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LAND CONSERVATION
AND DEVELOPMENT

January 29, 2010

Via Facsimile - (503) 378-5518

Land Conservation and Development Commission
c/o Department of Land & Conservation Development
635 Capital Street, NE, Suite 150
Salem, OR 97301-2540

Re: Appeal to LCDC of DLCD Decision on City of Bend Urban Growth Boundary

Dear Commissioners:

I am writing on behalf of Central Oregon LandWatch ("LandWatch") to appeal certain portions of the Director's Decision regarding the City of Bend's (and Deschutes County's) submittals on the Bend urban growth boundary expansion.

LandWatch participated at the local level, as documented in the Director's Decision. LandWatch also timely filed Objections to the City's and County's Bend UGB expansion materials and to the City's Water and Sewer Public Facility Plans.

Introduction.

The Director's Decision remands the City's and County's submittals for further work, and LandWatch is in support of that remand. There are additional matters, however, that should have also been remanded and they are the subject of this appeal. There are also several objections which were sustained but which are not clearly included in the remand.

What the City has proposed, and the County has approved, is a UGB expansion far outside the bounds of what is allowed under Oregon's land use laws and rules. In fact, the kind of sprawl proposed here is what would be expected if we had no land use system. Though the Director's Decision remands a number of matters, it fails to remand all that it should have.

We are also concerned with the City of Bend's expression of indignation about the remand and expectation of "concessions" from LCDC, as reported in recent local news articles. This is posturing at its worst and ignores that we are engaged in a rule-based process.

Much is being said about how Bend hasn't had a UGB expansion in years and therefore deserves this larger expansion, but what is not said is that Bend did have an extremely large annexation. Much also is said about how Bend is different and can't be treated as if it is Portland. There is no doubt that Bend is not like Portland or, for that matter, like any other comparably-size city

identified in the attached chart which shows that Bend has a population and housing density less than half of what is found in Corvallis, Springfield, Medford, Salem, Eugene and Portland. The continuing Bend sprawl agenda represented by the City's proposed UGB expansion is not consistent with state law.

Summary.

The deficiencies or errors in the Director's Decision and the appropriate remedies are:

1. The economic development land needs assessment is not adequate under Goals 2, 9 and 14 where the facts and trend analysis are based on a mid-2000s market bubble that had begun to burst long before the UGB expansion was adopted.

Remedy: The City should utilize evidence and analysis to include, at a minimum, the economic downturn that occurred during 2008, and optimally should be required to update the information to current conditions.

2. The City's risk to wildfire must be addressed under Goals 2, 7, 12 and 14.

Remedy: The issue of catastrophic fire should be remanded to the City to develop an adequate factual record, policies, analysis and mapping to account for the threat of catastrophic fire.

3. Environmental impacts to natural resources, the barrier of high land cost to affordable housing and impacts to irrigation districts may justify rejecting otherwise suitable exception land in favor of resource lands.

Remedy: The City on remand should address the environmental impacts to natural resources, the barrier of high land cost to affordable housing and impacts to irrigation districts in determining whether exception land is appropriate for inclusion in the UGB expansion.

4. The soils prioritization standards of ORS 197.298(2) are not limited to resource lands.

Remedy: The City should conduct an inventory of soils and determine a prioritization of soils and lands that should be included in the UGB under ORS 197.298(1)(a)-(c).

5. The City's estimate of needed second home units needs evidence and analysis of second homes being provided by destination resorts in the area.

Remedy: The City should recalculate its estimate of needed units for second homes after assessing Tetherow and other destination resorts in the area.

6. The City's proposed prioritization of "exemption" lands is not appropriate.

Remedy: The City should disregard its prioritization of the labeled "exception" lands which are in fact forest and farm lands.

7. The City's Public Facilities Plan should have been rejected for not having had noticed public hearing.

Remedy: The City should provide adequate notice and a public hearing on its Public Facilities Plan.

8. The City's public process was inadequate where critical information was not placed into the Record until after the public hearing process was closed.

Remedy: The Record should be reopened to allow public comment on all materials the City ended up including in its Record.

9. The Director's Decision needs to more clearly define the scope of the remand.

Remedy: The Decision should explain that the scope of the remand is not limited to specific listed items but includes all sustained objections and other findings by the Director. Other suggested specific remand items are included below.

Argument.

1. The economic development land needs assessment is not adequate under Goals 2, 9 and 14 where the facts and trend analysis are based on a mid-2000s market bubble that had begun to burst long before the UGB expansion was adopted.

The Director rejected LandWatch's objection that the City in its economic development land needs analysis and findings failed to factor in the recession and used outdated information. The Director stated, at page 63:

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

This interpretation is incorrect for several reasons:

1. OAR 660-024-0040(2) merely identifies when a 20-year planning period commences, not what data should be used.

2. OAR 660-024-0040(5) requires that the determination of a 20-year employment need be based on Goal 9 rules.

3. OAR 660-009-0010(5) provides:

“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 jurisdiction’s planning effort is adequate if it uses the best available or readily collectable information to respond to the requirements of this division.”

The City of Bend did not use “the best available or readily collectable information” and did not rely on “new information on national, state, regional, county, and local economic trends.” It used studies from 2000, 2005 and 2007 with no adjustments, including a 2007 rental owner survey and a 2005 housing needs analysis. Its calculation of vacancy rates is based on 1993-2005 data (Findings, p. 59) and its 2008 Economic Opportunity Analysis (“EOA”) was based on data from 1970-2007).

This data and their trends are flawed because they are based on a burst bubble and ignore the economic collapse that began long before the adoption of the UGB expansion. LandWatch’s expert, Eben Foder, testified in March 2008 that the City building permit data was flawed as it was based on the “exuberant speculative construction at the height of a market bubble that was about to burst.” The City cannot rely on a trend analysis that is based on a market bubble that burst at least nine months before the City adopted its UGB expansion. This violates Goals 2, 9 and 14.

2. The City’s risk to wildfire must be addressed under Goals 2, 7, 12 and 14.

The Director erred in failing to require the City to address catastrophic fire under Goals 2, 7, 12 and 14. The Director’s Decision states:

“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 [Central Oregon LandWatch] 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.” (p. 146)

The Director improperly rejected LandWatch’s objections on the basis that the cited Goal 7 provisions are not “requirements.” In the context of periodic review, LandWatch believes that DLCD has the authority to direct that these issues be adequately addressed. The threat of catastrophic fire is a serious public safety issue.

The Decision also states that LandWatch fails to identify “new fire hazard information.” The State of Oregon Department of Forestry, however, has already posted new information on its website, but what is actually necessary here is for the City of Bend to address the issue with adequate facts under Goals 2 and 7, to include catastrophic fire in its locational analysis of Goal 14 and to address fire evacuation under Goal 12. LCDC should direct the City to do this very necessary catastrophic fire planning.

3. Environmental impacts to natural resources, the barrier of high land cost to affordable housing and impacts to irrigation districts may justify rejecting otherwise suitable exception land in favor of resource lands.

The Director’s Decision at pages 135-136 states that environmental impacts to natural resources, the barrier of high level land cost to affordable housing and impacts to irrigation districts may not justify rejecting suitable exception land and that such rejection must be for a particular use based on physical site criteria. Yet at page 125, the Decision recognizes that the City failed to apply one of the Goal 14 location-factors towards a suitability analysis which is “compatibility of the proposed urban uses with nearby agricultural and forest activities occurring on farm and forest land outside the UGB.” It is because of the incompatibility that the lands are not suitable, not just that the incompatibility justifies rejecting suitable lands. Also, we believe the Record is adequate for these impacts to justify an exception under ORS 197.298(3). Consideration of high land cost on the west side of Bend (“exception” land) as a barrier to affordable housing is also appropriate under ORS 197.298(3)(a).

4. The soils prioritization standards of ORS 197.298(2) are not limited to resource lands.

We respectfully disagree with the Director’s interpretation at pages 131-132 that the requirement for prioritization of lands based on soils in ORS 197.298(2) applies only to resource lands. The statute does not limit application of ORS 197.298(2) just to ORS 197.298(1)(d), resource lands. The Decision is also incorrect in stating that LUBA has resolved the issue. The references to ORS 197.298(2) in *DLCD v Douglas County*, 36 Or LUBA 26, 30 n3, 37 n14 (1999), requiring prioritization of agricultural lands does not state that ORS 197.298(2) does not apply to ORS 197.298(1)(a)-(c) as that was not an issue in that case. If the Legislature had wanted ORS 197.298(2) to apply only to ORS 197.298(d) it would have said so.

5. The City’s estimate of needed second home units needs evidence and analysis of second homes being provided by destination resorts in the area.

The Director erred in denying the objection of Central Oregon LandWatch with respect to the City’s estimate of needed second home units:

“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 reasons set forth above with regard to the similar Bayard objection." (p. 52)

This conclusion is in error because, as recognized by the Director elsewhere, the City has failed to consider the approval of the Tetherow Destination Resort and the effect of other destination resorts in the area and their effect on land need within the UGB for this type of use:

“Objection: The city fails to consider the approval of 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." (p. 53)

The Director elsewhere also acknowledged that this component of housing should be considered in terms of its impact on housing need within Bend:

“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." (pp. 44-45)

While the Director is correct that the City has not adequately explained acreage needed within the UGB expansion area for second homes, LandWatch believes that the Director should also have determined that the City's estimate of needed second home units is also in error. The determination of needed units was made without assessing the current approvals for destination resort second homes in the area. This is particularly critical with regard to the Tetherow Destination Resort which directly abuts the city of Bend and is connected with the city sewer system and city roads. For all intents and purposes, this second home destination resort development is part of Bend.

6. The City's proposed prioritization of "exemption" lands is not appropriate.

LandWatch adopts and incorporates by reference the arguments of Swalley Irrigation District.

7. The City's Public Facilities Plan should have been rejected for not having had noticed public hearings.

The Director denied LandWatch's objection that the City improperly adopted the Public Facilities Plan in NS2111 because there was no public hearing on the ordinance and that the

City's public notice only referenced the UGB amendment. The Director determined that the City held a public hearing on the Public Facilities Plan simply because the City "provided public notice of the proposed UGB amendment, which included the proposed adoption of Chapter 8 of the General Plan (Public Facilities)." (p. 153) This analysis ignores the fact that the Public Facilities Plan was adopted separately in a different ordinance than the UGB amendment. Each ordinance must receive a public notice and it is not sufficient that somewhere within the UGB amendment there is a reference to the Public Facilities Plan.

8. The City's public process was inadequate where critical information was not placed into the Record until after the public hearing process was closed.

The Director inappropriately rejected LandWatch's objection 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. The Director determined that Goal 1 "does not establish legal requirements for the actions that are before the Director for review." (p. 151) The Director read our objection too narrowly and ignored the basic requirement of Oregon law that the public is entitled to comment on the materials and basis for legislative amendments such as this UGB expansion.

9. The Director's Decision needs to more clearly define the scope of the remand.

Sections I and J of the Director's Decision make clear that the remand must be done consistent with the Director's report. (pp. 127 and 144) That statement also needs to be made for other remand sections where the identification of specific items for remand might otherwise suggest that the remand is limited to what is listed. Sections E through H contain detailed listings of remand items. While we believe it is helpful to the City and County as well as other parties to have such listings, it would be also preferable for the Director to include, where appropriate, sustained objections in the specific remand requirements, including, for examples:

1. Add to the "Summary of Decision on Housing and Residential Land Needs" (pp. 46-47) the following:

"The city must consider Tetherow and other second home development in the region to determine how many units and how much acreage is needed in the UGB."

2. Under the "Economic Development Land Need" subsection F.1. "Did the city have an adequate factual basis for including and excluding lands for employment uses?", the following sustained objections should be added to the list of remand items at pages 64-65:

"EOA assumptions regarding vacancy rates and institutional use, open space and right-of-way must be re-determined."

3. Under the heading of "Transportation Planning" and the findings provided under H.1. "Did the amendments to the transportation plan violate Goal 12 or OAR 660, division 12 and related portions of Goal 14 and 060?" (p. 89), the following sustained objection should be added:

“The city needs to consider the impact of west side expansion on widening Newport and Galveston Streets which would violate a city plan policy that restricts widening of these streets.”

4. Under the heading of “UGB Location,” the findings, as mentioned above, do not give a detailed listing but generally refers to the determinations of the report. There is also a listing of “Response to Objections” at pages 124-125 and “Findings Regarding Boundary Location Threshold Suitability Criteria” in Table 3 on pages 118-122. Table 3 should be clarified to include the listing of sustained objections in pages 124-125. Also, an additional sustained objection of LandWatch (page 113) not included in either of these lists and should be:

“The city needs to justify its assumption that parcels smaller than three acres with a house are unsuitable.”

The City’s late submittal of new information.

Late yesterday I received a letter and disk from the City of Bend asserting that incorrect information was provided to the Director and that what information was enclosed with the letter should be considered instead. This late-offered evidence should be rejected where the City does not explain why this information was not provided earlier, how it differs from what information was provided, how this new information was (or was not) provided to the public and how this information explains anything determined in the Director’s Decision. LandWatch reserves the right to submit further objections to this late evidence once it has time to further examine it. (See also the Second Amendment to Toby Bayard’s appeal.)

Conclusion.

LandWatch respectfully requests the further remand as described above and requests an opportunity for an oral presentation.

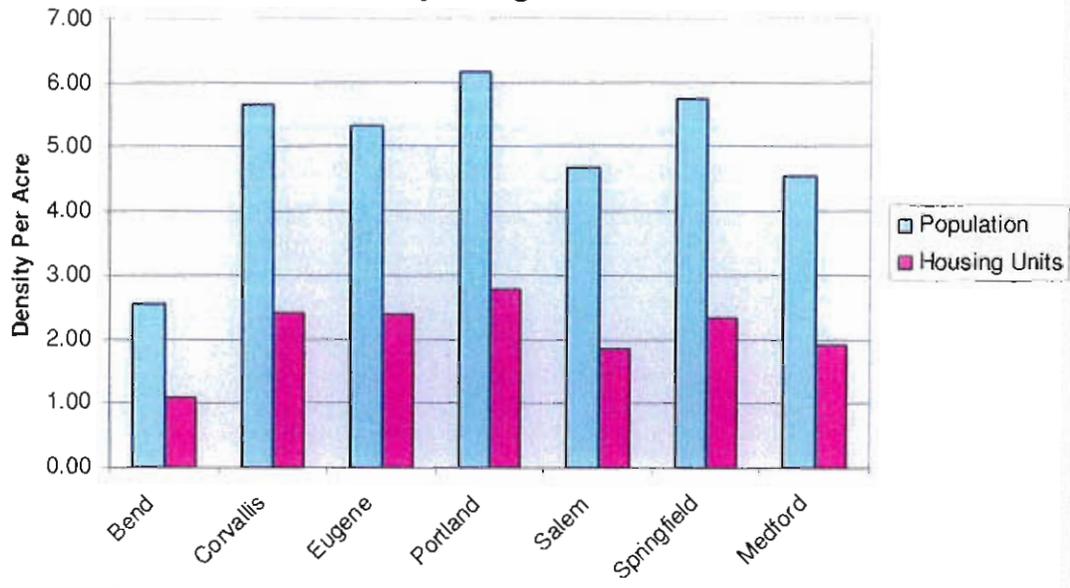
Very truly yours,



PAUL DEWEY

cc: Board
City of Bend
DLCD

Figure 1: Density in Bend Compared with Other Major Oregon Cities



Source: 2000 US Census, Fodor & Associates



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January 29, 2010

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FAX TRANSMISSION COVER PAGE

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Subject: Bend UGB LCDC review
Pages (including this cover sheet): 10

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