

January 25, 2010

Oregon Land Conservation and Development Commission
Care of Larry French
Oregon Department of Land and Conservation Development
635 Capitol St., NE, Ste. 150
Salem, OR 97301-2540

**Re: Appeal to LCDC of DLCD Order 001775: Report on Bend and Deschutes County's
Amendment to the Bend Urban Growth Boundary**

Dear Commissioners:

I, Toby Bayard, as a private citizen and volunteer of Central Oregon Landwatch, appeal the Oregon DLCD's Order 001775, which is a Report on Bend and Deschutes County's Amendment to the Urban Growth Boundary. In this appeal, I assert that the city (and to a certain extent, the county as well) did not comply with a number of Oregon's Statewide Land Use Planning statutes, administrative rules, goals and guidelines.

In submitting this appeal, I comply with the requirements of OAR 660-025-0150(4). I incorporate by reference the written materials I previously submitted to DLCD. These document my local participation and establish that I have the standing sufficient to file this appeal.

In my appeal, I have selected the areas of the Director's Report that are most important to me. Having said that, I agree with the entire Director's Report, except for its conclusion that the city, in conducting its UGB expansion process, did not violate Oregon Statewide Land Use Planning Goal 1, Citizen Involvement. While I am convinced the Director is technically correct—since the city is not amending its Citizen Involvement Program, Goal 1 does not establish legal requirements for the actions that are before the Director for review—it is also true that the City systematically shut its citizens out of the UGB expansion process, and denied all but selected stakeholders a chance to really influence its outcome. Over 40 separate pieces of testimony in the record assert that Goal 1 violations took place, including comments by prominent land use attorneys, the city's own UGB Expansion Technical Advisory Committee members, Deschutes County Planning Commissioners and others.

Given that Goal 1 violations are not relevant here, I can only hope that the LCDC will consider carefully my other assertions that the city of Bend's UGB expansion process was characterized by many legally relevant violations of Oregon revised statutes, administrative rules and statewide land use planning goals and Guidelines. The shortcomings led to a number of procedural errors, flawed analyses, legal misinterpretations and other problems with the city of Bend's UGB expansion process. I ask that the LCDC consider these and rule accordingly.

I thank you in advance for your consideration of my appeal.

Sincerely,



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Summary of Appeal.

My appeal covers six primary areas of concern:

1. Land Required for Needed Housing:

The city's UGB Amendment is based on a flawed Buildable Lands Inventory that improperly excludes lands that are both suitable and available. The Amendment includes approximately 3,000 acres of land not suitable for urban uses, improperly adds a 519 acre buffer, makes poor use of efficiency measures to encourage infill and redevelopment and fails to include documentation that ensure the two measures which were adopted will be effective. In addition, the Amendment fails to provide for efficient use of the lands added to the UGB, fails to properly analyze housing need by type, density and mix, and assumes that housing density and mix will continue to produce the same housing types, without regard for current and future housing needs over the next 20 years.

2. Economic Development Land Need:

The city's UGB amendment provides an inadequate factual basis for including (or excluding) lands for employment uses. The UGB expansion amendment includes more employment land than is justified. The city erred in including land for a hospital, university and special site industrial uses because it did not show that such uses could not be accommodated within the existing UGB.

3. Public Facilities Plans:

The city's CSMP and WSMP are not a timely, orderly and efficient arrangement of public facilities and do not appear to satisfy the coordination requirements of Goal 11. The city's did not provide proper DLCDC notice 45 days in advance for its PFPs. The city's CSMP and WSMP are not consistent with the comprehensive plan. Not all serviceable exception areas are included in the PFPs and there are lands included in the PFPs but not included in the expanded UGB map. The city assumed three different development densities for CSMP assumptions (one for its housing needs analysis, one to calculate the CSMP capacity within the existing UGB and a third to calculate sewer system capacity for the expanded UGB area. Nothing in the CSMP addresses the impact that the approximately 3,500 acres of unsuitable and/or surplus land will have on the CSMP.

4. Transportation Planning:

The city spread transportation costs associated with urbanizing the north US 97/20 area over the entire expansion area and did not provide a detailed transportation analysis for the discrete UGB expansion map that it and the County ultimately adopted. Instead, the city relied on a transportation analysis produced for earlier, significantly different alternatives. Its transportation analysis also bundled different expansion areas into four separate land use scenarios and ignored impacts of each separate area. The final expansion map adopted by the city mixed, matched and blended areas from the four separate scenarios into a new, adopted scenario. Traffic analysis for some areas on the final map was never performed. The city justified inclusion of certain lands on a draft TSP that indicates the city contemplates building a new bridge over the Deschutes and includes new minor arterial street segments to connect the bridge to the existing street network yet it deferred a final determination of need, Goal 5 study and other impacts to a later refinement study.

5. UGB Location:

The city's locational analysis of where to expand its UGB did not comply with ORS 197.298, Goal 14 or pertinent provisions of OAR 660, division 24. The methodology and approaches used were opaque, overly complicated and lacked clear explanations that linked it to data in the record.

6. Goal 5:

The city violated Goal 5 and its implementing rules when amending its UGB.

Objections.

Residential Land Need

1. 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.

b. Arguments with respect to Land Required for Needed Housing

1. The UGB amendment violates Goal 14 that states lands are generally considered suitable and available unless they (1) are severely constrained by natural hazards, (2) are subject to Goal 5 protection measures, (3) have slopes over 25 percent, (4) are within the 100-year floodplain, or (5) 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 convert them to more intense residential uses during the planning period. [OAR 660-008-0050(6)]. The city’s BLI excluded constrained lands that qualifies as buildable land under OAR 660-008-005(2), split-zoned parcels, some partially vacant land planned or zoned for residential use and lots less than three acres. It narrowly defined “redevelopable” land and also rejected as unsuitable lots with existing development without explanation. [Figure i](#) shows some of these assumptions are flawed. The realtor is listing a 2.47 acre developed property zoned RS on Butler Market Road, a road that is a strong candidate for being a transit corridor due to its connectivity to US 97, etc.



Figure 1: Many Bend under-3-acre lots are suitable for residential redevelopment

2. The proposed UGB expansion area is approximately four square miles over the city's projected land needs, evidently because it includes a variety of lands not suitable for urban uses. The city also misconstrued 660-024-0040(1) by including a 519 acre buffer over its demonstrated residential use land need. The city's findings explain this excess acreage by referring to OAR 660-024-0040(1), (20-year projections of land needs are estimates that should not be held to an unreasonably high level of precision). Findings defend excess acreage by explaining that it is needed (1) for the efficient provision of public services (e.g., including land on both sides of roads in some expansion areas), (2) to facilitate the development of complete neighborhoods, and (3) to make it possible to distribute employment lands throughout the expansion area. Findings state these reasons but do not explain where these areas are or why acreage cannot be reduced elsewhere in order to achieve congruence with estimated land need. The Director's report states, "The inclusion of a specific amount of land in the UGB in addition to estimated need appears to be driven by (a) desire to include particular properties..." My knowledge of the process has convinced me that the Director is correct in his conclusions and that a desire to include specific land drove the process, as opposed to using a process that revealed which lands could be most cost effectively developed to meet the estimated need.
3. The city did not sufficiently consider efficiency measures inside the existing UGB as required by ORS 197.296(9). The two efficiency measures that were adopted lack documentation to assure that they will be effective. Also, 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. I believe that all the identified residential land needs can reasonably be accommodated on land within the existing UGB if the city adopts measures [Goal 14; OAR 660-024-0050(4)]. While some powerful land owners / developers have interests best served by a major UGB expansion, Bend's tax- and fee-paying citizens cannot afford it. I encourage the city to adopt additional efficiency measures so that infill and redevelopment opportunities within its existing UGB are utilized to the maximum extent. Doing so will utilize costly public infrastructure more efficiently and help to ensure reasonably compact and contiguous urban development patterns that avoid a need for additional costly urban infrastructure (roads, water, sewer, etc.). Compact development also reduces the land area and distances involved in providing public services such as public safety, fire protection, road maintenance, snow removal and bus service. Redevelopment can also be encouraged through measures. Redevelopment will help to transform some of Bend's blighted and underutilized areas that might otherwise be abandoned for cheaper land on the urban perimeter. Finally, a compact community is easier to get around in and shortens trip distances. If Bend had a denser urban core, it could better support alternatives to auto-dependent travel, such as biking and walking and also achieve the densities needed for efficient public transit. In addition to being compliant with Goal 14 and OAR 660-024-0050(4), the City would be far better positioned to resolve its financial shortfalls with respect to snow removal, road improvements, the construction of sewer interceptors, etc. It would also help the City to live up to the requirements of SB 1059 (should it pass) which calls for a reduction in vehicle miles traveled and greenhouse gas emissions back to 1990 levels. Measures and redevelopment make sense and Bend's officials should not bristle at the suggestion that it develop more densely. Rather, it should embrace the chance that the DLCDC is giving it to say "no" to special interests and "yes" to smart growth.

4. The city failed to plan for efficient use of the lands added to the UGB. It has assumed that 76 percent of the added land will be zoned RS (average density of 4 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). Additionally, the city has reduced the density in the RL (Residential Low Density) and RS (Residential Standard Density) zones. 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.
5. The city did not properly analyze housing need by type and mix as required by ORS 197.296(3)(b), and failed to plan for needed housing as required by ORS 197.303. It assumed that housing density and mix will continue to produce the same housing types, without regard for current and future housing needs 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, yet the city rejected the Model and instead planned for a higher percentage of single-family housing and a lower percentage of multi-family housing. The city also changed to a different type of housing mix, "detached percent and attached percent" (where attached housing includes high end townhomes and condos) instead of using the terms "single-family percent and multi-family percent". 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.

c. Remedy sought

I ask that the Oregon LCDC sustain the DLCD Directors' Report with respect to Land Required for Needed Housing and uphold the Directors' remand decision, with instructions that the city adhere to the 14 instructions on pages 45 and 46 of the Director's Report.

Economic Development Land Need

2. Inadequate factual basis for including (or excluding) lands for Employment Uses

a. Legal standards

Statewide Planning Goal 9 and OAR 660, division 9, specifically OAR 660-009-0010(5), OAR 660-009-0015, OAR 660-009-0020, OAR 660-009-0025. Also OAR 660, division 24, specifically OAR 660-024-0040(5).

b. Arguments as to inadequate factual basis for inclusion / exclusion of lands

I concur with the Director that the Record does not include adequate findings, analysis or evidence to justify the city's determination of employment land need. The City did not follow the methodology for determining employment land need for a legislative UGB amendment, as set forth in OAR 660-009-0010(5). The Record is unclear and confusing as to how the amount of land needed for employment was determined. In addition to the Economic Opportunities Analysis (EOA), the City included other, conflicting findings and conclusions in its Findings. It did not analyze developed employment land likely to redevelop during the planning period.

c. Remedy Sought

I ask that the Oregon LCDC sustain the DLCD Directors' Report with respect to its ruling that there was an inadequate factual basis for including (or excluding) lands for Employment Uses and uphold the Directors' remand decision.

3. UGB Expansion Amendment includes more employment land than is justified

a. Legal standards

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. 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, the Record must contain 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. Arguments with respect to the inclusion of more employment land than is justified in the UGB Expansion Amendment

The city's UGB expansion amendment includes more employment land than was justified. The City used erroneous definitions of "developed land" and "serviceable land". The findings do not show that at least some employment land needs cannot be accommodated within the existing UGB. Further, the EOA employed an inappropriate assumption regarding vacancy rates and institutional use, open space and right of way. It also impermissibly added surplus employment lands to the inventory. Barriers to locating industry in Bend argue against the need for an oversupply of industrial land.

c. Remedy Sought

I ask that the Oregon LCDC sustain the DLCD Directors' Report with respect to its ruling that the City's UGB Expansion Amendment includes more employment land than is justified and uphold the Directors' remand decision.

4. City erred in including land for a hospital, university and special site industrial

a. Legal standards

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. OAR 660-009-0015 requires an EOA to determine the need for employment land. 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.

b. Arguments with respect to inclusion of land in the expanded UGB for specific types of employment land without a supporting factual basis

The City may have properly analyzed the need for specific employment land, but the EOA failed to analyze whether or not these uses could reasonably be accommodated within the existing UGB. I question that Juniper Ridge is the appropriate location to site a university, when other areas within UGB Study Area appeared to be less infrastructure constrained (e.g., the Oregon DSL Section 11 land). Within the existing UGB, areas within the Mill District, if appropriately zoned, could accommodate 50 acre industrial sites. The same holds true for a Medical District Overlay Zone. There are a number of areas within the existing UGB that could be zoned and redeveloped to accommodate a second MDOZ.

c. *Remedy Sought*

I ask that the Oregon LCDC sustain the DLCD Directors' Report with respect to its ruling that the City erred in including land in the expanded UGB for a hospital, university and special site industrial and uphold the Directors' remand decision that requires further documentation.

Public Facilities Plans

5. Ordinance NS-2111 does not comply with applicable Goals and OAR Rules

a. *Legal standards*

Goal 11 and ORS 197.712(2)(e); OAR 660-011-0000, OAR 660-011-0010(1); and OAR 660-011-0010(3); OAR 660-011-0015(1) and OAR 660-024-0060(8).

b. *Arguments with respect to the lack of compliance of Ordinance NS-2111 with applicable Goals and Oregon Administrative Rules.*

OAR 660-025-0175(3) and ORS 197.610 require the City to provide the DLCD with a proposed amendment notice 45 days prior to the City's first evidentiary hearing on the proposal. The notice must contain the text of the amendment and any supplemental information necessary to inform the director of the proposal's effect. [ORS 197.610(1)] The City properly noticed the DLCD of its June 2007 public hearings on its first UGB proposal, including draft public facility plans (PFPs) for the 4,884-acre UGB amendment under consideration at that time but when it sent its revised notice on October 8, 2008 (which nearly doubled the size of its proposed urban growth boundary) it failed to include updated PFPs. The City revised its revised notice on October 25, 2008 and again failed to include updated PFPs. The DLCD informed the City of that omission but it was not corrected. Thus, the City violated OAR 660-025-0175(3) and ORS 197.610(1).

The City's Water System Master Plan (WSMP) and Collection System Master Plan (CSMP) appear designed to support pre-existing biases as to which land to include in the expanded UGB rather than to serve the public facilities needs of Bend's existing and future residents. Not all serviceable exception areas are included in the PFPs and there are lands included in the PFPs but not included in the UGB proposal.

The City's Goal 11 findings state that it 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". However, the Record does not support this finding. The CSMP included an analysis of planned sewer interceptors, but the location of said interceptors is almost entirely on UAR lands or within the existing UGB). Moreover, the CSMP's analysis of what lands will be served in the future is not correlated with the lands in the UGB expansion area. The UGB expansion area includes 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. Further, the CSMP and WSMP do not 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.

The City's CSMP includes 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 WSMP. These internal inconsistencies are incorporated into the Bend General Plan in Chapter 8, Public Facilities and Services, and 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). For instance, the 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 and the Tetherow destination resort located southwest of the current UGB. It also includes some exception lands adjacent to the UGB designated as SR 2½, and the Section 11 (Stevens Tract) land owned by the Oregon DSL. The UGB expansion area does not include the DSL and Tetherow properties, and only includes a portion of the Juniper Ridge site (as location of a future university site). It entirely omits a large area of rural residential development south of the city.

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. 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.

The City assumed three different development densities for CSMP assumptions: one for its housing needs analysis of redevelopment potential within the existing UGB, another to calculate the CSMP capacity for within the existing UGB and a third to calculate sewer system capacity for the expanded UGB area. 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.

Nothing in the Record reveals how almost 3,000 acres of land "unsuitable" for urban development, and 519 acres of buildable "surplus," are analyzed and accounted in the CSMP. 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.

The above offers clear evidence that the City's WSMP and CSMP are not a timely, orderly and efficient arrangement of public facilities. The WSMP does not even cover all the area in the existing UGB, let alone the expanded UGB area. The UGB expansion proposal includes areas served by the city, Avion Water Company, and Roats Water Company but there is no evidence that the WSMP includes plans for these expansion areas, as required by the Goal 11 and 14 rules. Neither does the WSMP appear to satisfy the coordination requirements in Goal 11.

c. *Remedy Sought*

I ask that the City be required to prepare revised PFPs and to amend Chapter 8 of the BAGP to clearly identify what sewer and water projects are needed to accommodate development in the UGB expansion area (and also to accommodate development and the provision of service within the existing UGB).

I also ask that the city make a far greater effort to consider and share with the tax paying public all costs related to the provision of sewer service, including the cost of a Northern Crossing bridge over the Deschutes, which is required to build the Northern Interceptor.

Finally, I concur with all the Director's recommendations as they are presented on page 83 of the Director's Report.

*Transportation Planning***6. Transportation analysis and findings are flawed****a. Legal standards**

Goal 14 (Urbanization) and OAR 660-024-0060.

A 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. The evaluation and comparison must be conducted in coordination with service providers, including ODOT, and address 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 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.

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

b. City improperly spread costs across entire study area

The city did 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.

c. Remedy Sought

The city must provide a more detailed analysis of the extent to which the costs of improvements for major roadway improvements in north area (including proposed improvements to US 20 and 97) are a result of and should be assigned to development in the north area rather than the city as a whole. 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.).

7. The City's TSP amendments violated Goal 12 and OAR 660, division 12 and related portions of Goal 14 and OAR 660-024-0060**a. Legal standards**

Goal 14 (Urbanization) and OAR 660-024-0060. A 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. The evaluation and comparison must be conducted in coordination with service providers, including ODOT, and address 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 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.

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

b. Arguments with respect to City TSP's violation of Goal 12, OAR 660, division 12 and related portions of Goal 14 and OAR 660-024-060

The City did not provide a detailed transportation analysis for the discrete UGB expansion alternative that it and Deschutes County ultimately adopted (Alternative 4A) but rather, relied on one produced for earlier alternatives that were significantly different.

In 2007, the City hired DKS Associates to conduct a UGB expansion Transportation Analysis. The Draft Report produced by DKS was entered into the Record in response to the OAR 660, division 12 requirement that the City evaluate the transportation costs associated with serving different UGB expansion areas. This April 2007 study used a non-compliant approach that was, in addition, also not congruent with the final UGB expansion area that the City ultimately adopted. With respect to non-compliance, the study bundled four land use scenarios, each of which assumed urban levels of development sufficient to meet the state forecasted population needs for the Bend Urban Area. The land use scenarios were referred to as (A): The 2030 Base Case, (B) Miller-Day / DSL / Section 11, (C) Rural Residential 10 Lands and (D) Juniper Ridge. These four alternatives were reviewed for impacts on Committed and Capacity Street networks. Yet the Alternative 4A UGB expansion map was a blend of these four alternatives, none of which included the Coats property or much of the properties to the northeast or east.

(For an illustration of how the DKS Transportation Analysis grouped various areas into UGB expansion alternative scenarios and how the scenarios analyzed also differed from the City's Adopted UGB Expansion Amendment, please refer to [Figure 2](#) on the following page. Figure 2 makes it clear that in a number of cases, the City's adopted UGB amendment included lands that were entirely excluded from DKS' transportation analysis.

It is clear that the Coats Property Land Use Scenario – Alternative 8 (which was added to the Public Record on November 3, 2008) was a last minute addition. The DKS Analysis did not include an area map and simply lifted the findings associated with the Miller-Day area (which is south of the Coats property, much closer to the core area of the existing Bend UGB). DKS' analysis of Coats and the conclusions it reached were highly questionable. DKS found that the Coats scenario had exactly the same transportation impacts as did the Miller-Day scenario. In fact, the findings of its traffic analyses were identical to those of Miller-Day although it is clear that at least some (and probably a substantial amount) of Coats' traffic would use the Northern Crossing Bridge (the cost of which was also not revealed or even properly analyzed).

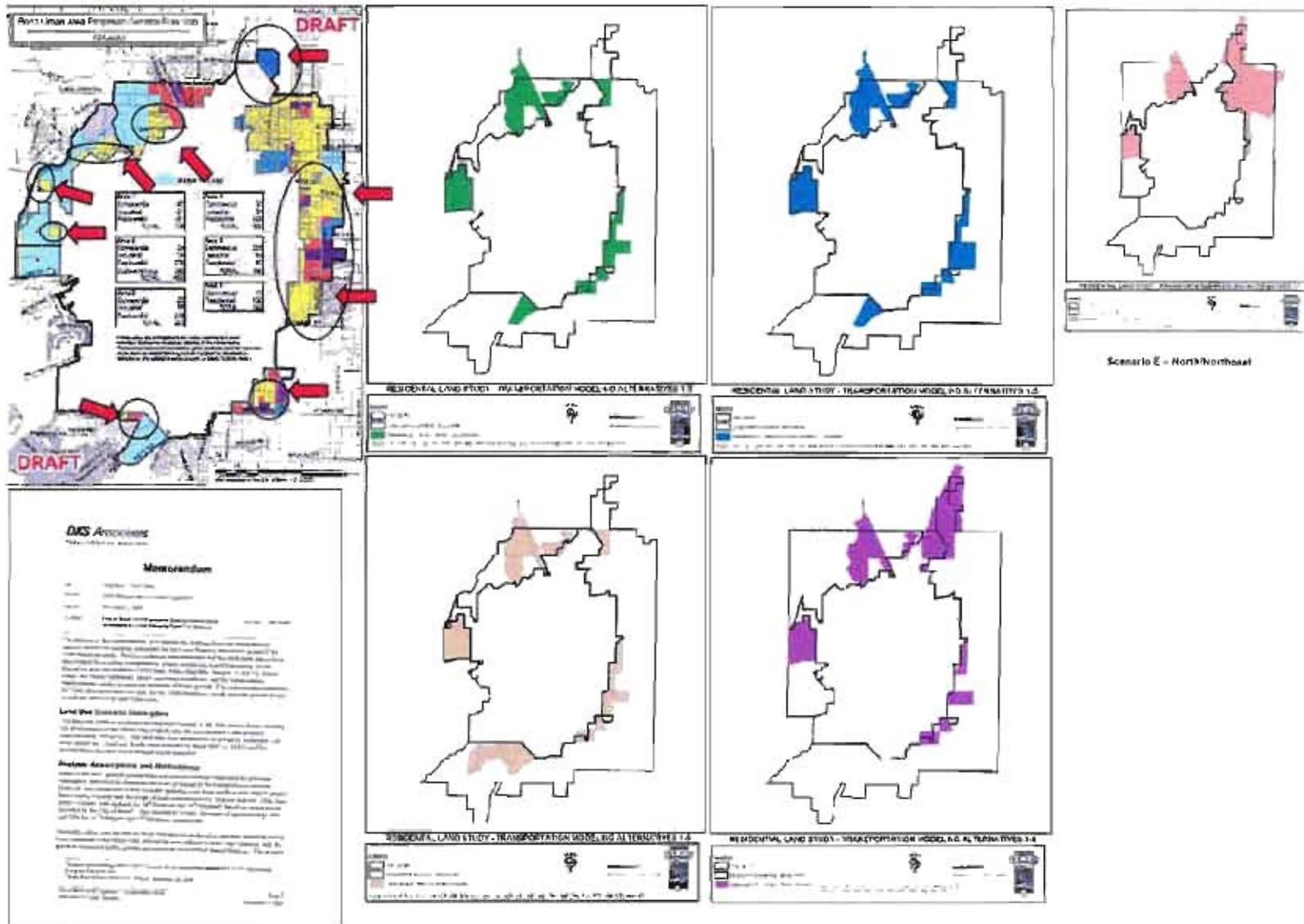


Figure 2: DKS grouped potential expansion areas and entirely omitted analysis of some lands (see circles and arrows) included in the final UGB map

As I understand the Oregon Transportation Planning Rule (TPR), the traffic impacts on the committed and capacity portion of an expansion area must be studied independently, not as part of an overall "UGB Expansion Scenario."

Further, according to the TPR, the individual costs of each potential development or area must be compared with all other potential developments serving the same purpose and as such, an estimation of the increased cost for an entire alternative is not relevant, particularly when that particular scenario was not identical (or even similar) to the final alternative adopted by the City of Bend.

The City's Alternative 4A UGB Expansion Amendment is top-heavy to the north. It will further exacerbate the congestion problems that continue to plague the US 97 Bend North Corridor. The city's assertion that US 97/20 improvements will be needed for any of the possible UGB expansion areas considered is not supported by the Findings. As a result, its Findings do not have an adequate factual base.

c. Remedy Sought

I ask that the Oregon Land Conservation and Development Commission sustain the DLCD Directors' Report with respect to its ruling that the City's Transportation System Plan and in its related transportation amendments violated Oregon's Statewide Land Use Planning Goal 12, OAR 660, division 12 and related portions of Goal 14 and OAR 660-024-060 and uphold the Directors' remand decision and requirement that findings and analyses be revised as shown on page 89 of the Director's Report.

8. Planning Status of the Proposed Northern Crossing Deschutes River Bridge

a. Legal standards

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. The legal standards that apply here are OAR 660-012-0015 - Preparation and Coordination of Transportation System Plan; OAR 660-012-0016 Coordination with Federally-Required Regional Transportation Plans in Metropolitan Areas; OAR 660-012-0020 - Elements of Transportation System Plans; OAR 660-012-0025 - Complying with the Goals in Preparing Transportation System Plans, Refinement Plans; OAR 660-012-0030 - Determination of Transportation Needs; OAR 660-012-0035 - Evaluation and Selection of Transportation System Alternatives; and OAR 660-012-0040 - Transportation Financing Program.

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))

b. Arguments: The planning status of the N. Deschutes River Bridge

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 contemplate. 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.

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

The Northern Crossing bridge is an expensive improvement and appears intended to serve a specific area (Gopher Gulch, Riley Park, Coats', Day and Miller properties). As part of Goal 14, the city should 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).

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. 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).

c. Remedy Sought

The City must either clearly authorize the bridge as a planned facility, or defer decisions to a subsequent refinement plan consistent with OAR 660-012-0025. Regardless of the path the city chooses 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.

UGB Location

9. The UGB Locational Analysis and UGB Amendment do not comply with ORS 197.298, Goal 14 and OAR 660, Division 24

a. Legal standards

ORS 197.298, Goal 14 and OAR 660-024-006058 contain the applicable state requirements that establish where a city may expand its UGG.

b. Arguments with respect to the UGB Locational Analysis and UGB Amendment's failure to comply with ORS 197.298 and OAR 660, Div. 24

The city and county locational analysis of where to expand its UGB did not comply with ORS 197.298, Goal 14 or the pertinent provisions of OAR 660, division 24. The methodology and approaches used were opaque and overly complicated and the analysis lacked clear explanations that linked it to data in the record.

The city's UGB expansion amendment included too much EFU (resource) land and not enough exception land. Its process excluded a large amount of adjacent exception lands as "unsuitable" based on suitability criteria that were 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. Therefore, the city and county did not comply with Goal 14, ORS 197.298, and OAR 660, division 24. The analysis created an artificial shortage of first priority exception lands, and then used that shortage to justify including lower priority resource land, effectively undermining the statutory priorities in ORS 197.298.

The city's boundary location analysis considered exception land found to be "suitable" if it met all a series of "threshold suitability criteria." The city impermissibly applied these threshold suitability criteria in a way that allowed it to substitute resource land for much of the exception land in the study area when development must be directed to exception lands instead of resource lands if the exception lands can reasonably accommodate the proposed development.

In addition, once it began considering EFU land for the 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.

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 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."

The UGB threshold suitability criteria approach excluded many acres of land in existing suburban subdivisions (most of which rely on septic systems) from consideration for inclusion in the UGB. For instance, the city's locational analysis improperly excluded thousands of acres of suitable, high priority exception land in the Buck Canyon area in the southwest part of the Study Area. 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.

In addition, the city's locational analysis aggregated all parcels in the study area and then applied the same threshold suitability criteria for all urban land needs. The city did not separate out resource lands by soil capability before applying site need criteria and it classified resource lands by current use, which is not an allowable "common circumstance" under Goal 14, ORS 197.298 and OAR 660-024-0060. The city also segregated exception lands with potential scenic or natural resources from other exception lands without performing a Goal 5 inventory or performing an ESEE analysis.

c. Remedy Sought

The city’s UGB location analysis and UGB amendment do not comply with Goal 14 boundary location requirements or with ORS 197.298, and OAR 660, division 24. Thus, I ask that the LCDC uphold the DLCDC Director’s ruling that 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.

Natural Resources and Hazards

10. The city violated Goal 5 and its implementing rules when amending its UGB

a. Legal standards

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 resource inventory. For all inventoried significant Goal 5 resources, a local government must complete a process to develop and implement appropriate protection measures. If a local Goal 5 protection program 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 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. Arguments with respect to the city's violation of Goal 5

The city states that its UGB expansion amendment “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.” 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.”

OAR 660-23-0250(3)(c) specifies that the requirements of Goal 5 apply when a PAPA “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 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.

The plan also recognizes the association between the Deschutes River and wetlands. Four out of the six quadrants in Alternative 4 are described as having “no naturally occurring wetlands,” 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.” The northwest quadrant is described as having land along the Deschutes River and Tumalo Creek that is within the 100-year floodplain. 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 and the existence of a Goal 5 aggregate resource in the northwest quadrant.

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

c. Remedy Sought

The city's UGB location analysis and UGB amendment do not comply with Goal 14 boundary location requirements or with ORS 197.298, and OAR 660, division 24. Thus, I ask that the LCDC uphold the DLCD Director's remand ruling and instruct the city to submit a location analysis consistent with requirements of Goal 14, ORS 197.298, and OAR 660, division 24.

Conclusion.

Thank you for this opportunity to file this appeal. I respectfully request an opportunity to make an oral presentation.

Very truly yours,

Toby Bayard

cc: City of Bend
DLCD


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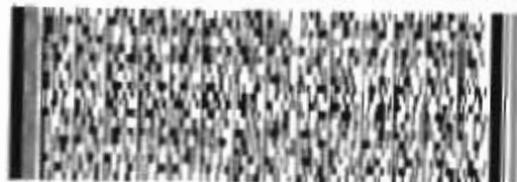
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