requires minimum densities of development to ensure housing

¹⁹ The General Plan amendments assumed an average net density of 5.9 dwelling units per net acre, for the expansion area only, based on average net densities for the RS, RM and RH Zones. [R. at 1308] These densities don't appear consistent with the 2006 built densities or the planned densities for the existing UGB or the "Needed density by housing types," and the plan doesn't include findings for the decision to use these numbers. Compare Table 13 [R. at 2132], Table 5-28 [R. at 1308], Table 5-29 [R. at 1308], and Table 5-29A [R. at 1309].

developed in the RM and RH zone occurs at densities higher than the assumed overall coverage of six units to the net acre. The city feels compelled to point out that the needed density of six units to the net acre is 50 percent higher than the current net density of just under 4 units to the acre. [R. at 1081]

As described in more detail below, the director does not agree that the minimum density provisions of the city's 2006 Development Code ensure or otherwise encourage any increase in density given the current and planned allocations of land between the SR 2½, RL, RS, RM and RH districts within the city and within the UGB expansion area. There is simply too much land planned as SR 2½, RL and RS, combined with minimum densities for these districts of one unit per 2.5 acres, 1.1 unit per acre, and two units per acre, respectively, to ensure anything but large lot residential development.

The use of an overall average residential density for the UGB expansion area of 6.0 units per net acre assumes that the city will maintain the same proportional allocation of zones within its prior UGB in the expansion area, providing no progress toward planning for more efficient urban development. This results in the city adding more land to its UGB than is necessary to provide needed housing, and in the long term this will only exacerbate the transportation and public facility challenges facing the city. As a result, the director finds that the city has not demonstrated that the amount of land added to the city's UGB for needed housing complies with Goal 10 or Goal 14, or their implementing rules, or with the needed housing statutes. The director remands the city and county decisions, with direction to:

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.

Measures – In order to approve the UGB expansion, the director also must determine whether the identified needs for residential land can reasonably be accommodated on land within the prior UGB. [Goal 14; OAR 660-024-0050(4)] In addition, Goal 10 and ORS 197.307(3) require that, when the city identifies a need for housing at particular price ranges and rent levels, sufficient buildable lands must be provided to satisfy that need. ORS 197.296(7) also requires adoption of measures that “demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet needs over the next 20 years.”

As part of its decision, the city adopted two new measures intended to increase the proportion of its housing need that could be satisfied within the existing UGB. These measures add 500 units of housing in the Central Area Plan, and up-zone areas along

transit corridors for another 600 units. Chapter 5 of the General Plan (Housing) requires that transit corridor amendments be implemented prior to 2012 [R. at 1311]; there is no timeframe associated with the Central Area Plan work. Nor does Chapter 5 include any specific commitment in terms of number of housing units. Although these units are “assumed” to be attached, the numbers are described as an estimate. [R. at 1303] As a result, the director is unable to determine that these measures “demonstrably increase the likelihood” that the additional residential development will occur.

The city also notes in its findings that it has taken *prior* efficiency measures. [R. at 1083] With respect to these measures, the director believes that the main efficiency measures identified by the city are not likely to be effective. The minimum adopted densities range from 1.1 unit per gross acre to 2.0 units per gross acre for most residentially zoned lands. Even in the city’s medium-density zones, the minimum densities are 6.0 to 7.3 units per acre. These densities do little or nothing to address the city’s identified need for multi-family, lower income, or workforce housing. As noted above, multi-family housing is not allowed at all in the RS zone (other than duplexes and triplexes, which are conditional uses). The 2007 Residential Lands Study does not demonstrate how much these actions have increased housing densities, how many additional housing units they provided, or how much urban land they saved in the past, nor does it show how much of the city’s needed housing types and units, and what amount of residential land, these actions will provide within the next 20 years. As a result, the director determines that the city has failed to demonstrate that the estimated needs cannot reasonably be accommodated on land already within the UGB. The director remands the city and county decisions, with direction to:

1. Consider measures to encourage needed housing types within additional areas of the city, including rezoning of areas along transit corridors and in neighborhood centers.
2. 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.
3. In areas where the city is planning significant public investments, consider up-zoning as a means to help spread the costs of such investments.
4. Consider strengthening the minimum density provisions in the existing UAR and SR 2½ zones by eliminating PUDs and other clustering tools.
5. 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.

As noted above, the director believes the city likely will be able to make a showing that some amount of residential land is needed in an expanded UGB due to the city’s rapid growth rate, but the director believes there are other reasonable measures that the city can

take to accommodate more of the needed housing within the prior UGB over the next 20 years.

e. Response to Objections

Toby Bayard –

Objection: The UGB amendment includes approximately 3,500 acres above the projected land needs, evidently including a variety of lands that are not suitable for urban uses. These lands include land in rural subdivisions, and appear to include lands that contain Goal 5 resources, but none of the reasons for inclusion are contained in the findings. State law does not allow a buffer or cushion (the city included a cushion of 519 acres).

Response: This objection is sustained. As noted in the department’s analysis, the findings provide no basis for including lands beyond the roughly 5,000 acres shown as needed for residential and employment related land needs.

Objection: The city has failed to show that residential uses cannot be reasonably accommodated within the existing UGB. The city estimates a potential capacity within the UGB of 44,738 units, but assumes that only 25 percent of this capacity will be utilized. Existing residential density in Bend is less than half that of other Oregon cities of the same size.

Response: This objection is sustained. Goal 14 and OAR 660-024-0050 require the city to show that its needs for urban land cannot reasonably be accommodated within the existing UGB.

Objection: The city has assumed no redevelopment of RL and RS lands within the UGB. Goal 14 and Goal 10 requires the city to analyze what redevelopment has actually occurred on these lands since 1998, and to estimate redevelopment based on actual experience as well as future trends, rather than simply concluding that no redevelopment will occur.

Response: This objection is sustained. As noted above, state statute requires the city to base its estimate of redevelopment on what has actually occurred within the UGB as well as future trends. The city’s findings do not address redevelopment or infill that has occurred on UAR, SR 2½, RL, or RS lands.

Objection: The city fails to plan for efficient use of the lands added to the UGB, by assuming that 76 percent of that land will be zoned RS (average density of four dwelling units per acre). Only 33 acres of the total 941 acres is assumed to be zoned RH (average density of 22 dwelling units per acre).

Response: This objection is sustained. The city’s Framework Plan and findings, as well as Chapter 5 of the General Plan, indicate that only a very small percentage of land added to the UGB will be planned for moderate or high-density residential uses. Given the findings that there is a shortage of multi-family housing, and shortages of affordable and workforce housing, the decision to follow existing land allocations in the expansion lands violates both Goal 10 and Goal 14, and their implementing rules.

Objection: Bend’s 1998 General Plan projected a housing mix of 55 percent single-family and 45 percent multi-family (including 10 percent mobile home parks), but actual development since 1998 has been 77 percent single-family and 23 percent multi-family (with 0 percent mobile home parks). The city assumes that housing density and mix will continue to produce the same housing types, without regard for current and future housing needs of the city’s population over the next 20 years. The 1998 planned mix of 55/45 percent is identical to the mix provided by the Oregon Housing and Community Services Department’s Housing Needs Model, which the city rejected and replaced with a much higher percentage of single-family housing and a much lower percentage of multi-family housing.

The city also changed to a different type of housing mix, “detached percent and attached percent” instead of “single-family percent and multi-family percent,” which includes single-family housing in the form of high end, low density detached housing, and attached housing in the form of attached housing in the form of high end townhomes, condos, and resort communities. The new mix terminology does less to ensure that both detached and attached housing types more affordable to lower and middle income households are likely to develop. The proposal includes medium and high density development only in the Central Area and on Transit Corridors without demonstrating that this will meet the 20-year housing needs of all residents.

Response: This objection is sustained for the reasons set forth in the department’s analysis. The form of the city’s Housing Needs Analysis makes it impossible to determine what housing needs are, and whether the city’s UGB expansion will meet those needs.

Objection: The city did not sufficiently consider efficiency measures inside the existing UGB as required by ORS 197.296(9). The efficiency measures that were adopted lack documentation to assure that they will be effective.

Response: This objection is sustained. As determined above, the city needs to evaluate additional measures to assure that it provides lands for needed housing, and the two efficiency measures that the city has adopted are not adequately assured based on the lack of specificity in Chapter 5.

Central Oregon LandWatch –

Objection: The city has not complied with OAR 660-015-0000(14)(2), in that it has not demonstrated that its projected needs cannot be met within the existing UGB.

Response: This objection is sustained. Both Goal 14 and ORS 197.296 require the city to adopt measure to provide needed housing within its UGB before looking to lands outside of the UGB.

Objection: The city relied on current market conditions as the basis for determining that a greater degree of redevelopment will not occur within the 20-year planning period. The proposed housing mix of 65 percent single-family detached and 35 percent multi-family will not correct a historic shortfall of land for medium and higher density housing types. The city has not done enough to promote infill and redevelopment within the existing UGB, and must adopt more measure to plan for more multi-family housing.

Response: This objection is sustained for the reasons set forth in the director’s decision.

Barbara I. McAusland –

Objection: Bend’s Development Code lacks incentives needed for the construction of affordable housing. Providing for second homes in the residential lands need consumes residential land without providing for the primary affordable housing needs of residents. Too much land is added to the UGB.

Response: These objections are sustained in part. As set forth in the director’s decision above, the city must consider additional measure to assure that lands are provided for the development of needed housing. The director agrees with the city and with the objector that second home development competes with other needed housing types, and should be considered in the city’s decisions, and that the city’s planning for expansion areas can influence whether the lands are used for second home development or other forms of housing. The director agrees that the city has not justified the amount of land added to the UGB.

Newland Communities –

Objection: The city underestimates the residential land need through the planning period. The assumptions used concerning redevelopment and infill are overly optimistic, and do not account for various livability land needs such as parks and schools. The city also did not adjust its capacity analysis to reflect infrastructure of lot configuration constraints. The city failed to consider the presence of dwellings on lots in its capacity analysis. The proposed expansion improperly provides less “room” or “livability” per person than existed during the period 1981-2008. The buildable land inventory within the existing UGB is overly conservative and likely overestimates the number of residential units that could be accommodated within the existing UGB and underestimates the amount of land needed within the proposed UGB.

Response: The director denies Newland’s objection that the city has underestimated the need for residential land through the planning period. As set forth above, the director is unable to determine whether the city has underestimated or overestimated its need for residential land due to problems with the city’s BLI and HNA.

The director does not agree that the assumptions used by the city concerning redevelopment and infill are overly optimistic. Again, those assumptions are inadequately documented under ORS 197.296.

The director does not agree that the city failed to consider livability needs. The city has included estimated land need for parks and schools. Again, however, the amounts of land included for these needs are not adequately documented under Goal 14 or OAR 660, division 24.

The director denies the objection that the city’s capacity analysis should reflect infrastructure of lot configuration constraints without more specific evidence that lands cannot be served during the planning period. The city did consider the presence of dwellings on lots in its capacity analysis, as set forth above.

The director denies the objection that the proposed expansion improperly provides less “room” or “livability” per person than existed during the period 1981-2008. There is evidence in the record that the density of the city is significantly lower than other large cities in Oregon, and there is nothing in state law that prevents the city from increasing the efficiency of its development pattern and lowering its costs for public services.

The director denies the objection that the buildable land inventory within the existing UGB is overly conservative and likely overestimates the number of residential units that could be accommodated within the existing UGB and underestimates the amount of land needed within the proposed UGB for the reasons set forth in the director’s analysis, above. In its current form, it is not possible to conclude whether the city’s BLI complies with ORS 197.296 and Goal 10.

Objection: The city’s use of the Oregon Housing and Community Services Department’s Housing Needs Model is in error, and will likely result in an underestimate of land need outside the existing UGB during the planning period. The Housing Needs Model should not be used in a UGB expansion, and Bend’s use of it should be disregarded. The state should disregard the city’s discussion or application of the Housing Needs Model and rely on actual trends (77/23 split) or the transition forecast of 65/35. The city must use the 1998-2005 housing mix and densities as required by HB 2709 [ORS 197.296].

Response: Based on the city’s findings, it does not appear that the city relied on the Housing Needs Model. Instead, the city relied on the HNA in Chapter 5 of its General Plan and (as set forth in its findings) its “Transition Forecast.” The Housing Needs Model is one source of evidence of needed housing, and one which the city apparently did not rely on. As a result, this objection provides no basis for remand of the city’s decision. The director agrees that 1998-2008 housing mix and densities (for each of the city’s residential districts) is one of the bases that the city must consider (along with future trends), as set forth in the analysis above.

Objection: The city is required to project housing density and mix, not housing tenure, and not a particular single family/multi-family split.

Response: This objection is denied, in part. The city is required to project housing density and mix for both owner-occupied and rental housing, for each residential district, for single family detached, single family attached, and multi-family housing. ORS 197.296(3) and (5).

Oregon Department of State Lands –

Objection: The city did not properly analyze housing need by type and density as required by ORS 197.296(3)(b) and failed to plan for needed housing as required by ORS 197.303. The city’s conclusion concerning a 65/35 detached/attached housing mix is too generalized to comply with the specificity required under ORS 197.296(3)(b), 197.296(9) and 197.303 for a determination of the number of units and amount of land needed for each housing type (attached and detached single-family housing, and multiple family housing, each for both owner and renter occupancy) for the next 20 years.

Response: This objection is sustained, for the reasons set forth in the director’s analysis, above.

Objection: The city also fails to adequately consider regional housing needs and a fair allocation of housing types, as required by OAR 660-008-0030.

Response: This objection is sustained. The city is obligated under Goal 10, and the cited rule, to consider needed housing on a regional basis. The city's findings indicate that much needed housing for the City of Bend is being provided outside of the city, forcing the region's residents to drive long distances and creating imbalances between cities in Central Oregon. The city and the county must address these regional issues on remand.

Objection: As a result of these deficiencies, the proposal fails to demonstrate that the UGB will provide sufficient buildable land to accommodate projected housing needs for 20 years.

Response: This objection is sustained. Until the city completes the tasks required on remand, it has not demonstrated that its UGB will provide sufficient buildable land to accommodate projected housing needs for 20 years.

Swalley Irrigation District –

Objection: The city and county violated Goal 10 by failing to adopt measures to achieve needed housing types.

Response: This objection is sustained, for the reasons set forth in the director's analysis above.

Objection: The buildable land inventory does not include all buildable land as defined in ORS 197.295, e.g., by excluding vacant land accessed by private road, by very narrowly defining "redevelopable" land, by excluding "split-zoned" parcels, and by not including all "partially vacant" land planned or zoned for residential use. The city's buildable land inventory and housing need analysis ignores or minimizes manufactured home parks as a needed housing type without a factual basis. The city ignores, contrary to Goal 10, the shortage of workforce housing. The city double-counts land need for open space, parks and schools. Parcels 3 acres or smaller with a house are arbitrarily rejected as "unsuitable" for future infill or redevelopment.

Response: This objection is sustained for the reasons set forth in the director's analysis above.

Objection: The city has selected the most expensive lands to serve with public facilities, making it impossible for affordable housing to be provided.

Response: This objection is sustained, in part. ORS 197.296(9) requires cities to ensure that land for needed housing is in locations appropriate for the housing types identified as needed. The city has identified needs for multi-family, workforce, and seasonal worker housing, and a general housing affordability problem, and yet at least some of the lands included within the expansion area are shown by the city's analyses to have very high service costs. The city's revised HNA should address and link needed housing types with its existing analysis of service costs.

Objection: The city ignored the housing that is planned within two destination resort sites in its housing needs assessment.

Response: This objection is sustained for the reasons set forth in response to the similar objection from Central Oregon LandWatch.

Objection: The city has failed to include efficiency measures for the existing UGB as required by Goal 14 and ORS 197.296.

Response: This objection is sustained, in part. The city has included two new efficiency measures and referred to some existing efficiency measures as described in the director's analysis above. However, as set forth in detail above, these measures are both too uncertain, and inadequately related to the city's housing needs, to ensure that the city is complying with the need criteria of Goal 14, or with the requirements of ORS 197.296 to adopt measures to ensure that the city is planning for needed housing.

f. Summary of Decision on Housing and Residential Land Needs

The director remands the UGB amendment with the following instructions:

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 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;
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;
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;
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;
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;

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 *current and future* 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));
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;
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;
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;
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;
12. In areas where the city is planning significant public investments, consider up-zoning as a means to help spread the costs of such investments;
13. Consider strengthening the minimum density provisions in the existing UAR and SR 2½ zones by eliminating PUDs and other clustering tools; and
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.

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

a. Legal standards

Goals 10 and 14 and OAR 660, divisions 8 and 24 are the applicable state laws.

b. Summary of Local Actions

As noted in the introduction to this section, in addition to the 941 acres of land added to the UGB for residential uses, the city has added 1,925 acres to meet its estimated land need for public schools, parks, second homes, private open space and rights-of-way, and public rights-of-way. The amount of land the city estimates is needed for each of these uses (based partially on its analysis of land use within the prior UGB) is summarized in Table 1, in subsection 1.b of this section. [R. at 1092]

c. Objections.

Objections related to land need are itemized in subsection 1.c, above, and the department's responses related to those objections specific to non-residential, non-employment land need are provided in section 2.e, below.

d. Analysis and Conclusions.

Public schools and parks. The estimates of land need for public schools [R. 1088-1089] and parks [R. 1089-1090] are based on per-capita service standards recommended by the school district and the parks district. While there may be no inherent problem with the use of service standards, the city's application of the standards assumes that *all* new school and park facilities to serve new residents in Bend will be located on expansion lands outside of the prior UGB. The findings do not address whether the estimated land needs for schools can reasonably be accommodated within the UGB, as required by OAR 660-024-0050(4). Similarly, the findings for parks do not address whether the estimated need can be met within the UGB, or the extent to which the need may already be met by existing or planned facilities *outside* of the UGB (some types of park facilities are allowed outside of UGBs; see, OAR 660, division 34).

In addition, the land need estimate for public parks was increased from 362 acres to 474 acres at the very end of the city's review process, based not on the district's service standards but on an estimate of land need "on a quadrant basis using the city's Framework Plan." [R. at 1090] The findings do not clearly explain the basis for this increase,²⁰ and given the director's action with regard to the Framework Plan (see below) do not have an adequate factual base. As a result, the director is unable to find that there is an adequate factual basis for the increased estimate of land needed for public parks. The director remands the city and county decisions, with direction to:

1. Determine whether the need for land for public schools can reasonably be accommodated within the existing UGB;

²⁰ The city's acceptance of this estimate was based on city council direction to err on the side of including too much, rather than too little land. [R. at 1090, note 55; R. at 8801]

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; and
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.

Second homes. The director agrees with the city that second homes are a “legitimate Goal 10 issue.” The city has estimated a land need for 500 acres for second home development. This acreage represents over half (again) the amount of land added for new housing units (first homes).

The city received testimony estimating that 377 acres of land were developed with second homes during the seven years prior to its decision. [R. at 1086] The city also received testimony that 20 percent of the total number of homes that would be developed during the planning period would be second homes. [R. at 1087] However, the city elected to use an 18 percent factor instead. [R. at 1087]

The director believes there is substantial evidence in the record to support the city’s determination concerning the number of *units* of second home development during the planning period (between 18 and 20 percent of the total units needed). However, the city’s findings do not identify or explain why the city used an average density of six units per net acre (the same density used for the expansion area generally) for this housing type. The findings do not explain why second homes require the same amount of land as the city is planning for first home development. Nor do the findings evaluate whether (or to what extent) this use might be accommodated within the prior UGB. [OAR 660-024-0050] Instead, the findings assume the entire need must be met on expansion lands at the same density as first home development. The result is that, although the city estimates second homes will be 18 percent of the total units developed over the next 20 years, it then allocates second homes more than half of the amount of land allocated to first home development. As a result, the director is unable to determine that land need for this use complies Goals 10 or 14, or their implementing rules, or with ORS 197.296. The director remands the city and county decisions, with direction to:

1. Coordinate with the county specifically concerning the need for second-home housing, and where this need should be satisfied regionally;
2. Evaluate whether this need can reasonably be accommodated on lands within the existing UGB;
3. To the extent that additional lands are required, establish a reasonable, specific density of development for this housing type for the next 20 years.

Private Open Space and Private Rights-of-way. The city applied a 15 percent factor to its projected residential (and park and school and second home) land needs to reflect projected land need for private open space and private rights-of-way. This figure is based on an analysis of the proportion of land within the prior UGB devoted to this use, and assumes the same land allocation within the expansion area. [R. at 1092] However, projecting a land need for private open space and rights-of-way for public parks and for public schools does not appear logical (unless the 15 percent figure was derived for all non-employment lands within the existing UGB, which is not clear from the findings). Further, 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. Elsewhere in its decision, the city determines that lots that have access through private rights-of-way are not suitable for urbanization. Simply adopting past development patterns is not a sufficient basis to demonstrate a land need under Goal 14 or under ORS 197.296. For all these reasons, the director is unable to determine that this element of the city’s decision complies with Goal 14 or OAR 660-024-0040.

The director remands the city and county decisions, with direction to 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 public rights-of-way.

Surplus Acreage. The amendment expands the UGB by 5,475 “suitable” acres to meet the estimated land need of 4,956 acres, yielding a surplus of 519 acres. [R. at 1193] The city’s findings explain this excess acreage by referring to OAR 660-024-0040(1), which acknowledges that 20-year projections of land needs are estimates that should not be held to an unreasonably high level of precision. The city also appears to believe that this amount of acreage is needed for several specific reasons, including efficient provision of public services (e.g., including land on both sides of roads in some expansion areas), to facilitate the development of complete neighborhoods, and to make it possible to distribute employment lands throughout the expansion area. [R. at 1193] The findings, however, simply state these reasons, without explaining where these areas are, or why it is not possible to reduce acreage elsewhere in order to keep the total acreage consistent with its estimated land need.

The state does not require precision in estimating land need, and the city’s estimates for residential, employment, and other land needs necessarily involve some degree of uncertainty.²¹ But once the city *makes* its estimate, state law does not allow the city to simply add a cushion. Instead, state law requires the city to make its best effort to arrive at a reasonable estimate of land need and then stick with that number. The inclusion of a specific amount of land in the UGB in addition to estimated need appears to be driven by its desire to include particular properties in the expansion area rather than first

²¹ As an example, the Goal 10 findings state that the “[c]ity identified a need for 2,714 acres of additional land for housing based on the inventory, the coordinated population forecast, and the housing needs analysis.” [R. at 1219] However, elsewhere the findings state that the estimated residential land need is 2,866 acres. [R. at 1092, 1167]

determining an amount of land need, and then deciding where to satisfy that need. [R. at 1193]

In addition, as noted at the introduction to this section, the city has included almost 3,000 additional acres of land within its UGB expansion area with no need determination at all. The city's decision appears to reflect an interpretation of state law that if lands are not suitable for urbanization,²² they may nevertheless be included within a UGB with no need showing. That interpretation turns the state's urban growth management statutes, goals and rules on their heads.²³

The city has provided no justification or explanation for the inclusion of these lands in its findings. As a result, the director remands the city and county decisions, with direction to remove the approximately 3,000 acres of lands 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.

Buffer Areas and Land Shown as RL in the Framework Plan. The adopted "Alternative 4A" UGB includes a 29-acre strip of Urban Low Density Residential (RL) along the central west edge of the proposed UGB, north of Skyliners Road and west of Master Plan Areas 3 and 4. [See Bend Urban Area Framework Plan Map, R. at 3; map of "Alternative 4A – Preliminary UGB Expansion December 3, 2008," Supp. R. at 3; and Supp. R. at 207-08] Neither the 2007 Residential Lands Study nor the General Plan amendments provide an adequate factual basis for a need for this land for this use and, in fact, the findings provide that lands proposed for RL plan designations are not serving an urban need. [R. at 1079] The city has not demonstrated a Goal 10 or 14 need for a very low density residential buffer with housing at two units per acre along the west side of the existing UGB between Skyliners Road and Shevlin Park.

More generally, the Framework Plan shows a substantial amount of lands planned as RL (Low Density Residential, 1.1 to 2.2 dwelling units per acre). As noted above, the city does not anticipate that the housing in these lands will serve any urban need. [R. at 1079] We find no findings explaining why it is appropriate to bring these lands within the UGB or what the urban land need is for them. The Framework Plan indicates that the city has no expectation that these lands will ever become urban. In fact, much of the lands were found by the city to not be suitable for urbanization.

²² The city's bases for determining that lands in the expansion area are not suitable for urbanization also contain multiple problems, including that: (a) the conclusion that a parcel smaller than three acres with an existing dwelling on it is not suitable for urbanization lacks an adequate factual basis, and is not consistent with Goal 14; (b) the city's conclusion that lands within certain rural subdivisions cannot urbanize due to their CC&Rs is not supported by the city's own findings, which do *not* show that these lands cannot undergo additional development except in the case of a couple of the subdivisions. These issues are addressed in more detail in the portion of this decision concerning the city's decision about *where* to expand its UGB.

²³ For example, see *Collins v. LCDC*, 75 Or App 517 (1985).

As a result, the director finds that their inclusion in the UGB violates Goal 14 and Goal 10 and their implementing rules, as well as ORS 197.296. The director remands the city and county decisions, with direction to remove the 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.

e. Response to Objections

Anderson –

Objection: The city and county underestimate the amount of land needed for right-of-way, and therefore fails to comply with OAR 660-024-0040(1). Specifically, the estimate is based on land use within the existing UGB, and fails to account for standard existing rights-of-way and for needs attributable to stormwater management.

Response: This objection is denied. While additional right-of-way may be required for stormwater management, the city has included a 15 percent factor for private rights-of-way and open space that should provide more than enough land area for stormwater management needs. In addition, the city’s assumption that most of the added residential land will be planned RL or RS provides substantial excess land beyond that required for needed housing. There is no specific evidence regarding the quantity of land needed for stormwater management and public right-of-way, or that the amount of land the city has added to the UGB cannot accommodate these uses. The city should evaluate the amount of land needed for stormwater management in connection with its reevaluation of land need for the UGB expansion area, but no separate remand is required.

Toby Bayard –

Objection: The proposal doesn’t plan for needed housing types to meet the housing needs of all residents as required by Goal 10, particularly lower income and multifamily housing. The proposal underestimates the land need for housing for lower income households.

Response: This objection is sustained. As noted above, the city’s Housing Needs Analysis fails to analyze needed housing types as required by Goal 10, the Goal 10 rule, and ORS 197.296. The city’s Framework Plan would devote most of the expansion area to low density residential uses, where large lots would likely not provide needed housing for lower income households.

Objection: The city’s estimate of land need for second homes is too high, and is not supported by the evidence in the record.

Response: This objection is denied in part. As noted in the department’s analysis, second home housing is an appropriate Goal 10 issue, and there is substantial evidence to support the city’s determination concerning the need for second home units. However, as to the acreage of land needed in a UGB expansion area, the objection is sustained. As explained above, the city has not explained whether this need can be accommodated within the existing UGB, or the amount of land needed in the expansion area.

Objection: The city’s estimate of land need for public right-of-way is too high.

Response: This objection is denied. There is substantial evidence in the record to support the city's use of a 21 percent factor in estimating right-of-way for lands added to the UGB (the amount of land devoted to right-of-way within the existing UGB).

Carpenter/McGilvary –

Objection: The city and county underestimate the amount of land needed for right-of-way, and therefore fails to comply with OAR 660-024-0040(1). Specifically, the estimate is based on land use within the existing UGB, and fails to account for substandard existing rights-of-way and for needs attributable to stormwater management.

Response: This objection is denied for the same reasons that the objection of Anderson was denied (above).

Central Oregon LandWatch –

Objection: The city does not explain how or why unsuitable lands are added to the UGB to arrive at a gross acreage total of 8,462 acres. The city's findings do not explain why some lands are considered unsuitable, nor why they are nevertheless added to the UGB. The city's determination that lots less than 3 acres in size are unsuitable if they have existing development is not explained, not does it comply with Goal 14.

Response: These objections are sustained. State law does not allow lands that are not needed, and not suitable, for urban development to be added to an urban growth boundary. The city's findings do not explain its justification for adding lands beyond the approximately 5,000 acres of land need shown for housing, housing-related, and employment needs.

Objection: The city's projected land need of 500 acres for second home development is not justified and is based on incorrect data.

Response: This objection is denied in part and sustained in part. The objection is denied with respect to the city's estimate of needed units. The objection is sustained with regard to the acreage needed within the UGB expansion area, for the reason set forth above with regard to the similar Bayard objection.

Objection: The city's projected land need of 474 acres for parks is not justified, and is based on plans not incorporated into the city's comprehensive plan. In addition, the city fails to account for the fact that some of this need is and will continue to be met on lands outside of the UGB.

Response: This objection is denied in part, and sustained in part. The district's plans can serve as substantial evidence for the city's decision, even though those plans have not been adopted by the city as part of its comprehensive plan. As a result, the city could chose to base its decision on evidence including service standards recommended by the district. However, the element of the objection with regard to the location of where this land need may be met is sustained, for the reasons set forth above.

Objection: Regarding land need for public right-of-way, the city's estimate is based on existing development patterns and does not consider provisions for skinny streets that can and have reduced the amount of land required in newer developments in the city.

Response: This objection is denied. 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.

Objection: Regarding land needed for private rights-of-way and open space, there is no showing of why this type of private land use is needed under Goal 14, when public parks are already provided.

Response: This objection is sustained for the reasons set forth in the director's decision.

Objection: The city misconstrues 660-024-0040(1) in including a "buffer" of 519 acres over and above its demonstrated land need for residential use.

Response: This objection is sustained for the reasons set forth in the director's decision.

Objection: The city fails to consider the approval of the Tetherow destination resort and its effect on land need within the UGB for this type of use.

Response: This objection is sustained. Both the city and the county have an obligation to consider other second-home development in the region in determining how much second-home development is needed within Bend's UGB. The director's decision requires the city and the county to coordinate in determining regional need for this type of housing, and what proportion of that need should be accommodated within Bend.

Newland Communities –

Objection: The theoretical surplus of 519 acres is needed to fulfill land needs, and to provide for effective delivery of infrastructure and complete communities.

Response: This objection is denied, in part. The director agrees that the 519 acres in question may only be included if the city documents a need for that amount of land. Otherwise, the objection is denied because the city has failed to provide the required justification of need under Goal 14, as set forth in detail above.

Swalley Irrigation District –

Objection: The amount of land determined to be needed is too large and beyond what the city determined was needed. The 519-acre cushion must be removed.

Response: This objection is sustained, in part. As set forth in more detail above, the city has not adequately documented its 20-year need for land for housing and other non-employment uses. In addition, the city may not include land in addition to its documented 20-year need (e.g., the 519 acres of "cushion").

f. Summary of Decision on Land Need Not Related to Residential or Employment Needs

The director remands the UGB amendment with the following instructions:

1. Determine whether the need for land for public schools can reasonably be accommodated within the existing UGB;

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;
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;
4. Coordinate with the county specifically concerning the need for second-home housing, and where this need should be satisfied regionally;
5. Evaluate whether this need can reasonably be accommodated on lands within the existing UGB;
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;
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 public rights-of-way;
8. Remove the approximately 3,000 acres of lands 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; and
9. Remove the 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.

3. Is the UGB amendment consistent with the Bend Area General Plan?

a. Legal standard

Comprehensive Plan data, findings, conclusions, and policies must be complete, comply with the statewide planning goals, and be internally consistent. ORS 197.015(5), ORS 197.250, and Goal 2.

b. Summary of Local Actions

On January 5, 2009, the city adopted a UGB expansion and other Bend Area General Plan amendments. [R. at 1228-1835] The amendments regarding housing and residential land are in Chapter 5 of the Plan. [R. at 1280-1315]

c. Analysis

No objections were received concerning consistency of the action with Bend's General Plan. The UGB amendment findings state: "Adopted policies in the Bend General Plan support the designation of higher-density residential areas in proximity to commercial services, parks and schools." [R. at 2133] However, the only places that the city plans for needed medium density and high density housing is in the Central Plan Area, on some planned transit routes (location undefined), and in the expansion area; no new medium density and high density housing, infill development, or redevelopment is planned for existing neighborhoods. Therefore, this part of the UGB amendment is not consistent with existing plan policies. (For more details, see the discussions in this report regarding (1) compliance with Goal 14 with efficiency measures, and (2) Goal 10 compliance.)

The UGB amendment and related plan amendments are also inconsistent with the following plan policies:

- 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 policy." [R. at 1311] Evidence of inconsistency: *As discussed elsewhere in this report*, the city is apparently restricting infill and redevelopment to (1) certain areas in the Central Area Plan and along planned fixed route transit corridors, and (2) developed exception parcels in the UGB expansion area that are larger than three acres. The record shows no evidence for planned infill and redevelopment in most of the existing UGB and also much of the exception lands in the expansion area.
- 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 development code and/or new strategies identified in the Plan" [R. at 1313] Evidence of inconsistency: *As discussed elsewhere in this report*, the proposal does not demonstrate for either the 2006 development code or proposed amendments thereto how the code will facilitate the development of needed housing for households of most income levels.
- 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." [R. at 1313] Evidence of inconsistency: *As discussed elsewhere in this report*, the proposed UGB and other plan amendments do not plan for—in fact, do not permit—any infill subdivisions in existing neighborhoods.

d. Conclusion and decision

The Bend Area General Plan is internally inconsistent. The UGB amendment and related plan amendments adopted on January 5, 2009 are not consistent with Housing Policies 4, 17 and 21.

The director remands the proposal with direction to revise the proposal to be consistent with Housing Policies 4, 17 and 21 in Chapter 5 of the Bend Area General Plan.

4. Do the UH-10, UH-2½ and SR 2½ zones comply with Goal 14 and OAR 660, division 24?

a. Legal Standard

Goal 14 and OAR 660-024-0050(5) (2006) address the zoning of land brought into a UGB.²⁴ The goal and rule require county zoning for urbanizable land within the UGB to “maintain [the land’s]²⁵ potential for planned urban development until appropriate public facilities and services are available or planned.”

Retaining the existing rural zoning on land brought into the UGB maintains large parcel sizes, severely restricts new non-resource uses, and limits new primary structures. Allowing parcelization at well below 10 acres and allowing new primary use structures,

²⁴ Goal 14 provides, in part:

Urbanizable Land

Land within urban growth boundaries shall be considered available for urban development consistent with plans for the provision of urban facilities and services. Comprehensive plans and implementing measures shall manage the use and division of urbanizable land to maintain its potential for planned urban development until appropriate public facilities and services are available or planned.

The statewide planning goal definitions as amended April 28, 2005 define “urbanizable land” as: “Urban land that, due to the preset unavailability of urban facilities and services, or for other reasons, either:

- (a) Retains the zone designations assigned prior to inclusion in the boundary; or
- (b) Is subject to interim zone designations intended to maintain the land’s potential for planned urban development until appropriate public facilities and services are available or planned.”

[OAR 660, division 15]

Goal 14 planning guideline #2 states: “The size of the parcels of urbanizable land that are converted to urban land should be of adequate dimension so as to maximize the utility of the land resource and enable the logical and efficient extension of services to such parcels.”

Likewise, OAR 660-024-0050(5) (adopted October 5, 2006) provides: “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 until the land is rezoned for the planned urban uses, 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. The requirements of ORS 197.296 regarding planning and zoning also apply when local governments specified in that statute add land to the UGB.”

²⁵ “Its” refers to land within the UGB.

especially if they are placed in the middle of a parcel, fails to maintain the expansion area in parcels and in form that can develop efficiently and where it is possible to provide efficient and economic urban services. As the city's findings regarding suitability indicate, urbanizing areas that have developed as suburban subdivisions can be extremely difficult.

b. Summary of Local Actions

The county adopted two holding zones for the UGB expansion area: the Urban Holding-10 (10-acre minimum parcel size) and the Urban Holding-2½ (2½-acre minimum parcel size), in Title 19 of the Deschutes County Code. [R. at 1877-80] The findings state that these zones:

* * * respect the existing pattern of development and permit reasonable use of the land in the interim while retaining the rural densities. Both holding zones allow lot sizes as small as 15,000 square feet provided that the overall density of the development does not exceed the density of the zone. This 'cluster development' provision encourages maximum retention of large lot parcels. Too often holding zones with ten acre minimum lot sizes develop with 'hobby' farms and ranchettes that never redevelop to urban potential. Cluster development allows residential development at the same rural density but preserves the majority of the land for urban development. [R. at 1221]

An existing city zone, Suburban Low Density Residential (SR 2½), like the new UH-2½ and UH-10 zones, was intended to hold parcels within the UGB "until these lands are annexed to the city or until sewer service is available, and such lands are rezoned consistent with planned densities and uses in the Bend Area General Plan."

c. Analysis

The findings quoted above fail to recognize that the "cluster" provisions in the "holding" zones allow substantial low-density suburban development to occur on lands that are planned for urban densities. None of the adopted zones will preserve urbanizable land for future urbanization. As a result, the city and county actions violate Goal 14 and OAR 660-024-0050. Fifteen-thousand square-foot lots (approximately three units per acre) are urban-density lots, albeit at a density that is lower the six units per acre that the city has planned for the expansion area. Urban levels and intensities of development are not permitted within a UGB unless and until urban facilities and services are available and the land is annexed to the city. Even without the provision for "clustering" with 15,000 square foot lots, the UH-2½ and SR 2½ zones' 2.5-acre minimum parcel size is too small to protect urbanizable lands for efficient future urbanization once the lands are annexed and provided with urban public services. State law provides for two ways to preserve urbanizable land for future urban development: retain the existing rural resource zoning, or apply an interim holding zone that maintains large parcel sizes and doesn't

increase vehicle trip generation.²⁶ State law does not allow holding zones that provide for substantial increases in development, increased traffic generation, and inefficient future development patterns prior to urbanization and the application of urban zoning and provision of urban services.

The existing city zone, Suburban Low Density Residential (SR 2½), like the new UH-2½ and UH-10 zones, is intended to hold parcels within the UGB “until these lands are annexed to the city or until sewer service is available, and such lands are rezoned consistent with planned densities and uses in the Bend Area General Plan.” The SR 2½ zone applies only to “existing SR 2½ lands within the UGB.” At first glance, this appears to prohibit *new* lots as small as 2½ acres in the urbanizable area (*i.e.*, outside city limits) of the city’s UGB. However, there is no maximum lot size in this zone, and existing SR 2½ lots larger than 2.5 acres may be divided into lots as small as 2.5 acres.²⁷ As explained above, 2.5 acres is too small a parcel size for a holding zone in an urbanizable area because it does not maintain land for efficient future urbanization. Therefore, the SR 2½ zone also violates Goal 14 and OAR 660-024-0050.

The department advised the city of these issues by letter on October 24, 2008. [R. at 4372]

d. Conclusion and Decision

The UH-10, UH-2½, and SR 2½ zones do not maintain the potential of urbanizable land for planned urban development until appropriate public facilities and services are available or planned and therefore violate Goal 14 and OAR 660-024-0050. The director remands the city and county decisions with direction to:

1. Eliminate the UH-2½ zone, and eliminate application of the SR 2½ zone to lands within the UGB expansion area; and
2. Revise the UH-10 zone to:
 - a. Prohibit land divisions that create any parcels smaller than 10 acres in size; and
 - b. Include development siting standards to avoid future conflicts with the extension of efficient urban transportation, public facilities, and land use patterns; and
3. Apply the UH-10 zone to any and all land acknowledged for addition to the UGB.

²⁶ See, e.g., ORS 197.752(1): “Lands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards.” Also see OAR 660-024-0020(1)(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.”

²⁷ See Bend Code Section 10-10.9C.

F. Economic Development Land Need

Several objections raise issues related to the assumptions, analysis and conclusions used to determine land need for employment uses. The legal criteria for this portion of the submittal are found in Statewide Planning Goal 9 and OAR 660, division 9.

Subsection 1.a, below, provides a description of what the goal and rules require, and this description is relied upon in subsequent subsections addressing related objections to the UGB amendment. Objections relating to land need for employment uses that not specifically addressed are deemed denied for the reasons set forth in this section.

1. Did the city have an adequate factual basis for including and excluding lands for employment uses?

a. Legal Standard

Statewide Planning Goal 9, “Economic Development,” requires that comprehensive plans provide opportunities for a variety of economic activities, based on inventories of areas suitable for increased economic growth taking into consideration current economic factors. The goal requires that comprehensive plans provide for at least an adequate supply of suitable sites, and limit incompatible uses to protect those sites for their intended function.

OAR 660, division 9 is the administrative rule that implements Goal 9. Its purpose is to “link planning for an adequate land supply to infrastructure planning, community involvement and coordination among local governments and the state,” and “to assure that comprehensive plans are based on information about state and national economic trends.” [OAR 660-009-0000]

OAR 660-009-0010(5) provides that the effort necessary to comply with OAR 660-009-0015 through 660-009-0030 will vary depending upon the size of the jurisdiction, the detail of previous economic development planning efforts, and the extent of new information on national, state, regional, county, and local economic trends. A local government’s planning effort is adequate if it uses the best available or readily collectable information to respond to the requirements of the administrative rule.

OAR 660-009-0015 requires that comprehensive plans provide an Economic Opportunities Analysis (EOA) that describes a review of economic trends, required site types for likely future employers in the jurisdiction, an inventory of available lands, and assessment of the community’s economic development potential. OAR 660-009-0015(1) requires that the review of trends be the principal basis for estimating future employment land uses.

OAR 660-009-0020 requires that comprehensive plans include policies to implement the local economic development objectives, provide a competitive short- and long-term supply of sites for employment, ensure those sites are suitable for expected users, and provide necessary public facilities and services. OAR 660-009-0020(2) states that plans

for cities and counties within a Metropolitan Planning Organization (MPO) must include detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed.

OAR 660-009-0025 requires that comprehensive plans adopt measures adequate to implement local economic development policies. These include designation of sites for a 20-year supply of employment land and maintenance of a short-term supply of serviceable lands.

OAR 660, division 24, "Urban Growth Boundaries," provides direction regarding the use of data, findings and conclusions developed to address economic development and Goal 9 during a UGB review. OAR 660-024-0040(5) states that 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. 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.

b. Summary of Local Actions

The EOA is included in the record as Appendix E. [R. at 1498] The EOA includes a discussion of the community's objectives, including target industries. [R. at 1516] The Executive Summary highlights the steps of the complete analysis including demographic trends, historic and expected employment trends, inventory of the current land supply, determination of new employment, land need through 2028, which is reported in the summary as a table [R. at 1503-1506].

Section 3 of the EOA contains the review of trends used for estimating future employment land uses, as required by OAR 660-009-0015(1). [R. at 1519-1566] It provides a detailed report and analysis of trends, including population and demographics, coordinated population projection, educational attainment, household income, wages and benefits, labor force and unemployment, changing economic markets, current covered employment, employment shifts and land needs, the economic outlook, local economic trends, expectations of disproportionate employment growth, land supply as a threat to employment growth, education's role in the economy, and a need for a large university campus.

Other sections of the EOA detail characteristics of Bend's employment lands, discuss the employment projection methodology, and the results of the projections. [R. at 1567-1578]. The EOA includes a discussion of the use of employment categories instead of the more common employment sectors. [R. at 1583-1584]

The EOA includes a note that the analysis and conclusions were modified by the city [R. at 1585]. The modifications, based on input from the planning commission, UGB

technical advisory committee, and stakeholders, are discussed in appendices A-H [R. at 1642-1727].

Appendix A presents the modified employment projections per industrial sector classification as a spreadsheet. [R. at 1642]

Appendix B is a memo outlining staff recommendations of modifications to economic variables relative to consultant work completed for the city. [R. at 1649-1651] To account for uncovered workers, the employment projection is increased by 11.5 percent, based on interpolation of national and state census data. No local employment data were gathered for this analysis. The memo includes a comment by the Oregon Employment Department regional economist that no analysis exists to suggest how land needs for uncovered workers should be calculated, and suggested a rule-of-thumb instead. The memo also makes recommendations regarding modifications to the employment forecast for employment on residential and public facilities lands.

The submittal includes findings in support of the UGB expansion for employment lands. [R. at 1103-1165] These findings include: policy direction, incorporation by reference of a 2008 EOA, trend analysis, employment projection, employment land inventory, employment land need, discussion of how to satisfy the requirements of Goal 9, identification of required site types, assessment of economic development potential, meeting the requirement of MPOs for short-term supply, economic development policies, designation of employment lands, and findings related to uses with special siting requirements.

In summary, the EOA says there is need for 1,008 acres of commercial land and between 100 and 250 acres of land for each of the following use categories: industrial and mixed employment, public facilities, economic uses in residential zones, medical, new hospital site, a university site, and two 56-acre industrial sites. The total employment land need shown is 2,090 acres. [R. at 1114] This compares to the “Scenario A” conclusion that there is a 1,380-acre need, which was the result of a relatively simplistic formula of dividing employment projections by employment densities.

c. Objections and DLCD Comments

DLCD commented on Goal 9 issues prior to local adoption of the UGB amendment. A DLCD letter of October 24, 2008 commented that the EOA lacked findings on site suitability criteria and findings supporting a land need for two approximately 50-acre industrial sites. [R. at 4725]

A DLCD letter of November 21, 2008 commented that assumptions and determinations relating to employment land were either missing, were not calculated accurately, or lacked an adequate factual basis. Specifically, DLCD cautioned against: (1) the use of a 15 percent vacancy rate assumption for the 20-year employment land supply; (2) adding “surplus” employment land to the need calculation to account for market efficiency; and (3) adding residential land need via the EOA based on employment in residential zones.

The letter further comments that these errors led to an overestimation of the need for employment land. [R. at 3765]

Three objectors challenged whether the submittal provides an adequate factual basis for the findings and conclusions drawn: Swalley Irrigation District, Brooks Resources, and Central Oregon LandWatch.

Swalley Irrigation District – The employment forecast is not supported by evidence in the record. [Swalley Irrigation District, May 6, 2009, pp. 47-53]

Brooks Resources – The findings do not demonstrate that at least some of the employment land needs cannot be accommodated within the existing UGB. The record lacks evidence that the Westside UGB expansion area is suitable for employment lands. [Brooks Resources April 29, 2009, pages 2–9]

Central Oregon LandWatch – The findings and EOA are outdated, so there is no basis for need demonstrated. [Central Oregon LandWatch May 7, 2009, pages 11–12]

d. Analysis

A local government’s planning effort under Goal 9 is adequate if it uses the best available or readily collectable information to respond to the requirements of the rule. [OAR 660-009-0010(5)] This standard is intended to make the planning effort informative rather than prescriptive. A substantial record of fact gathering and analysis exists in the record.

The methodology for determining employment land need for a legislative UGB amendment includes the following main steps:

- Determine the total 20-year employment land supply need by reviewing trends; [OAR 660-009-0005(13), 0015(1) and 0025(2)]
- Subtract existing sites that are defined as vacant; [OAR 660-009-0005(13)]
- Subtract existing sites that are defined as likely to redevelop; [OAR 660-009-0005(13)]
- Add needed sites not available in the inventory of vacant or likely to redevelop. [OAR 660-009-0025(2)]

Completing these steps yields the amount of employment land required in a UGB expansion to meet the 20-year employment land supply called for in the Goal 9 rule. It may also identify some amount of surplus employment land. This surplus means that there are currently-zoned employment sites unsuitable to meet the requirements of the 20-year supply, although in usual practice this is absorbed by the need for general employment sites without specific characteristics other than some number of acres in unspecified locations.

The analysis for the EOA did not follow these steps, and the record is unclear and confusing regarding how the amount of land needed for employment was determined. An

EOA was prepared in 2008, and it was incorporated by reference in the findings for the UGB expansion, [R. at 1110] but other, conflicting findings and conclusions were also included, without the differences being reconciled. A table showing the 20-year employment land need in gross acres is included in the findings. [R. at 1114, 1141]

A table showing the existing supply of vacant and developed employment land is also included in the findings. [R. at 1109] However, there is no analysis included that distinguishes developed employment land likely to redevelop during the planning period from that not likely to redevelop. As set forth above, this analysis is key to determining the quantity of land needed for employment uses for a UGB expansion, and is a required part of an EOA. [OAR 660-009-0015 and 660-009-0005(1)] The EOA “* * * assumes that 10 percent of new employment will take place on existing lands.” [R. at 1595] However, there is no analysis of trends to support this assumption.

The findings also do not include identification of needed suitable sites (i.e., sites that are not in the inventory of vacant and likely to redevelop sites already in the UGB). The city response to DLCD’s request for record clarification [Bend December 7, 2009] refers to sections of the original EOA as the analysis and basis for findings, but the original EOA analysis was significantly modified later in the process [R. at 1585], and it does not appear that the original EOA is still a basis for the city's decision given the findings.

Forecasts and data are not required to be updated once the UGB review process has begun. [OAR 660-024-0040(2)]

Regarding the assumption that Bend will experience a 15 percent vacancy rate on employment land during the planning period, the evidence in the record does not support such a conclusion. [R. at 1616 and 1111-1112]. The findings state that the local vacancy rates have been approximately half this amount. The city justifies the higher long-term rate on a desire to drive industrial and commercial land rents down. That cannot be a basis for inflating trend data because, taken to its extreme, it would have no limit in terms of the acreage assumed to be committed as a result of commercial and industrial vacancies. While employment land availability, and the effects of availability on rents and land prices, are legitimate considerations in planning for growth, assigning an across-the-board vacancy rate that is significant above trends [R. at 1562] does not comply with the Goal 9 rule.

e. Conclusion

Except for the objection from Central Oregon LandWatch that the findings and EOA are outdated, the objections based on adequacy of the factual record, findings and analysis are sustained. The record does not include adequate findings, analysis or evidence to justify the city's determination of employment land need. The director remands with instructions to develop an EOA that includes a determination of the employment land supply consistent with the requirements of OAR 660, division 9. This must at least include the following elements based on factual evidence:

1. Determination of the 20-year supply of employment land;
2. 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;
3. Identification of required site types that are not in the inventory of either vacant or likely to redevelop sites;
4. Identification of serviceable land; and
5. Reconciliation of need and supply.

2. Does the analysis show too great a need for employment land?

a. Legal Standard

OAR 660-009-0015 requires that an EOA determine the need for employment land. OAR 660-024-0040(5) establishes the determination of employment land in the context of a UGB amendment. A more complete explanation of the Goal 9 requirements is provided in subsection 1.a of this section. These rules make it clear that the standard is for the city to provide a 20-year supply of land for employment.

In order to justify a need for employment land within the UGB to provide for efficient market functions or to respond to unique market conditions, there needs to be in the record a policy directive to provide additional land to meet some public purpose; a factual basis in the EOA to satisfy OAR 660, division 9; and, to satisfy OAR 660, division 24, a finding that the job growth estimate that supports that land need determination is reasonable.

b. Summary of Local Actions

A general summary of the city's actions is provided in subsection 1.b, above. The EOA discusses the provision of additional employment lands for a variety of locations and sites in addition to the 20-year supply, described in the EOA as Scenario B. [R. at 1620] A summary is provided. [R. at 1632] The land need findings discuss the city's rationale for increasing the supply of employment land 20-year need. [R. at 1115-1165]

Scenario A is characterized as "minimal employment land demand" and is from the 2008 EOA. Scenario B makes several adjustments to the employment land need from Scenario A, based on input from a stakeholder group. Scenario B reduces the land need as determined by a review of trends from 1,380 to 898 acres, reduces the resulting amount of vacancy-rate adjustment from 207 to 134 acres, adds 421 acres of redundant supply for market choice, increases the resulting 21 percent right of way adjustment to 235 acres, and adds 15 percent or 168 acres for other land needs. The total estimated employment land need in Scenario B is unclear [R. at 1622].

The city adopted economic development policies in chapter 6 of the Bend Area General Plan. [R. at 1339] The policies accept the 2008 EOA and associated land needs, establish the short-term supply management plan, establish emphasis on large-lot industrial, and established mixed-use and commercial development guidance. The short-term land supply management plan requires staff to report to council and do not include detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed as required by OAR 660-009-0020(2).

c. Objections and DLCD Comments

The department commented that the city erred in increasing its estimated long-term (20-year) employment land supply by 50 percent based on analysis perhaps appropriate for the required short-term supply, and by adding residential land need in the EOA based on employment in residential zones. [R. at 3765-3766] Also see the description of DLCD comments in subsection 1.c of this section.

The department received objections from four parties alleging a variety of deficiencies with the submittal related to the amount of employment land the city needs: Swalley Irrigation District, Central Oregon Land Watch, and Brooks Resources Corporation.

Swalley Irrigation District – The UGB was expanded to include more employment land than was justified. The city used an erroneous definition of “developed land” and “serviceable land.” [Swalley Irrigation District, May 6, 2009, pp. 47-53]

Brooks Resources – The findings do not demonstrate that at least some of the employment land needs cannot be accommodated within the existing UGB. [Brooks Resources April 29, 2009, pages 2–9]

Central Oregon LandWatch – The EOA employed an inappropriate assumption regarding vacancy rates and institutional use, open space, and right of way. The EOA does not demonstrate a need for several specific uses. The EOA impermissibly adds surplus employment land to the inventory. [Central Oregon Land Watch May 7, 2009, pages 11–12]

Barbara I. McAusland – Barriers to locating industry in Bend argue against the need for an oversupply of industrial land. The findings do not demonstrate a need for an oversupply of employment land. [McAusland May 5, 2009, page 3]

d. Analysis

The determination of the employment land supply is based on the review of trends the local government expects to influence the decision. The local government then identifies the sites that are expected to be needed to accommodate anticipated employment growth. 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, but 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. . .” [emphasis added] and OAR 660-024-0050 and Goal 14 require an analysis showing that the needs cannot reasonably be accommodated on land already inside the UGB.

The EOA includes two estimates of employment land need [R. at 1618, 1622]. Both scenario A and B include policy directives to increase the base land need for a variety of factors including vacancy, redundant supply, and right-of-way. There is policy direction and ample discussion. However, as noted in subsection 1.c of this section, the city’s findings do not explain the land need determination in a fashion that demonstrates it complies with OAR 660, division 9.

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 to satisfy OAR 660, division 9; and, to satisfy OAR 660, division 24, a finding that the job-growth estimate that supports the land need determination is reasonable and cannot be accommodated within the existing UGB.

As noted in subsection 1.c above, the findings do not include identification of needed suitable sites. The EOA does not make a distinction between built sites that are likely to redevelop and those that are not, as required by OAR 660-009-0015(3).

e. Conclusion

The objection is sustained. The director remands with the same instructions explained in subsection 1.e, above.

3. Did the city err in designating 114 acres for employment in residential areas?

a. Legal standard

OAR 660, division 9 requires that an EOA determines the need for employment land. [OAR 660-009-0015] OAR 660-024-0040(5) establishes the determination of employment land in the UGB. A more complete explanation is provided in subsection 1.a of this section, above.

OAR 660-009-0005(3) defines industrial use. OAR 660-009-005(6) defines “other employment uses” as:

All non-industrial employment activities including the widest range of 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.

OAR 660-009-0025 requires local governments to “adopt measures adequate to implement [economic development] policies” and “(a)ppropriate implementing measures include amendments to plan and zone map designations...”

Goals 10 and 14 and OAR 660, divisions 8 and 24 establish the requirements for designation of residential land and UGB expansion considerations for residential uses.

b. Summary of Local Actions

The findings regarding employment land need in Table 4-3 include 119 acres for employment uses on residentially zoned land. [R. at 1114] The trends analysis includes the number of employees expected to find employment on 119 acres zoned for residential [R. at 1113].

The 2008 EOA recommends an increase to the employment projection for jobs that are typically based in residential zones, such as certain public facilities, schools, churches and home occupations, and that may not be captured by traditional forecast methods, and recommends that additional residential land be designated to accommodate the forecast. [R. at 1651]

c. Objections and DLCD Comments

The department received objections regarding designation of residential areas for employment from Swalley Irrigation District and Central Oregon LandWatch. DLCD had also commented on this issue. The department’s letter asserts that the EOA allocates a significant amount of employment to the high-density residential districts based on a methodology that does not protect lands for needed multi-family housing from commercial development. [R. at 3767]

Subsequent review has revised this analysis. The city’s 2008 EOA [R. at 1651] recommends an increase to the employment projection for jobs typically based in residential zones, such as certain public facilities, schools, churches and home occupations that may not be captured by traditional forecast methods, and recommends that additional residential land be designated to accommodate the forecast.

d. Analysis

It is appropriate to define the portion of projected employment that is expected to take place on residential land in order to gain an accurate approximation of how much will locate in employment zones. However, OAR 660, division 9 does not permit designation of residential land for employment use. Residential land is designated according to the standards of OAR 660, division 8, which permits adjustments to the residential buildable lands inventory to account for non-residential uses.

e. Conclusion

The objection is sustained. The 119 acres of residential land is not justified, and must be removed from the employment land need.

4. Did the city err in including land for a hospital, university campus, and two 50-acre industrial sites?

a. Legal standard

OAR 660-009 requires that an EOA determines the need for employment land. [OAR 660-009-0015] OAR 660-024-0040(5) establishes the determination of employment land in the UGB. OAR 660-009-0025(8) provides requirements for designating employment uses with special siting characteristics.²⁸ A more complete explanation of OAR 660, division 9 requirements is provided in subsection 1.a of this section, above.

In order to justify an increase in the need for certain types of employment land within the UGB there must be a factual basis in the EOA to satisfy OAR 660, division 9, a policy directive to provide the sites for economic development purposes, and measures to protect the sites for the intended uses.

b. Summary of Local Actions

The EOA discusses the provision of additional employment lands for specific uses including a new hospital, a university campus and two 50-acre industrial sites [R. at 1506, 1517, 1628, 1724]. Policies are included as an appendix to the EOA [R. at 1674]. Findings are included [R. at 1103-1165], with specific use references [R. at 1107, 1114, 1115, 1116, 1120, 1122, 1123, 1124, 1126, 1128, 1140].

c. Objections and DLCD Comments

The department received objections alleging the city lacked justification to add to its estimated need land for a hospital, a university campus and two 50-acre industrial sites. [Central Oregon LandWatch May 7, 2009, p. 11] The department had commented that the city lacked substantial findings to support the addition of large sites for a new hospital, an auto mall, a university campus and two 50-acre industrial sites [R. at 3770, 3771, 3776].

d. Analysis

A jurisdiction's planning effort is adequate if it uses the best available or readily collectable information to respond to the requirements of this division per OAR 660-009-0010(5). There is in the record policy direction, fact-based analysis of an employment

²⁸ OAR 660-009-0025(8): * * * Cities and counties that adopt objectives or policies providing for uses with special site needs must adopt policies and land use regulations providing for those special site needs. Special site needs include, but are not limited to large acreage sites, special site configurations, direct access to transportation facilities, prime industrial lands, sensitivity to adjacent land uses, or coastal shoreland sites designated as suited for water-dependent use under Goal 17. Policies and land use regulations for these uses must:

- (a) Identify sites suitable for the proposed use;
- (b) Protect sites suitable for the proposed use by limiting land divisions and permissible uses and activities that interfere with development of the site for the intended use; and
- (c) Where necessary, protect a site for the intended use by including measures that either prevent or appropriately restrict incompatible uses on adjacent and nearby lands.

projection and market analysis of the rationale for providing employment land for a hospital, a university campus, and two 50-acre industrial sites.

The justification for these specific uses is undermined, however, by other deficiencies in the EOA. The EOA does not adequately identify land already in the UGB that could be developed for some or all these uses. There city does not appear to have adopted policies or other mechanisms to ensure the land included in the UGB is protected for the intended use and from conflicting uses.

e. Conclusion

While the analysis of the need for the specific employment uses is present, the EOA must also analyze whether these uses can reasonably be accommodated within the existing UGB. Additionally, the city has not adopted policies that provide adequate protections to ensure the sites remain available for the intended uses.

The objection is sustained. The director remands with instructions to analyze whether the identified uses can reasonably be accommodated within the existing UGB, and for the adoption of measures so that employment land with special siting characteristics complies with OAR 660-009-0025(8) regarding protection of the site for the intended use and from conflicting uses.

G. Public Facilities Plans

This section addresses whether the City of Bend’s ordinance NS-2111, adopting new public facilities plans for the city and a new Chapter 8, complies with Goal 11, Goal 14, applicable administrative rules, and OAR 660-024-0060, or whether the ordinance takes exceptions to those goals.

a. Legal Standard

Goal 11 and ORS 197.712(2)(e) require cities with a population greater than 2,500 to prepare and adopt public facilities plans for water, sewer and transportation services within the city’s UGB. Public Facilities Plans (PFPs) are required primarily to assure that local governments plan for timely, orderly and efficient arrangement of public facilities and services, and to serve as a framework for future urban development. Timely, orderly and efficient arrangement “refers to a system or plan that coordinates the type, locations and delivery of public facilities and services in a manner that best supports existing and proposed land uses.” Goal 11 and OAR 660-011-0000.

The required contents of a public facility plan are provided in OAR 660-011-0010(1), and are not intended to cause duplication or to supplant technical documents supporting facility plans and programs. OAR 660-011-0010(3). At a minimum, public facility plans shall include plans for water, sewer and transportation facilities and the responsibility(ies) for preparation, adoption and amendment of a public facility plan shall be specified within an urban growth management agreement. OAR 660-011-0015(1).

When evaluating a proposed UGB amendment, OAR 660-024-0060(8) requires that:

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

* * *

b. Summary of Local Actions

The city prepared certain water and sewer system master plans in 2007, which evaluated the capacity of existing public facilities to serve areas already within the UGB, as well as areas being studied at that time for possible inclusion in a UGB expansion area. Those master plans also identified significant system improvements needed both to serve lands and uses within the existing UGB (a significant number of homes in the prior UGB utilize septic systems) and to serve lands being considered for inclusion in a UGB expansion area. The master plans evaluate future service needs for a UGB expansion area containing only lands zoned UAR. They did not evaluate other exception lands, including a large area of rural residential development to the south of the city, or most of the lands zoned and planned for farm use to the east that were included in the UGB expansion area. See, e.g. R. at 467 (map of study area); R. at 500-504 (SE interceptor). The sewer collection master plan also did not evaluate the cost of some improvements identified as needed (North interceptor crossing of Deschutes River, R. at 497 “For this river crossing to be cost-effective, a bridge must be constructed over the river. * * * Costs for the bridge structure were not included in the cost for this interceptor.”]

In the first half of 2008, the city had certain addenda to the master plans prepared. [R. at 211]. Those include several analyses specific to particular areas (Newlands property; Hamby Road area). On October 8, 2008, the city provided the department an amended 45-day notice of its proposed UGB amendment that included a summary statement that it was also proposing to amend its public facilities plan element of the General Plan. However, no draft of the PFP Chapter (chapter 8) of the city's General Plan was provided until October 20, 2008 (seven days before the first evidentiary hearing).

Bend Ordinance NS-2111 adopts certain Water Public Facilities Plans and Sewer Public Facilities Plans as amendments to the Public Facilities Element of the Bend General Plan. [R. at 35]. The ordinance also appears to adopt the city’s sewer and water public facilities plans in support of and associated with its UGB expansion proposal. [R. at 35-1049] Exhibit A (Findings in Support of UGB Expansion) [R. at 37-210], Exhibit B (Findings in Support of the Amendments to the Public Facilities Plan) [R. at 211-224] and Exhibit C (Facilities Plans and all supporting components, addenda and supplements) [R. at 225-1049] are attached to Ordinance NS-2111.

Ordinance NS-2111 states:

* * * the Public Facilities serve the goals, objectives and policies of the General Plan by addressing the provision of public facilities and services within the urban growth boundary (UGB), services to areas outside the UGB, locating and managing public facilities and financing public facilities. [Record at Page 35] The city’s Goal 11 findings state “the proposed amendment to Chapter 8 of the Bend General Plan incorporates the city’s water system master plan and collection system master plan as Goal 11 public facility plans,” and “[i]n addition, the city has based the proposed expansion of the UGB in part on the development of three

(3) new sewer interceptors that are located beyond the city's current UGB. [R. at 205]

Exhibit C [R. at 225] includes documents that comprise the adopted Public Facilities Plan. The following is a general description of the facilities plan and incorporated documents provided in the findings:

The water system master plan covers those areas already inside the Bend UGB, and areas outside the current Bend UGB that are not already served by the Avion Water Company or another private water utility. The sewer master plans include a Collection System Master Plan (CSMP) that covers those areas inside the existing Bend UGB, and areas identified under the (prior, 2007) Bend Area General Plan as urban reserves. The sewer master plans also include a master plan for the reclamation facility, which is located north and east of Bend and treats effluent collected through the city system. [R. at 211]

The proposal includes a new chapter 8 of the Bend Area General Plan dated October 20, 2008. [R. at 1478-1498] No facility collection, distribution or service area maps are provided in chapter 8 of the plan. Map information is contained only in incorporated documents. The findings also incorporate by reference the adoption of water and sewer collection master plans and supporting documentation as the public facility plans for water and sewer service under Goal 11. [R. at 211]

The incorporated water and sewer collection master plans and supporting documents are described as follows. The adopted water public facility plan (WPFPP) includes:

- Water System Master Plan (WSMP) Update-Final Report (2007) [R. at 225-340]
- Airport Water System Master Plan (2007) [R. at 341-384]

The adopted sewer public facilities plan (SPFP) includes:

- Collection System Master Plan (CSMP) Final Report (2007) [R. at 385-516]
- CSMP Addendum No. 1 – Final Executive Summary and Alternative Technical Analysis: North East Bend (2007) [R. at 517-550]
- CSMP Addendum No. 2 – Collection System CIP Analysis and Report (2008) [R. at 551-692]
- CSMP Addendum No. 3 – Technical Memorandum 1.5 – Hamby Road Sewer Analysis (2008) [R. at 693-703]
- Water Reclamation Facilities Plan (2008) and Technical memos No. 1-10 [R. at 705-1048]

In a footnote, the city's findings state, "The record on the Bend UGB expansion also includes a 2007 draft of the CSMP, including nine study area plans that were submitted to DLCD on June 11, 2007." [R. at 211, see footnote 1].

A number of technical memos related to sewer planning appear in the city's supplemental submittal provided to the department on May 6, 2009. However, Ordinance NS-2111 and its associated findings do not appear to include these technical memos, and they are not listed as part of the incorporated public facilities plans adopted as part of the UGB adoption package which is described above from page 211 of the record.²⁹

The adopted public facilities plan includes sewer, stormwater and water services only. Transportation plans are not included in the public facilities plan amendment. The city's submittal and this report, however, do address transportation separately.

c. Objections and Analysis

The city did not prepare revised public facilities plans for water or sewer to address the additional lands added to its UGB expansion study area in 2008. Although there are parts of the city's submission that address parts of the additional expansion area, the primary two master plans limit their analysis to lands that were planned UAR in 2007. [R. at 450-453] Exception lands and agricultural lands to the east are not analyzed in the sewer system collection master plan. Nor are exception lands to the south of the city. The water system master plan only examined Tetherow and Juniper Ridge outside of the prior UGB. [R. at 249]

Nine objecting parties raised 13 specific concerns related to the city's public facilities plans. Four of the 13 parties filed public facilities plan objections during the city's first UGB submittal to the department on April 16, 2009, and in response to the city's June 12, 2009 supplemental submittal of public facilities plans as part of the UGB expansion proposal.

A list of objectors and a summary of objections filed in response to the city's public facilities plans follows. Parties filing objections on both submittals are noted with an asterisk.

- Swalley Irrigation District *
- Central Oregon LandWatch *
- Rose and Associates, LLC *
- Tumalo Creek Development, LLC *
- Toby Bayard
- Hunnel United Neighbors
- Newland Communities
- Anderson Ranch
- J. L. Ward Company

Swalley Irrigation District – The May 6, 2009 objection states that no notice was provided to DLCD or others for the city's public facilities plans, nor was notice provided advising of hearings on the plans. The objection further states that there was never a time when the city provided opportunity for meaningful input on the location of public

²⁹ Supplemental Items 99, 99A through 99M, Supplemental R. at 985 – 1210.

facilities. [p. 1]. The city's October 8, 2008 and October 20, 2008 revised notice to DLCD indicated that the city planned to adopt a variety of public facility plans on November 24, 2008, yet those plans were not attached to the revised DLCD notice, making the notice void. [p. 22]

The objection also states that draft public facilities plans were improperly used to influence the location of the UGB without adequate public input, thereby violating Goal 1. [pp. 25-26]

The objection points out that Goal 11 requires the city to (1) evaluate the carrying capacity of "air, land and water resources of the planning area" and not exceed such carrying capacity, (2) provide an orderly and efficient arrangement of public facilities and services, and (3) provide rough cost estimates for planned facilities. According to the objection, the city fails these requirements, particularly in the service areas of the Swalley Irrigation District. [p. 55]

The objection argues that, for reasons generally discussed above, chapter 8 of the Bend Area General Plan does not comply with OAR 660, divisions 11 or 24. [p. 80]

The objection points out that the city's Consolidated Sewer Master Plan (CSMP, 2007) acknowledges significant funding gaps. At the same time, the CSMP fails to compare the cost of sewer upgrades and enhancements to areas of failing onsite system or areas with infill and redevelopment capacity versus the CSMP's program. [pp. 88-89] The objection discusses several areas where the CSMP is allegedly deficient. [pp. 89-95]

The objection asks that the department remand and instruct the city to select public facility options that are reasonably affordable and can demonstrate reasonable costs for needed housing, and that the city be required to examine "undisputed" exception areas in the south and southwest quadrants of the city.³⁰ [p. 103]

Swalley Irrigation District also submitted objections in a July 6, 2009 letter (herein noted as SID2) on the city's public facility plan submittal. The objection's arguments regarding whether the department and the LCDC have jurisdiction to decide the adequacy of Bend's public facilities plan are examined in section III.D of this report. [SID2, pp. 8-12]

The objection argues that the public facility plan submittal failed to clearly identify what adoption decisions were submitted, leaving objectors to guess what the city actually submitted. [SID2, pp. 12-13]

The objection argues that since the UGB proposal does not demonstrate compliance with Goal 14, ORS 197.298 and OAR 660-0024-0060, the city must start over with its public facilities planning after it develops a new UGB proposal that follows and meets those requirements. [SID2, p. 43] The objection provides a number of technical challenges to

³⁰ Swalley Irrigation District has objected that lands zoned Urban Area Reserve (UAR) were not acknowledged exception lands.

the city's sewer master plan, which are similar to the objector's earlier May 2009 submittal. [SID2, pp. 45-55]

Central Oregon LandWatch – The May 7, 2009 objections argue that the sewer and water facility plans impermissibly provide infrastructure on lands outside the current UGB. [Page 16 of 18] The objector's June 30, 2009 objections argue that the city predetermined "so many aspects" of its UGB decision on the location of infrastructure, that it has not properly prepared public facility plans for lands inside the current UGB. The objection argues that the city has not recognized its overarching priority "to provide sewer to the thousands of acres and people currently lacking this service within the City." The objection points out that, while the city's Central Area needs infrastructure improvements and capacity to handle substantial infill development, it assumes only 500 new residential units due to Central Area sewer deficiencies. [p. 2] The objection incorporates by reference the June 28, 2009 objections of Toby Bayard.

Rose and Associates, LLC – The objector filed during both submittal phases. In its May 5, 2009 objection, it is argued, "The city erred by adopting the sewer and water master plans as part of the UGB rather than through an independent process." In addition, the city failed to comply with Goal 1 when it adopted the plans without separate public hearings. [p. 3] (See section III.K concerning Goal 1 objections.) The objection also points to technical errors regarding gravity sewer serviceability for specific property excluded from the UGB proposal. [p. 5]

The objector's June 29, 2009 submittal argues that the city sewer plan is inconsistent with the UGB amendment and does not provide for timely, orderly and efficient service, as required by Goal 11. The objection points out specific lands included in the UGB proposal but not in the sewer facilities plan, and other properties included in the sewer facilities plan but not in the UGB proposal. [p. 2]

Tumalo Creek Development, LLC – The objector's July 2, 2009 submittal states that the public facilities plan violates Goal 11 and OAR 660, division 11, because it does not consider more cost effective sewer alternatives. The objection cites its submittal of alternative lower cost technical solutions (e.g., membrane technology associated with satellite treatment facilities) for serving portions of the west side and Central Area, which it determined would provide much needed additional capacity in the city's urban core. According to the objection, however, the city did not consider objector's alternative proposal and the city's findings do not address the proposed alternatives. [p. 2] This objection is also included in the objector's May 7, 2009 submittal.

The objection argues that the sewer facility plan does not provide service in a "timely, orderly, and efficient" manner. The objection specifically points to the ability of the city to serve areas needing a Deschutes River crossing via the proposed North Interceptor as an area that will likely have to wait years and probably decades for sewer service, due to high costs and environmental concerns. The city has not adequately addressed these cost and environmental concerns, according to the objection. [pp. 2-3]

Toby Bayard – The objector’s June 28, 2009 objection argues that the city adopted its public facilities plans without the benefit of a public hearing, “having failed to advertise, properly notice, or inform the public that it was accepting testimony on the PFP.” (See section III.K of this report, dealing with Goal 1.)

While the objector’s June 28, 2009 objections include concerns over how the city adopted its public facility plans and how it used the same plans in determining its Goal 14 boundary location analysis, these issues are addressed elsewhere in this report. (See report discussions on Goal 1 and ORS 197.298.). The objection lays out a number of Goal 11 concerns as follows:

- There is no clear statement demonstrating how various public facilities plan infrastructure costs will be funded [pp. 7, 23]
- The public facilities plans and related documents provide conflicting information [p. 7]
- The sewer facilities plan contemplates provision of services to areas not part of the UGB proposal. [p. 15] At the same time, certain land included in the UGB proposal is not included in the sewer facilities plans. [p. 18]
- The sewer facilities plan does not satisfy Goal 11 requirements for a timely, orderly and efficient arrangement. [p. 20]
- The city’s sewer facilities plan was not coordinated with other entities, including state and federal agencies. [p. 20-21]
- The sewer facilities plan and Bend Area General Plan Chapter 8 (Facilities Plan) conflict with each other and with the city’s findings. [p. 21-22]
- Key Goal 11 determinants were not properly applied when developing the sewer facilities plan. [p. 22]
- The Northern Interceptor cost estimates omit crucial cost components. [p. 22-23]
- Goal 11 requires that estimates use current year costs but the city used 3-year old cost estimates. [p. 23]

Hunnel United Neighbors – The objection argues that the city failed to provide a sewer facility plan that is internally coordinated or provides for an orderly, timely and efficient arrangement of services. The objection challenges whether the Northern Interceptor produces an orderly arrangement of sewer service, given that Goal 11 directs that priority should be given to the large supply of unsewered land to the southeast and south which is located in the current UGB. The objection questions whether the Northern Interceptor will accommodate timely development in an area that is already subject to “serious transportation issues” and cost of service issues. The objection also questions whether the Northern Interceptor’s full cost, which has not been “determined or disclosed” related to the crossing of the Deschutes River, will demonstrate an efficient arrangement of its sewer service plans. [pp. 3-4]

Newland Communities – Most of the objection’s concerns raise jurisdictional issues related to review of the public facilities plans; these are addressed in section III.D of this report. The objection provides a single objection directly pertinent to Goal 11, which is stated in precautionary terms as follows: “If DLCD exercises jurisdiction over the PFPs,

DLCD’s review must conform with OAR 660-011-0010(1) and OAR 660-011-0050.” The objection then argues that the city’s decision meets these requirements. [July 2, 2009, letter from Christe C. White]

Anderson Ranch – The objection argues that in preparing its public facility plans, the city failed to comply with the citizen involvement requirements of OAR 660-015-0000(1). This objection is addressed in section III.K of this report under Goal 1 compliance.

J. L. Ward Company – The objection questions whether the sewer facility plan adequately addresses which existing and amended UGB areas are to be served by the proposed Southeast Sewer Interceptor and asks that this be clarified by the city. [June 22, 2009, letter from Jan Ward]

d. Analysis

In this section, the department examines whether the public facilities plans satisfy the requirements of Goal 11 and its rule, and whether those plans are consistent with the land use provisions of Goal 14, ORS 197.298 and OAR 660, division 24 relating to a UGB expansion. The following examination is based on the objections above and on the department’s own concerns.

Public notice, hearing issues and public involvement. Under OAR 660-025-0175(3) and ORS 197.610, the city is required to provide the department with notice of a proposed amendment 45 days prior to the city’s first evidentiary hearing on the proposal. The notice is required to contain the text of the amendment and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. [ORS 197.610(1)] The department received notice of the city’s June 2007 public hearings on its first UGB proposal, including draft public facility plans for a 4,884-acre UGB amendment considered at that time.^{31 32} The city’s October 8, 2008 revised notice,³³ however, which proposed to nearly double the size of its UGB proposal to 8,943 acres, did not include updated public facility plans, as pointed out in department letters sent to the city in October 2008 and November 2008.

³¹ While the city’s June 11, 2007, 45-day notice and submittal included a draft public facilities plan, it did not include other information necessary to review that proposal at that time. Specifically, the submittal did not contain any comparative analysis as required by ORS 197.298 and Goal 14 locational factors.

³² On March 30, 2007, the city submitted a plan amendment to the department that proposed to amend Chapter 8 – Public Facilities and Services element to the Bend Area General Plan. (DLCD file Bend 002-07, local file 07-012) The proposal included changing the plan text to incorporate by reference two new facility master plans, a Water Master Plan and a Sewage Collection System Plan, with no changes to existing policies or the UGB. The intent of these amendments was to support re-calculation of system development charges for water and sewer services and for capital improvement programming. In April, 2007 the city indefinitely postponed hearings on the amendment. (Source: DLCD plan amendment files)

³³ The city’s October 8, 2008 revised 45-day notice was revised on October 20, 2008; neither of the notices contained an updated public facility plan for the 8,943-acre UGB proposal.

Several parties raise objections regarding adequate public involvement and the city's public hearings process related to adoption of its public facility plans; these objections are addressed in sections III.K in this report. Objections have also raised jurisdictional questions relating the city's public facility plan adoption; these objections are addressed in section III.D.

Public facility plans were improperly used to determine the location of the UGB. A key question raised by objector is whether the sewer collection and water distribution master plans are consistent with the city's UGB expansion, and whether these plans provided the analysis required to evaluate alternate locations for a UGB expansion, as required by ORS 197.298, Goal 14 and OAR 660, division 24.

The first step in making such a determination is to examine the capacity of the city's public facilities to serve the existing UGB area, as well as areas proposed for addition to the UGB. OAR 660-024-0060(8).

The next step is a comparative analysis of the relative costs, advantages, and disadvantages of alternative UGB expansion areas with respect to the provision of public facilities and services. OAR 660-024-0060(8).

The data and findings from the second step may be used in two situations:

1. When a city prepares findings supported by an adequate factual base to demonstrate that future urban services could not reasonably be provided to higher priority lands (such as exception lands) due to topographical or other physical constraints, the city may then exclude these lands from the prioritization otherwise required by ORS 197.298(1). ORS 197.298(3)(b).
2. In addition, if the total amount of land in a particular priority category exceeds the amount needed, the city may apply, weigh and balance the four Goal 14 location factors to select which lands will be added to the UGB. One of those four factors is the "orderly and economic provision of public facilities and services" (see OAR 660-024-0060(1)).

The requirements for analyzing alternate UGB expansion areas are contained in OAR 660-024-0060(8).

The city's Goal 11 findings state, "The city has based the proposed expansion of the UGB in part on the development of three (3) new sewer interceptors that are located beyond the city's current UGB." [Record at 205] The record does not support this finding. The sewer collection master plan included an analysis of planned new sewer interceptors, but the location of those interceptors was (for the most part) not identified as being on agricultural lands (the interceptors are located almost entirely on UAR lands, or within the existing UGB). Further the analysis of what lands will be served in the future in the master plans does not correlate with the lands in the UGB expansion area. The UGB expansion area includes substantial lands that are evaluated in the master plans,

creating an internal conflict in the city's General Plan contrary to Goal 2 as well as Goals 11 and 14. Nor do the master plans contain an analysis of the relative costs, advantages and disadvantages of alternative UGB expansion areas as required by OAR 660-024-0060(8). Instead, they simply analyze the feasibility of serving the existing UGB and UAR lands.

Not all serviceable exception areas were included in the public facility plans. Several objections point to certain lands included in the amended UGB but not included in the public facility plans, and certain other lands included in the public facility plans but not included in the UGB proposal. The Collection System Master Plan (CSMP) study area includes the area within the prior UGB, UAR exception lands adjacent to the existing UGB, all of the 1,500-acre Juniper Ridge area in the north one square mile of EFU lands,³⁴ and the Tetherow destination resort located southwest of the current UGB. [R. at 410] The CSMP has also included some exception lands adjacent to the UGB designated as SR 2½, and property owned by the Department of State Lands (DSL). The UGB expansion area does not include the DSL and Tetherow properties, and only a portion of the Juniper Ridge site (as location of a future university site); nor does it include a large area of rural residential development south of the city.

The city also adopted CSMP Addendum No. 1–Final Executive Summary and Alternative Technical Analysis: North East Bend (2007) which expands the territorial scope of the CSMP approximately 1.5 miles eastward north of Butler Market Road to include both exception and resource lands in the northeast area of the UGB proposal. [R. at 517-550] The main purpose of this study is to propose a more southerly alignment for the Plant Interceptor sewer line to the treatment plant. It is not clear from the record what disposition occurs between the CSMP’s original version of the Plant Interceptor expansion and alignment and the North East Bend supplement, which appears as an alternative to the original CSMP Plant Interceptor proposal. Chapter 8 of the General Plan appears to provide that the CSMP (rather than the Addendum) controls. [R. at 1495 (“[The CSMP] shall direct the development of the system and be the basis for all sewer planning and capital improvement projects.” R. at 1495, Policy 2.)³⁵

³⁴ Land referred to as Section 11 owned by the Oregon Department of State Lands, zoned for exclusive farm use and located adjacent to the current UGB on the east side.

³⁵ The city also adopted CSMP Addendum No. 3–Technical Memorandum 1.5–Hamby Road Sewer Analysis (2008) which proposes an alternative sewer interceptor approximately one mile east of the existing UGB on a mix of exception and resource land. The newly proposed route at least partially replaces an earlier proposed Southeast Interceptor alignment along 27th Street. [R. at 693-703] This proposed alternative interceptor, proposed as an alternative alignment for the Southeast Interceptor, would flow north from Stevens Road (Department of State Lands property located at Section 11) along Hamby Road to one of the Plant Interceptor alternatives described above. Similar to the Plant Interceptor alternatives, the findings do not explain the disposition between the CSMP’s original alignment for the Southeast Interceptor expansion and the Hamby Road alternative. The Addendum No. 3 shows the costs of the two alignments to be very similar, and indicates that there are disadvantages to the Hamby Road alignment. [R. at 698]

Approximately 640 acres of exception land adjacent to the prior (and current) UGB in the southwest area in the vicinity of Bucks Canyon Road and west of Highway 97 are not evaluated in the CSMP. This area meets the city's suitability criteria, but is not included in the UGB or in the CSMP. [R. at 2449] The Bucks Canyon Road exception area is zoned RR-10 and consists of mostly large-lot exception properties. This exception area was included in the September 2008 UGB alternatives analysis in Alternatives 1 and 2, and a significant portion of Alternative 3. [R. at 5983, 5986 and 5989, respectively] Each alternative map showed proposed sewer interceptors and major roadway facilities. These exception lands are not considered in the CSMP although they meet the suitability criteria for residential development and are located at a higher elevation than gravity sewers in CSMP Planning Study Area No. 8 served by the CSMP's proposed Southeast Sewer Interceptor. [R. at 463, 476]

The Water System Master Plan Update does not cover all the existing UGB or expanded UGB area. The Water System Master Plan (WSMP) update was completed in March 2007. [R. at 226] According to the WSMP, the city serves 53,000 people within its existing UGB at the time the study was completed. The remaining population within the UGB was served by two private water providers, the Avion Water Company and Roats Water System. [R. at 236] The WSMP goes on to point out that the plan includes the "current service area within the UGB and the Tetherow development area as well as the Juniper Ridge area." [R. at 236]

The WSMP does not contain any public facility plan components for the Avion Water Company or Roats Water System, as required by OAR 660-011-0005 and -0010 and OAR 660-024-0020(1). The WSMP does not appear to contain composite service maps of the UGB service areas or illustrations of the proposed principle water distribution system operated by the Avion Water Company or Roats Water System.

The UGB expansion proposal includes areas served by the city, Avion Water Company, and Roats Water Company. However, there is no evidence that the WSMP includes plans for these expansion areas, as required by the Goal 11 and 14 rules. The WSMP also does not appear to satisfy the coordination requirements in Goals 2 and 11.

Sewer plans undercut providing adequate and timely services to unserved, underserved and areas with high infill and redevelopment potential, such as the Central area. This objection is closely related to the Goal 14 requirement to promote efficient patterns of urban development; adequate provision of density measures called for by ORS 197.296 and Goal 14; and OAR 660-024-0050(4), which calls for demonstration that land needs cannot reasonably be accommodated on land already inside the UGB prior to expanding the boundary.

The most significant CSMP project to affect the service capacity of the Central area is the need for a threefold increase in capacity of the Westside pump station, which is a major regional facility serving west and central Bend. The CSMP shows that ultimate buildout of the service area relying on the Westside pump station will require rerouting some of the increased flow from the pump station to a new Westside Interceptor, hence

connection to a new Northern Interceptor near Highway 97, all to relieve the current central interceptor, which follows a northeasterly alignment to the treatment plan. [R. at 493, 494, 495, 497] The CSMP's cost estimate for upgrading the Westside pump station, Westside Interceptor and Northern Interceptor to near Highway 97 is almost the same as building the entire Northern Interceptor, including an alignment that crosses the Deschutes River and follows the contour around the north and west quadrants of Awbrey Butte. [R. at 488, 499, 504]

The CSMP notes that 53 percent of the acreage, or 9,468 acres, within the existing UGB does not currently receive sanitary sewer service based on the city's 2005 database. [R. at 407] The city identifies 2,909 acres of vacant and redevelopable residential land by plan designation in UGB in 2008. [R. at 1071, 1083] The CSMP describes its UGB buildout conditions as the number of dwelling units "calculated assuming all parcels developed on a net acreage basis at the average zoning density for the specific land use type for each parcel." [R. at 407] For areas within the current UGB, the CSMP utilizes average densities for new housing construction over the last six years, as inventoried by the city planning department.³⁶ [R. at 417] The city's RS designation is estimated to build out at 5.3 dwelling units per acre during the planning period.

For UAR areas located outside the existing UGB, the CSMP assumes an average residential density of 5.3 dwelling units per acre. [R. at 417] However, nothing in the record demonstrates how almost 3,000 acres of land "unsuitable" for urban development, and 519 acres of buildable "surplus," are analyzed and accounted in the sewer facility plan. The effect of these approximately 3,500 acres of "unsuitable" and "surplus" land on the capability and capacity of service cannot be determined from the record when it provides little or no information on the location of such "unsuitable" and "surplus" lands.

On the other hand, the city's housing needs analysis assumes that vacant and redevelopable residential land within the current UGB, will build out at the current average density of 3.96 units per acre. [R. at 1071, 1289] For the expanded UGB area, however, the housing needs analysis assumes an average density of just under 5.9 units per acre on 941 net acres of residential development spread over 2,866 acres. [R. at 1080, 1082] In essence, the city proposes to provide higher densities in UGB expansion areas on the city periphery than on existing vacant and redevelopable land inside the existing UGB.

Both needs analysis numbers are inconsistent with those used by the CSMP. For areas in the existing UGB, 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.

³⁶ This residential density data is provided in Table 2-7 of the CSMP. [Record at Page 418] An average overall density and period of measurement is not provided, though. The department believes this data shows recent density of new construction for the period of 1998 to 2005.

The Bend General Plan incorporates a defective PFP. The discussion above highlights internal inconsistencies between the city’s water and sewer facilities plans and the UGB expansion. Chief among these inconsistencies are that the sewer plans include areas that are not part of the UGB expansion area, and the UGB expansion area includes areas not analyzed in the CSMP. Similar deficiencies appear for the water system plan. These internal inconsistencies are incorporated into the Bend General Plan in chapter 8, Public Facilities and Services, do not provide an adequate public facilities plan required by Goal 2 and Goal 11 or as required by the Goal 11 rules or the UGB amendment rules (OAR 660, divisions 11 and 24, respectively). [R. at 1480, 1483]

No timely, orderly and efficient arrangement of public facilities. Timely, orderly and efficient arrangement refers to “a system or plan that coordinates the type, locations and delivery of public facilities and services in a manner that best supports the existing and proposed land uses.” [Goal 11 and OAR 660-011-0000] If the public facility plan is found to be incomplete, as described immediately above, then the water and sewer facility plans, as a whole, cannot demonstrate the “timely, orderly and efficient arrangement of public facilities.”

Did not evaluate carrying capacity. “Carrying capacity” is a term used by Statewide Planning Goal 6. This term does not apply directly to Goal 11 unless a water or air quality violation is found. Since the UGB expansion does not directly implicate water or air quality standards, there is no Goal 11 compliance issue.

Can the city’s public facilities plan be acknowledged for areas of the existing UGB, only? At the city's request, the department considered whether the updated public facilities plan could be partially acknowledged for use in planning sewer and water services within the existing UGB. In order to be acknowledged, the adopted plan would need to demonstrate compliance with Goal 11 and its rules, including those parts of the goal and rules that prohibit extension of sewer collection systems beyond the UGB to serve properties located outside of the current UGB. The exception includes mitigating circumstance for specifically recognized health hazards.

Internal inconsistencies identified in this section, including density assumptions related to infill and redevelopment, and the efficient development of vacant land, need to be resolved between the city’s needs analysis and its public facilities plans before the public facilities plans may be acknowledged. In addition, the city must complete its public facility plan for water by including information called out in OAR 660-011-0010 for areas served by the Avion Water Company and Roats Water Company, consistent with the city’s urban growth management agreement with each water company. [OAR 660-011-0015] As a result, the director determines that he cannot partially acknowledge the city's public facilities plan based on the current submittal.

d. Conclusions

The director remands the public facilities plans for sewer and water, and directs the City of Bend to complete the work described below.

The city is directed to prepare revised public facility plans and amend chapter 8 of the Bend Area General Plan to clearly identify what sewer and water projects are needed to accommodate development in the UGB expansion area, including the elements listed below. To the extent that the city is relying on relative costs of public facilities and services to justify inclusion of particular lands within the UGB expansion area, it must include the comparative analysis required by OAR 660-024-0060(8).

Revised public facilities plans shall contain the items listed in ORS 660-011-0010(1), which outlines the minimum content for a public facility plan, including:

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

H. Transportation Planning

Several objections raise issues related to whether the transportation planning component of UGB planning complied with relevant requirements. The legal criteria for this portion of the submittal are primarily found in Statewide Planning Goal 12 and OAR 660, division 12 (the “Transportation Planning Rule” or “TPR”).

1. Did the amendments to the transportation plan violate Goal 12 or OAR 660, division 12 and related portions of Goal 14 and OAR 660-024-060?

Several objections allege the amendments to the City of Bend’s urban-area transportation plan violate Goal 12 and the TPR and related portions of Goal 14 and OAR 660-024-060, which require consideration of cost and feasibility of providing transportation facilities needed to serve planned urban development. The department submitted comments to the city prior to adoption of the amendments, and these comments along with the objections raise issues with whether the evaluation of transportation facility improvement needs (i.e., major road and highway improvements) provide a complete and accurate evaluation and comparison of the costs, advantages, and disadvantages of alternative UGB expansion areas.

a. Legal Standard

OAR 660-024-0060(8) sets forth how cities must evaluate and compare public facility costs of alternative boundary expansion areas:

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:

* * *

(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.

b. Summary of Local Actions

The city has adopted findings that reflect a transportation analysis of UGB alternatives conducted in 2007 by DKS (Bend UGB Expansion: Transportation Analysis), which has been incorporated into amendments to the city's transportation system plan (TSP), and the transportation element of the general plan. [R. at 2184-2303] The city's evaluation and comparison of transportation costs, advantages and disadvantages follows the city's overall approach to evaluation of alternatives, which combines multiple individual areas into a few composite options for UGB expansion.

The major findings of the city's transportation analysis are as follows:

- Overall impacts, needed mitigation measures, and costs are similar under any of the alternatives analyzed.
- State highways will be severely congested.... The most severe congestion would be on US 97 north of Colorado Avenue to the city limits. Significant system expansion, new facilities or new management measures would be needed to comply with state mobility standards.”
- The four land use scenarios for UGB expansions have very similar relative impacts on the Capacity Street network.The location, function and scale of needed additional improvements on the state and city street network had very many common elements among the scenarios. That means that the total expected investment will be very similar no matter which combination of areas within the planning area is selected for UGB expansion.
- Development in the Juniper Ridge area does have several unique roadway elements associated with the state highway that do not occur with the other land use scenarios considered. These potentially could include upgraded junctions with US 97 at Cooley Road, US 97 at Deschutes Market Road and a potential additional connection in between. The scale of these projects would require additional review and approvals with ODOT.
- The total cost estimated for mitigations to the transportation system resulting from UGB expansion ranges from \$154 million to \$232 million A major element of this cost range is targeted for improvements at the US 97 / US 20 junction area which is under study by ODOT for a preferred alternative solution (cost estimated at \$125 million to \$185 million in 2006 Refinement Plan.)
- Further study is required to select the best options on state facilities in the US 97 and Cooley Road areas that were identified for the Juniper Ridge development scenario. Recommendations made in this study are preliminary only. Specifically the concept of upgrades at Cooley Road and Deschutes Market Road require further study in conjunction with the Juniper Ridge Master Plan to understand the best combination of

investments on the state highway system. (Findings in Support of UGB Expansion, page 150-151; [R. at 1202-1203]

c. Objections and DLCD Comments

The department and the Oregon Department of Transportation (ODOT) expressed concerns about the city's evaluation and comparison of transportation costs of different UGB expansion alternatives prior to adoption. The department raised this issue in its comment letters in July 2007 and October 2008.

In November 2007, the department advised that the city needed to do more work and coordination with ODOT to compare costs, advantages and disadvantages of expanding UGB to the north. [R. at 10378] In October 2008, the department again expressed concern that the city's process for evaluating transportation costs was not complete or detailed enough to comply with requirements in OAR 660, division 24. The department's comments questioned the city's decision to assign costs of major roadway improvements in the north area of Bend to the entire city, and the city's overall conclusion that the extent of needed transportation improvements was essentially the same regardless which lands were included in the UGB.

ODOT expressed significant concern about the proposal to extend commercial and other intensive zoning along both ends of Highways 20 and 97. Of particular concern was the northerly portion of Highway 97 and 20. Intensifying land use in this area will further complicate the process of identifying transportation solutions and, given that it will likely be 15-20 years before a long-term solution could be constructed, these more intensive uses will exacerbate the existing congestion and safety issues. (ODOT Preliminary Comments on City of Bend UGB Expansion, October 27, 2008) [R. at 4392]

ODOT also commented on the April 2007 DKS Traffic Report: "It is unclear to what extent this analysis reflects the impacts and needed mitigation for the currently proposed "Alternative 4." We are currently comparing this report to the Alternative 4 proposal but it is clear that the preferred alternative has not been sufficiently analyzed to determine what the transportation investment costs will be." (ODOT Preliminary Comments on City of Bend UGB Expansion, October 27, 2008) [R. at 4392]

Five objectors challenged whether the city has adequately evaluated and compared transportation costs, advantages and disadvantages of alternative UGB expansion areas:

- Swalley Irrigation District
- Rose and Associates
- Central Oregon LandWatch
- Newland Communities
- Department of State Lands

Each of these objectors made objections to the city's analysis that can be characterized as follows:

- The city failed to analyze relative costs of serving individual areas and instead assigned the cost of major improvements to the city or UGB as a whole, when in fact, these improvements are primarily needed to serve a particular area. Several objectors referred to comments provided by ODOT expressing concern about improvements proposed to in the North area, to Highway 20 and 97.
- The analysis of roadway improvements needs did not use a consistent or accurate method to evaluate transportation of roads needed to serve development in different areas of the city.

Individual objectors provided additional specific objections to the city's analysis, as follows.

Swalley Irrigation District – The city assigned costs of major roadway projects that appear to be needed primarily to serve UGB expansion to the NW to the entire city. These include a proposed new bridge crossing the Deschutes River and improvements to state highways 97 and 20. The city fails to provide a detailed cost estimate for the Deschutes River bridge construction. [Swalley, May 6, 2009, page 75]

Department of State Lands – The city excluded transportation infrastructure improvement costs directly associated with specific alternative UGB expansion areas, leading to flawed conclusions and decisions. The city excluded from its analysis expensive transportation improvements at Cooley Road that are required to serve the Juniper Ridge expansion area. The city also excluded the expensive bridge over the Deschutes River that is necessary to serve select northwest UGB candidate expansion areas. These projects are by far the largest improvements in the city's transportation infrastructure list, yet those improvements are not applied to the UGB expansion areas they uniquely serve. If the candidate UGB expansion areas served by these infrastructure improvements were not included in the UGB, then these expensive projects would not be needed or built to the same extent, and the extraordinary costs of the projects would not be incurred to the same degree. [DSL, May 7, 2009, page 5 of 6]

Rose and Associates, LLC – North end highway and bridge improvements are estimated at \$300-\$500 million with no clue as to where funding might come from. Rather than analyze the direct impacts of adjacent properties upon development, the city spread these costs evenly through out the system. This same methodology was not employed at the south end interchange, for example. There is not consistency in the methodology creating an unfair advantage for the north and west properties in terms of cost per acre to develop. [Rose and Associates, May 1, 2009, Exhibit 2]

The city used different local roadway spacing standards (arterials and collectors) for the north and west areas than they did for the southeast area. Due to steep slopes, the Deschutes River and other natural features, it would not be practical to build a standard grid system as is required in the southeast. Therefore, in the city's analysis, the cost to serve the southeast area is higher than serving the north and west areas. What they didn't

take into account was the extraordinary cost of building roadways on steep terrain. They also didn't take into account the extraordinary cost of building a bridge across the river and the north end interchange. The relative cost comparison is fundamentally flawed. [Rose and Associates, May 1, 2009 Exhibit 2]

Newland Communities – The city did not properly consider costs and advantages of its property (and others) in the southeast area that will rely on the existing collector and arterial street system and not require trips on the heavily impacted Highway 97 and 20 for access to employment and other local trips. [Newland Communities, May 7, 2008, pages 21-22]

Central Oregon LandWatch – The city did not provide a detailed transportation analysis for the UGB expansion that it ultimately adopted. The analysis the city relied upon covers earlier proposals that are significantly different than the one ultimately adopted by the city and county.

Expansion in the northwest area would require widening of Newport and Galveston Streets from three to five lanes, which would violate a city plan policy that restricts widening of these streets (Street System Policy 21 of the Bend Area General Plan). [LandWatch, May 7, 2009, page 16]

d. Analysis

The city's evaluation of transportation costs of serving different areas is improper and incomplete. By bundling combinations of different areas into UGB expansion alternatives, the city has not properly conducted the evaluation of "alternative areas" called for in OAR 660-012-0060(8) because the analysis does not disclose unique costs associated with serving individual areas.

The city has not justified assignment of cost for key major highway improvements in Highway 97/20 area to all of the possible UGB expansion areas. State highway and related improvements in the north Highway 97/20 area are the single largest transportation cost identified in the city's evaluation. The city's estimate, based on a 2006 refinement plan is that facilities will cost \$125 million to \$185 million. These improvements makes up roughly 80 percent of the total cost of transportation improvements needed to serve the proposed UGB expansion areas. The city's findings assert that these improvements will be needed for any of the possible UGB expansion areas the city is considering. The city's position is not supported by the findings provided and is contrary to the information that is in the record and as a result does not have an adequate factual base.

The city's findings, summarized above, state that Juniper Ridge has unique additional costs, but does not itemize or otherwise identify these costs, and indicates that the further study of appropriate solutions is needed, and that this would need to be done "in conjunction with the Juniper Ridge Master Plan." By contrast, the city has provided a

detailed estimate of individual street improvements needed to serve most of the other proposed expansion areas.

Also, as Central Oregon LandWatch notes, the city's analysis does not appear to have considered existing plan policies that restrict widening of Newport and Galveston.

The DKS analysis that the city relies on was conducted prior to the development of the city's adopted UGB amendment, Alternative 4A. Alternative 4A is significantly different from the UGB expansion alternatives analyzed by DKS and as a result the city's analysis does not comply with OAR 660-024-0060.

e. Conclusion

The director remands the evaluation of transportation costs of UGB expansion alternatives for further work consistent with the requirements of OAR 660-024-0060(8). The findings and analysis need to be revised to:

1. Identify and assign costs of individual UGB expansion areas, rather than combinations of different areas;
2. Provide additional information regarding the costs of providing transportation facilities to serve individual areas, including any extraordinary costs related to overcoming topographic barriers or rights of way;
3. Provide more detailed analysis of the extent to which the costs of improvements for major roadway improvements in 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 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 was reduced.); and
4. Provide comparable estimates for providing needed roadway capacity for areas that, because of topographic constraints, may need to be served by different types of road networks. For example, growth on the east 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.

2. Does the UGB amendment violate Goal 12 because the urban-area Transportation System Plan has not been acknowledged to be in compliance with the Transportation Planning Rule?

a. Legal Standard

The TPR requires that cities and counties adopt TSPs establishing a system of planned transportation facilities and services to adequate to support planned land uses.

b. Summary of Local Actions

The city's findings note that the city adopted a TSP that was approved in periodic review. [R. at page 1202]

c. Objections

Swalley Irrigation District contends that the city's UGB amendment does not comply with various portions of the TPR that require the city to adopt a TSP, which sets forth a system of planned facilities and services to meet identified transportation needs.

d. Analysis

The Bend TSP, adopted in 2000, was *partially* approved by the commission in periodic review. The commission's approval of the TSP itemized a number of relevant TPR requirements with which the city had not fully complied. However, the department believes that, notwithstanding this remaining work, the existing TSP is partially acknowledged and the city may rely upon it. The TSP complies with Goal 12 and the TPR except for those provisions where the periodic review order specifically indicated additional work remains to be done. The objector does not indicate how the UGB amendment is inconsistent with specific provisions of the TPR where the city has additional work to do.³⁷

e. Conclusion

The city has a substantially complete, commission-approved TSP. Because the objector has not identified specific TPR provisions that require additional work by the city that affect the UGB decision, the department disagrees that the TPR requirement that the city have an adopted TSP has been violated.

3. Does the UGB amendment violate Goal 12 and the Transportation Planning Rule because findings do not demonstrate there are adequate planned transportation facilities to serve the planned land uses?

a. Legal standard

OAR 660, division 24 requires that UGB amendments comply with all statewide planning goals and rules, including Goal 12 and the TPR. OAR 660-012-0020(1)(d) allows cities to defer addressing requirements of OAR 660-012-0060 (to demonstrate that there are adequate planned transportation facilities) until property is re-designated or rezoned to allow urban development.³⁸

³⁷ The department has separately identified outstanding work related to TPR planning requirements for metropolitan areas that the city has not completed. These are discussed below, but were not raised by Swalley and so are not considered here.

³⁸ OAR 660-024-0020(1)(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;

b. Summary of Local Actions

The findings indicate that the city has elected to defer addressing OAR 660-012-0060 to subsequent plan amendments and zone changes as provided for in OAR 660-024-0020. The findings supporting the UGB amendment indicate that adopted zoning for UGB expansion areas put in place interim plan and zone designations that are intended to restrict development to levels that would not result in more traffic generation than allowed by existing zoning. [R. at 1202]

c. Objection

Swalley Irrigation District contends that the UGB amendment fails to comply with provisions of OAR 660-012-0060, applicable to plan amendments and zone changes, which require that the city plan for adequate transportation facilities and services to accommodate planned land uses.

d. Analysis

The city is required to address OAR 660-012-0060 requirements as part of its UGB decision *only* if that decision also authorizes more intense use of the land (in terms of trip generation) than allowed under current zoning. In this case, the UGB decision defers addressing OAR 660-012-0060 to a separate process that would involve a plan amendment and zone change. In short, while the city has the option to address and comply with the OAR 660-012-0060 now, it has chosen instead to defer compliance with the TPR to a subsequent plan amendment or zone change, which it is allowed to do if its interim zoning does not allow development that would generate more vehicle trips than the prior zoning.

As noted in section III.E.4 of this report, however, the interim zoning applied by the city and the county includes provisions that *may* allow for development that would generate more vehicle trips. The director is unable to determine whether the city and county have complied with this provision because their findings do not address it and there does not appear to be a comparison of prior and current zoning of the expansion area for Alternative 4A in the record.

e. Conclusion

The objection is sustained. OAR 660, division 24 specifically allows local governments to address OAR 660-012-0060 in a subsequent plan amendment or zone change, but only if they show that the interim zoning adopted for the UGB expansion area will not generate more traffic than the prior zoning. The expansion area includes a significant amount of land that had prior resource zoning (mainly EFU), that now is zoned UAR-10, as a result, the director concludes that the city and county have failed to show that they are entitled to defer the application of OAR 660-012-0060.

The director remands with direction to either retain current zoning within the expansion area or evaluate and adopt findings and measures to address OAR 660-012-0060.

4. Planning Status of the Proposed Deschutes River Bridge Crossing

a. Legal Standard

OAR 660-012-0025 describes how local governments are to comply with the statewide planning goals in preparing TSPs. This rule includes three major requirements:

- It directs that TSPs are to include land use decisions regarding planned transportation facilities (OAR 660-012-0025)(1));
- It directs that TSPs include findings showing that planned facilities are consistent with applicable goal requirements (OAR 660-012-0025)(2)); and
- It allows, under certain conditions, that local governments may defer required planning decisions to a subsequent refinement plan. (OAR 660-012-0025(3))³⁹

b. Summary of Local Actions

The TSP indicates that the city “contemplates” a new bridge over the Deschutes River in northwest Bend. The TSP also includes two new minor arterial street segments that would extend from existing roadways to either side of the Deschutes River to the location where the proposed bridge is contemplated:

The transportation circulation plan for the greater Bend urban area also contemplates a new bridge over the Deschutes River. This new bridge would join an extension of Skyline Ranch Road on the west to an extension of Cooley Road on the eastside. *Arterial street connections are included in the plan to accommodate that facility.*

The exact location and alignment of the affected roadways and bridge crossing is the subject of further study and evaluation. Also, the *final* determination of need, evaluation of state land use Goal 5 and other impacts is being deferred to a refinement study. Findings of need and impact will be incorporated into the TSP once that study has been completed. [R. at 1472, emphasis added]

³⁹ (3) A local government or MPO may defer decisions regarding function, general location and mode of a refinement plan if findings are adopted that:

- (a) Identify the transportation need for which decisions regarding function, general location or mode are being deferred;
- (b) Demonstrate why information required to make final determinations regarding function, general location, or mode cannot reasonably be made available within the time allowed for preparation of the TSP;
- (c) Explain how deferral does not invalidate the assumptions upon which the TSP is based or preclude implementation of the remainder of the TSP;
- (d) Describe the nature of the findings which will be needed to resolve issues deferred to a refinement plan; and
- (e) Set a deadline for adoption of a refinement plan prior to initiation of the periodic review following adoption of the TSP.

The proposed bridge is also shown on the adopted roadway system map.⁴⁰

While the TSP appears to be deferring key planning decisions about the bridge to a refinement study, the adopted findings addressing OAR 660-012-0025(3)⁴¹ say:

[The city is] not proposing to defer decisions regarding function, general location and mode of a refinement plan to a later date. [Exhibit D, Bend UGB Expansion Study – Statewide Planning Goal 12 Findings, pages 15 and 41 of 55]

In the process of conducting its review, the department has learned that the city may have adopted the wrong findings.⁴²

c. Objection and DLCD Comments

Swalley Irrigation District contends that the UGB amendment violates several provisions of the TPR, including OAR 660-012-0025. [Swalley Irrigation District, May 6, 2009, page 56] As discussed in detail in objections related to Goals 5, 11, and 14, Swalley argues that the sewer plan assumes a crossing of the Deschutes River—in the form of either a bridge or tunnel under the river—but does not incorporate the cost of this crossing in its cost estimates, or address relevant goal requirements that would apply to this decision.

DLCD’s October 24, 2008 letter asked that the city clarify the planning status of the proposed bridge:

While this improvement is included in the plan’s list of “outstanding issues” the text of the plan suggests that the city has made key land use decisions about need, mode, function and general location of this planned improvement [in].... Section 9.6.3 (quoted above)

If the city is making a decision that this roadway and bridge are planned facilities subject only to subsequent decisions about selecting a precise alignment, the plan

⁴⁰ The river crossing is highlighted with a large asterisk with this note: “Bridge subject to further study of need and location (see TSP Chapter 9)” [R. at 1476]

⁴¹ The city’s adopted Goal 12 and TPR findings are referenced in the record at page 1220. The referenced exhibit, Exhibit D, was included in the city’s 2007 notice to the department, but was not included in the adopted record.

⁴² In response to a request from the department to confirm the contents of the city’s record and findings, city staff advised the department that the wrong set of TPR findings were adopted. [Bend letter, December 7, 2009, page 8 of 9] The adopted findings are a draft version dating from June 2007. The record includes “replacement” findings developed in 2008 that are somewhat different than the 2007 findings, but these were not adopted by the city or county as their official findings. In addition, the city advises that it has posted a *third* set of TPR findings on its website that were not part of the city’s record. Due to time constraints in preparing this report, the department has not been able to analyze these findings in detail. And, in any event, the director must base his decision on the city’s adopted findings.

needs to (1) address the relevant goals, including Goal 5, (2) establish an overall corridor within which the roadway may be located; and (3) specify the process and standards by which a subsequent decision selecting an alignment for the roadway and bridge will be made. [R. at 4735]

d. Analysis

OAR 660-012-0025 directs that TSPs clearly make or defer decisions about proposed transportation improvements. In this case, the plan is ambiguous. It neither clearly authorizes the proposed bridge, with findings demonstrating that the bridge is consistent with relevant goals, nor clearly defers specific planning decisions about the bridge to a subsequent process.

It appears that the city may have intended to defer a decision on a possible bridge in the northwest area to some point in the future. However, the TSP does not accomplish deferral consistent with OAR 660-012-0025. The TSP does not include findings and provisions required to properly accomplish deferral consistent with the OAR 660-012-0025(3). In addition, parts of the TSP and other parts of the UGB submittal suggest a decision to plan a bridge at this location (i.e., the statement that the bridge is contemplated, and decision to plan for minor arterial roadways extending to either side of the river at to the proposed bridge location).

In short, further work is needed to either authorize the bridge as a planned facility, or defer decisions to a subsequent refinement plan consistent with OAR 660-012-0025. Also, whichever path the city chooses to take in addressing OAR 660-012-0025, its work should be conducted in concert with work addressing two other requirements: OAR 660-024-0060(8) evaluating and comparing costs of different UGB expansion alternatives and evaluating whether widening of Newport and Galveston streets is consistent with the city's adopted plan policies for these streets.

e. Conclusion

The objection is sustained. The plan policy language does not comply with OAR 660-012-0025. As described above, OAR 660-012-0025 requires specific findings and actions when a local government acts to defer required planning decisions to a refinement plan. The city's findings and policies do not fulfill requirements of OAR 660-012-0025(3). The director remands the decision with instructions to either revise the TSP to include planning decisions required to comply with the TPR and applicable goals or properly accomplish deferral consistent with OAR 660-012-0025(3).

Because the bridge is an expensive improvement and appears intended to serve a specific area, the city should, as part of its Goal 14 work, consider whether the bridge improvement is needed to serve a specific areas proposed for UGB expansion, and consider the costs of such an improvement as part of its evaluation of expansion alternatives consistent with OAR 660-024-0060(8).

5. Is the city obligated to complete overdue requirements to reduce reliance on the automobile?

This subsection addresses several issues related to TPR requirements that apply specifically to city's within metropolitan planning areas (MPOS), and whether these requirements must be satisfied prior to significantly amending its UGB. The TPR establishes planning requirements for cities within MPO areas to develop a strategy to reduce reliance on the automobile through the adoption of transportation and land use measures. This section of the report addresses three related issues:

1. Whether the metropolitan planning requirements of the TPR are applicable to Bend at this time;
2. Whether Bend's plan is in compliance with provisions applicable to metropolitan areas for adoption of standards and benchmarks to reduce reliance on the automobile; and
3. Whether the planning requirements in the TPR must be met prior to a significant amendment of the UGB.

Goal 12 and the TPR apply to the UGB expansion decision. Bend is subject to TPR requirements for metropolitan areas, and is well past deadlines for completing the required work. The outstanding work is significant because it is likely to require that the city take additional steps to promote mixed-use land use patterns that support multiple modes of transportation. This work relates directly to requirements in Goal 14 that the city maximize efficiency of urban land uses, and demonstrate that lands within the UGB cannot reasonably accommodate anticipated housing, employment and other land needs.

Issue 1: Whether Bend is Subject to Metropolitan Transportation Planning Requirements at this time.

a. Legal standard

OAR 660-012-0016 and -0055 require that each MPO prepare a regional transportation system plan (RTSP) in coordination with adoption of the federally-required regional transportation plan (RTP). Under both provisions, MPO plans and the city's conforming amendments to its TSP must be adopted no later than one year after the federally required RTP.⁴³

⁴³ OAR 660-012-0016: (1) In metropolitan areas, local governments shall prepare, adopt, amend and update transportation system plans required by this division in coordination with regional transportation plans (RTPs) prepared by MPOs required by federal law. Insofar as possible, regional transportation system plans for metropolitan areas shall be accomplished through a single coordinated process that complies with the applicable requirements of federal law and this division. * * *

(2) When an MPO adopts or amends a regional transportation plan that relates to compliance with this division, the affected local governments shall review the adopted plan or amendment and either:

b. Summary of Local Actions

The city asserts that obligations in OAR 660-012- 0016 and -0055 to conduct metropolitan planning are not applicable at this time:

OAR 660-012-0016...[and]...OAR 660-012-0055(1)...[do] not apply to the City of Bend because at the time the 2000 Bend Urban Area Transportation System Plan was prepared and adopted on October 11, 2000, the city of Bend was not part of an MPO. [Exhibit D, Bend UGB Expansion Study – Statewide Planning Goal 12 Findings, pp. 15 and 41 of 55]

However, the city’s findings, prepared in 2007 and adopted by reference in its submittal, indicate that the city understood the one-year deadline for adoption of an RTSP:

An RTP that meets federal requirements is expected by the end of June 2007 and an RTP that meets the requirements of this division is expected by the end of December 2007. The City of Bend is committed to amending the City’s TSP to be consistent with the adopted RTP within one year of the adoption of the RTP. [Exhibit D, Bend UGB Expansion Study – Statewide Planning Goal 12 Findings, page 42 of 55]

c. DLCD Comments

The department advised the city that the metropolitan transportation planning requirements in the TPR are applicable to Bend at this time. The department raised this issue in its comment letters in July 2007 and October and November 2008:

The Transportation Planning Rule (TPR) requires that metropolitan areas adopt transportation and land use plans and measures that significantly increase the availability and convenience of alternative modes of transportation and reduce reliance on the automobile. Bend is past due in completing this work. The City of

-
- (a) Make a finding that the proposed regional transportation plan amendment or update is consistent with applicable provisions of adopted regional and local transportation system plan and comprehensive plan and compliant with the applicable provisions of this division; or,
 - (b) Adopt amendments to the relevant regional or local transportation system plan that make the regional transportation plan and the applicable transportation system plans consistent with one another and compliant with the applicable provisions of this division. Necessary plan amendments or updates shall be prepared and adopted in coordination with the federally-required plan update or amendment. Such amendments shall be initiated no later than 30 days from the adoption of the RTP amendment or updated and shall be adopted no later than one year from the adoption of the RTP amendment or update or according to a work plan approved by the commission. * * *

OAR 660-012-0055(1)(b): When an area is designated as an MPO or is added to an existing MPO, the affected local governments shall, within one year of adoption of the regional transportation plan, adopt a regional TSP in compliance with applicable requirements of this division and amend local transportation system plans to be consistent with the regional TSP.

Bend is currently obligated to work with department to prepare a work plan and schedule for completing the required work. (DLCD, November 21, 2008) [R. at 3781]

d. Analysis

The metropolitan transportation planning requirements were applicable at the time the city adopted its amended UGB and amended its TSP. As outlined above, the TPR includes two separate but essentially equivalent requirements for adoption and update of transportation system plans in metropolitan areas.

OAR 660-012-0016 was adopted in 2006 and specifically addresses the relationship of state and federally required transportation plans. This was intended to minimize duplication of effort in meeting state and federal transportation planning requirements. As noted above, the rule specifically directs that TPR required planning "...be accomplished through a single coordinated process" and allows up to one year for local governments to adopt conforming amendments when a federally adopted plan is adopted or amended. (OAR 660-012-0016 also allows local governments to request an extension to the one year deadline, but the city has not requested an extension.)

OAR 660-012-0055, adopted in 1991, requires local governments in a newly designated or expanded MPO to adopt a TSP within one year of adoption of a federally required RTP.

The Bend MPO was designated in 2002, and the MPO adopted an RTP on June 27, 2007. Consequently, the city was obligated to adopt amendments to its TSP meeting relevant TPR requirements no later than June 27, 2008.⁴⁴

The fact that the city was not part of an MPO in 2000 when it adopted its TSP does not affect the applicability of the metropolitan planning requirements. OAR 660-012-0016 clearly directs that metropolitan planning requirements be addressed *at the same time* and *through the same process* that is used to develop the RTP.

The MPO has been working on preparation of an RTP since the area was designated as a metropolitan area in 2002. The city's proposed UGB expansion proposal, TSP, and the RTP have been developed at the same time (2006-2007), and all three plans cover the same planning period: through 2030. Under the terms of the TPR, the city's TSP is subject to metropolitan planning requirements and must include these in its transportation plan.

e. Conclusion

The TPR requirements for metropolitan areas are applicable to Bend at this time.

⁴⁴ The city could also have requested that the commission approve a work program extending the date for completion of the required plan as provided in OAR 660-012- 0016, but it has not done so.

Issue 2: Whether the adopted TSP complies with TPR requirements for metropolitan areas.

a. Legal Standard

OAR 660-012-0035 includes requirements regarding planning for transportation choices, and reduced reliance on the automobile. The rule includes a specific target for reduction in vehicle miles traveled (VMT) and provides timeframes for completion and review procedures.⁴⁵

b. Summary of Local Actions

The submittal includes conflicting findings on its compliance with metropolitan transportation planning requirements. As noted above, city argues that provisions of the TPR for metropolitan areas do not apply to Bend at this time. However, the city's findings also say that the city has adopted performance measures and benchmarks as required by 0035 and that it can demonstrate that it has planned for a five percent reduction in vehicle miles travelled (VMT) per capita, as required by the rule:

* * * the TSP includes benchmarks to assure satisfactory progress towards meeting the approved standard or standards adopted pursuant to this rule at

⁴⁵ OAR 660-012-0035: (4) In MPO areas, regional and local TSPs shall be designed to achieve adopted standards for increasing transportation choices and reducing reliance on the automobile. Adopted standards are intended as means of measuring progress of metropolitan areas towards developing and implementing transportation systems and land use plans that increase transportation choices and reduce reliance on the automobile. It is anticipated that metropolitan areas will accomplish reduced reliance by changing land use patterns and transportation systems so that walking, cycling, and use of transit are highly convenient and so that, on balance, people need to and are likely to drive less than they do today.

OAR 660-012-0035(5) *MPO areas shall adopt standards to demonstrate progress towards increasing transportation choices and reducing automobile reliance* as provided for in this rule:

(a) *The commission shall approve standards by order upon demonstration by the metropolitan area that:*

- (A) Achieving the standard will result in a reduction in reliance on automobiles;
- (B) Achieving the standard will accomplish a significant increase in the availability or convenience of alternative modes of transportation;
- (C) Achieving the standard is likely to result in a significant increase in the share of trips made by alternative modes, including walking, bicycling, ridesharing and transit;
- (D) VMT per capita is unlikely to increase by more than five percent; and
- (E) The standard is measurable and reasonably related to achieving the goal of increasing transportation choices and reducing reliance on the automobile as described in OAR 660-012-0000.

(6) *A metropolitan area may also accomplish compliance with requirements of subsection (3)(e), sections (4) and (5) by demonstrating to the commission that adopted plans and measures are likely to achieve a five percent reduction in VMT per capita over the 20-year planning period.* The commission shall consider and act on metropolitan area requests under this section by order.

(7) *Regional and local TSPs shall include benchmarks to assure satisfactory progress towards meeting the approved standard or standards adopted pursuant to this rule at regular intervals over the planning period. MPOs and local governments shall evaluate progress in meeting benchmarks at each update of the regional transportation plan. Where benchmarks are not met, the relevant TSP shall be amended to include new or additional efforts adequate to meet the requirements of this rule. [emphasis added]*

regular intervals over the planning period. [Exhibit D, Bend UGB Expansion Study – Statewide Planning Goal 12 Findings, page 27 of 45]

* * * the City can demonstrate to the commission that adopted plans and measures are likely to achieve a five percent reduction in VMT per capita over the 20-year planning period.⁴⁶ In addition, the City has adopted interim benchmarks for VMT reduction and shall evaluate progress in achieving VMT reduction at each update of the TSP. [Exhibit D, Bend UGB Expansion Study – Statewide Planning Goal 12 Findings, page 27 of 55]

c. DLCD Comments

The Bend metropolitan area does not have commission-approved standards or benchmarks for achieving reduced reliance on the automobile as required by OAR 660-012-0035. The department raised this issue in its comment letters of October 24, 2008 and November 21, 2008:

We...recommend that the city revise or delete the finding related to TPR Section 0035. This section of the rule relates to adoption of measures to implement an adopted, Commission-approved standard (required of 0035(5)-(6). As noted above, work related to these requirements remains as an outstanding work task. (DLCD, October 24, 2008, page 16.) [R. at 4737]

The key outstanding [TPR] requirement relates to adoption of a plan and measures to significantly increase the availability and convenience of alternative modes of transportation and reduce reliance on the automobile. This includes development and adoption of specific targets for accomplishing reduced reliance. (TPR Section 035(5)) (DLCD, November 21, 2008) [R. at 3781]

d. Analysis

While the city has adopted several benchmarks for adding bike and pedestrian facilities and transit service, it has not formally proposed or adopted a performance measure as required by provisions of OAR 660-012-0035, and has not obtained or sought commission approval of such a standard as required by OAR 660-012-0035(5)(a).

Further, although the city asserts that it can demonstrate that its TSP is likely to achieve a five percent reduction in VMT—thus meeting relevant requirements of the TPR—nothing in city’s TSP or adopting findings provide evidence to support this assertion, or that would provide a basis for a commission order approving this finding as provided under OAR 660-012-0035(6).

⁴⁶ Under terms of OAR 660-012-0035(6), a metropolitan area can meet the requirement to adopt standards for accomplishing reduced reliance on the automobile in sections 0035(4) and (5) “...by demonstrating to the commission that adopted plans and measures are likely to achieve a 5% reduction in VMT per capita over the 20 year planning period.”

e. Conclusion

The city's amended TSP does not satisfy TPR requirements for metropolitan planning. The city must develop a standard and benchmarks that 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 the automobile and obtain commission approval of those measures.

Issue 3: Whether the TPR's requirements for metropolitan area planning must be completed prior to or contemporaneously with the city's UGB amendment

a. Legal standard

OAR 660-024-0020 requires that the city address all of the statewide planning goals in its decision to amend its UGB:

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

* * *

- (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 OAR 660-024-0020 (emphasis added).⁴⁷

This rule allows deferral of the application of OAR 660-012-0060, but not of other provisions of the TPR. The TPR includes several specific requirements for metropolitan areas that affect or are implemented through changes to land use densities, designations and design standards to meet specific requirements in the TPR to significantly increase transportation options and significantly reduce reliance on the automobile. These include:

- Adoption of local standards, approved by LCDC, that demonstrate the city's TSP will significantly increase transportation options and reduce reliance on the automobile. (OAR 660-012-0035(4)-(6))
- Adoption of a parking plan and a transit plan (OAR 660-012-0020(2)(c) and (g))
- Adoption of ordinance amendments to allow for transit-oriented developments, and transit-supportive uses and densities along transit routes (OAR 660-012-0045(4))

⁴⁷ As noted above, the director sustained an objection from Swalley Irrigation District concerning this requirement as it relates to deferring application of OAR 660-012-0060 of the TPR to subsequent plan and zone change decisions.

b. Summary of Local Actions

Table 2 below summarizes the city’s actions and findings that relate to planning requirements for metropolitan areas. As noted above, for the most part the city contends that these requirements do not apply to the city at this time. Individual findings appear to suggest that the city has nonetheless adopted actions that comply with metropolitan planning provisions in the TPR.

Table 2. City findings and actions related to TPR Requirements for Metropolitan Areas

TPR Section	Summary	Goal 14 Related Outcome	City Findings/Status
0035(4)–(7)	Performance standards for increasing transportation options and reducing reliance on the automobile	Plan and zoning changes to allow more mixed use higher density residential and employment development; especially in close-in areas, and infill and redevelopment	City has not adopted performance standards. The TSP includes several “benchmarks” for TDM, bike and pedestrian improvements that were adopted as part of city’s 2000 TSP that predate Bend’s designation as an MPO ⁴⁸
0020(2)(g) 0045(5)(c)	Parking Plan to reduce per capita parking by 10% or adopt parking management reforms	Supports increased employment density, multifamily housing density	City findings assert city has met this requirement of the rule. Nothing in TSP or record includes a parking management plan that meets applicable requirements
0020(2)(c)(C)	Transit Plan designating major transit routes and major stops	Supports higher residential and employment densities	TSP includes a map of potential routes and three potential major stops. ^{49 50} Policies dating from 2000 TSP direct city to continue work on transit planning
0045(4)–(5)	Ordinances allowing transit-oriented developments and transit supportive uses and densities along transit routes	Increased housing and employment densities along transit routes	City has adopted some changes to ordinances as a result of 2000 TSP work and PR remand. Policies direct city to continue work. ⁵¹ No new ordinance provisions as part of this amendment.

c. DLCD Comments

The department raised this issue in its comment letters in October and November 2008:

⁴⁸ TPR requires benchmarks that measure progress in implementing adopted, LCDC approved performance standards. Since Bend does not have an adopted, approved performance standard, these benchmarks do not meet -0035 requirements.

⁴⁹ At present, the following are proposed as major transit stops: the downtown transit center, St. Charles Medical Center and Central Oregon Community College. Also, as the system grows, evaluation of major transit stops in the northern and southern reaches of the Bend area should be conducted. [R. at 1388]

⁵⁰ “The final determination of public transit routes, facilities and amenities within the UGB areas will be subject to further analysis and funding availability. [R. at 1453]

⁵¹ “Major transit corridors shall be opportunity areas within ¼ mile of either side of a corridor shall be a priority for medium to high density residential designations to implement the Framework Plan. [TSP, R. at 1354]

In our July 2007 comments we recommended that the city clarify the relationship of proposed TSP amendments to the city's obligations to prepare and adopt a regional transportation system plan (RTSP) in compliance with the TPR. Of particular note are TPR requirements to plan for reduced reliance on the automobile. Because land use strategies play an important role in accomplishing this objective, this work should be integrated with the city's consideration of UGB amendments. (DLCD, October 24, 2008) [R. at 4737]

The key outstanding [TPR] requirement relates to adoption of a plan and measures to significantly increase the availability and convenience of alternative modes of transportation and reduce reliance on the automobile. This includes development and adoption of specific targets for accomplishing reduced reliance. (OAR 660-012-035(5)) Because urban growth patterns affect reliance on the automobile, the proposal needs to assess how expansion to different areas would affect city's efforts to reduce reliance on the automobile. In general, reduced reliance on the automobile is accomplished by planning for compact, mixed use development, with an emphasis on focusing development in close in areas and along major transit routes. This is especially true for major trip generating uses, including regional commercial development, the proposed university and hospital medical center. For these uses, the proposal should evaluate whether needs can be met through increased infill or redevelopment or more intense development of close in sites. (DLCD, November 21, 2008) [R. at 3781]

d. Analysis

The city is required to address portions of Goal 12 and TPR related to metropolitan planning in its UGB amendment. The UGB expansion adds a significant quantity of land and residential and employment capacity to the Bend urban area that will affect transportation systems and that will have long-term effects on the extent to which area residents must rely on automobiles. Compliance with these provisions of the rule is important now because the work needed to meet these requirements relates to and affects the city's decisions about how to accommodate future urban growth. Generally, this portion TPR is met by changes to land use designations and densities that result by planning and zoning additional areas for compact, mixed use development and higher densities, through increased rates of infill and redevelopment and through development of transit oriented development or mixed use centers or neighborhoods:

It is anticipated that metropolitan areas will accomplish reduced reliance by changing land use patterns and transportation system so that walking, cycling and use of transit are highly convenient and so that, on balance, people need to and are more likely to drive less than they do today. [OAR 660-012-0035(4)]

In addition, the TPR includes detailed guidance about the kinds of land use actions that metropolitan areas should consider to accomplish this objective.⁵²

As the department stated in its comments to the city, this work must be integrated into the city's analysis of future land use needs as part of the UGB amendment process. As discussed above, the Goal 14 rule requires the city to consider and adopt efficiency measures to attempt to accommodate future land use needs on lands that are currently within the UGB. Since city must comply with the TPR as part of its UGB amendment, the city's efficiency measures must also include land use related actions that comply with the TPR.

e. Conclusion

The city's plan does not comply with key portions of the TPR related to planning for reduced reliance on the automobile. The city does not have a commission-approved standard for accomplishing reduced reliance on the automobile; a transit or parking plan; or related implementing measures allowing for transit oriented development.

Compliance with this part of the TPR is likely to require that the city take steps to plan and zone lands to encourage more compact, mixed use development, either through infill and redevelopment in the central area, or more detailed planning for transit oriented development or mixed use centers along transit routes. This work is closely related to work city is otherwise required to complete in order to comply with Goal 14 to adopt "efficiency measures." The city's decision is remanded to address these portions of the TPR, and to coordinate this work with its proposed UGB expansion.

⁵² OAR 660-012-0035(2) lists the types of land use changes that local governments are encouraged to consider to reduce reliance on the automobile:

- (a) Increasing residential densities and establishing minimum residential densities within one quarter mile of transit lines, major regional employment areas, and major regional retail shopping areas;
- (b) Increasing allowed densities in new commercial office and retail developments in designated community centers;
- (c) Designating lands for neighborhood shopping centers within convenient walking and cycling distance of residential areas; and
- (d) Designating land uses to provide a better balance between jobs and housing considering:
 - (A) The total number of jobs and total of number of housing units expected in the area or subarea;
 - (B) The availability of affordable housing in the area or subarea; and
 - (C) Provision of housing opportunities in close proximity to employment areas.

6. Did the rezoning of lands within the UGB expansion area violate Goal 2, OAR 660-024-0050(5) and the Transportation Planning Rule?

a. Legal standard

OAR 660-024-0050(5) (2006)⁵³ provides that at the time a city and county adopt a UGB amendment, they must also adopt comprehensive plan and zoning designations that are consistent with the 20-year land need determinations for all land that is being added to the UGB. This rule codifies long-standing appellate case law.⁵⁴ For Bend, this rule applies to revisions to plan and zoning maps to address future urban residential, commercial, industrial, institutional, park, and other uses in the expansion area. There are two ways to zone the land being added to the UGB: (1) retain the existing rural zoning, such as rural residential or exclusive farm use, or (2) apply interim urban holding zones that limit or prohibit land divisions, maintain large parcel sizes, limit uses, and prohibit increased vehicle trip generation.⁵⁵ The purpose of this requirement is to maintain the potential of the urbanizable land⁵⁶ within the UGB for future planned urban development.

b. Summary of Local Actions

In addition to adopting new interim plan and zoning designations, the city also designated future land uses for the expansion area on the Urban Area Framework Plan Map [R. at

⁵³ The text of OAR 660-024-0050(5) (2006):

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 until the land is rezoned for the planned urban uses, 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. The requirements of ORS 197.296 regarding planning and zoning also apply when local governments specified in that statute add land to the UGB.

⁵⁴ A UGB expansion based on a specific need must be conditioned on zoning and development the subject property to achieve the result of providing for the identified need. *Concerned Citizens vs. Jackson County*, 33 Or LUBA 70 (1997).

⁵⁵ See, e.g., ORS 197.752(1): "Lands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards." Also see OAR 660-024-0020(1)(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."

⁵⁶ The definitions in OAR 660, division 15 define "Urbanizable land" as: "Urban land that, due to the present unavailability of urban facilities and services, or for other reasons:

- (a) Retains the zone designations assigned prior to inclusion in the boundary; or
- (b) Is subject to interim zone designations intended to maintain the land's potential for planned urban development until appropriate public facilities and services are available or planned."

"Urban land" is defined as "land inside an urban growth boundary."

4897]. Part of the expansion area was designated as six master plan areas: four on the west side, one on the south side, and one on the northeast side. The map specifies the approximate gross “available acres” for various urban uses for each master plan area.

c. Objection

Tumalo Creek Development LLC contends Bend violated Goal 2 by assigning future plan designations in the proposed Framework Plan to lands outside its jurisdiction. This would be lawful only if the designations are guidelines. If the map designations are binding, the city must coordinate with Deschutes County and comply with statutes and rules regarding re-zoning, including Goal 2. Objector states that it owns the land designated as Master Plan Area 3. [May 7, 2009 letter, p. 2]

d. Analysis

The city designated future urban land uses on the Urban Area Framework Plan Map. This designation was coordinated with Deschutes County through the county’s co-adoption of the UGB amendment, Framework Plan amendments, and plan and zoning map amendments, in compliance with OAR 660-024-0050(5)(2006). However, the city did not apply the *appropriate* plan designations and zoning as required by OAR 660-024-0050(5).⁵⁷

⁵⁷ The proposal does not comply with the OAR 660-024-0050(5) requirement to apply appropriate plan designations and zoning to the expansion area. This rule states:

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

The city applied the following *plan designations* to the expansion area: Urban Reserve Residential, Urban Reserve Commercial, Urban Reserve Industrial, Surface Mining, and Public Facilities. [Bend Urban Area Proposed General Plan Map, R. at 40, 174, 1189, 1055, 1226, 1232] Except for the last two, these are rural, not *urban* plan designations.⁵⁷ The city has in the past zoned a large amount of land outside the UGB as “urban reserve”⁵⁷ but has not used such zoning inside the UGB.

The proposed *zoning* for the expansion area also does not comply with OAR 660-024-050(5). The county adopted two new zones for the expansion area, the Urban Holding-10 (10-acre minimum parcel size) and the Urban Holding-2½ (2½-acre minimum parcel size), in Title 19 of the Deschutes County Code. [R. at 1852] The code also states that an existing city zone, Suburban Low Density Residential (SR 2½), like the new UH-2½ and UH-10 zones, is an urban holding zone. Please see the detailed discussion in section III.E regarding the department’s position that these three zones will not preserve urbanizable land for future urbanization and therefore are not urban holding zones in violation of Goal 14 and OAR 660-0050(5). The “land uses” that appear on the Bend Area Framework Plan Map [R. at 1235] are neither land use designations nor the pre-expansion zoning or interim holding zones; they are the intended future urban uses, only.

e. Conclusion and Decision

The city and county did not violate Goal 2 by adopting future urban plan designations for lands within the proposed UGB expansion area. The city appropriately coordinated with Deschutes County. The director denies this objection.

However, as described in more detail immediately below, the city violated OAR 660-024-0050(5) by applying *rural* plan designations (Urban Reserve Residential, Urban Reserve Commercial, Urban Reserve Industrial) to portions of the expansion area, and by applying zoning designations that fail to maintain the expansion area 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.*

I. UGB Location

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

a. Legal standard

ORS 197.298, Goal 14 and OAR 660-024-0060⁵⁸ contain the applicable state requirements that establish *where* a city may expand its urban growth boundary (UGB).

⁵⁸ ORS 197.298 Priority of land to be included within urban growth boundary:

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

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

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

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

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

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

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

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

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

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

[emphasis added]

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

Boundary Location

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

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

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

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

Boundary Location Alternatives Analysis

(1) When considering a UGB amendment, a local government must determine which land to add by evaluating alternative boundary locations. This determination must be consistent with the priority of land specified in ORS 197.298 and the boundary location factors of Goal 14, as follows:

(a) Beginning with the highest priority of land available, a local government must determine which land in that priority is suitable to accommodate the need deficiency determined under 660-024-0050.

(b) If the amount of suitable land in the first priority category exceeds the amount necessary to satisfy the need deficiency, a local government must apply the location factors of Goal 14 to choose which land in that priority to include in the UGB.

(c) If the amount of suitable land in the first priority category is not adequate to satisfy the identified need deficiency, a local government must determine which land in the next priority is suitable to accommodate the remaining need, and proceed using the same method specified in subsections (a) and (b) of this section until the land need is accommodated.

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

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

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

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

(5) If a local government has specified characteristics such as parcel size, topography, or proximity that are necessary for land to be suitable for an identified need, the local government may limit its consideration to land that has the specified characteristics when it conducts the boundary location alternatives analysis and applies ORS 197.298.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Summary of Local Actions

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

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

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

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

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

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

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

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

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

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

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

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

c. Objections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Analysis

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

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

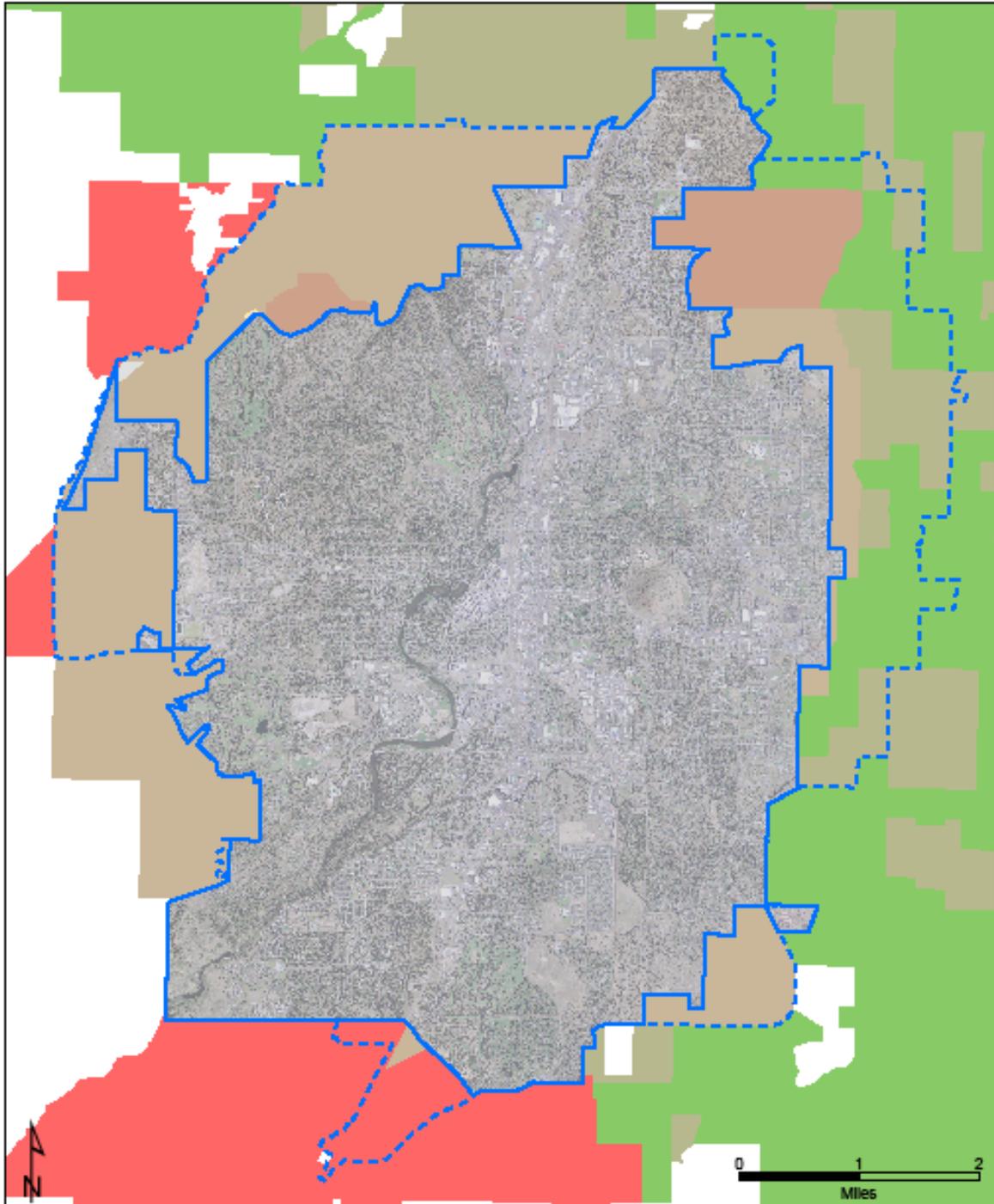
⁶⁴ On or about April 10, 2008, the city planning commission was presented with a proposed “strategy” for the city’s boundary alternatives analysis. [R. at 7772-75] The memorandum quoted relevant portions of Goal 14, OAR 660-024-0060, and ORS 197.298, but its explanation of how those laws must be applied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

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

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

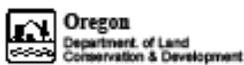
Suitability. As described above, in order to eliminate lands from consideration for inclusion in a UGB expansion, they either must be found to be generally unsuitable based on the criteria in OAR 660, division 8 (“buildable” lands for housing) or division 9 (“suitable and available lands” for employment),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

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



Exception Lands Zoning

Figure 3



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

- | | |
|---|--|
| Unincorporated County Areas | Urban Growth Boundary |
| ■ EFU Resource | ▬ Current UGB |
| ■ SR2.5 - Res. Suburb. Low Density | - - - Expansion Area |
| ■ UAR - Urban Area Reserve | |
| ■ MUA10 - Multi Use Agriculture | |
| ■ RR10 - Rural Residential | |

Aerial Image: 2008 HAP
 UGB and zoning information extracted from maps provided by City of Bend and Deschutes County
 DLCD GIS 08/11/09
 WebCasting.com

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

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

Table 3. Findings Regarding Boundary Location Threshold Suitability Criteria

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

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

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

Criterion	Analysis
<p>Lot has improvements with a value of less than \$20,000.</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 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.</p>
<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 twenty-year planning period. As noted in the section of this report addressing housing need, the city has not analyzed the actual level of redevelopment that has occurred on such lands, making it impossible to reach definitive conclusions about the amount of redevelopment that is likely to occur, as those terms are used in OAR 660-008-0005(2) and 660-024-0010(1) and 0060(1)(e) and (5). The city appears to have excluded a substantial amount of exception lands based on this criterion.</p>

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

By excluding a large amount of adjacent exception lands as “unsuitable” based on suitability criteria that are not tied to a specific identified need for housing or employment, or are not based in the general criteria allowed under OAR 660-024-0060, the city and county have not complied with Goal 14, ORS 197.298, and OAR 660, division 24. The analysis creates an artificial shortage of first priority exception lands, and then uses that shortage to justify including lower priority resource land, effectively undermining the statutory priorities in ORS 197.298.⁶⁷

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

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

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

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

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

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

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

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

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

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

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

The following objections are denied:

- The “Stevens Road Tract,” a large parcel of EFU land abutting the east side of Bend’s UGB that is owned by the objector, should be included in the UGB expansion if any resource land is included, because it is the city’s “top-ranked UGB candidate expansion area” (Department of State Lands). Reason for denial: Because of the improper application of relevant state goals, statutes and rules in the city’s urban growth boundary location analysis, it is not possible to determine, until the city redoes the location analysis on remand, whether any resource land must be added to the UGB, and if so, where. In addition, there is no showing that these lands have lower capability soils, under ORS 197.298(2).
- The amendment fails to comply with a city ordinance that requires application of the Goal 14 boundary location factors and the Goal 2 exception process that were in effect before LCDC amended Goal 14, Goal 2, and OAR 660-004-0010 on April 28, 2005 (Swalley Irrigation District). Reason for denial: LCDC adopted amendments to Goal 14, Goal 2, and OAR 660-004-0010 on April 28, 2005, effective April 28, 2006. These amendments, among other things, revised the Goal 14 location factors and eliminated the need for Goal 2 exception findings for a UGB amendment. A city that began the UGB amendment process prior to LCDC’s action had the option of proceeding with either the “old” Goal 14 or the “new” Goal 14. The city submitted a 45-day notice of the UGB amendment on June 11, 2007⁶⁹ and adopted the UGB amendment on January 5, 2009; Deschutes County adopted the UGB amendment on February 11, 2009; and the city and county submitted a revised UGB amendment to the department on April 16, 2009⁷⁰, after the goal amendments took effect. Between the time that the city submitted its notice and the time the city and county adopted the revised UGB amendment, the city made several changes to the findings and conclusions and used the amended Goal 14. Any provisions in the city’s plan or code to the contrary are not consistent with current State law and are not valid or enforceable. The goals and that apply to this UGB amendment are those in effect after LCDC amended Goal 14, Goal 2, and OAR 660-004-0010.

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

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

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

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

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

⁷¹ This rule states:

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

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

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

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

⁷² Definition from Merriam-Webster On-Line Dictionary.

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

d. Conclusion and decision

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

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

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

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

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

a. Legal standard

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

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

because there are no acknowledged urban reserves under ORS 195.145 and ORS 197.298(1)(a).⁷³ Make a list of these parcels and/or map them. Determine which of these parcels are suitable for an identified land need⁷⁴ by analyzing each parcel according to specific site suitability characteristics for the intended use, if any (*i.e.*, residential, commercial or industrial), that were identified in the earlier need analysis (for example, if the city's EOA identified special size, location and access characteristics necessary for regionally significant industrial sites).

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

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

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

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

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

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

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

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

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

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

b. Summary of Local Actions

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

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

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

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

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

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

c. Objections

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

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

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

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

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

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

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

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

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

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

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

d. Analysis

Which lands in Bend’s UGB study area are exception lands evaluated under ORS 197.298(1)(b)? Are lands zoned UAR urban reserves evaluated under ORS 197.298(1)(a), exception lands evaluated under ORS 197.298(1)(b)? On June 25, 1981, LCDC acknowledged the City of Bend comprehensive plan, which included city and county exceptions to Goals 3 and 4 for approximately 6,858 acres of land outside the 1981 UGB. These lands were designated UAR, 10-acre minimum parcel size (UAR-10), Suburban Residential, 2.5-acre minimum parcel size (SR 2½), and Surface Mining (SM). Parcels zoned UAR are therefore exception lands. UAR parcels in Deschutes County have not been designated as urban reserves under ORS 195.145.⁷⁸ UAR lands in Deschutes County are exception lands. [R. at 7268; Excerpts from the July 7, 1981 LCDC Compliance Acknowledgment Order for the Bend comprehensive plan are attached as Exhibit A]

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

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

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

LUBA has agreed that the ORS 197.298(2) priority ranking scheme is applicable only to resource lands. In its decision remanding expansion of the Myrtle Creek UGB, LUBA stated: “ORS 197.298(2) and Goal 14, factor 6⁷⁹ establish a second priority system for including agricultural lands.”⁸⁰

“The relationship between the elements of ORS 197.298(1)–(3) is essentially the same as the relationship between the elements of OAR 660-021-0030(3) and (4), and LUBA’s and the Court of Appeals’ interpretation of the latter should guide the interpretation of the former.”⁸¹ The statutory exceptions to the priorities to add land to a *UGB* in ORS 197.298(3), enacted in 1995, were based on the statutory exceptions to the priorities to add land to *urban reserves* in OAR 660-021-0030(4), which LCDC had previously adopted in 1992. Therefore, appellate interpretations of the OAR 660-021-0030(4) priority exceptions⁸² apply to Bend’s use of the ORS 197.298(3)(a) and (c) priority exceptions in this UGB amendment, including assigning the same meaning to the second sentence of OAR 660-021-0030(3)(c) and ORS 197.298(2). In 2000, the commission amended OAR 660-021-0030 to move the text that was a separate sub-rule, OAR 660-021-0030(3)(d), into 660-021-0030(4), apparently for consistency with ORS 197.298. In 1995, the rule text originally adopted as OAR 660-021-0030(3)(d) was codified in its own statutory subsection, ORS 197.298(2), instead of being included within ORS 197.298(1)(d).

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

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

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

⁸¹ *Residents of Rosemont*, 38 Or LUBA at 249.

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

Does the amendment comply with the ORS 197.298(2) requirement to give higher priority to resource land of lower capability? The amendment submittal does not contain the data and findings that constitute an ORS 197.298(2) soil capability comparison and analysis. The amendment does not include a map showing the soil capability of all resource parcels in the study area. The boundary location analysis map that shows resource lands does not show soil capability. The record lacks the data, analysis, and (particularly) findings that resource lands within the study area were grouped by soil capability, with lower capability lands being considered before higher capability lands, in accordance with Goal 14, ORS 197.298, and OAR 660-024-0060.⁸³

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

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

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

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

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

⁸⁴ ORS 197.298(3):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e. Conclusion and decision

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

J. Natural Resources and Hazards

The department submitted comments and received objections related to compliance with Statewide Planning Goal 5 and received one objection related to Statewide Planning Goal 7. These goals relate to natural resource areas and natural hazards.

1. Did the city and county comply with Goal 5 and its implementing rules in amending the city's UGB?

The department received a variety of objections that the city failed to comply with Goal 5 by not adequately applying Goal 5 to the UGB expansion area, and by identifying land within the proposed expansion area as protected land without adequate justification for the designation.

a. Legal Standard

Statewide Planning Goal 5 and OAR 660, division 23 address protection of significant natural, scenic and historic resources and open space. Rules in OAR 660, division 23 specify which resource categories must be protected by comprehensive plans and which are subject to local discretion and circumstances; the rules provide guidance on how to complete inventories and protection programs, and when the rule requirements apply. OAR 660, division 23 requires cities to inventory significant riparian areas, wetlands and wildlife habitat.

For some Goal 5 resources the rule allows cities to rely on inventories compiled by other agencies, and for other resources the local government must complete their own inventory of the resource. For all inventoried significant Goal 5 resources, a local government must complete a process to develop and implement appropriate protection measures. If a local program to protect a Goal 5 resource includes development restrictions, the loss of buildable land that results from these restrictions must be accounted for when determining the amount of land need.

OAR 660, divisions 23 and 24 both specify that a UGB expansion triggers applicability of Goal 5. [OAR 660-023-0250(3)(c) and OAR 660-024-0020(1)(c)] At a minimum, a local jurisdiction expanding its UGB must complete the following for the expansion area when factual information is submitted that a Goal 5 resource or the impact area of a Goal 5 resource is included in the UGB expansion area:

- Conduct an inventory of Goal 5 resources that are required to be inventoried and for which the rule does not rely on state or federal inventories. These are riparian corridors, wetlands, and wildlife habitat
- Adopt the local state and federal inventories as described in the rule for resources that require inventories. These are: federal Wild and Scenic Rivers, Oregon Scenic Waterways, state-designated critical groundwater areas and restrictively classified areas, approved Oregon Parks and Recreation Commission recreation trails, Oregon

State Register of Natural Heritage Resources sites, federally designated wilderness areas, and certain specific energy sources.

- Develop a local protection programs for all significant Goal 5 resources that are identified in an inventory, as required by the rule specific to the resource category.

Local jurisdictions have the option of conducting inventories and developing protection programs for historic resources, open space, and scenic views and sites. When using this option at the time of a UGB expansion, the Goal 5 process for these resources must be complete before land can be designated unbuildable or limitations on building can be considered in sizing the expansion area. [OAR 660-023-0070] The Goal 5 process is complete for these resources when:

- Existing and available information about Goal 5 resource sites is collected [OAR 660-23-0030(2)]
- Information on the location, quantity, and quality of the resource is determined to be adequate [OAR 660-23-0030(3)]
- The significance of resource sites is determined [OAR 660-23-003(4)]
- A list of significant resources is adopted of as part of the comprehensive plan [OAR 660-23-0030(5)]
- An analysis is completed of the economic, social, environmental and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use [OAR 660-23-0040]
- A program to achieve Goal 5 is developed and adopted based on the conclusions of the ESEE analysis [OAR 660-23-0050]

b. Summary of Local Actions

Findings in the submittal state that the proposed UGB expansion and Public Facilities Plan element of the city’s General Plan satisfy Goal 5 because, “it avoids to the extent practicable lands with county-inventoried Goal 5 resources.” The findings for Goal 5 further state that Deschutes County’s Goal 5 program “does not identify any acknowledged riparian corridors, wetlands, wildlife habitat or other Goal 5 resources within the proposed urban growth boundary.” [R. at 1215] The findings also state that review of the National Wetlands Inventory shows no wetlands within the proposed expansion area, and this serves to satisfy Goal 5 requirements.

The findings describe the county’s knowledge of wildlife habitat within its jurisdiction, and explains that the proposed expansion area does not include any lands in the Wildlife Area Combined Zone, “applied to Goal 5 wildlife habitat,” and does not include county-mapped deer winter range or elk habitat [R. at 1216]. The findings do not state when the county’s inventories were last updated.

The findings identify two significant riparian corridors within the proposed expansion area and explain that they are protected through the county’s plan and code. The findings also state that “approximately 22 additional [riparian] acres are located in the proposed UGB expansion area outside of the Deschutes River and Tumalo Creek.” [R. at 1216]

The findings also consider the possibility that additional Goal 5 resources will be identified through future planning efforts. The record states that existing city code implementing its Waterway Overlay Zone and its areas of special interest will apply to newly identified Goal 5 resources. [R. at 1216]

New policies commit the city to perform “a complete Goal 5 inventory once the new UGB is acknowledged.” Other policies prevent urbanizable land from becoming urban until the Goal 5 inventory is complete and protection measures are in place. [R. at 1217] The findings apparently use the term “Goal 5 resource” only to refer to resources that have, or will at some point, be identified as significant Goal 5 resources.

The findings do not include information about the approach to areas of special interest (ASI), a city classification described in the Bend General Plan. The ASI classification includes Goal 5 scenic, open space and habitat resources. [R. at 1247] Some discussion of the city’s intention to identify and manage impacts to ASIs is presented in the findings on the UGB locational analysis. [R. at 159]. Although the term “Areas of Significant Interest” is not used, the findings state that about 299 acres will not be available for urban uses, “because of their significance as scenic or natural resource” [R. at 159] The bulleted list of evidence for these resources in the proposed expansion area describes landscape features that fit the ASI classification. These include: the presence of the Deschutes River viewshed; presence of the Deschutes River Canyon State Scenic Waterway; and past surveys documenting prominent rock outcroppings, which are potential scenic resources.

Bend has included the Bend Area General Plan as amended January 5, 2009 in the record. Chapter 2, “Natural Features and Open Space,” provides some information on riparian areas, wetlands and wildlife habitat, and the city’s commitment to protecting these resources. The preservation of water resources, riparian areas and wildlife habitats is identified as one of the goals necessary to ensure Bend’s livability by provide long term protection of open space and natural features. [R. at 1244] In several places, the Natural Features and Open Space chapter recognizes that the Deschutes River and Tumalo Creek provide important habitat for a variety of aquatic life, birds, reptiles and mammals, both big and small. On page 1251 of the record, it is stated that all of the significant wetlands identified for the local wetland inventory, conducted in 2000, are located along the Deschutes River.

The plan includes several policies for natural features and open space. Policy 4 states:

Prior to the completion of the Goal 5 inventory, analysis and ordinance by the city, properties seeking annexation shall conduct a Goal 5 inventory pursuant to OAR 660-023. Where a significant Goal 5 resource is identified, amendments to the Bend Area General Plan and the Bend Development Code shall be proposed and adopted, consistent with inventory findings and OAR 660-23, to ensure appropriate protection of the resource, prior to approval of any land use action.

This appears to be one of the policies mentioned in the findings. [R. at 1217]. It would allow development to proceed and provide for a property-by-property approach to the inventory and protection of Goal 5 resources.

The “Natural Features and Open Space” chapter of the plan explains that the identification and preservation of ASIs and natural features is part of an effort to “retain and conserve the natural character of Bend as the community grows and changes.” [R. at 1247] ASIs are identified as “features typical of Central Oregon, or represent important wildlife areas.” [R. a 1247]. The association of river canyons with wildlife habitat is recognized in this section.

The analysis for UGB amendment alternative 4A includes information on the environmental consequences of selecting the alternative, and discusses Goal 5 resources for each quadrant. It appears that the term “Goal 5 resource” is used to refer to a resource that has already been identified as significant and placed on the Deschutes County inventory of significant resources, or that may be identified by the city as significant in the future. There are findings of no Goal 5 resources for the northeast priority 2 and priority 4 quadrants and the southeast priority 2 and priority 4 quadrants. It is stated that the southeast priority 4 quadrant is near Townsend bat habitat and has features that could qualify as an ASI. The northwest priority 2 quadrant is described as having one Goal 5 resource, a 200-acre aggregate site, and potential Goal 5 resources within the Tumalo Creek corridor. It is also stated that a State Scenic Waterway designation is recognized for portions of the Deschutes River that run through this quadrant. [R.. at 2460-1261]

There are findings of “no naturally occurring wetlands” for four of the six quadrants, presumably based on the National Wetlands Inventory. The analysis states that the southwest quadrant “contains some soils that have characteristics that may be indicative of potential areas of special interest,” and that the northwest quadrant contains a band of lowlands along the canyon bottom of the Deschutes River and Tumalo Creek which is in the 100-year floodplain. [R. at 2430-2462]

c. Objections and DLCD Comments

DLCD provided comments regarding Goal 5 requirements to the city in letters of October 24 and November 8, 2008. [R. at 4728-4729 and 3782] There were two main issues raised with respect to Goal 5: the Goal 5 *procedures* that are required prior to land being identified as non-buildable, and the *inventory* requirements for Goal 5 resources that are triggered at the time of a UGB expansion.

In the October 24 letter, DLCD described several Goal 5 resource categories that overlapped with the “areas of special interest” designation used by the city, and described some options for meeting the objectives of preserving the values of these land both within and outside the confines of Goal 5. The November 8th letter recognized the city’s intent to complete the Goal 5 requirements following completion of the UGB expansion, and stated this was not sufficient to comply with the rule. Both letters explained that it was the city’s obligation to inventory riparian areas, wetlands and wildlife habitat and assess

resource sites for significance when factual information was submitted that these resources exist in the expansion area.

Objectors have raised concerns regarding the decision to postpone application of the Goal 5 process to known resources that exist within the proposed expansion area. In particular, riparian areas, wetlands, wildlife habitat and state Scenic Waterways need to be inventoried and protected as part of the UGB expansion planning process.

The following comments have been submitted regarding compliance with OAR 660-023 and OAR 660-024-060.

Swalley Irrigation District – Avoidance of county-designated Goal 5 resources (e.g., big game habitat) does not comply with the Goal 5 rule. At the time of a UGB expansion, resources within the expansion area must be reevaluated due to the new conflicting uses allowed. The city failed to apply Goal 5 protections to state scenic waterways. The designation of land along the Deschutes River and canyon as unbuildable was made without completion of the Goal 5 process. It is premature to adopt the Combined Sewer Master Plan and the transportation plan without an adequate inventory of Goal 5 resources. [Swalley, May 6, 2009, p. 45]

Toby Bayard – The city failed to complete Goal 5 inventories of natural areas, scenic and historic areas and open space. Land set aside for protection within the proposed expansion area was not adequately identified as a Goal 5 resource. Reliance on county Goal 5 inventory is not sufficient to meet Goal 5 requirements that apply to the proposed UGB expansion. The city failed to maintain an inventory of historic, open space, and scenic views and sites. [Bayard, April 29, 2009, pp. 1 and 34]

Bend Metro Park and Recreation District – The city failed to provide an adequate Goal 5 analysis as part of the proposed UGB expansion, pursuant to OAR 660-023-0250. The city inappropriately defers Goal 5 analysis to after the adoption of the UGB. [Bryant Lovlien & Jarvis, PC for Bend Metro Parks & Recreation District, May 5, 2009, pp. 1-2]

Central Oregon Land Watch – The city wrongly interpreted OAR 660-024-0020(1)(c) and 660-023-0250(3)(c) and failed to apply Goal 5 requirements as part of the proposed UGB expansion. The designation of 299 acres as restricted due to the presence of Goal 5 resources is not based on a Goal 5 inventory. The city wrongly relies on existing county Goal 5 inventory information to identify to satisfy Goal 5 requirements triggered by the UGB expansion. [Paul Dewey Attorney at Law for Central Oregon Land Watch, May 7, 2009, pp. 5 and 14-15]

Edward J. and Doris E. Elkins – City failed to justify their designation of available lands and constrained lands since no Goal 5 analysis has been completed. A portion of the land was identified as constrained without adequate inventory and assessment. [Elkins, April 26, 2009, pp 1-3].

Department of State Lands – The city failed to conduct Goal 5 inventories and analysis in the proposed UGB expansion areas. [Vrooman, Oregon Department of Justice for Oregon Department of State Lands, May 7, 2009, p. 4]

Tumalo Creek Development, L.L.P. – The city’s proposed areas of special interest do not comply with Goal 5. The city failed to conduct a Goal 5 process to properly identify the location of and potential conflicts with ASI designated land. [David C. Allen Attorney, for Tumalo Creek Development, LLC, May 7, 2009, p. 3]

Toby Bayard (PFP) – The city failed to meet its Goal 5 obligations. Specifically, the city did not perform a Goal 5 inventory in advance of recommendations to construct a major sewer system interceptor. [Bayard, July 2, 2009, pp. 11-14]

Swalley Irrigation District (PFP) – The city failed to apply the Goal 5 process during adoption of the public facilities plan, which was required due to the presence of a designated State Scenic Waterway in the northwest quadrant. This objection is also included in the objections made to the UGB expansion. The city failed to address the habitat conservation planning effort that is underway for the bull trout and to recognize constraints on sewers and other infrastructure that are likely to result from the federal endangered species listing. Potential impacts to Tumalo Creek have not been evaluated. [Swalley Irrigation District, July, 6 2009, pp. 29-31]

d. Analysis

The city states that the proposal “avoids to the extent practicable lands with county-inventoried Goal 5 resources,” and that Deschutes County’s Goal 5 program “does not identify any acknowledged riparian corridors, wetlands, wildlife habitat or other Goal 5 resources within the proposed urban growth boundary.” [R. at 1215] These statements may be accurate if Goal 5 resources are understood to mean only resources that the *city* has determined to be significant, but it does not appear that the city made that decision. Even so, there appears to be some contradiction. The findings also state that the Deschutes County Code, Chapter 23.112, identifies two Goal 5 riparian areas within the expansion area. The findings go to explain that “most of these areas are along the Deschutes River and Tumalo Creek...[but] approximately 22 additional acres are located in the proposed UGB expansion area outside of the Deschutes River and Tumalo Creek.” [R. at 1216]

OAR 660-23-0250(3)(c) specifies that that the requirements of Goal 5 apply when a post-acknowledgment plan amendment “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.” The resource sites at issue in this rule are not only sites that have already been identified by the county as significant. The rule requires the city to independently evaluate the expansion area where where resources are identified and evaluate them for significance and possible protection. The city may use the county’s inventory as a starting point, but it must also evaluate other information and make its own determination of significance.

The city has factual information that natural resource sites may exist in the UGB expansion area. The alternatives analysis and associated maps clearly show that the Deschutes River and Tumalo Creek run through proposed expansion areas. The Bend Area General Plan recognizes the association between these two landscape features and important wildlife habitat. [R. at 1251 and 1254]

The plan also recognizes the association between the Deschutes River and wetlands. [R. at 1251] Four out of the six quadrants in Alternative 4 are described as having “no naturally occurring wetlands,” [R. at 2432, 2437, 2442 and 2447] presumably based on National Wetland Inventory data. The southwest quadrant is described as having soils with “characteristics that may be indicative of areas of special interest.” [R. at 2453] The northwest quadrant is described as having land along the Deschutes River and Tumalo Creek that is within the 100-year floodplain. [R. at 2461] The descriptions of these latter two quadrants may indicate the likelihood of wetlands. The record also acknowledges the State Scenic River designation for the Deschutes River [R. at 2460], and the existence of a Goal 5 aggregate resource in the northwest quadrant. [R. at 2460-2461]

Based on the evidence in the record of Goal 5 resources, the city needs to conduct an inventory, identify conflicting uses, and complete the Goal 5 process for the following resources in the proposed expansion area: riparian corridors, wetlands, and wildlife habitat. Potential impacts from new uses that will result from the proposed UGB expansion on the significant Goal 5 resources that are located in the expansion area must also be identified. These include State Scenic Waterways along the Deschutes River and the aggregate resource site in the northwest quadrant.

The city will also need to complete the Goal 5 process for areas of special interest, if these lands are to be considered unavailable for urban use within the proposed UGB expansion area. The Goal 5 process includes the identification of potential impacts from allowed uses and an assessment of the consequences of allowing, limiting or prohibiting uses and activities that conflict with a significant resource. This process is intended to generate findings that justify the final decision to alter or not alter development options. It is possible that the city will be able to rely on significance criteria and portions of the impact analysis that were completed to implement the ASI program within the existing UGB. However, if the ASI program development was completed under OAR 660, division 16, additional work will be needed. The fact that the ASI definition includes wildlife habitat, and implementation of protection measures serve in part to protect habitat, the city will need to consider the requirements of OAR 660-23-0110, when applying Goal 5 to these resources.

Failure to complete an inventory of historic resources was mentioned by one objector, but local governments are not required to identify and protect significant historic resources under Goal 5. If a jurisdiction chooses to identify historic resources, the process and criteria described in OAR 660-23-0200 must be followed. Another objector stated that the city had not adequately addressed current efforts to develop a habitat conservation plan for bull trout in the Deschutes River. Although the listing of bull trout under the

federal Endangered Species Act may be an important consideration for UGB expansion, Goal 5 does not require fish habitat to be included in a wildlife inventory. The inclusion of fish habitat will depend on choices made by the city when applying the rule (OAR 660-23-0110(4)), and is a consideration in protection of riparian corridors.

The director concurs with the objectors that the city has not completed the steps necessary to assess Goal 5 resources within the UGB expansion area for significance, and has not adequately addressed potential impacts to known significant Goal 5 resources as required by OAR 660-023-0250(3)(c) and OAR 660-024-060. The director also concurs that the areas of special interest identified by the city have not been evaluated sufficiently by the city at this point in time for land to be set aside for their protection. Furthermore, the director agrees with objectors that planning for transportation, housing and parks is undermined by the lack of analysis of the location, quantity, and quality of Goal 5 resources.

e. Conclusion

The UGB amendment and the amendments to the Public Facilities Plan do not comply with OAR 660, division 23. The director remands with direction to complete the inventory, assessment, and program development work needed to comply with Goal 5.

2. Is the designation of Surface Mining on certain property appropriate?

a. Legal Standard

OAR 660-023-0180 addresses identification of significant aggregate resources, approval of mining activity, and protection of the resource from conflicting uses. The rule sets criteria for significance and prescribes a process for evaluating potential impacts from the proposed mining activity. The rule requires a plan amendment for amending the local inventory of significant aggregate resources, changes to the mining activities allowed on the site, changes to the post-mining use of the site, and changes to the restrictions imposed in the impact area on new uses that could conflict with a protected mining activity.

b. Summary of Local Actions

The Bend Urban Area General Plan Map, dated December 12, 2008, shows the comprehensive plan designation for property owned by Shevlin Sand and Gravel to be surface mining. [R. at 1226]

c. Objection

One objector, Shevlin Sand and Gravel (SSG), raised a concern about a comprehensive plan map designation of surface mining that does not correlate with the Department of Aggregate and Mineral Industry (DOGAMI) permit authorizing mining. The objector does not cite a violation of local or state regulations, but explains that the plan designation depicted on the Bend Urban Area Proposed General Plan Map creates a problem with making use of their property. More land is designated as surface mining

than is covered under the DOGAMI permit for their mining operation. The land not covered by the DOGAMI permit can't be mined, and it can't be used for other purposes due to the plan designation. The objector does not state when the plan designation was made.

The objection is, "The surface mining designation makes [the] portion of the property [not covered by the DOGAMI permit] useless, because it is legally impossible for SSG to conduct mining and processing operations in this area." The objector recommends that the City of Bend change the boundary of the area designated surface mining to include only the area subject to the DOGAMI permit. The objector has provided a diagram showing the DGAMI permit boundary. Some land would need to be removed and other land added to the area designated as surface mining for the boundaries to be coincident. [Johnson & Sherton Attorney for Shevlin Sand and Gravel, May 7, 2009, pp. 1-2]

d. Analysis

The map designation is presumably based on a previous action by Deschutes County to designate the Shevlin Sand and Gravel property as a significant aggregate resource. A UGB expansion does not trigger a requirement for the city to conduct a new inventory of aggregate resources within the expansion area. Local jurisdictions are only required to amend the significant aggregate resource inventory in response to an application for a post-acknowledgement plan amendment. [OAR 660-23-0180(2)] A change in the boundaries of this site will require consideration of a separate plan amendment and will need to be based on findings developed consistent with OAR 660-23-0180.

e. Conclusion.

The objection is not sustained.

3. Does the UGB amendment comply with Goal 7 when the findings do not address wildfire hazard?

a. Legal Standard

Goal 7 is: "To protect people and property from natural hazards." There is no administrative rule associated with this goal.

The goal requires local governments to "adopt comprehensive plans (inventories, policies and implementing measures) to reduce risk to people and property from natural hazards." The definition of natural hazard includes wildfires. The goal provides how local governments are to implement the goal, and avoiding development in hazard areas is one of the principles to be considered.

b. Summary of Local Actions

The UGB amendment findings, analysis and conclusions do not address wildfire risk as a consideration regarding where to locate the boundary.

c. Objection

Central Oregon LandWatch objected that the UGB amendment does not address wildfire risk and specifically that emergency preparedness and emergency access are not addressed. The objector submitted evidence that the City of Bend “is one of four western cities at the greatest risk of wildfire.” The objector cites to Goal 7 provisions, and states the department should review new fire hazard information and notify local governments (presumably Bend and Deschutes County in this case) that the information requires a local response, as required by Goal 7. The objection does not identify this new information. [Central Oregon LandWatch, May 7, 2009, p. 17]

d. Analysis

Deschutes County has adopted a community wildfire protection plan for the Greater Bend Area that identifies significant wildfire risks for the area. The department agrees that the county and city should consider wildfire risk in evaluating the location and type of development for the city’s UGB expansion. However, at present, the Goal 7 does not *require* such an action by the county and city.

e. Conclusion

The director denies this objection. However, the director also believes that the city and county should consider the information in the Community Wildfire Protection Plan for the Greater Bend area on remand as they determine where to expand the UGB and how to plan for the expansion area.

K. Procedural Issues

Several objections raise issues related to whether the city and county have complied with certain procedural requirements in adopting the five ordinances at issue in this review. The legal criteria for this portion of the submittal are primarily found in ORS 197.610, OAR 660-025-0175 and OAR 660-018-0020, and Goals 1 and 2. This section addresses objections relating to local procedure and coordination for both the four ordinances initially submitted to the department (the two county ordinances, and city ordinances NS 2112 (UGB) and NS 2113 (code amendments), and the city's public facilities plan, adopted as ordinance NS 2111.

1. Did the city properly notice its submittal of the ordinances and plan amendments to the department?

Swalley Irrigation District (Swalley) alleges that the City of Bend's April 16, 2009 notice of its submittal to the department is inadequate to meet ORS 197.626, 197.633(2)(b), OAR 660-025-0175(3), and OAR 660-025-0100 (as well as Goal 1) in that the notice does not identify with clarity what decisions were submitted to the department for review. Swalley Objection 2(A), at 17-18.

a. Legal Standard

OAR 660-025-0175 sets forth how local governments must provide notice of UGB amendments, and the requirements for submittal of their final decision:

- (3) The local government must provide notice of the proposed amendment according to the procedures and requirements for post-acknowledgement plan amendments in ORS 197.610 and OAR 660-018-0020.
- (4) The local government must submit its final decision amending its urban growth boundary, or designating urban reserve areas, to the department according to all the requirements for a work task submittal in OAR 660-025-0130 and 660-025-0140.

In turn, OAR 660-025-0130 governs what must be submitted to the department and when, and OAR 660-025-0140 governs notice of the submittal and objections.

b. Summary of Local Actions

The city submitted notice of the city's and county's adoption of four ordinances to the department on April 16, 2009. Those four ordinances were the city's ordinances adopting the amended UGB and amending the city's development code in certain respects (Ordinances NS-2112 and NS-2113), and the county's ordinances co-adopting the amended UGB and making certain amendments to the county's comprehensive plan map and text for the lands within the UGB expansion area. [R. at 1050-1051 (city ordinance NS 2112 - UGB); R. at 1836-1844 (city ordinance NS 2113 – development code);

[county ordinance 2009-1 – UGB map and DCC and TSP map]; [county ordinance 2009-2 – zoning map and certain DCC amendments].

The city did *not* submit ordinance NS 2111, amending the city’s Public Facilities Plan element of its General Plan, to the department on April 16, 2009 (although a copy of this ordinance, which was adopted immediately before the UGB amendment ordinance, was included in the record for the submittal of the UGB ordinance (NS 2112), and the city submitted a separate notice of adoption of the Public Facilities Plan on January 9, 2009). However, on June 12, 2009, following LUBA’s decision and May 8, 2009 order in LUBA Nos. 2009-010, 2009-011 and 2009-020, the city did separately submit ordinance No. NS-2111 to the department, and provided notice to the objectors, as required by OAR 660-025-0175(3) and (4) and OAR 660-025-0130 and -0140.

c. Analysis

Although the city’s action in adopting the Public Facility Plan elements of its General Plan as a separate ordinance from its UGB amendment may have caused confusion, there is no legal prohibition on what the city did. The city’s 45-day notice covered both the UGB amendment and amendments to elements of the city’s comprehensive plan, including the Public Facilities Plan. The city properly gave post-adoption notice of its submittals to the department and those entitled to notice.

d. Conclusion

The director denies this objection. The city properly gave pre- and post-adoption notice of its submittals to those entitled to notice, include Swalley.

2. Did the city provide required notice and hearings for its ordinances?

Swalley, Bayard, Hillary Garrett, and Central Oregon LandWatch allege that the local processes leading to the submittals were unreasonably confusing and provided inadequate notice. Swalley Objection 2(B), at 18-28; Bayard Objection 1, at 23-25; Central Oregon LandWatch Objection at 6-8; Hillary Garrett, at 3-4.

a. Legal Standard

OAR 660-018-0020 sets forth how local governments must provide notice to the department 45 days in advance of the first evidentiary hearing on a proposed comprehensive plan amendment:

- (1) A proposal to amend a local government acknowledged comprehensive plan * * * must:
 - (a) Be submitted to the director at least 45 days before the first evidentiary hearing on adoption. * * *
 - (c) Contain two copies of the text and any supplemental information the local government believes is necessary to inform the director as to the effect of the proposal. One of the required copies may be an electronic copy;

* * *

(e) In the case of a map change, include a map showing the area to be changed as well as the existing and proposed designations. Wherever possible, this map should be on 8-1/2 by 11-inch paper;

* * *

(2) The text submitted to comply with subsection (1)(c) of this rule must include the specific language being proposed as an addition to or deletion from the acknowledged plan or land use regulations. A general description of the proposal or its purpose is not sufficient. In the case of map changes, the text must include a graphic depiction of the change, and not just a legal description, tax account number, address or other similar general description.

These provisions concern the required notice to the department. They do not prohibit changes to a proposed action. If a local government substantially amends a proposed plan amendment, then it must describe the changes in its notice of adoption. [OAR 660-018-0045]

Statewide Planning Goal 1 sets forth what must be contained in a local government's citizen involvement program. The city's citizen involvement program is acknowledged for compliance with Goal 1. The city's hearings procedures for legislative amendments do include a local code requirement for 20-day advance local notice of public hearings on legislative plan amendments, which is cited by Bayard and Garrett. BDC Section 4.1.315.

b. Summary of Local Actions

The city provided an amended 45-day notice to the department of its revised proposal to amend the UGB and certain provisions of its comprehensive plan, including the Public Facilities element of its plan, and including its development code, on October 8, 2008. [R. at 4820] Swalley, Garrett and Bayard identify several respects in which they and other local participants were frustrated or confused about what was proposed, and allege that the proposed Public Facilities Plan was not submitted to the department until October 20, 2008, and that the local newspaper notice did not separately identify that amendments to the Public Facilities Plan were to be heard.

The record indicates that the proposed amendments to Chapter 8 (Public Facilities) of the General Plan were first presented to the city's planning commission on or about August 15, 2008. [R. at 6150, 6250] The record also indicates that the location and, to some extent, size of the proposed UGB amendment was changed significantly on or about October 3, 2008, and that the city and county planning commissions met to consider the submittals on October 27, 2008. [R. at 1211] The city gave public notice of the planning commissions' hearing on October 7, 2008; [R. at 4756] and public notice of the city council hearing on November 7, 2008. [R. at 3954-55] It is not clear when the city provided the text of the proposed changes to Chapter 8 of its General Plan (Public Facilities); it appears that the text was sent on or about October 20th.

c. Analysis

Swalley, Garrett and Bayard are correct that the city's notices failed to comply with OAR 660-018-0020 and ORS 197.610, in that the submittal was late (in relation to the first evidentiary hearing) and may not have initially been complete. It also appears that the city's notice of the planning commissions' joint hearing and the city council hearing violated BDC section 4.1.315 by failing to provide notice 20 days in advance of the hearings. However, Swalley, Garrett and Bayard also note that they were allowed to and did provide written testimony to the planning commissions (and city council) at public hearings on the proposals.

Whether a violation of the notice requirements of ORS 197.610 requires a remand depends on whether the objector(s) were prejudiced by the late or inadequate notice. See, *No Tram to OHSU, Inc. v. City of Portland*, 44 Or LUBA 647, 658 (2003). In this case, Swalley and other objectors allege that they were prejudiced by the lack of time to review the extensive submittal, which was changed substantially by the city in early October. The objectors have identified substantial prejudice in the sense of not having been able to present their concerns to the local decision-makers.

d. Conclusion

Goal 1 is violated in the context of a legislative comprehensive plan amendment only if the local government does not follow its citizen involvement program. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 284 (1998); *Wade v. Lane County*, 20 Or LUBA 369 (1990). Swalley and Bayard have not identified a violation of Goal 1.

However, as set forth above, the record shows that the city did violate ORS 197.610 by failing to provide timely and adequate notice of its proposed amendment to its General Plan. As a result, the director concludes that remand is required in this case.

3. Did the city otherwise violate Goal 1?

Toby Bayard (and to some degree Swalley and Central Oregon LandWatch) alleges that the city failed to provide critical information to the public in a timely fashion, and made substantial last-minute changes in its proposal that had the effect of not allowing the public adequate time to comment. [Bayard Objection 1 at 1-26; Central Oregon LandWatch Objection at 6-8]

a. Legal Standard

Goal 1 is to "develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process." [OAR 660-015-0000(1)] Goal 1 establishes requirements for local citizen involvement programs. Its provisions do not apply to comprehensive plan amendments unless those amendments include the government's citizen involvement program. The city and county submittals do not amend or affect either the city's or county's citizen involvement program. Under those circumstances, the submittals are in violation of Goal 1 only if the submittals include provisions that are inconsistent with the city or county citizen involvement programs.

Homebuilders Assoc. v. Metro, 42 Or LUBA 176, 196-197 *aff'd Homebuilders Assn. of Metropolitan Portland*, 184 Or App at 669. No objector attempts to establish that the submittals include provisions that are inconsistent with either citizen involvement. In addition, the objectors do not identify any specific provision of the city's citizen involvement program that has been violated. See, General Plan, Chapter 1.

b. Summary of Local Actions

The city is not amending its citizen involvement program.

c. Analysis

Because the city is not amending its citizen involvement program, Goal 1 does not establish requirements for the local government actions before the director.

d. Conclusion

The director denies the Bayard, Central Oregon LandWatch and Swalley objections concerning Goal 1, because the goal does not establish legal requirements for the actions that are before the director for review.

4. Did the local governments fail to coordinate with Swalley Irrigation District, Central Oregon Irrigation District, or ODOT in violation of Goal 2?

Swalley Irrigation District (Swalley) and Toby Bayard allege that the city and county failed to coordinate with the Swalley and other governmental entities, as required by Goal 2. In particular, Swalley alleges that the submittals were not coordinated with the district in the sense that the district's needs were considered and accommodated as much as possible. Goal 2; ORS 197.015(5). [Swalley Objection 2(A), at 28-34. Bayard Objection 2, at 27-33]

a. Legal Standard

The coordination elements of Goal 2 require local governments to exchange information with affected governmental units. In addition, information received from affected governmental units must be used by the adopting local government. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 553, 558-559 (2007); *DLCD v. Douglas County*, 33 Or LUBA 216, 221 (1997); *Brown v. Coos County*, 31 Or LUBA 142, 145 (1996). The adopting government must provide "notice clearly explaining the nature of the proposal and soliciting comments concerning the proposal." *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 394, *aff'd* 130 Or App 406 (1994). A local government's 45-day notice to DLCD is not sufficient for this purpose. *Id.*

Similarly, newspaper notice is not sufficient. *Adkins v. Heceta Water District*, 23 Or LUBA 207, 218 (1992). Finally, the local government's findings must address the concerns raised; simply rejecting the concerns or deferring addressing them to a later time is not sufficient. *Cox v. Polk County*, 49 Or LUBA 78, 89 (2005). *DLCD v. Douglas County*, *supra*. Goal 2 and ORS 197.015(5) do not mandate success in accommodating

the needs or legitimate interests of all affected governmental agencies, but they do mandate a reasonable effort to accommodate those needs and legitimate interests “as much as possible.” *Turner Community Association v. Marion County*, 37 Or LUBA 324, 353-354 (1999). From the foregoing, the coordination requirement is satisfied where the local government has engaged in an exchange of information regarding an affected governmental unit’s concerns, put forth a reasonable effort to accommodate those concerns and legitimate interests as much as possible, and made findings responding to legitimate concerns.

b. Summary of Local Actions

The city adopted findings summarizing its coordination with irrigation districts, including Swalley. [R. at 1214-1215] Those findings describe how the city and the district communicated, and the city’s consideration of the concerns raised by the district. According to the city’s findings, it removed a 332-acre area entirely within the district. Also according to the city it “cannot balance SID’s opposition to urbanization with the need for urbanization of the identified lands, for all of the reasons explained in the city’s findings.” [R. at 1215]

c. Analysis.

The director concludes that the city has complied with the coordination elements of Goal 2. The city met repeatedly with the district; conducted an analysis of the acreage of irrigated lands affected by the proposal; removed some irrigated lands from the proposal; and adopted findings describing the district’s concerns and how they were accommodated. Although the notice provided by the city was confusing, it appears to have met legal requirements, and the district itself has indicated that it was able to make its concerns known in writing.

d. Conclusion

The director concludes that the city’s and county’s actions (the three city ordinances, and the two county ordinances) were adopted in compliance with the coordination requirements of Goal 2. The objection is denied.

5. Did the city improperly adopt the Public Facilities Plan?

Toby Bayard and Hillary Garrett and Central Oregon LandWatch, and Hunnel United Neighbors and Anderson Ranch all allege that the city improperly adopted the Public Facilities Plan in NS 2111. Specifically, they allege there was no public hearing on the ordinance, and that the city’s public notice only referenced the UGB amendment. Bayard Objection 2, at 25; Garret Objection, at 3.

a. Legal Standard

BDC section 4.1.310 requires a public hearing before the city’s planning commission and its city council on any legislative change to the city’s plan or land use regulations. BDC 4.1.315 requires public notice of the hearing 20 days prior to the date of the hearing.

b. Summary of Local Actions

The city held a public hearing on the proposed Public Facilities Plan. The planning commission held a hearing on October 27, 2008 and the city council held a hearing on November 24, 2008. The city provided public notice of the proposed UGB amendment, which included the proposed adoption of Chapter 8 of the General Plan (Public Facilities).

c. Analysis

BDC section 4.1.310 requires a public hearing on the legislative change to the city's General Plan. The code does not prevent the city from splitting proposed changes to its comprehensive plan into two ordinances, so long as a public hearing was held that covers all of the changes. The city's hearings appear to have met the code requirement. The objectors have not identified a legal requirement concerning the level of detail required in the city's public notice.

d. Conclusion

Based on the reasoning above, the director denies these objections.

IV. CONCLUSIONS AND DECISION

1. Conclusions

The scope of the director's review of the decisions is whether they comply with the statewide planning goals and relevant statutes and administrative rules. The foregoing sections of this report explain the analysis and findings for the relevant provisions of law. The conclusions resulting from of the director's review are as follows.

Goal 1

As explained in section III.K.2 and 3, the local governments comply with Goal 1.

Goal 2

As explained in sections III.H.5 and III.K.4, the local government actions and decisions generally comply with Goal 2. However, as explained in sections III.E. and III.G., there are inconsistencies between the housing needs analysis and the UGB decision, and between the public facilities master plans and the UGB decision such that the decisions do not comply with the Goal 2 requirement for consistency with the comprehensive plan. Bend and Deschutes County complied with the requirement of Goal 2 that it coordinate the UGB amendment with affected units of local government. The director concludes that the decisions do not comply with Goal 2, for the reasons stated above and in the analysis sections of this report.

Goal 3

Compliance with Goal 3 in the context of a UGB amendment relies on satisfaction of Goal 14 requirements. See the section for Goal 14, below. Because the local governments have not demonstrated that the UGB amendment has satisfied the need criteria or location factors in Goal 14, the director cannot conclude that agricultural land is preserved and maintained pursuant to Goal 3. The director concludes that the decisions do not comply with Goal 3.

Goal 4

Compliance with Goal 4 in the context of a UGB amendment relies on satisfaction of Goal 14 requirements. In this case, no land subject to Goal 4 is affected by the decision. The director concludes that, as a result, Goal 4 does not apply to the decisions.

Goal 5

As discussed in section III.J, the UGB submittal does not comply with the requirements of Goal 5. The city has not completed the steps necessary to assess Goal 5 resources within the UGB expansion area for significance, and has not adequately addressed potential impacts to known significant Goal 5 resources as required by OAR 660-023-

0250(3)(c) and OAR 660-024-060. The director concludes that the decisions violate Goal 5.

Goal 6

Goal 6 ensures compliance with state and federal environmental laws. No person has objected that the decisions violate Goal 6, or that Goal 6 compliance will be affected by the UGB expansion. The city's amended public facilities plans indicate that the city will be in compliance with state and federal water quality laws. As a result, the director concludes that the UGB expansion complies with Goal 6.

Goal 7

As discussed in section III.J.3, the director concludes that the decisions do not conflict with the requirements of Goal 7.

Goal 8

The city's analysis of land needs included an analysis of lands required for parks. No person has objected that the UGB expansion violates Goal 8. The director concludes that the expansion complies with Goal 8.

Goal 9

This goal is addressed in section III.F. The UGB amendment does not appropriately identify land for employment uses for the planning period. The data and analysis in the adopted economic opportunities analysis are inadequate to justify the amount and location of employment land included in the UGB expansion. As a result, the director concludes that the decisions violate Goal 9.

Goal 10

As explained in section III.E, the adopted housing needs analysis does not demonstrate that the comprehensive plan will permit appropriate housing types and densities that accommodate housing affordability needs for Bend's population. The residential land needs analysis contains data, assumptions, and conclusions that are not supported by the evidence in the record. As a result, the director concludes that the decisions do not comply with Goal 10.

Goal 11

The public facilities plans and comprehensive plan amendments prepared in conjunction with the UGB amendment do not comply with the requirements of Goal 11 or OAR 660, division 11. As a result, the director concludes that the decisions do not comply with Goal 11.

Goal 12

The decision did not properly evaluate transportation impacts or clearly make or defer decisions about proposed transportation improvements. The city, as a member of a

metropolitan planning organization, needs to address requirements for increasing the availability and convenience of alternative modes of transportation and reducing reliance on the automobile and it has not done so. As a result, the director concludes that the decisions do not comply with Goal 12.

Goal 13

Compliance with Goal 13 in the context of a UGB amendment relies on satisfaction of Goal 14 requirements. See the section for Goal 14, below. Because the local governments have not demonstrated that the UGB amendment has satisfied the need criteria or location factors in Goal 14, particularly as they relate to efficient arrangement of land uses, the director cannot conclude that energy is conserved pursuant to Goal 13. As a result, the director determines that the decisions do not comply with Goal 13.

Goal 14

Primary considerations for evaluating compliance with Goal 14 include 20-year land need and the appropriate location for the UGB. Need is addressed in section III.E and F while boundary location is addressed in section III.I. The findings and conclusions supporting the decision do not adequately justify the amount of land included in the UGB amendment for residential, employment, or other uses. The findings supporting the decision on UGB location do not adequately address the requirements of the goal. As a result, the director determines that the decisions do not comply with Goal 14.

ORS 197.296, 197.298, 197.303, 197.307

2. Decision

The director remands the decisions to the City of Bend and to Deschutes County for further action, consistent with this report and order.



Department of Land Conservation and Development

1175 COURT STREET N.E., SALEM, OREGON 97310 PHONE (503) 378-4926

July 7, 1981

The Honorable Ruth Burleigh
Mayor, City of Bend
P.O. Box 431
Bend, OR 97701

Dear Mayor Burleigh *(Handwritten signature)*

It gives me a great deal of pleasure to confirm that the Land Conservation and Development Commission, on June 25, 1981, officially acknowledged the comprehensive plan and implementing ordinances of the City of Bend as being in compliance with the Statewide Planning Goals.

The acknowledgment signifies a historic step for the City's land use planning efforts.

I would like to commend the local officials, staff, and citizens of your City for their hard work and foresight in the field of land use planning.

Congratulations,

(Handwritten signature)

W. J. Kvarsten
Director

WJK:DZ:af
5980A/5B

Enclosure

cc: Deschutes County Board of Commissioners
Betsy Shay, Coordinator
Brent Lake, Field Representative
Dick Wilson, Real Estate Division
Claire Puchy/Dale Blanton, Lead Reviewers
~~Jim Knight, DLCD~~
DLCD Library
Portland Field Office

LAND CONSERVATION AND DEVELOPMENT COMMISSION
ACKNOWLEDGMENT OF COMPLIANCE

RESPONSE TO CONTINUANCE ORDER OFFERED

January 22, 1980

City of Bend

DATE RECEIVED:
January 14, 1981

DATE OF COMMISSION ACTION:
June 26, 1981

I. REQUEST

Acknowledgment of Compliance with the Statewide Planning Goals for the comprehensive plan and implementing measures.

II. SUMMARY OF RECOMMENDATIONS

Staff:

Recommends the Commission acknowledge the City of Bend's comprehensive plan and implementing measures to be in compliance with the Statewide Planning Goals.

Local Coordination Body:

None received.

FIELD REPRESENTATIVE: Brent Lake
Phone: 389-2253

LEAD REVIEWER: Dale Blanton/Claire Puchy
Phone: 378-4926

COORDINATOR: Betsy Shay
Phone: 382-4000

Date of Report: June 17, 1981

III. BACKGROUND INFORMATION

The Commission reviewed the City of Bend's initial acknowledgment request in December, 1979, and offered to continue the request 120 days to allow the City time to complete work to comply with Statewide Planning Goals 1, 2, 4-6 and 8-14. Major problems were primarily due to the fact that the UGB and major portions of the plan were established prior to the adoption of the Statewide Planning Goals. Most plan policies were advisory rather than mandatory, and there was an inadequate factual base for a number of goals. The location and size of the UGB were not supported with adequate findings.

IV. ADDITIONAL MATERIALS

The following additional materials have been submitted by the City as part of its second acknowledgment request:

City and urban area plan amendments, and UGB amendments	City Resolution No. 1557 (12-17-80) County Ordinance No. 80-216 (12-18-80)
City Zoning Ordinance amendments	City Ordinance No. NS-1308 (1-7-81)
City Zoning Map amendments	City Ordinance NS-1314 (2-18-81)
Urban Area Zoning Map and ordinance amendments	County Ordinance No. 80-217 (12-18-80)
Historic Preservation Ordinance	City Ordinance No. NS-1289 (9-17-80) County Ordinance No. PL-21 (9-17-80)
Joint Urban Area Planning Commission	City Ordinance No. NS-1300 (11-19-80) County Ordinance No. 80-226 (12-18-80)
City of Bend - Water System Master Plan	(July 1980)

V. FINDINGS AND REASONS

Previously Approved Goals:

In making its continuance offer in December, 1979, the Commission found the City of Bend's request in compliance with Statewide Planning Goal 7. The amendments made do not conflict with that action taken by the Commission.

Requirement 2

All lands remaining outside the boundary established in 1. above, but inside the current UGB must be designated as natural resource, rural or urban reserve, and zoned in the UAR-10 or other protective zone classification until such time as a boundary change is justified.

Response

Lands between the IUGB and out UGB have been designated as Agriculture or Open Space on the plan map and zoned in UAR-10 (Urban Reserve), SM (Surface Mining) and SR-2 1/2 (Residential Suburban).

An exceptions statement has been adopted for the area between the IUGB and the outer UGB. This document states:

"The City and County have agreed to a new Initial Urban Growth Boundary that excludes approximately 25 percent of the land contained in the 1979 Urban Growth Boundary. These lands are designated as urban reserve and surface mining, and zoned SR-2 1/2, UAR-10, and SM. The majority of the SR-2 1/2 areas are currently developed with lot sizes of that size or smaller.

The inventory of soil data indicates that most of the agriculture lands are Class VI and are interspersed between lava ridges of scabland Class VIII. The forest soils are site 6 except for a small area of 4 contained within the Tumalo Creek Canyon which is Shevlin Park. The conclusion from this analysis is that these lands are marginal resource lands. Much of the land is surrounded by existing one to five acre subdivisions. These areas have been excepted in the Deschutes County Comprehensive Plan.

The urban reserve area acts as a buffer to the more rural and resource lands beyond the UGB. The use of the urban reserve will promote more orderly and efficient development, and still retain the 1972 planning commitments which have resulted in financial commitments from both the public and private sectors. The minimum lot sizes of 2 1/2 to 10 acres will be compatible with the adjacent land uses, and in most cases are the same as the adjacent MUA-10 and RR-10 zoning outside the UGB.

The provisions of these areas as urban reserve will enable the community to convert these areas when needed, and hopefully reduce any impact of the small number of individual owners of larger parcels within the IUGB. It is important to pre-plan future expansion areas for compatibility and consistency with

adjacent uses and services. These areas offer opportunities important to the Bend's and Deschutes County's economy for destination resorts. These areas offer the community an opportunity to review rural urban conflicts and develop more compatible urban and rural relationships.

No alternatives were considered, since this would require the enlargement of the 1979 UGB.

Based on these considerations, the City and County are taking an exception to Goals 3 and 4 as they relate to the land between the IUGB and the UGB."

Objection

1000 Friends of Oregon has objected to acknowledgment of the Bend Plan for Goal 14 (see Attachment A). The objection raises the following issues:

1. Unjustified use of a double UGB.
2. Inadequate demonstration of need and commitment for lands included in the UGB.
3. Inappropriate urban densities.
4. Inappropriate inclusion of lands within the UGB.

Response

The concept of a second UGB as a longer term boundary for planning purposes does not violate Goal 14 or other resource Goals in this instance. The concept here can be an effective long-range tool for facilities and urbanization planning. Adopted plan policies cited earlier in this section of the report ensure the orderly provision of facilities and services within the IUGB. Although no specific policy prohibits annexation beyond the IUGB, this has not been a compliance requirement. Even though not explicitly stated as policy, the City cannot under Goal 14, annex beyond the IUGB. If the plan indicated that such an annexation could occur, this would violate Goal 14. The combination of quality of resource lands, holding zones and a requirement to amend the IUGB before more intense development insures the IUGB will function as an effective Goal 14 boundary.

As noted in the conclusion to this section of this report, the City has adequately considered the seven factors of Goal 14 in establishing the IUGB. Although the boundary contains more land than needed, the area is justified based upon commitment and other locational factors.

The SR 2 1/2 outside the IUGB is justified because the area is relatively parcelized and for the most part, surrounded by a Deschutes County exception to Goals 3 and 4 based upon commitment. This area is clearly a

dividing line between the larger urbanizable parcels inside the IUGB and the agricultural areas beyond the outer UGB and as such provide for an orderly transition between urban, rural and resource lands.

The RL lands (20,000 square foot) do not impact the City's ability to meet its housing needs, but are not efficient in terms of economy of services. However this area is, for the most part already developed to these lot sizes and is outside the Phase II service area. According to the City:

"These RL areas have supplied a substantial amount of the recently developed lots providing modest priced housing within the urban area. In most cases, until such time as the sewer would become available, these areas will not be further divided.

The County's subdivision ordinance does contain replatting provisions. The Urban Area Planning Commission is working on a redraft of the subdivision ordinance to bring standards, procedures, and requirements into uniformity within the urban area. We will add provisions for redivision as part of this process" (see Attachment C).

Finally, the inclusion of a 177 acre parcel inside the UGB, but outside the IUGB does not impact the County's ability to preserve all or portions of the parcel as a habitat area. This parcel's inclusion in the outer UGB does not violate Goal 14.

Conclusion: The City of Bend complies with Goal 14.

The City has revised its urban growth boundary to exclude 6,858 acres which are not needed and could not be justified based upon Goal 14 requirements. The revised boundary is justified because the land is committed to urban development through facilities or existing development. Locational considerations of Goal 14 (Factors 3-7) are addressed by the findings document through general findings and specific findings for each geographic segment of the boundary. This initial urban growth boundary serves as a viable Goal 14 UGB. Any land use changes outside the IUGB will require an amendment pursuant to the seven factors of the Goal. The outer UGB will work as a longer term growth area, which will be retained for potential urbanization at the time the land is needed. In the interim, UAR-10, SM and SR-2 1/2 zoning will retain the area in a land use pattern which will enable more intensive development in the future.

OVERALL CONCLUSION

The City of Bend has made extensive modifications to its comprehensive plan and implementing measures to correct deficiencies identified by the Commission in December, 1979. Among the major changes were a completely updated land use and buildable lands inventory, a new water plan, a new

parks plan, and a revised economic base analysis. Perhaps the most significant change has been the establishment of a UGB and IUGB with Deschutes County. The City now has a sound plan upon which land use decisions can be based.

V. RECOMMENDATION

Staff:

Recommends the Commission acknowledge the City of Bend's comprehensive plan and implementing measures to be in compliance with the Statewide Planning Goals.

Local Coordination Body:

None received.

CP:kb
5514A
6/15/81



Oregon

Theodore R. Kulongoski, Governor

Department of Land Conservation and Development

635 Capitol Street NE, Suite 150

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April 14, 2005

EXHIBIT B

Bend UGB

January 8, 2010

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TO: Land Conservation and Development Commission (LCDC)

FROM: Bob Rindy and Jim Hinman, DLCD

SUBJECT: Agenda Item 6; April 28, 2005, LCDC meeting

WORK SESSION AND POSSIBLE ADOPTION OF PROPOSED AMENDMENTS TO GOAL 14 AND RELATED ADMINISTRATIVE RULES CONCERNING URBAN GROWTH BOUNDARIES

AGENDA ITEM SUMMARY

This item is a work session intended for Land Conservation and Development Commission (LCDC) to discuss and potentially adopt proposed amendments to Goal 14 and two related administrative rules – OAR 660, Divisions 004 and 026. The proposed amendments (Attachments A through C to this report) are intended to clarify and streamline the state's urban growth boundary (UGB) requirements and procedures. LCDC held a final public hearing on these proposals February 3, 2005, and extended the time for written comments until February 28, 2005. The Commission held a work session on March 17, 2005, to discuss the proposals and the comments regarding the proposals. At that time, the Commission indicated its intent to consider adoption of the goal and rule amendments at its April 28, 2005, meeting.

For more information about this agenda item, contact Bob Rindy, at (503) 373-0050, Ext. 229, or email at bob.rindy@state.or.us.

SUMMARY OF RECOMMENDED ACTION

The department recommends that the Commission adopt the proposed Goal 14 amendments and related rule amendments, OAR 660, Divisions 004 and 026.

BACKGROUND AND HISTORY

The Commission initiated this policy project on June 11, 2004. The intent is to clarify and streamline the UGB amendment process by amending Goal 14 and by adopting new administrative rules outlining procedures and requirements for UGB amendments. An addition new rule (not presented with this report) would include "safe-harbors" that will specify optional methods for local governments to use in order to save time and expense in the UGB amendment process.

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LAND CONSERVATION &
DEVELOPMENT COMMISSION
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SUBMITTED BY: DLCD staff



LCDC appointed an advisory workgroup to guide the department and Commission with this project, consisting of twenty four members from a variety of backgrounds representing local governments, state agencies, citizens and interest groups concerned about the UGB amendment process. The workgroup began meeting in July 2004 and has met twelve times.

The workgroup discussion of amendments to Goal 14 resulted in proposed changes to the existing text that would more clearly express longstanding UGB policy and other requirements, and improve wording that is currently ambiguous or unclear. The workgroup has also recommended the elimination of a major step in the UGB process – the “exceptions process” – and replacing it with more clearly expressed requirements intended to accomplish the same purposes. The workgroup discussion resulted in proposed amendments to Goal 14 and two related rules (Divisions 004 and 026), published October 20, 2004, that were the subject of ten public hearings statewide conducted by the department in November 2004 through January 2005, and also the subject of two LCDC public hearings and one work session.

In addition to consideration of Goal 14 itself, the workgroup’s primary purpose has been to draft a new set of rules (under a proposed new Division 024 under OAR 660) in order to clearly set forth the procedures and requirements for UGB amendment, and to provide a higher level of detail than the goal itself concerning these procedures and requirements. Most important, the draft rules would establish new “safe harbor” provisions intended to reduce local government time and cost in amending a UGB. An initial draft of these new rules was published on October 20, 2004, and was also a subject of the department’s ten public hearings in November 2004 through January 2005. Based on comments received in the initial ten public hearings, the workgroup determined that there had not been enough time for study and discussion of the new rules, especially the proposed safe harbors. In response, at its December 8, 2004, meeting, LCDC directed the department and the workgroup to extend the time period for study and consideration of the proposed new UGB rules under Division 024. The workgroup will meet at least through the Fall of 2005 in order to refine the proposed new rules for LCDC’s consideration later in 2005.

In its February and March 2005, meetings, LCDC indicated its intent to consider adoption of the proposed amendments to Goal 14 (and the two related rules). The workgroup met December 18, 2004, and January 6, 2005, in order to respond to the Commission’s direction with regard to the proposed Goal 14 amendments. Based on this discussion, the department issued a new draft of the goal amendments (and two related rules at OAR 660, Divisions 004 and 026) on January 7, 2005.

On February 3, 2005, the Commission held a final public hearing on the proposed amendments to Goal 14 and related rules. After the close of that hearing, LCDC directed the department to extend the period for written comments. The comment period was extended to February 28, 2005, based on a revised draft of the Goal amendments dated February 9, 2005, and a written proposal for the applicability dates of the new goal and rule amendments should they be adopted by the Commission (See Attachment D).

NOTE: This report does not include detailed descriptions of the intended goal amendments. The department's November 29, 2004, and January 19, 2005 staff reports provided detailed descriptions as to the intent of the various changes in the proposed Goal 14 and related rule amendments, and these descriptions were also summarized and attached to the department's March 3, 2005, staff report to LCDC.

SUMMARY OF MARCH 17, 2005, LCDC WORKSESSION

At its March 17, 2005, meeting, the Commission held a work session on the proposed amendments. At that time the Commission discussed the various issues that had been raised in testimony regarding the proposal. The Commission's discussion is summarized below.

1. Timeline for Goal Adoption

The Commission discussed postponing action to amend Goal 14 until the broad "30-year review" of the land use program contemplated in the department's legislative proposal, Senate Bill 82. The Commission decided the proposed amendments to Goal 14 should not be put off to that longer-term review of the program.

2. Potential for Litigation regarding Changes to Goal 14

The Commission agreed that, although changes to the goal should be made very carefully because they are likely to be the subject of litigation in the future, the potential for unintended consequences as a result of such litigation should not deter action to clarify and streamline Goal 14.

3. Livability

The Commission favored leaving the term "livability" in the Land Need section of the goal, but also leaving the clarifying language on page 1, lines 30 through 32 of Attachment A, that had been crafted in order to replace "livability". In its discussion the Commission indicated that, although the term livability, as interpreted in the past, does not provide a different standard than the new clarifying language, there is a public perception that omitting the term could in some manner affect a change in the goal. The Commission asked the department to omit Option 1 in the proposed goal amendments, and prepare a version for Commission consideration in April that carries forward Option 2 retaining the word "livability" (See Attachment A).

4. The "and" Between Need Factors 1 and 2

The Commission discussed the two need factors, and agreed that local governments need to address both of these factors (1) and (2), and may not choose either one or the other. This was in response to a suggestion that prior policy allowed local governments to consider both factors, but then address only one or the other. The department pointed out that the seven factors were always connected by an "and," i.e., there had not been

previous policy suggesting only one of the need factors could be addressed. Thus, to change the "and" to "or" would be a change in policy.

The discussion also highlighted the fact that authorizing only one of the need factors to be addressed could imply that a local government may ignore Factor 1 and approve a UGB amendment without support of a 20-year population forecast. The amended goal states that the determination of a land need is a two-step process: First, calculate the 20-year population forecast, and then calculate the amount of land needed for one or more need categories. As part of this discussion, the Commission also directed that the department's staff report clarify that a new 20-year population forecast is not necessarily required in order to amend a UGB. Rather the local government must show that the proposed UGB amendment "is consistent with" the 20-year forecast, either a new forecast or the current forecast. Thus, a "quasi-judicial UGB amendment" proposed by a property owner could still be considered based on the current population forecast.

5. The "or" in the list of uses under Factor 2

Proposed amendments to Need Factor 2 link the list of land need categories with the term "or", rather than "and" as in the current list ("Demonstrated need for land suitable to accommodate housing, employment opportunities, livability "or" uses such as public facilities, streets and roads, schools, parks or open space"). The department explained that this was done in order to clarify that a local government could pursue a UGB amendment in order to accommodate only one of the categories of needs on the list while not addressing the other, for example, to accommodate the need for housing land while not simultaneously examining the need for employment land. In the discussion, it was brought out that the term "and/or" may have been more appropriate, but that term is discouraged by legal counsel and protocols for rule drafting. The Commission directed the department to propose wording that accomplishes the same thing without using "and/or," and that more clearly indicates the intent to authorize a UGB amendment for one or more need categories. The department has proposed the following:

"(2) Demonstrated need for land suitable to accommodate housing, employment opportunities, and livability *or any combination of the foregoing*, and uses such as public facilities, streets and roads, schools, parks or open space."

6. Special Characteristics for Need

The Commission discussed the new proposed wording indicating that local government may specify characteristics of needed land, and the alternative wording proposed by Jeff Bachrach, which provides more specificity than the department's proposed wording. The Commission discussed whether the language should remain fairly broad, as in the current draft proposal, or provide a higher order of specificity, as in Mr. Bachrach's proposal. It was concluded that the general direction in the workgroup's proposal provides a greater degree of discretion for local governments.

7. The Reference to ORS 197.298

The Commission discussed whether to include this reference in the goal, and whether or not there is need for more detailed guidance on the manner in which cities address this statute and the locational factors. The Commission decided to include the reference, and to consider the question of additional guidance in the new UGB rules under consideration by the workgroup. Proposed legislation affecting this statute was also discussed and the Commission agreed that we would not likely know whether this bill would pass by April 28, and we should not delay action due to that uncertainty.

It was also noted that this statute is the only place in the goal that provides for consideration of the preservation of farm and forest land in UGB amendments. If at any point in the future that statute is deleted or modified, the Commission indicated it would need to revise the locational factors to return Factor (6) or something equivalent.

8. If "livability" is retained as a need, should it be remove it as a location factor?

The Commission asked whether the decision to retain "livability" as a need factor would mean that it is no longer appropriate to add it as a locational factor (the term is included as a new Location Factor 2, see Page 2, Line 12 of Attachment A). The department notes that Location Factor 2 also includes the term "efficient urban form", which is not currently a location factor.

By retaining the word "livability" in both the sections, the Commission may be implying – and a Court could well conclude - that "livability" is something different in each section, and that is not necessarily what the UGB workgroup intended. The department indicated that there might conceivably be some aspects of "livability" that are purely locational, and therefore this term could logically remain under the Boundary Location section of the goal. On the other hand, the goal does not currently require local governments to address "livability" as a locational factor. As such, this would arguably be a *modification* of the goal, *not a clarification*. If the rationale for retaining "livability" in the land needs section is to *not* change the Goal, then the Commission might also consider *not* adding the term to the locational factors.

If the commission decides to *not* add "livability" as a new location factor, the department would recommend that the commission also consider whether the remaining piece of that factor, regarding "efficient urban form," should stand alone as a new Location Factor 2, or should be combined with the proposed modified Location Factor 1, which also addresses efficiency.

9. Urbanizable land available "over time"

The discussion brought out concerns regarding the phrase "over time" and whether this might be misinterpreted to mean there would be some sort of sequence for making UGB land available. This discussion also raised the fact that the proposed goal should do more