

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON

3  
4 CENTRAL OREGON LANDWATCH,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF BEND,  
10 *Respondent,*

11 and

12  
13 TETHEROW GOLF COURSE, LLC, TETHEROW GLEN 58, LLC,  
14 VIRTUAL REALTY ENTERPRISES LLC, VRE TRACT Y LLC,  
15 VRE TRACT AC LLC, VRE LODGE HOMES LLC, VRE  
16 CRESCENT LLC, and WESTON INVESTMENT COMPANY LLC,  
17 *Intervenors-Respondents.*  
18

19  
20 LUBA No. 2013-037

21  
22 FINAL OPINION  
23 AND ORDER  
24

25 Appeal from the City of Bend.

26  
27 Paul D. Dewey, Bend, filed the petition for review and argued on behalf of petitioner.

28  
29 Gary F. Firestone, Bend, filed the response brief and argued on behalf of respondent.

30  
31 Sharon R. Smith, Bend, represented intervenors-respondents Tetherow Golf Course,  
32 LLC and Tetherow Glen 58, LLC.

33  
34 Bruce W. White, Bend, represented intervenors-respondents Virtual Realty  
35 Enterprises, LLC et al.

36  
37 Steven P. Hultberg, Bend, represented intervenor-respondent Weston Investment  
38 Company, LLC.

39  
40 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
41 participated in the decision.

42  
43 AFFIRMED

09/12/2013

44  
45 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

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

5 **REPLY BRIEF**

6 Petitioner moves for permission to file a reply brief that exceeds five pages, in order  
7 to respond to new matters raised in the response brief. The reply brief is allowed.

8 **INTRODUCTION**

9 The challenged decision is Ordinance 2194. Ordinance 2194 amends Chapter 8 of the  
10 Bend Area General Plan (BGP) and adopts a water public facilities plan (2013 Water PFP)  
11 pursuant to Statewide Planning Goal 11 (Public Facilities and Services) and OAR 660-011-  
12 0000 *et seq*, the administrative rules that elaborate on the requirements of Goal 11. The city  
13 adopted Ordinance 2194 after our decision in *Central Oregon Landwatch v. City of Bend*, \_\_\_  
14 Or LUBA \_\_\_ (LUBA No. 2012-043, November 29, 2012) (*COLW I*) remanded the city’s  
15 previous ordinance that amended the BGP and adopted a water public facilities plan (the  
16 2012 Water PFP). Petitioner’s assignments of error challenge various aspects of the 2013  
17 Water PFP’s compliance with OAR 660-011-0000 *et seq* and Goal 11.<sup>1</sup>

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<sup>1</sup> As relevant here, OAR 660-011-0010 provides the required elements for a public facility plan:

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

1 **WAIVER**

2 As a general response to petitioner’s first through fourth assignments of error, the city  
3 asserts that LUBA is precluded from reviewing the issues raised in the first four assignments  
4 of error for two reasons. First, the city cites ORS 197.825(2)(a), which limits LUBA’s  
5 jurisdiction to “those cases in which the petitioner has exhausted all remedies available by  
6 right before petitioning the board for review.” The city argues that petitioner failed during  
7 the proceedings on remand from our decision in *COLWI* to raise the issues that it seeks to  
8 raise in the petition for review, and has thus failed to exhaust “all remedies available by  
9 right.” ORS 197.825(2)(a). The city cites *Miles v. City of Florence*, 190 Or App 500, 79 P3d  
10 382 (2003), in support of its argument.

11 *Miles* was an appeal of a quasi-judicial decision. In *Miles* the Court of Appeals held  
12 that in order for LUBA to review an issue on appeal to LUBA of a decision made after a local  
13 appeal is filed, a petitioner must have raised that issue in the local notice of appeal. *Id.* at  
14 506-07. The court’s reasoning in *Miles* relied on the interrelationship between ORS 197.763,  
15 which requires a party to have raised all issues that it seeks to raise at LUBA prior to the  
16 close of the initial evidentiary hearing, and ORS 197.825(2)(a), which requires exhaustion of  
17 available remedies. For that reason, the waiver principle articulated in *Miles* is sometimes  
18 referred to as “exhaustion waiver.”

19 The present appeal is an appeal of a legislative decision, and ORS 197.763 is  
20 inapplicable to legislative proceedings. ORS 197.763; *Hatley v. Umatilla County*, 256 Or

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- “(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.”

1 App 91, 111-12, 301 P3d 920 (2013). For that reason, part of the reasoning in *Miles* simply  
2 does not apply in the present appeal. To the extent the city argues that the exhaustion  
3 requirement of ORS 197.825(2)(a) alone requires the petitioner to have raised during the  
4 remand proceedings all the issues it now seeks to raise before LUBA, that argument is a  
5 significant extension of *Miles*. ORS 197.825(2)(a) is concerned with the exhaustion of  
6 administrative remedies, and applies in circumstances where there is a local right of appeal or  
7 right to seek a local appeal. In the present case, there is no local right of appeal or  
8 administrative remedy of any kind for the legislative decision on remand that is before us.  
9 Accordingly, ORS 197.825(2)(a) does not apply, and there is no basis to apply, much less  
10 extend, the exhaustion waiver principle in *Miles*.

11 The second legal theory the city presents to support its argument relies on Bend  
12 Development Code (BDC) 4.1.1225. BDC 4.1.1225, "Scope of Proceeding," provides in  
13 relevant part:

14 "A. On remand, the Review Authority shall review those issues that LUBA  
15 or the Appellate Court required to be addressed. The Review  
16 Authority shall have the discretion to reopen the record in instances in  
17 which it deems it to be appropriate.

18 "B. At the Review Authority's discretion, a remanded application may be  
19 modified to address issues involved in the remand to the extent that  
20 such modifications would not substantially alter the proposal and  
21 would not have a significantly greater impact on surrounding  
22 neighbors. Any greater modification would require a new application.

23 "C. If additional testimony is required to comply with the remand, parties  
24 may raise new, unresolved issues that relate to new evidence directed  
25 toward the issue on remand. Other issues that were resolved by LUBA  
26 or the Appellate Court or that were not appealed shall be deemed to be  
27 waived and may not be reopened."

28 As we understand the city's argument, it is that under BDC 4.1.1225(C), the issues that  
29 petitioner raises in the petition for review are issues that petitioner could have raised but did  
30 not raise in its appeal of the 2012 Water PFP and are, pursuant to BDC 4.1.1225(C), "deemed  
31 to be waived" because they are "issues \* \* \* that were not appealed." We understand the city

1 to argue that BDC 4.1.1225 prohibits petitioner from raising the issues that it now raises in  
2 the petition for review.

3 The language of BDC 4.1.1225(C) is nearly identical to and appears to be the city's  
4 codification of the holding in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992),  
5 that when a record is reopened on remand parties may not raise old, resolved issues that were  
6 resolved in prior proceedings or that were not appealed. *Hatley* concluded that the holding in  
7 *Beck* does not apply to legislative land use decisions.<sup>2</sup>

8 Although we understand the city to take the position that BDC 4.1.1225(C) is an  
9 attempt by the city to exercise its authority to enact local land use laws to narrow the  
10 permissible scope of proceedings on remand, the decision contains no reviewable  
11 interpretation by the city council to that effect. For that reason, we will not assume that BDC  
12 4.1.1225(C) is anything other than the city's codification of the *Beck* holding, and because  
13 *Beck* does not apply to legislative land use decisions, BDC 4.1.1225(C) also does not apply to  
14 legislative land use decisions.

15 Accordingly, petitioner is not precluded by BDC 4.1.1225(C) from raising the issues  
16 raised in the first through fourth assignments of error.

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<sup>2</sup> In *Hatley*, the petitioner challenged a provision of an ordinance that had previously been unchallenged in a previous appeal to LUBA of a previous version of the same ordinance. Citing *Beck*, LUBA concluded that the petitioner's challenge was waived because it could have been, but was not, raised in the previous appeal.

The Court reversed that determination. The Court explained that the appeal in *Hatley* was a "different and separate appeal" from the previous appeal because the county adopted a new ordinance that contained different provisions than the two ordinances that the county adopted that were appealed in the previous appeal. *Hatley*, 256 Or App at 110. The present appeal is an appeal of the city's adoption of a new ordinance that adopts a new water public facilities plan that is different from the 2012 Water PFP. In that regard, the present appeal is on all fours with the appeal in *Hatley* that the Court characterized as a "different and separate appeal" from the appeal in *COLWI*.

1 **FIRST ASSIGNMENT OF ERROR**

2 Goal 11 requires the city to adopt a public facilities plan for areas within the city’s  
3 urban growth boundary (UGB).<sup>3</sup> OAR 660-011-0000 explains that the purpose of the public  
4 facilities plan is “to help assure that urban development in such urban growth boundaries is  
5 guided and supported by types and levels of urban facilities and services appropriate for the  
6 needs and requirements of the urban areas to be serviced, and that those facilities and services  
7 are provided in a timely, orderly and efficient arrangement, as required by Goal 11.”<sup>4</sup>

8 Ordinance 2194 adopts the 2013 Water PFP. As required by OAR 660-011-  
9 0010(1)(b), the findings adopted by the city in support of the 2013 Water PFP include within  
10 “Table 1” at Record 42-43 a list of significant public facility projects which are to support the  
11 land uses designated in the BGP, for storage, new wells, new pumps and new valves.  
12 Additionally, Tables 1.1 and 1.2 at Record 46-47 further categorize the significant public  
13 facility projects described in Table 1 according to their projected construction during the 20-  
14 year planning period, as “Short Term Projects (Years 1-5)” and “Long Term Projects (Years  
15 6-20).” The Table 1 list of significant public facilities projects was prepared based on a 2010  
16 study in the record.

17 In its first assignment of error, petitioner argues that the 2013 Water PFP  
18 impermissibly includes water facilities projects for lands that are outside of the city’s current  
19 UGB, in violation of Goal 11. As support for its contention that the 2013 Water PFP  
20 includes projects for lands that are located outside of the city’s current UGB, petitioner first

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<sup>3</sup> Goal 11 states in relevant part:

“Cities or counties shall develop and adopt a public facilities plan for areas within an urban growth boundary \* \* \*.” OAR 660-015-0000(11).

<sup>4</sup> OAR 660-011-0005(1) defines “[p]ublic [f]acilities [p]lan” as “\* \* \* a support document or documents to a comprehensive plan. The facility plan describes the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plans within an urban growth boundary containing a population greater than 2,500. \* \* \*”

1 points to language in the 2010 study explaining that the projects described in the 2010 study  
2 as the “build-out case – projected to occur beyond the 20-year master planning period” are  
3 “solely related to development outside the UGB.” Original Record 1988. According to  
4 petitioner, the 2013 Water PFP includes projects identified in the 2010 study as “build-out  
5 case” projects and because the 2010 study describes the “build-out case” projects as “solely  
6 related to development outside the UGB,” the 2013 Water PFP must include projects for  
7 lands outside the existing UGB.

8 As additional support for its contention that the 2013 Water PFP includes projects for  
9 development located outside of the city’s current UGB, petitioner points to the purpose  
10 statement included in the 2013 Water PFP that states that the BGP plans for land uses “within  
11 \* \* \* planned urban reserves outside the UGB.” Record 31. According to petitioner, the  
12 city’s “planned urban reserves” are located outside the existing UGB, and the reference in the  
13 2013 Water PFP purpose statement demonstrates that the 2013 Water PFP includes public  
14 facility projects for lands outside of the city’s existing UGB.

15 The city disputes that any of the public facility projects that are included in the 2013  
16 Water PFP are new projects to serve lands outside the existing UGB.<sup>5</sup> Response Brief 20-21.  
17 The city first explains that the purpose statement included in the 2013 Water PFP expressly  
18 provides that the city relied on the 2010 study to develop public facility projects “only to the  
19 extent they provide service to areas within the [city’s UGB] \* \* \*.” Record 31. The city next  
20 points to a statement from the city engineer that none of the projects included in the 2013  
21 Water PFP propose to provide service to areas outside the UGB, and a statement in the record  
22 from the city attorney that takes the same position. Finally, the city disputes that the 2013

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<sup>5</sup> The city states:

“All the projects listed in Tables 1.1 and 1.2 (the only projects actually planned for in the planning period) are either at existing City facilities (e.g. Awbrey Well) or within the UGB (e.g replacement of piping on Norton and Olney).” Response Brief 20-21.



1 Water PFP's reference to the BGP's urban reserve area proves that the 2013 Water PFP  
2 includes projects that serve areas within the urban reserve area.

3 The 2013 Water PFP includes several pages of tables that list with a fair amount of  
4 specificity, including some geographic descriptions, the water public facilities projects that  
5 the city projects it will need to construct within the 20-year planning period. The references  
6 that petitioner points to in the 2010 study and the purpose statement to lands outside the UGB  
7 are not sufficient to overcome other evidence in the record that none of the projects are  
8 proposed to serve lands outside the UGB. Absent a developed argument from petitioner that  
9 identifies specific projects that will serve areas outside the city's existing UGB, petitioner's  
10 argument in the first assignment of error provides no basis for reversal or remand of the  
11 decision.

12 The first assignment of error is denied.

### 13 **SECOND ASSIGNMENT OF ERROR**

14 OAR 660-011-0010(1)(g) requires the public facility plan to include "[a] discussion  
15 of the provider's existing funding mechanisms and the ability of these and possible new  
16 mechanisms to fund the development of each public facility project or system." *See* n 1. The  
17 2013 Water PFP explains that the existing funding mechanisms for water projects and  
18 systems are user fees, systems development charges (SDCs), leasing revenue and hydrant  
19 meter fees:

20 "[t]he city's water utility program is funded through system development  
21 charges [SDCs] and utility user fees. \* \* \* In addition to utility rates and  
22 SDCs, the City's funding mechanisms for water include revenue streams from  
23 leasing of property to wireless telecommunications companies and the City's  
24 hydrant meter program. The City has also adopted a five-year capital  
25 improvement program (CIP) for water for 2011 through 2015." Record 45-46.

26 In the second assignment of error, petitioner argues that although the city has included an  
27 expensive public facility project, the Surface Water Improvement Project (SWIP), as a short-  
28 term project to be constructed in years 1-5 of the planning period the city has not explained

1 how the SWIP will be funded. Petitioner also argues that the city’s discussion of funding  
2 mechanisms for the projects included in the 2013 Water PFP fails to satisfy OAR 660-011-  
3 0010(1)(g).

4 The city responds initially by citing ORS 197.712(2)(e) and OAR 660-011-0005(8),  
5 which generally provide that “project timing and financing provisions of public facilities  
6 plans shall not be considered land use decisions.” According to the city, petitioner’s  
7 challenges to the portions of the 2013 Water PFP that address the requirements of OAR 660-  
8 011-0010(1)(g) are not within LUBA’s scope of review. Petitioner responds that it is not  
9 challenging the timing or financing of projects in the 2013 Water PFP, but rather is  
10 challenging the plan’s satisfaction of the informational requirements of OAR 660-011-  
11 0010(1)(g).

12 Although it is a subtle distinction, we agree with petitioner that its challenge is to the  
13 adequacy of the 2013 Water PFP to comply with the informational requirements of OAR  
14 660-011-0010(1), and not to the substance of the projects that are included as short or long  
15 term projects. Stated differently, if petitioner challenged the categorization of a project as a  
16 short or long term project or challenged the proposed funding of such projects with user fees  
17 or SDCs, we would likely agree that ORS 197.712(2)(e) places those challenges outside our  
18 scope of review.

19 The city next responds that the discussion at Record 46-47 explains that the city’s  
20 Capital Improvement Program budgets approximately \$21,000,000 per year for the first three  
21 years of the planning period for projects related to “repair and maintenance” and “growth,”  
22 and that “utility user fees (a.k.a. rates)” are projected to cover the costs of the projects. The  
23 city also responds that the discussion of funding of projects at Record 46 and 47, and also the  
24 discussion in the document at Original Record 287-92, demonstrate that the city can fund all  
25 of the projects that are included in the 2013 Water PFP, and that if the city can fund all of the  
26 projects, it can fund each project.

1 We agree with the city that the 2013 Water PFP includes an adequate discussion of  
2 the city’s existing funding mechanisms and the ability of those mechanisms to fund the  
3 projects included in the PFP, as required by OAR 660-011-0010(1)(g).

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 In the third assignment of error, petitioner argues that there is not an adequate factual  
7 base under Statewide Planning Goal 2 (Land Use Planning) to support the city’s decision to  
8 include the projects that it has included in the list at Table 1 and Tables 1.1 and 1.2. As far as  
9 we can tell, petitioner’s Goal 2 argument is derivative of the arguments under the first  
10 assignment of error, and merely restates those arguments. We denied petitioner’s first  
11 assignment of error and therefore also reject petitioner’s Goal 2 arguments. Also in the third  
12 assignment of error, petitioner argues that the 2013 Water PFP fails to include, as required by  
13 OAR 660-011-0010(1)(f), “[a]n estimate of when each facility project will be needed,” and  
14 fails to include an adequate discussion “of the provider’s existing funding mechanisms and  
15 the ability of these and possible new mechanisms to fund the development of each public  
16 facility project or system” as required by OAR 660-011-0010(1)(g). *See* n 1.

17 The 2013 Water PFP identifies each project as a “Short Term Project (Years 1-5)” or  
18 a “Long Term Project (Years 6-20).” That identification is a sufficient “estimate of when  
19 each facility project will be needed.” Additionally, as far as we can tell, the remaining  
20 arguments under this assignment of error merely restate arguments that are included in  
21 petitioner’s second assignment of error that is denied above. We reject those arguments here  
22 as well.

23 The third assignment of error is denied.

24 **FOURTH ASSIGNMENT OF ERROR**

25 In its fourth assignment of error, petitioner points out that “Table 1.2 - Long Term  
26 Projects (Years 6-20) (2018-2032)” at Record 47 contains conflicting dates for construction

1 or completion of the projects that are categorized as “long term projects,” because a footnote  
2 included with Table 1.2 contains a statement that “[t]he projects in Table 1.2 will be needed  
3 sometime between 2013-2028. These represent Years 6 through 20 of this PFP.” Record 47.  
4 Petitioner also argues that, similar to its arguments under the second and third assignments of  
5 error, the discussion of funding mechanisms for the long term projects is inadequate to satisfy  
6 OAR 660-011-0010(1)(g).

7 The city responds that the footnote contains a typographical error resulting from a  
8 previous version of the table and that the table’s title includes the correct dates. According to  
9 the city, an error in the footnote is not a sufficient basis for remand of the decision. We agree  
10 with the city.

11 The fourth assignment of error is denied.

12 **FIFTH ASSIGNMENT OF ERROR**

13 OAR 660-011-0045(1)(a) requires the city to “adopt as part of the comprehensive  
14 plan \* \* \* [t]he list of public facility project titles, excluding (if the jurisdiction so chooses)  
15 the descriptions or specifications of those projects.” In its fifth assignment of error, petitioner  
16 argues the amendments to Chapter 8 of the BGP do not comply with OAR 660-011-  
17 0045(1)(a) because instead of including project titles in Chapter 8, the city included the  
18 following statement:

19 “For more information about short and long term projects for the City’s water  
20 system please see the 2013 Water Public Facilities Plan.” Record 15.

21 The city responds that the 2013 Water PFP was adopted as a supporting document to  
22 the BGP, and additionally the entire 2013 Water PFP was incorporated into and made a part  
23 of the BGP. Supplemental Record 2. Therefore, the city argues, the city has adopted as part  
24 of the BGP “the list of public facility project titles \* \* \*.” We agree with the city that it has  
25 complied with the requirement in OAR 660-011-0045(1)(a).

26 The fifth assignment of error is denied.

27 The city’s decision is affirmed.