



Oregon

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November 3, 2010

Kathie Eckman, Mayor
City of Bend
710 NW Wall Street
Bend, OR 97701

Dennis Luke, Chair
Deschutes County Board of Commissioners
1300 NW Wall Street
Bend, OR 97701

RE: LCDC Remand and Partial Acknowledgment of City of Bend Urban Growth Boundary Commission's Order 10-Remand-Part Acknowledgment-001795

Dear Mayor Eckman and Chair Luke:

On March 18 and 19, April 22 and 23, and May 12, 2010, the Land Conservation and Development Commission (LCDC) held hearings on the appeal of the decision of the Director of the Department of Land Conservation and Development's Order 001775 regarding the City's Urban Growth Boundary expansion. The Commission took action to remand and partially acknowledge the City's UGB expansion and related actions of the City and Deschutes County. Enclosed you will find the LCDC Order 10-Remand-Partial Acknowledgment-001795.

You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this final order. Judicial review is pursuant to the provision of ORS 183.482 and 197.650.

If you have any questions please feel free to contact your periodic review team leader and regional representative, Karen Swirsky at (541) 318-2899 or karen.swirsky@state.or.us.

Yours truly,

Richard Whitman
Director

Attachment: Remand and Partial Acknowledgement Order
cc via e-mail:

Objectors

Mel Oberst, Bend Community Development Director

Nick Lelack, Deschutes County Planning Director

Steve Shipsey, Assistant Attorney General, DOJ

Larry French, DLCD Periodic Review Specialist (*e-mail*)

DLCD Staff (Rob Hallyburton, Darren Nichols, Gloria

Gardiner, Jon Jinings, Karen Swirsky - *e-mail*)

**BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF THE REVIEW)	
OF THE URBAN GROWTH)	REMAND AND PARTIAL
BOUNDARY EXPANSION FOR THE)	ACKNOWLEDGEMENT ORDER
CITY OF BEND; & RELATED)	10-REMAND-PARTIAL ACKNOW-001795
ACTIONS OF THE CITY AND)	
DESCHUTES COUNTY)	

This matter concerns certain ordinances adopted by the City of Bend and Deschutes County relating to a legislative amendment of the city's urban growth boundary (UGB). This matter came before the Land Conservation and Development Commission (Commission or LCDC) on March 18 and 19, April 22 and 23, and May 12, 2010, as an appeal of a decision of the Director of the Department of Land Conservation and Development (Director) Order 001775 dated January 8, 2010, pursuant to ORS 197.626, ORS 197.633, ORS 197.644(2) and OAR chapter 660, division 25. The Commission fully considered the City of Bend's submittals; Deschutes County's submittals, the objections to the submittals, Order 001775; the appeals of that order, the Department's Report on the Appeals, exceptions to the Department's Report, and the oral argument of the parties to the appeal.

To the extent that there is any conflict between the analysis in this order and the conclusions set forth in the order, the conclusions will control. In addition, any objection to the submittals not expressly addressed herein is deemed denied for the reasons set forth in Order 001775. Similarly, and basis for appeal of Order 001775 not expressly addressed herein is deemed denied for the reasons set forth in the Department's Report on the Appeals.

The organization of this order is shown in the following table of contents:

Table of Contents

I. Background and Procedural History	3
II. Procedural Matters	6
III. Scope of Review	7
IV. Standard of Review	8
V. Procedural Issues	9
1. Jurisdiction	9
2. Adequacy of Local Public Notice of Facilities Plans	13
VI. Substantive Objections and Appeals	13
1. Adequacy of Findings for Review	13
2. Residential Land Needs	17
3. Capacity of the Existing UGB & Efficiency Measures	48
4. Other (Non-Employment) Land Needs	57
5. Employment Land Needs	64
6. Natural Resources and Hazards	86
7. Public Facilities Planning	96
8. Transportation Planning	114
9. Location of the UGB Expansion Area	123
10. Other Issues	138
VII. Compliance with the Goals, Rules and Statutes	147
VIII. Conclusions	148

I. Background and Procedural History

The submittals before the Commission for review are three City of Bend Ordinances: NS 2111 (Public Facility Plans), NS 2112 (Urban Growth Boundary (UGB)), and NS 2113 (Bend Development Code); and two Deschutes County Ordinances: 2009-001 (Urbanization Code, UGB Comprehensive Plan Map and Transportation System Plan (TSP) Map) and 2009-002 (Urban Holding Zones, UGB Zoning Map).

The history of these submittals is as follows:

1. On June 11, 2007, the City submitted a notice of a proposed 4,884-acre UGB expansion to the Department through a 45-day post-acknowledgement plan amendment notice. The notice also included a 14,775-acre urban reserve proposal, which was withdrawn from further consideration shortly thereafter. Following joint public hearings by the city and county planning commissions, it was decided locally that further work was needed on the UGB.

2. On October 8, 2008 the city submitted notice of a revised 8,943-acre UGB expansion proposal, along with related amendments to its public facilities plan, other elements of its comprehensive plan, and its development code. A joint planning commission hearing occurred on October 27, 2008 (with the Deschutes County Planning Commission). The Bend City Council and Deschutes County Board of Commissioners held a joint public hearing on the proposal on November 24, 2008 and considered certain changes to it. The written public hearing record remained open until December 1, 2008. After deliberation during December 2008 the City adopted the proposal (consisting of three ordinances as described above) on January 5, 2009.

3. The Deschutes County Board of Commissioners co-adopted the UGB amendment and related amendments to the county comprehensive plan and county zoning code (consisting of two ordinances as described above) on February 11, 2009.

4. The City provided local notice of its adoption, and submitted ordinances NS-2112 and NS-2113 to the Department for review on April 16, 2009. The submittal did not include Ordinance NS-2111, which adopted an amended public facilities plan, although a copy of Ordinance NS- 2111 was included in the April 16, 2009 submittal materials.

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

2009.

6. On June 12, 2009, the City provided local notice of its adoption of Ordinance NS-2111 (public facility plan amendments), and submitted that ordinance to the Department for review. This submittal started a second 21-day objection period. This second objection period ended on July 6, 2009 with nine objecting parties, including some who had objected to the UGB submittal, objecting.

7. The department determined that the city's submittals were complete on August 28, 2009, and consolidated the submittals for review in the manner of periodic review. This began the 120-day review period for the director's decision on the consolidated submittal.

8. The 120-day review period was extended to January 8, 2010 by agreement of the City and the Department. On January 8, 2010 the Director issued his Director's Decision, remanding the city's three ordinances, and providing notice to the City and County and all objectors. The Director's Decision held that the objections of two objectors were not valid under the Commission's rules (Simpson and Spencer). Director's Decision, at 11.

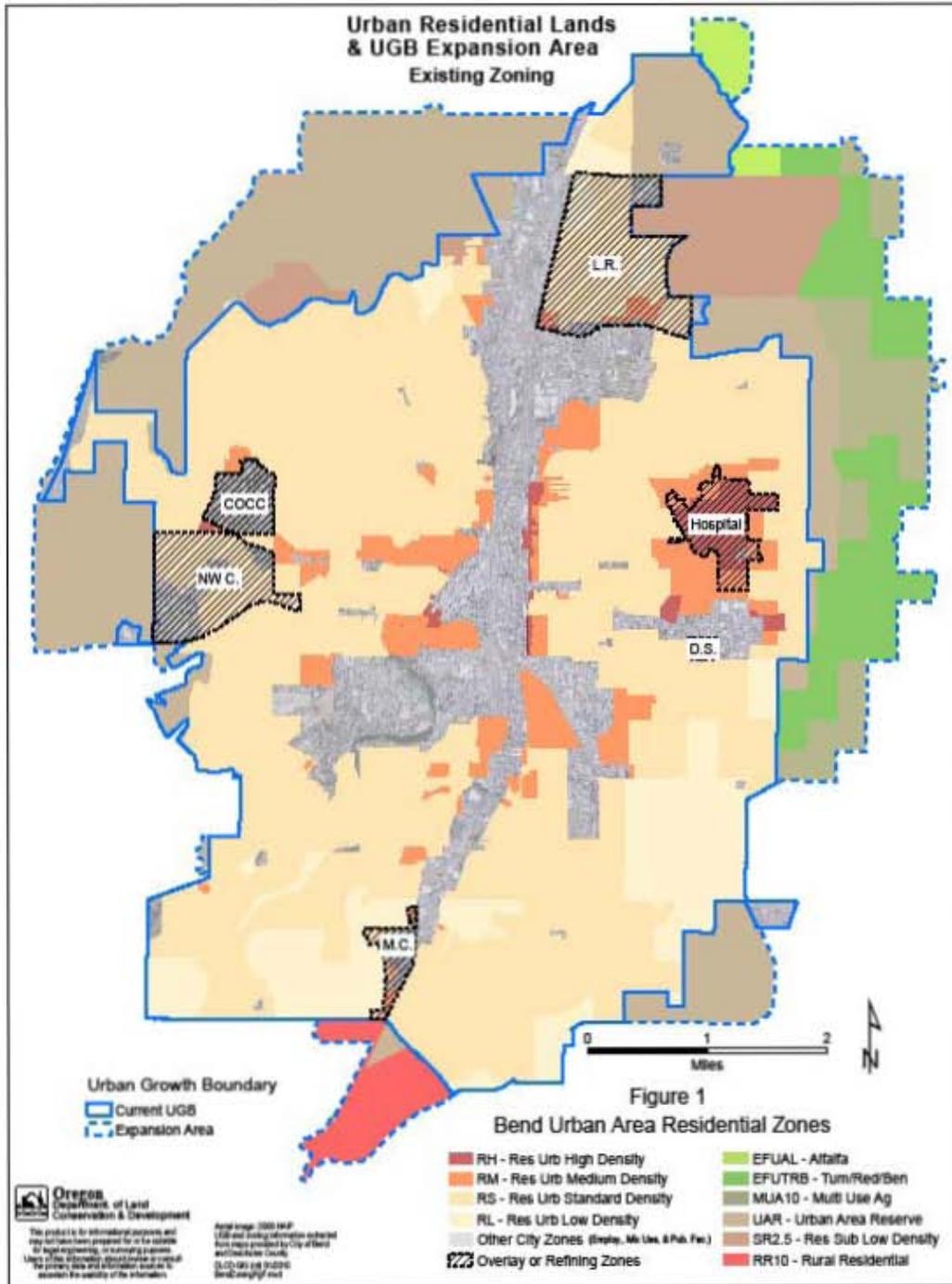
9. Appeals of the Director's Decision were timely filed on or before January 29, 2010 by: the City of Bend (the "City" or "Bend"); the Bend Metropolitan Parks and Recreation District; the Bend-La Pine School District; Swalley Irrigation District (Swalley); Newland Communities (Newland); Shevlin Sand and Gravel Inc. (Shevlin); Rose & Associates, LLC (Rose & Associates); Toby Bayard (Bayard); Central Oregon LandWatch (COLW); Hunnell United Neighborhoods (Hunnell); Terry Anderson (Anderson); and Hilary Garrett (Garrett). Simpson and Spencer did not appeal the Director's Decision holding that their objections were not valid.

10. The Department issued a report on the appeals (Department Report on Appeals) on February 25, 2010.

11. The City; Bend Metro Park & Recreation District; Bend-LaPine School District No. 1; Swalley; Newland Communities; Bayard; COLW filed timely exceptions to the Department's Report, on or before March 8, 2010.

12. The Commission held three public hearings over five days to hear oral argument from the City, objectors and appellants, and to deliberate. The public hearings on March 18 and 19, and May 12, 2010, were held in Bend. The public hearings on April 22 and 23 were held in Lincoln City.

13. The city's UGB expansion area, together with the zoning designations that existed prior to the UGB expansion, are shown in the following figure (taken from the Director's Decision):



II. Procedural Matters

1. Commission Tour

By memorandum dated February 25, 2010, the Department notified appellants and objectors of the commission meeting to consider appeals of Order 001755. The Department also notified appellants and objectors that the Commission requested new evidence or information from the City of Bend pursuant to OAR 660-025-0085, in the form of a tour of the areas affected by the expansion of the Bend UGB. By memorandum dated March 9, 2010, the Department provided supplemental notice to appellants and objectors concerning the tour and tentative meeting schedule and procedures.

On March 17, 2010, prior to the start of the Commission hearings on the appeals of DLCD Order 001775, the Commission toured the area. All appellants and objectors were allowed to participate in the tour. On the tour, the City of Bend distributed three maps: Bend Urban Area Framework Plan Map (R 1235), Suitable/Available Lands in UGB Expansion Study Area by Priority Class (R 155), and Bend Urban Area Roadway System Plan (R 1371), each of which had the tour route and stops indicated.

At the start of the Commission hearing on March 18, 2010, Commissioner Jenkins described what the commissioners observed on the tour, so as to give all parties an opportunity to rebut the information. Other commissioners concurred with Commissioner Jenkins' description. Appellants were given the opportunity to present visual and other materials in response to the tour, and Toby Bayard provided such a presentation to the Commission.

2. Extension of Time

On March 19, 2010, pursuant to ORS 197.633(5)(b), the Commission extended the time for taking action on the appeal, finding that the appeal raised both new and complex issues of fact and law that made it unreasonable to give adequate consideration to the issues within the 90-day limit provided in ORS 197.633(5) and OAR 660-025-0085(2)(b).

3. Official Notice

The Commission took official notice of the 1981 acknowledgment order of the city's Urban Area Reserve as an exception area pursuant to OAR 660-025-0085(5)(e)(B).

4. Oral Argument

Pursuant to OAR 660-025-0085(5)(c), the Commission allowed oral argument. The Commission allowed persons who submitted objections or an appeal to address only those issues raised in their objections or appeal.

III. Scope of Review

The Commission has exclusive jurisdiction to review certain UGB amendments pursuant to ORS 197.626 and OAR 660-025-0040(1)(a). ORS 197.626 provides, in pertinent part, that:

"a city with a population of 2,500 or more within its urban growth boundary that amends the urban growth boundary to include more than 50 acres * * * shall submit the amendment * * * to the Land Conservation and Development Commission in the manner provided for periodic review under ORS 197.628 to 197.650."

In addition, ORS 197.825(2) provides that:

"The jurisdiction of the board [the Land Use Board of Appeals]:

(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;

(b) Is subject to the provisions of ORS 197.850 relating to judicial review by the Court of Appeals;

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

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

Where the Commission reviews an urban growth boundary amendment under ORS 197.626, it does so "in the manner of periodic review." That review is to determine whether the decision(s) amending the urban growth boundary (or urban reserve designation) and any matters arising out of that decision, comply with the applicable statewide planning goals, their implementing rules, applicable state statutes, and applicable local comprehensive plan and land use regulations. OAR 660-025-0175(1); *City of West Linn v. LCDC*, 201 Or. App. 419 (2005) (reviewing LCDC order on review of Metro's UGB decision for compliance with Metro's code).

ORS 197.825 was amended in 2005. According to LUBA:

"It is fair to characterize the 2005 amendments to ORS 197.825(2)(c) as attempting to eliminate some of the confusion created by shared jurisdiction over the same land use

decisions by requiring local government decisions amending a UGB to be submitted to DLCD, after which certain matters may potentially be transferred to LUBA by DLCD.

After the 2005 amendments were enacted, DLCD [*sic*] adopted administrative rules to govern its review of UGB amendments and to govern transfers under ORS 197.825(2)(c)(A) to LUBA. OAR 660-025-0175(1) requires that land use decisions amending a UGB must be submitted to DLCD “for review with the statewide planning goals and related statutes and rules * * *.” OAR 660-025-0250 specifies which matters that are raised in an appeal of a UGB expansion may be transferred to LUBA under the statute.”

Swalley Irrigation Dist. v. City of Bend, __ Or LUBA __ (slip. op., 5/8/2009) (Final Order dismissing LUBA Nos. 2009-012, 2009-013, 2009-031 and 2009-032).

IV. Standard of Review

As described above, the Commission reviews the submittal for compliance with the applicable statutes, goals and administrative rules. OAR 660-025-0040. For periodic review submittals under ORS 197.628 to 197.650, “compliance with the goals” means the submittal “on the whole, conform[s] with the purposes of the goals and any failure to meet individual goal requirements is technical or minor in nature.” ORS 197.747.

In determining compliance with Goal 2, the Commission considers whether the submittal is supported by an adequate factual base. The city’s and county’s decisions on the UGB and related plan and code amendments are legislative decisions. The Goal 2 requirement for an adequate factual base requires that a legislative land use decision be supported by substantial evidence. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 376-378, *aff’d* 130 Or App 406, 882 P2d 1130 (1994), *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c) and *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). Where the evidence in the record is conflicting, if a reasonable person could reach the decision the city made in view of all the evidence in the record, the choice between the conflicting evidence belongs to the city. *Mazeski v. Wasco County*, 28 Or LUBA 178, 184 (1994), *aff’d* 133 Or App 258, 890 P2d 455 (1995).

Because the UGB amendment and related submittals embody both basic findings of fact and inferences drawn from those facts, substantial evidence review involves two related inquiries: “(1) whether the basic fact or facts are supported by substantial evidence, and (2)

whether there is a basis in reason connecting the inference to the facts from which it is derived.” *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271, 639 P2d 90 (1981). Where substantial evidence in the record supports the adopted findings concerning compliance with the goals and the Commission’s administrative rules, the Commission nevertheless must determine whether the findings lead to a correct conclusion under the goals and rules. *Oregonians in Action v. LCDC*, 121 Or App 497, 504, 854 P2d 1010 (1993).

V. Procedural Issues

1. Whether the Department and Commission Have Jurisdiction Over the City’s Submittal

a. Summary of Issue and Objectors/Appellant

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

b. Legal Standard

Under ORS 197.825, LUBA has exclusive jurisdiction to review any land use decision of a local government with specific statutory exceptions.¹ One exception to the exclusive

¹ ORS 197.825(1) provides:

jurisdiction of the board is for certain matters submitted to the Department. ORS 197.825(2) provides in part:

"The jurisdiction of the board:

* * * * *

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

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

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

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

This Commission adopted OAR 660-025-0040² to implement its exclusive jurisdiction under the statute and OAR 660-025-0250³ to provide for transfers of matters to LUBA.

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

² OAR 660-025-0040 provides:

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

(a) If made by a city with a population of 2,500 or more inside its urban growth boundary, amendments to an urban growth boundary to include more than 50 acres;

(b) If made by a metropolitan service district, amendments to an urban growth boundary to include more than 100 acres;

(c) plan and land use regulations that designate urban reserve areas.

(2) The director may transfer one or more matters arising from review of a work task, urban growth boundary amendment or designation or amendment of an urban reserve area to the Land Use Board of Appeals pursuant to ORS 197.825(2)(c)(A) and OAR 660-025-0250.

³ OAR 660-025-0250 provides:

(1) When the department receives an appeal of a director's decision pursuant to OAR 660-025-0150(4), the director may elect to transfer a matter raised in the appeal to the Land Use Board of Appeals (board) under ORS 197.825(2)(c)(A).

c. Summary of Local Actions, Director's Decision and Appeal(s)

The City submitted notice of the city's and county's adoption of four ordinances to the department on April 16, 2009. Those four ordinances were the city's ordinances adopting the amended UGB and amending the city's development code in certain respects (Ordinances Nos. NS-2112 and NS-2113), and the county's ordinances co-adopting the amended UGB and making certain amendments to the county's comprehensive plan map and text for the lands within the UGB expansion area. R. at 1050-1051 (city ordinance NS 2112 - UGB); R. at 1836-1844 (city ordinance NS 2113 – development code); see R. at 1854 and county ordinance 2009-1 (UGB map and DCC and TSP map); see R. at 1860 and county ordinance 2009-2 (zoning map and certain DCC amendments). The City did *not* submit ordinance NS 2111, amending the city's Public Facilities Plan element of its General Plan, to the department on April 16, 2009 (although the City included a copy of this ordinance, which the City adopted immediately before the UGB amendment ordinance, in the record for the submittal of the UGB ordinance (NS 2112), and the City submitted a separate notice of adoption of the Public Facilities Plan on January 9, 2009). On June 12, 2009, following LUBA's decision in *Swalley Irrigation District v. City of Bend*, 59 Or LUBA 52 (2009) and order in *Swalley Irrigation District v. City of Bend*, ___ Or LUBA ___ (LUBA Nos. 2009-010, 2009-011, and 2009-020, May 8, 2009) suspending the appeal of the Public Facilities Plans.⁴ The City separately submitted ordinance NS 2111 to the Department for review under ORS 197.626, and provided notice to the objectors, as required by OAR 660-025-0175(3) and (4) and OAR 660-025-0130 and -0140.

(2) Matters raised in an appeal may be transferred by the director to the board when:

(a) The matter is an urban growth boundary expansion approved by the local government based on a quasi-judicial land use application and does not require an interpretation of first impression of statewide planning Goal 14, ORS 197.296 or 197.298; or

(b)(A) The matter alleges the work task submittal violates a provision of law not directly related to compliance with a statewide planning goal;

(B) The appeal clearly identifies the provision of the task submittal that is alleged to violate a provision of law and clearly identifies the provision of law that is alleged to have been violated; and

(C) The matter is sufficiently well-defined that it can be separated from other allegations in the appeal.

(3) When the director elects to transfer a matter to the board, notice of the decision must be sent to the local jurisdiction, the appellant, objectors, and the board within 60 days of the date the appeal was filed with the department. The notice shall include identification of the matter to be transferred and explanation of the procedures and deadline for appeal of the matter to the board.

(4) The director's decision under this rule is final and may not be appealed.

⁴ LUBA determined that under ORS 197.825(2)(c)(A), it did not have initial jurisdiction to review a decision by a city with a population over 2,500 to amend its urban growth boundary to add more than 50 acres of land where that decision is submitted to the Department of Land Conservation and Development (DLCD) for review under ORS 197.626. LUBA may later acquire jurisdiction over certain matters addressed in the decision if the director of DLCD transfers those matters to LUBA. *Swalley Irrigation District v. City of Bend*, 59 Or LUBA 52 (2009).

The Director denied Swalley's objection, and did not transfer any of the decisions to the Board, and issued his decision remanding all five of the city and county decisions on January 8, 2010.

d. Analysis

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

“ORS 197.825(2)(c)(A) and ORS 197.626, and the implementing rules adopted by [LCDC] * * * make clear that after the City of Bend submitted NS-2112 and NS-2113 to DLCD for review under the statutes governing periodic review, LUBA ceased to have jurisdiction over those submitted decisions *or over matters arising out of those submitted decisions* unless the director of DLCD transfers matters to LUBA pursuant to OAR 661-025-0250(2).” 59 Or LUBA at 58-59.⁵

In this case, the city's findings for its amendments to its public facilities plans state that the amendments are intended to address both lands within the (then) existing UGB and lands proposed for the UGB expansion. R. at 211. The City relied on its amendments to its public facilities plan in justifying some aspects of its UGB decision. Director's Decision, at 15. As a result, the Commission concurs with the Director that Ordinance No. NS-2111 is a "matter arising out of" the city's submitted decisions, including its UGB amendment.

e. Conclusion

The Commission concludes that the Director correctly denied this objection. Consistent with LUBA's decisions and orders regarding jurisdiction over the City and county submittals, unless and until the matters are transferred to LUBA pursuant to OAR 661-025-0250(2), jurisdiction over all three of the city ordinances (and the two county ordinances) lies with the Department and not the Land Use Board of Appeals.

⁵ The Board also dismissed challenges to County Ordinances 2009-01 and 2009-02 submitted to the Department on April 16, 2009. *Swalley Irrigation District v. City of Bend*, 59 Or LUBA 192 (2009).

2. Whether the City Provided Adequate Public Notice of its Amended Public Facilities Plans

Swalley and several other objectors submitted objections relating to the process the City followed for adoption of the amendments to its Public Facilities Plans (Ordinance No. NS-2111). These objections are addressed below, as issues 10.3 and 10.4, under substantive objections.

VI. Substantive Objections and Appeals

1. Whether the City's Findings Are Adequate for Review

a. Summary of Issue and Objectors/Appellants

The Director remanded the city's and county's decisions in a number of instances on the basis that their findings were inadequate. *See, e.g.*, Director's Decision at 21 (no findings); 22 (findings lack explanation of how standard is met); 26 (findings do not explain how the City determined which lands are vacant or redevelopable); 28 (findings do not relate capacity analysis to statutory factors). The City appealed, arguing that detailed findings are not required for a legislative decision (such as this one). City Appeal, at 8-9.

b. Legal Standard

There is no statute, statewide planning goal or administrative rule that generally requires that legislative land use decisions be supported by findings. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA 122, 132 (2008). However, there are instances where the applicable statutes, rules or ordinances require findings to show compliance with applicable criteria. In addition, where a statute, rule or ordinance requires a local government to consider certain things in making a decision, or to base its decision on an analysis, "there must be enough in the way of findings or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered." *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). The Commission's standard of review is further described above, at pages 7-8.

c. Summary of Local Actions, Director's Decision and Appeal(s)

The submittal consists of legislative land use decisions adopted by the City of Bend and Deschutes County. The City points to findings addressing the many applicable standards at R. 1052 *et seq.* City of Bend's Exceptions at 3.

The Department decided that the submittal was deficient and directed that on remand the City must adopt findings that first identify the applicable legal standard, second identify the evidence in the record that is relevant to the identified legal standard, and third explain why that evidence shows that the City has complied with the standard. The City agrees

“that it must adopt findings to show how its legislative action complied with the statewide goals, statutes and administrative rules. The City also agrees that the findings must allow the Department and the Commission to review whether there is substantial evidence in the record to support the findings.” *Id.* (City of Bend’s Exceptions at 3.)

The City seeks clarification regarding the nature and extent of the findings required.

d. Analysis

The relevant periodic review statutes place the Department and the Commission in the role of assuring that local land use legislation complies with the statewide goals, applicable statutes and rules. *Oregonians in Action v. LCDC*, 121 Or App 497, 501, 854 P2d 1010 (1993). Legislative decisions are subject to review for adequate support in the record. *City of West Linn v. LCDC*, 201 Or App 419, 428, 119 P3d 285 (2005). The parties agree that the standard of review, derived from the Goal 2 requirement for an adequate factual base, is “substantial evidence.” *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999). The Commission applies the substantial evidence standard of review to determine whether the local land use legislation complies with the statewide goals, applicable statutes and rules.

With regard to the nature and extent of findings required for the city's legislative decision, the Oregon Supreme Court described the importance of findings in establishing that a land use decision serves established objective and polices:

“Findings are important only insofar as they relate to the objectives and policies to which the planning government is committed by its plan or by state law, goals or guidelines. Consequently findings must make clear what these objectives or polices are as applied in the concrete situation. Thereafter, findings must describe how or why the proposed action will in fact serve these objectives or polices.”

Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 22-23, 569 P2d 1063 (1977).

The Court of Appeals further described the obligation of the legislating local government to articulate its thinking. In rejecting an appellant’s position that the court should review portions of a record identified by the parties and their arguments to determine whether a criterion was met (in the absence of findings), the Court of Appeals explained:

“Ryland Homes argues that ‘the findings taken as a whole adequately explain why Metro determined, balancing all consideration and impacts,’ that expanding the UGB at this location was a better alternative than expanding at other locations. Ryland Homes then points to certain evidence throughout the record and findings under portions of Metro’s decision concerning other Goal 14 factors, as well as other portions of its decision, and contends that we should essentially put the pieces of the puzzle together and conclude that Metro did adequately address the ESEE consequences under factor 5. As discussed above our function on review is to determine if LUBA correctly assessed whether the local government has satisfied all applicable legal requirements in making its decision. Metro has an obligation to consider each of the locational factors and to articulate its thinking regarding the factor and the role that each factor played in its balancing of all of the factors.”

1000 Friends of Oregon v. Metro, 174 Or App 406, 415-416, 26 P3d 151 (2001); *see also*, *1000 Friends v. LCDC* (Woodburn), __ Or App __ (No. 135375, 9/8/10)(requiring that LCDC orders set out the Commission's reasoning in disposing of objections to a UGB decision).

To be clear, parties before the Commission are free to cite material in the record that demonstrates applicable criteria were applied. *Port of St. Helens v. City of Scappoose*, 58 Or LUBA at 132. However, for purpose of Department and Commission review, it is essential that the submitting jurisdiction, in the first instance, explain its decision in written findings that connect the applicable standards with the relevant evidence. Findings should (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. *Mountain Gate Homeowners v. Washington County*, 34 Or LUBA 169, 173 (1998).

Adequate findings serve additional purposes. By demonstrating that the legislating body considered the applicable criteria, the risk that LCDC or the Department will substitute its own judgment in review of the record is diminished. Findings also help assure that subsequent land use decisions applying the city's urban growth boundary expansion decision will be consistent with state standards. *See Oregonians in Action*, 121 Or App at 502 (“Moreover, as LCDC contends in its brief, its ability to require that local legislation contain particular provisions or that it spell out with particularity how it complies with statewide standards can be essential to assuring that, after acknowledgment or periodic review, the local legislation will be interpreted and applied by the local government in a manner that is consistent with the state standards.”)

e. Conclusion

The Commission concludes that the Director correctly determined that the submittals under ORS 197.626 must be supported by substantial evidence and present adequate findings.

The city's findings must:

- articulate the applicable standard that the City is showing it met;
- explain why the city's decision complies with the standard; and
- identify substantial evidence in the record to support its explanation.

The Commission also concludes that in reviewing submittals under ORS 197.626, it will uphold findings that fail to identify the evidence in the record that support them *if* the City on appeal identifies that evidence, *and* the evidence clearly supports the finding. This is *not* intended to (and cannot) alter the Commission's standard of review. Instead it provides a substitute for inadequate evidentiary findings under Goal 2 – analogous to the express authority that the Land Use Board of Appeals has under ORS 197.835(11(b)).

2. Residential Land Needs

2.1. Whether the Director Applied the Correct Version of the Commission's Goal 10 and Goal 14 Rules to the City's Decision.

a. Summary of Issue and Objectors/Appellants

No objection was filed concerning this issue. The issue arises from the way in which the Director analyzed one aspect of the city's decision, and the city's subsequent appeal of that aspect of the director's decision.

b. Legal Standard

OAR 660-024 contains specific provisions relating to when particular versions of that rule is applicable to particular decisions.

c. Local Actions, Director's Decision, and Appeal

The City applied the version of OAR 660-024 in effect on April 5, 2007 in making its UGB decision. The Director reviewed the city's decision using a subsequent version of OAR 660-024 (the one in effect at the time of the city's decision). The director's decision determined that the City of Bend failed to comply with the current versions of the commission's rules implementing Goal 10 and Goal 14. The City appealed, arguing that its decision was subject to the earlier version of the Goal 14 implementing rules (OAR 660-024).

d. Analysis

The city's UGB expansion and related decisions are not the approval or denial of a permit or a zone change. As a result, the "goal post" statute, ORS 227.178, does not apply. The city's decision is subject to the version of the commission's rules in effect at the time of its decision, *unless* the rules specifically provide otherwise.

The Commission last amended its Goal 10 rules, OAR chapter 660, division 8, on April 18, 2008. Division 8 does not include a special applicability provision, and the current version applies.

The Commission last amended its Goal 14 rules, OAR chapter 660, division 24, on April 8, 2009. OAR 660-024-0000 contains an applicability provision that provides that the applicable version of the rule is tied to the date a city initiates its UGB amendment. Under the rule, the date the city initiated its UGB amendment is the date it sent 45-day notice of the proposed amendment to the Department. The City initiated the UGB amendment after April 5, 2007.

Following the director's decision, the Department and the City agreed that the version of

OAR 660-024 in effect on April 5, 2007 applies to the city's decision. The Commission concurs.

e. Conclusion

The Commission concludes that the April 2007 version of the commission's Goal 14 rules apply to the city's decision, and affirms the city's appeal. The current version of the commission's Goal 10 rules apply to the city's decision. On remand, the City may need to apply the current version of the Goal 14 rules, depending on the application of OAR 660-024-0000 to its actions on remand.

2.2. Whether the City's Buildable Lands Inventory (BLI) is Adequate for Review. Whether the City Correctly Determined what Lands are "Vacant" and What Lands are "Redevelopable. Whether the City's Estimate of the Development Capacity of those Lands Complied with the Needed Housing Statutes and the Commission's Rules.

a. Summary of Issue and Objectors/Appellants

Swalley objected to the city's buildable lands inventory (BLI), arguing that the City failed to distinguish between vacant and redevelopable lands as required by state law. Swalley Objection, at 63-64. The Director agreed, and determined that the city's BLI was not adequate for review due to an inadequate map of vacant and redevelopable lands, due to the city's use of criteria for categorizing lands as vacant and redevelopable that were inconsistent with the Commission's rules and state statutes, due to inadequate findings concerning what lands were categorized as vacant and redevelopable and why (including an inadequate factual basis for the determinations), and due to inadequate findings concerning the projected capacity of vacant and redevelopable lands over the planning period. Newland also objected to the city's decision, arguing that the city's estimates of residential development capacity on buildable lands *underestimated* the amount of land needed to be added to the UGB by not properly accounting for land needs for schools and parks, by not reflecting infrastructure constraints, and by not considering the location of dwellings on lots. Newland Objection, at 25-26. The Director denied Newland's objection. Director's Decision, at 42.

The City and Newland appealed the director's decision on this subissue. City Appeal, at 18-20.

b. Legal Standard

The statutory requirement for a map of buildable lands is found in ORS 197.296. ORS 197.296(4)(c) provides that:

"Except for land that may be used for residential infill or redevelopment, a local

government shall create a map or document that may be used to verify and identify specific lots or parcels that have been determined to be buildable lands."

In other words, the BLI map must show specific lots and parcels that have been determined to be "buildable." As detailed below, those lands include: (a) vacant lands planned or zoned for residential use; (b) partially vacant lands planned or zoned for residential use; and (c) lands that may be used for a mix of residential and employment uses under the existing planning or zoning. However, lands that may be used for residential infill and redevelopment do not have to be shown on the map.

The statutory requirement for a buildable lands inventory (the determination of the *amount* of buildable land within the existing UGB), along with some direction concerning what lands are to be inventoried as "buildable," is contained in ORS 197.296(3), which provides in pertinent part that:

"* * * a local government shall:

(a) Inventory the supply of buildable lands within the urban growth boundary and determine the housing capacity of the buildable lands;

* * *

(4)(a) For the purpose of the inventory described in subsection (3)(a) of this section, "buildable lands" includes:

- (A) Vacant lands planned or zoned for residential use;
- (B) Partially vacant lands planned or zoned for residential use;
- (C) Lands that may be used for a mix of residential and employment uses under the existing planning or zoning; and
- (D) Lands that may be used for residential infill or redevelopment.

The Commission's rules further define what lands are "buildable" for purposes of the buildable lands inventory. OAR 660-008-0005(2) and (6) state that:

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

- (a) Is severely constrained by natural hazards as determined under Statewide Planning Goal 7;
- (b) Is subject to natural resource protection measures determined under statewide Planning Goals 5, 15, 16, 17, or 18;
- (c) Has slopes of 25 percent or greater;
- (d) Is within the 100-year flood plain; or

(e) Cannot be provided with public facilities.

* * *

(6) "Redevelopable Land" means land zoned for residential use on which development has already occurred but on which, due to present or expected market forces, there exists the strong likelihood that existing development will be converted to more intensive residential uses during the planning period.

The Commission's division 24 rules also clarify certain aspects of how the BLI must be carried out. OAR 660-024-0050 (2007 version) provides that:

"(1) When evaluating or amending a UGB, a local government must inventory land inside the UGB to determine whether there is adequate development capacity to accommodate 20-year needs determined in OAR 660-024-0040. *For residential land, the buildable land inventory must include vacant and redevelopable land, and be conducted in accordance with OAR 660-007-0045 or 660-008-0010, whichever is applicable, and ORS 197.296 for local governments subject to that statute.* * * *

(2) As safe harbors, a local government, except a city with a population over 25,000 or a metropolitan service district described in ORS 197.015(14), may use the following assumptions in inventorying buildable lands to accommodate housing needs:

(a) The infill potential of developed residential lots or parcels of one-half acre or more may be determined by subtracting one-quarter acre (10,890 square feet) for the existing dwelling and assuming that the remainder is buildable land;

(b) Existing lots of less than one-half acre that are currently occupied by a residence may be assumed to be fully developed.

****." OAR 660-024-0050 (emphasis added).

Finally, OAR 660-008-0010 requires that: " * * * the local buildable lands inventory must document the amount of buildable land in each residential plan designation."

Together, the statutes and the Commission's rules make it clear that for purposes of the BLI, vacant land is distinguished from land that is already developed. Vacant lands are further broken down into two subcategories: completely vacant, and partially vacant. ORS 197.296(3). Both types of vacant land, if they are planned *or* zoned for residential use, must be included in the BLI unless one or more of the screens listed in OAR 660-008-0005(2) is present.

Like "vacant" lands, "developed" lands also are further broken down into subcategories: lands with infill potential, lands that are redevelopable, and lands that are developed and that do not have a strong likelihood of redevelopment during the planning period. The context provided by OAR 660-024-0050(2) (2007) shows that developed lands with infill potential are lots or parcels that have one or more existing dwellings on them, but where there is enough land

remaining that one or more additional dwellings could be developed. Redevelopable lands are lots or parcels where there is a strong likelihood that existing residential development is likely to be converted to a more intensive form (more units) during the planning period. OAR 660-008-005(6). For example, a lot with an existing dwelling that is projected to be converted into a duplex would fall into the redevelopment subcategory.

These categories and subcategories matter, because for "redevelopable" lands (unlike vacant and partially vacant lands) the local government must show that there is a strong likelihood of more intensive residential development during the planning period due to present or expected market forces in order to include additional future capacity from this element in determining the residential capacity of the existing UGB over the planning period.. OAR 660-008-0005(6). That is not the case for vacant and partially vacant lands.

c. Local Actions, Director's Decision, and Appeal

The City adopted a map of buildable lands and included that map in the record. However, the map transmitted to the Department by the City as part of the local record was not at a scale sufficient to determine what lots and parcels had been inventoried as buildable. R. at Supplement 1257.

The city's findings state that it assigned each tax lot within the four primary residential plan designations within the Bend UGB to one of the several categories of development status, including vacant acres (platted lots), vacant acres with minimal improvements, vacant acres with physical constraints, and redevelopable acres. R. at 1071. The city's findings also summarize the development capacity it projects over the planning period by several subcategories of vacant lands and redevelopable lands. R. at 1071 (Table III-4). However, these subcategories differ both from the types described under statute and Commission rule, and from the narrative summary in the city's findings.

The Director determined that the BLI map the City provided to the department was not adequate to comply with ORS 197.296, because it did not show specific lots and parcels that have been determined to be "buildable," and more specifically lots and parcels that are: (a) vacant lands planned or zoned for residential use; (b) partially vacant lands planned or zoned for residential use; and (c) lands that may be used for a mix of residential and employment uses under the existing planning or zoning. Director's Decision, at 26.

The Director also determined that the city's BLI was inconsistent with the categories

established by state statute and commission rule, and that the city's findings failed to explain what criteria the City used to determine that specific lots and parcels fell under the particular subcategories of buildable lands. Director's Decision, at 25-26.

The City and Newland appealed the Director's Decision on this subissue. In addition to disagreeing with the Director that state statute and commission rules require the City to document what lands are included in its BLI by categories other than those used by the City, the City and Newland also argued that state law allows a BLI to be organized by comprehensive plan designation (rather than zoning designations).

On appeal, the City provided a map at a sufficient level of detail (by tax lot) to show what lands it inventoried as buildable (copies of this map were provided to the other parties and to the commission as Exhibit 1 to the department's Report). The City also clarified in its appeal that its 2005 BLI was updated with data from 2005 to 2007. City Appeal, at 18. The data were not included in the record submitted to the department, however. City Appeal, at 19-20.

d. Analysis

The mapping the City provided (on appeal) of buildable lands is sufficient to comply with ORS 197.296(4)(c), because it shows what lands the City inventoried as buildable on a tax lot basis (generally, while not all tax lots are necessarily lots or parcels, all lots or parcels typically have a separate tax lot). In addition, the city's BLI is properly based on plan districts rather than zoning districts, as permitted by OAR 660-008-0010.⁶

The city's findings, however, do not adequately explain its determination of what lands are "vacant" (including lands that are "partially vacant") and what lands are "redevelopable" as those terms are used in ORS 197.296 and in OAR 660 divisions 8 and 24. The City inventoried three types of "vacant" land: vacant acres (with platted lots); vacant acres with minimal improvements, and vacant acres with physical constraints. R. at 1071. However, those categories do not correspond to the categories used in Table III-4 of the city's findings, and it is not clear how the City considered the three types of vacant lands.

For example, it is not clear whether vacant lands with "minimal improvements" were treated as "vacant" lands or as "redevelopable" lands. This matters because, as described above,

⁶ However, ORS 197.296(4)(a), requires that lands be included in the inventory whether they are planned *or* zoned for residential use. In other words, although the BLI may categorize buildable lands by plan designation, it must include all lands that are planned *or* zoned for residential use. If land is zoned for residential use, but in a non-residential plan designation, it still must be included in the BLI.

under the commission's rules “redevelopable” lands are considered “buildable” only if there is a strong likelihood that they will be converted to a more intensive residential use during the planning period, while “vacant” lands are not subject to this additional test (and are generally considered “suitable and available”). It is not clear why the City distinguished between different types of vacant lands.

Table 5-4 of the city’s Housing Element, which the City identifies as the summary of its final BLI (R. at 1288), uses the terms: “vacant acres,” “vacant acres - pending land use,” and “vacant acres - platted lots.” The city’s findings do not describe how these types are defined or how they relate to the statutory and rule definitions.⁷

There also are several problems with the city’s approach to physical constraints. OAR 660-008-0005 provides that:

- "(2) Land is generally considered 'suitable and available' [for inclusion in the BLI] unless it:
 - (a) Is severely constrained by natural hazards as determined under Statewide Planning Goal 7;
 - (b) Is subject to natural resource protection measures determined under statewide Planning Goals 5, 15, 16, 17, or 18;
 - (c) Has slopes of 25 percent or greater;
 - (d) Is within the 100-year flood plain; or
 - (e) Cannot be provided with public facilities.

The City excluded lands from its BLI as “constrained” if the lands had physical constraints over 50 percent or more of the lot. R. at 2042; Director's Decision at 26. The commission’s rule does not authorize a local government to exclude vacant lands from a BLI on the basis that more than half of a lot or parcel is constrained.⁸ While that approach *might* be justified for small lots, with larger lots it would potentially exclude a significant amount of land that is in fact buildable over the planning period.

The City also excluded lands within the city's “areas of special interest.” These are lands protected by the City for natural resource values, but which the City has not inventoried or

⁷ The city's findings under OAR 660-008-0005 state that: "The city has relied on these definitions to develop the foregoing findings, and the subsequent findings, to demonstrate compliance with Goal 10." However, the findings do not explain how the categories and subcategories the city uses related to the provisions of OAR 660-008-0005 or ORS 197.296. R. at 1097.

⁸ OAR 660-024-0050 (2007) does contain a safe harbor authorizing local governments with a population within the UGB of less than 25,000 to assume that one-quarter acre of a lot or parcel over half an acre with an existing dwelling is developed for purposes of calculating the infill potential of the lot or parcel. The City of Bend is not authorized to use this safe harbor, however, as its population is greater than 25,000.

protected as containing significant natural resources under statewide land use planning Goal 5. The commission's rule authorizes a city to exclude lands that are protected under Goal 5, but not lands that the city is protecting under its own local code provisions. OAR 660-008-0005(2)(b).

Additional findings also are necessary to clarify how the City considered “redevelopable” lands. Despite some argument to the contrary,⁹ there is not any disagreement about how these lands are defined. Lands that are fully developed are “redevelopable” and included in an inventory as “buildable” only if there is a strong likelihood that the existing development will be converted to more intensive residential uses during the planning period. OAR 660-008-0005(6). The City excluded parcels that contain less than 0.5 acres from its inventory of “redevelopable” lands if they have a land value exceeding improvement value. While this *may* be a reasonable application of OAR 660-008-0005(6), the city’s findings do not identify what the factual basis for this assumption is. For instance, the City does not identify whether lands with these characteristics have seen little or no redevelopment since the city’s last periodic review.

The City also excluded some lands from its inventory on the basis of covenants, conditions, and restrictions (CC&Rs) imposing restrictions on future development. However, the City's findings do not explain why the CC&Rs make redevelopment less than highly likely, or why they preclude future development of vacant lands covered by the CC&Rs.

The city’s summary of its BLI in Table 5-4 of its Housing Element, R. at 1288, shows that it counted about five percent of its lands in its residential plan districts as being “redevelopable” and another five percent were counted as "vacant." *Id.* On remand, the City must analyze the development capacity of the vacant and redevelopment lands in light of the actual trends in redevelopment of developed properties and infill of vacant properties. Those trends include the fact that the city’s 2007 Residential Lands Study reported that 12,800 building permits were issued for lands within the prior UGB between 1998 and 2005. R. at 1807. While the Commission understands that this development may have utilized much of the vacant and redevelopable land within the prior UGB, to the extent the City projects that it will deviate from those past trends significantly in the future, the City needs to explain why in its findings. It also appears that some of the redevelopment and infill activity during the 1998-2005 period occurred as a result of significant annexations and subsequent plan and zone changes that provided an increase in the residential capacity of the prior UGB of between 4,259 and 5,950 units. R. at

⁹ City Appeal at 20-22, Newland Appeal at 3-7.

1827. It is unclear, however, whether this is the case and, if so, whether this trend is expected to continue, or whether the potential for additional up-zoning within the prior UGB is limited.

The city's findings state that:

"* * * the city is assuming that development in the RL, RS, and RM designations will meet minimum densities for vacant lands; development in the RH designation will occur at lower than minimum densities because of the parcelized pattern of RH lots in the current UGB. The density of redevelopment will be lower than minimum as well because of the parcelized pattern of redevelopable lots within the current UGB." R. at 1071.¹⁰

The City also assumed that already platted lots would not further divide. R. at 1071. The city's minimum densities are: RL – 1.1 dwellings per gross acre; RS – 2.2 dwellings per gross acre, RM 6.0 dwellings per gross acre; and RH – 22 dwellings per gross acre. R. at 1287. Most vacant and redevelopable land in the prior UGB was in the RS plan district (2,410 acres out of 2,909 total). R. at 1071 (Table III-3). In other words, the City is projecting that much infill and redevelopment will occur at relatively low densities – an average of about 3 units per acre. Without additional explanation, the Commission finds that this assumption is not justified, either in terms of what has happened in the City in the past, or in terms of what is likely to occur within the UGB in the future.

Without a BLI and findings that follow state statutes and the Commission's definitions of "vacant" and "redevelopable," and that explain the city's projections and policy choices, the commission is left with the summary BLI table in Chapter 5 of the comprehensive plan, the city's findings (which contain no explanation of how the City determined whether lands were vacant or redevelopable), and the BLI map. The commission finds that there is not an adequate explanation in the city's findings, nor an adequate factual basis in the record to determine how the City compiled its buildable lands inventory. Without that key baseline, the Commission is not able to evaluate the city's projections for the residential capacity of its buildable lands over

¹⁰ In its appeal, Newland notes that the City calculated capacity based on plan districts rather than current zoning, which (according to Newland) resulted in the city's determination of capacity being "aggressive." Newland Appeal, at 4-5. However, it is not clear from the city's findings that when it used minimum densities for each plan district, exactly which minimum densities it used. See, e.g., Table 5-3A of the city's Housing Element. R. at 1287 (reporting density ranges by plan district). For the plan district containing the most lands (RS), the City found there are 2,410 acres of vacant or redevelopable lands, and that those lands have a capacity for 7,458 potential units (R. at 1071, Table III-3 and III-4) – an average gross density of about three units to the acre. That figure is very close to the average actual density of single-family housing city-wide at present, R. at 1289. The Commission also notes that the city's findings concerning the capacity of buildable lands for additional residential units (10,059 units plus 1,100 units through measures, R. at 1071) do not match what the City adopted in its Housing Element (10,789 units plus 1,100 units through measures, R. at 1303).

the planning period. This latter issue is addressed further in connection with the requirement in Goal 14 to "reasonably accommodate" future land needs within the existing UGB prior to expanding onto new lands, beginning at page 50, below.

e. Conclusion

The Commission denies the city's and Newland's appeals on this subissue, upholds the Director's Decision, including the director's disposition of objections (for the reasons set forth in the Director's Decision) and remands the city's decision with instructions for it to develop a record and adopt a buildable lands inventory supported by findings that are consistent with state law. The city's findings must explain what criteria it uses (based on ORS 197.296, OAR 660-024 and 660-008) to determine whether particular lands are vacant or redevelopable, examine the amount and type of development that has occurred on the vacant and redevelopable lands since its last periodic review, and project the capacity of the city's buildable lands (prior to additional measures being implemented) based on that analysis (and as further detailed in connection with Goal 14, below). If the amount of redevelopment and infill within the city's UGB is projected to differ significantly from past trends, the City must explain why, and provide an adequate factual and policy basis to support that change.

The city's buildable lands inventory may not exclude lots and parcels smaller than 0.5 acres with no improvements without specific findings consistent with OAR 660-008-0005. Similarly, the City may not exclude lots and parcels subject to CC&Rs unless it adopts specific findings, supported by an adequate factual base, that show why the lands are not available for development or redevelopment during the planning period. In addition, the City has agreed to reexamine lands it identified as "constrained" to determine whether the lands are buildable under OAR 660-008-0005.

Finally, the Commission denies the objection of Newland for the reasons set forth in the Director's Decision, which are incorporated herein by this reference. Director's Decision, at 42-43.

2.3. Whether the City's Housing Needs Analysis and Comprehensive Plan Identify Needed Housing as Required by Goal 10 and the Needed Housing Statutes. Whether the City is Required to Analyze Housing Need by Tenure, Given that it Does Not Regulate Tenure (OAR 660-008-0040). Whether ORS 197.296 Requires an Analysis of Housing Needs for Owner-occupied and Rental Housing?

a. Summary of Issue and Objectors/Appellants

Newland objected to the City’s housing needs analysis, arguing that it must be based only on the factors of ORS 197.296(5), and that the City’s use of its “Housing Needs Model” in developing its projections is “outside the scope” of that statute. Newland Objection, at 27-29. DSL objected to the City’s housing needs analysis, arguing that it did not comply with ORS 197.296(3)(b) or 197.303. DSL Objection, at 1-2. DSL objected that the City was required to analyze housing need by tenure. *Id.* DSL also objected that the City had failed to show that it planned for needed housing in locations appropriate for needed housing types, or zoned in density ranges likely to be achieved by the market, as required by ORS 197.296(9). *Id.*¹¹ Swalley also objected to the City’s housing needs analysis. Swalley Objection, at 65-68.

The Director found that the City’s housing needs analysis failed to comply with Goal 10 and the needed housing statutes (Director’s Decision at 32-37), and the City and Newland appealed. City Appeal, at 22-23. Newland Appeal, at 9.

b. Legal Standard

ORS 197.296(2)-(3) and (5) state that:

"(2) At periodic review pursuant to ORS 197.628 to 197.650 or at any other legislative review of the comprehensive plan or regional plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, a local government shall demonstrate that its comprehensive plan or regional plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years. The 20-year period shall commence on the date initially scheduled for completion of the periodic or legislative review.

(3) In performing the duties under subsection (2) of this section, a local government shall:

(a) Inventory the supply of buildable lands within the urban growth boundary and determine the housing capacity of the buildable lands; and

(b) Conduct an analysis of housing need by type and density range, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the number of units and amount of land needed for each needed housing type for the next 20 years. (5)(a) Except as provided in paragraphs (b) and (c) of this subsection, the determination of housing capacity and need pursuant to subsection (3) of this section must be based on data relating to land within the urban growth boundary that has been collected since the last periodic review or five years, whichever is greater. The data shall include:

(A) The number, density and average mix of housing types of urban residential development that have actually occurred;

(B) Trends in density and average mix of housing types of urban residential development;

¹¹ This specific objection is addressed separately, as part of the next issue area.

- (C) Demographic and population trends;
- (D) Economic trends and cycles; and
- (E) The number, density and average mix of housing types that have occurred on the buildable lands described in subsection (4)(a) of this section.

(b) A local government shall make the determination described in paragraph (a) of this subsection using a shorter time period than the time period described in paragraph (a) of this subsection if the local government finds that the shorter time period will provide more accurate and reliable data related to housing capacity and need. The shorter time period may not be less than three years.

(c) A local government shall use data from a wider geographic area or use a time period for economic cycles and trends longer than the time period described in paragraph (a) of this subsection if the analysis of a wider geographic area or the use of a longer time period will provide more accurate, complete and reliable data relating to trends affecting housing need than an analysis performed pursuant to paragraph (a) of this subsection. The local government must clearly describe the geographic area, time frame and source of data used in a determination performed under this paragraph.

(5)(a) Except as provided in paragraphs (b) and (c) of this subsection, the determination of housing capacity and need pursuant to subsection (3) of this section must be based on data relating to land within the urban growth boundary that has been collected since the last periodic review or five years, whichever is greater. The data shall include:

(A) The number, density and average mix of housing types of urban residential development that have actually occurred;

(B) Trends in density and average mix of housing types of urban residential development;

(C) Demographic and population trends;

(D) Economic trends and cycles; and

(E) The number, density and average mix of housing types that have occurred on the buildable lands described in subsection (4)(a) of this section.

(b) A local government shall make the determination described in paragraph (a) of this subsection using a shorter time period than the time period described in paragraph (a) of this subsection if the local government finds that the shorter time period will provide more accurate and reliable data related to housing capacity and need. The shorter time period may not be less than three years.

(c) A local government shall use data from a wider geographic area or use a time period for economic cycles and trends longer than the time period described in paragraph (a) of this subsection if the analysis of a wider geographic area or the use of a longer time period will provide more accurate, complete and reliable data relating to trends affecting housing need than an analysis performed pursuant to paragraph (a) of this subsection. The local government must clearly describe the geographic area, time frame and source of data used in a determination performed under this paragraph."

ORS 197.303 provides, in pertinent part, that:

"(1) As used in ORS 197.307, until the beginning of the first periodic review of a local government's acknowledged comprehensive plan, "needed housing" means housing

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

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

Goal 10 provides that:

"Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

* * *

"Needed Housing Units – means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, "needed housing units" also includes government-assisted housing. For cities having populations larger than 2,500 people and counties having populations larger than 15,000 people, 'needed housing units' also includes (but is not limited to) attached and detached single-family housing, multiple-family housing, and manufactured homes, whether occupied by owners or renters."¹²

OAR 660-008-0040 provides that:

Any local government that restricts the construction of either rental or owner occupied housing on or after its first periodic review shall include a determination of housing need according to tenure as part of the local housing needs projection.

Finally, OAR 660-024-0040(7)(2007) provides that:

¹² Guideline 1 for Goal 10 provides that:

1. In addition to inventories of buildable lands, housing elements of a comprehensive plan should, at a minimum, include: (1) a comparison of the distribution of the existing population by income with the distribution of available housing units by cost; (2) a determination of vacancy rates, both overall and at varying rent ranges and cost levels; (3) a determination of expected housing demand at varying rent ranges and cost levels; (4) allowance for a variety of densities and types of residences in each community; and (5) an inventory of sound housing in urban areas including units capable of being rehabilitated.

The following safe harbors may be applied in determining housing needs under this division:

(a) Local government may estimate persons per household for the 20-year planning period using the persons per household for the urban area indicated in the most current data for the urban area published by the U.S. Census Bureau.

(b) If a local government does not regulate government-assisted housing differently than other housing types, it is not required to estimate the need for government-assisted housing as a separate housing type.

(c) If a local government allows manufactured homes on individual lots as a permitted use in all residential zones that allow 10 or fewer dwelling units per net buildable acre, it is not necessary to provide an estimate of the need for manufactured dwellings on individual lots.

(d) If a local government allows manufactured dwelling parks required by ORS 197.475 to 197.490 in all areas planned and zoned for a residential density of six to 12 units per acre, a separate estimate of the need for manufactured dwelling parks is not required.

c. Summary of Local Actions, Director's Decision, and Appeal(s)

The City of Bend completed three housing needs analyses: an analysis based on past trends since its last periodic review (a "HB 2709 or Trend Forecast"), an analysis of expected future housing needs (a "Housing Needs Forecast"), and a "Transition Forecast" that projects that the City will move from a 77/23 single-family/multi-family mix (during the 1998 to 2007 period) to a 55/45 mix over a period longer than 20 years (and to a 65/35 mix over the 20-year planning period). R. at 1078. Under all three forecasts, the City analyzed its projected housing need for single family housing in one category (combining single family attached and detached housing). In some of the forecasts, the City also analyzed the need for manufactured homes, plexes (2, 3 & 4 units); and multi-family (5 or more unit buildings). R. at 1075.

d. Analysis

The City has carried out much of the analysis required by the commission's rules and the needed housing statutes. In particular, the City has provided an analysis of needed housing based on actual development trends since its last periodic review. That analysis is provided in the most detail in the City of Bend Residential Lands Study (2007). R. at 1798-1835. Some analysis based on actual development trends (the so-called HB 2709 analysis) is also included in the 2005 City of Bend Housing Needs Analysis, R. at 1742-1797, and is summarized in the city's findings. R. at 1075.

With regard to whether the City must separately analyze housing need for rental and owner-occupied housing types, the Commission agrees with the City that its rules do not require

such an analysis in this case. OAR 660-008-0040 provides that such an analysis is required *if* a local government "restricts the construction of either rental or owner occupied housing on or after its first periodic review." The City argued in its appeal that it does not regulate housing according to tenure and, as a result, is not required to analyze housing types by tenure. The Commission agrees, and upholds the city's appeal on this issue based on the wording of OAR 660-008-0040.

However, the needed housing statutes do require the City to identify housing need by *at least* three categories of housing types: single-family detached, single-family attached, and multi-family (a city *may* identify additional types). In turn, the commission's rules define these three basic types of needed housing as follows:

- "Attached Single Family Housing" means common-wall dwellings or roughhouses where each dwelling unit occupies a separate lot. OAR 660-008-0005(1).
- "Detached Single Family Housing" means a housing unit that is free standing and separate from other housing units. OAR 660-008-0005(3).
- "Multiple Family Housing" means attached housing where each dwelling unit is not located on a separate lot. OAR 660-008-0005(5).

While the city's 2007 Residential Lands Study contains much, if not all, of the required *data* concerning these housing types, the city's analysis and findings (including chapter 5 of its comprehensive plan) use different categories of housing types and collapse multiple categories. For instance, the city's findings analyze the amounts of new housing built in the City since its last periodic review by single family dwellings (combining both attached and detached single-family housing into one category), and "plexes" and "multi-family" (more than 5 units) (separating out what the commission's rules define as multi-family into two categories). R. at 1074. While the City is free to *separate* the three basic housing types required to be analyzed by statute into subcategories, it may not *combine* categories as this effectively makes it impossible to do the analysis required by statute.

Goal 10, the Goal 10 implementing rule, and the needed housing statutes also require that the City analyze needed housing types at particular price ranges and rent levels commensurate with the financial capabilities of present and future residents of area residents. The city's record contains much information on projected population and income levels, but neither its adopted plan policies nor its findings clearly tie together how the types and amounts of housing that it is planning for will be affordable for future residents of the area. This issue is addressed in more

detail in the next subsection.

Newland argues that the City *only* may consider past housing trends in its housing needs analysis. Newland Objection at 27-29. The Commission does not agree. ORS 197.296(3)(b) directs local governments to determine the amount of land needed for each housing type for the next 20 years in accordance with ORS 197.303 and the statewide planning goals and rules relating to housing. OAR 660-024-0040(4) provides that:

"[t]he determination of 20-year residential land needs for an urban area must be consistent with the adopted 20-year coordinated population forecast for the urban area, and with the requirements for determining housing needs in Goal 10, OAR 660, division 7 or 8, and applicable provisions of ORS 197.295 to 197.314 and 197.475 to 197.490.

OAR 660-008-0005(4) defines the "Housing Needs Projection" required by Goal 10 and ORS 197.296 as:

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

(a) Commensurate with the financial capabilities of present *and future area residents* of all income levels *during the planning period*.

While past development trends are clearly one required part of a local government's housing needs projection, ORS 197.296(5)(a), under Goals 10 and 14 the City also must consider the *future* housing needs of area residents during the (twenty-year) planning period. The purpose of the analysis of both past trends and future needs is that -- if there is a difference -- the local government must show how it is planning to alter those past trends in order to meet the future needs. Specifically, if the *future* needs require a different density or mix of housing types than has occurred in the past, then ORS 197.296(7) requires the local government to show how new measures demonstrably increase the likelihood that the needed density and/or mix will be achieved.

e. Conclusion

Based on the foregoing reasons, the Commission upholds the appeals of the City and Newland with regard to whether the City was required to analyze housing need by tenure. Based on the foregoing reasons, the Commission denies the appeals of the City and Newland with regard to the remaining subissues under this section, affirms the Director's Decision with regard

to those other subissues (including the Director's disposition of objections for the reasons set forth in the Director's Decision), and remands the city's decision for it to revise its findings and chapter 5 of its comprehensive plan consistent with the preceding analysis.

2.4. *Whether the City Has Planned for an Adequate Land Supply for Needed Housing Types as Required by Goal 10 and the Needed Housing Statutes.*

a. *Summary of Issue Objectors/Appellants*

DSL and Bayard objected that the City had failed to plan for an adequate amount of buildable lands to meet its identified housing needs. DSL Objection, at 1-2. Bayard Objection, at 63. The Director found that the City failed to plan for an adequate amount of land in appropriate plan designations to meet its future housing needs as shown in its housing needs projection. The City of Bend appealed the Director's Decision on this issue. The City asserted that it has already set ambitious targets for multi-family and higher density housing, by planning for housing types that have a higher density than housing that has been built in the City since its last periodic review. City Appeal, at 23-26.

b. *Legal Standard*

ORS 197.307 and Goal 10 require that when a need has been shown for housing at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts with sufficient buildable lands to satisfy that need. ORS 197.307(3)(a).¹³

c. *Local Action, Director's Decision and Appeals*

As described above, the City carried out three different analyses of housing needs, adopting the third "Transition Forecast." R. at 1077-1081. The Transition Forecast essentially acknowledges that the City will not meet its projected housing needs under Goal 10 and ORS 197.307(3)(a). The Director remanded this aspect of the city's decision because he found it did

¹³ ORS 197.307(3)(a) provides that:

"(3)(a) When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing, including housing for farmworkers, shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need."

Goal 10 provides that:

"Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density."

not comply with ORS 197.296, 197.307 or Goal 10, and because he found that the city's findings were inadequate. The City appealed this aspect of the director's decision. City Appeal at 23-26.

d. Analysis

The department found that the city failed to comply with the requirement in ORS 197.307 and Goal 10 to permit needed housing in one or more zoning districts with sufficient buildable lands to satisfy housing needs at particular price ranges and rent levels. The city's findings, studies and the Housing Element of its General Plan show a significant need for housing for low and moderate income households, along with a need for workforce housing. R. at 1072-1079 (findings); R. at 1305-13 (Housing Element of the city's General Plan). The city's Transition Forecast of housing needs is intermediary between its analysis of past trends (HB 2709 forecast) and its analysis of needed housing based on expected future population and incomes (HCS Housing Needs Model). R. at 1075-1078 (describing the different models). The Transition Forecast is based on a planned housing mix of 65 percent detached and 35 percent attached for the new housing produced during the planning period. R. at 1078.

The city's findings do not explain how its policy choice to adopt a 65/35 housing mix relates to the housing needs analyses it has prepared. The first paragraph of Bend's Housing Element states:

"While residents enjoy a variety of housing choices, they also face significant challenges in finding affordably priced housing in Bend as land and housing prices have increased significantly in the past decade, leaving fewer realistic housing options for many Bend residents and workers." R. at 1281.

The city's Housing Element also states:

"The inadequate supply of land [in the UGB] has led to a lack of multi family units, as high land costs have forced developers to build luxury townhomes rather than more affordable apartments or condominiums. The rapid increase in population has resulted in growth in demand for workforce housing that has outpaced the production of workforce housing units. Between 2000 and 2005, job growth created a demand for 9,057 units of workforce housing while only 8,230 units were produced.

* * *

Affordable housing for service workers, both for individuals and families, is in short supply in Bend. Rapid increases in home prices have combined with growth in the (low wage) service sector to make it difficult for much of Bend's workforce to live in the city." R. at 1282.

The City must (under Goal 10 and the needed housing statutes) plan for an adequate supply of buildable land for affordable housing, including workforce housing (whether that land is inside the prior UGB, on lands in a UGB expansion area, or both). The City has seen a shift away from development of multi-family housing and toward a higher proportion of single-family units over the 1998-2007 period. The City acknowledges the need for more affordable and multi-family housing (including the need for affordable workforce housing as a Goal 9 issue, R. at 1156), but does not state how maintaining its current planning allocations of land or other actions will influence that trend or meet its projected housing needs. The city's findings acknowledge that one reason for the shortage of affordable housing is the "dwindling supply" of land planned for multi-family use. R. at 1075. The city's adopted Housing Element (Chapter 5 of its General Plan), contains repeated references to the shortage of affordable housing in Bend, as a result of an inadequate supply of land planned for multi-family residential use. R. at 1282, 1283. This shortage is, at least in part, a result of the city having planned 87 percent of its residential lands within the prior UGB for its either its low density(1.1 to 2.2 dwellings per gross acre) or standard density (2.2 to 7.3 dwellings per gross acre) plan districts. Housing Element, at 5-9. Similarly, for the UGB expansion area, the city has planned 85 percent of the residential land in the UGB expansion area (based on its Framework Plan) for its low density or standard density plan districts.

In addition, as noted by DSL, ORS 197.296(9) and Goal 10 require the City to show that land planned for needed housing is located in areas that are appropriate for the housing types identified in its housing needs projection. On remand, the City also must explain why it believes particular areas planned to meet the future housing needs of residents are appropriate for the expected housing types.

e. Conclusion

The Commission affirms the Director's Decision, including the Director's disposition of objections for the reasons set forth in the decision, and remands the city's decision for it to revise its analyses and findings consistent with the foregoing analysis. The City must plan lands within its existing UGB and any expansion area so that there are sufficient buildable lands in each plan district to meet the city's anticipated needs for particular needed housing types. To the extent that the City continues to determine that there is a current and projected future shortage of land for affordable housing that translates into a need for more multi-family housing, the City must

show how it's planning for lands within the exiting UGB and lands in any expansion area will provide sufficient buildable lands in plan districts that are designed to meet that need. If the City continues to project a future housing mix of 65% single-family and 35% multi-family, it must explain why that housing mix will provide sufficient buildable lands to meet its projected future housing needs over the planning period, and that projection and explanation must be supported by an adequate factual base.

2.5. Whether Second Homes are a “Needed Housing Type” for the City of Bend. Is the City Required to Coordinate with Deschutes County Concerning the Regional Need for this Form of Residential Use. Whether the City Adequately Justified its Projected Density for Second Home Development, and Whether the City is Required to Coordinate with Deschutes County on the Regional Demand for Second Homes.

a. Summary of Issues and Objectors/Appellants

Bayard and COLW both objected to how the City addressed land for second homes. Bayard Objection, at 53; COLW Objection, at 11 (arguing that the City should have considered the effect of the Tetherow development on this land need). The Director remanded the city's decision, finding that the City failed to comply with Goal 10 and 14 in its determination of the amount of land needed for this use and the proportion of the use that would occur within the prior UGB. The City of Bend (City Appeal at 36), Central Oregon LandWatch (COLW) (COLW Appeal at 5-6) both appealed the Director's Decision, raising issues related to how second homes were considered in the city's housing needs analysis.

b. Legal Standard

In *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 152-53 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999), LUBA determined that:

Under ORS 197.303(1), the first inquiry is whether a local government has identified a need “for housing within an urban growth boundary at particular price ranges and rent levels.” If a local government does so, any housing types the local government determines to be necessary to meet the identified need is considered “needed housing.”

In that case, the City of Ashland identified (in its comprehensive plan) a need for “highcost” housing. LUBA held that such housing was a “needed housing type” under both 197.303 and Goal 10 because the lists of needed housing types in those provisions is nonexclusive, and the city had identified high-cost housing as needed in its plan.

Goal 14 provides that the:

Establishment and change of urban growth boundaries shall be based on the following:

(1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments; and

(2) Demonstrated need for housing, employment opportunities, livability or uses such as public facilities, streets and roads, schools, parks or open space, or any combination of the need categories in this subsection (2).

c. Summary of Local Actions, Director's Decision, and Appeal

The City identified a need for 500 acres of land for second home residences, R. at 1058. It included this use as part of its summary of residential land need. *Id.* The quantity of land was based on the city's estimate of the number on new units of housing that the market would demand for this use, which it found would be eighteen percent (18%) of the total number of new residential units needed during the planning period. R. at 1087. The City based its projected land need for this use on an average density of six units to the net acre. *Id.* The City also determined that this use does *not* provide needed housing, R. at 1086 (as that term is used in the needed housing statutes). However, the City found that because this use consumes lands planned for residential use, the City must provide land for it if the City is to assure a 20-year land supply for needed housing. R. at 1088.

The Director's Decision treated second home development as an other use of land (other than needed housing). Director's Decision, at 48. The Director found that while there was substantial evidence to support the city's determination regarding the number of second home units needed over the planning period, the City had not adequately justified the projected density of such development, nor explained why *all* of those units would be built within the expansion area rather than split between the existing UGB and the expansion area. *Id.* The Director also found that the City was required to coordinate consideration of how to satisfy the need for second home development with Deschutes County. The Director remanded the city's decision for it to:

- "Coordinate with the county specifically concerning the need for second-home housing, and where this need should be satisfied regionally;
- Evaluate whether this need can reasonably be accommodated on lands within the existing UGB; and
- To the extent that additional lands are required, establish a reasonable, specific density of development for this housing type for the next 20 years." Director's Decision, at 48.

The City and COLW appealed the Director's Decision. City Appeal at 35; COLW Appeal at 2, 5-6. The City clarified that (as with its residential land need generally) two-thirds of the demand for second homes would be met on vacant and redevelopable lands within its existing UGB. City Appeal, at 35. See also, R. at 1071-1072 (table III-4 and accompanying text). The City also argued that there is no evidence in the record that second homes will develop at a density different from other housing in the City. City Appeal, at 35.

COLW argued that the city's estimate of needed second home units was not supported by an adequate factual base, and that the analysis should include an examination of second homes being provided by destination resorts in the area (Tetherow). COLW Appeal, at 6.

d. Analysis

The first question under this issue is whether the City did, in fact, consider second homes as a type of needed housing. The city's findings on this point are not clear, as it both lists second homes under its summation of all residential land needs (findings at 6), and then describes second homes as a use other than needed housing, but one that consumes land planned for residential use. R. at 91. Presumably, past second home development also was included in the city's "2709 Forecast"¹⁴ based on building permits issued since its last periodic review.

Nevertheless, based on the city's findings, R. at 1086, the Commission concurs with the City (and the Director) that the City did not identify second homes as a needed housing type.¹⁵ The Commission also concurs with the City and the Director that there is an adequate factual base for the number of second-home units that the City projects for the planning period (3,002). R. at 1087. The City was presented with conflicting evidence concerning future demand for second homes, R. at 1087, and decided to base its estimate on a percentage of the demand for first homes, rather than on the amount of land estimated to be used for this use in the recent past. There was evidence in the record that a reasonable person could rely on, and that is all that the Goal 2 provisions for an adequate factual base require.

With regard to the projected density of second-homes, the City states that second-home purchasers and renters will seek both attached and multi-family housing, and that there is no

¹⁴ The city's "2709 Forecast" is in response to the requirements of HB 2709 (1995), now codified (primarily) at ORS 197.296.

¹⁵ The commission reserves for the future the question of whether a city may include second homes as a needed housing type under Goal 10. The commission notes that unlike other residential uses, the need for second homes may not be tied to the projected population of a community.

evidence in the record that a separate density projection is warranted. Appeal at 36. The Department agreed, after further review, that there was an adequate factual basis for the City to use a density of six units per net acre, and the Commission concurs.

Finally, with regard to the interplay between the city's decision to consider land need for second homes, and destination resort development in the region, COLW argues that the City was required to consider resort development occurring elsewhere, but did not identify a legal basis for its argument. The Department argued that the coordination provisions of Goal 2 and Goal 10 required the City to coordinate its estimate of land need with Deschutes County. The Commission agrees that the County must coordinate with the City on this issue. To the extent that the County amends its comprehensive plan provisions relating to second homes or destination resorts in the future, it must consider the city's planning for this land use within the proposed Bend UGB. On remand, the city's findings also will need to address whether the amount of land need for this use is altered by any of the changes it makes to its estimate of the number of housing units or density for residential uses generally.

e. Conclusion

The Commission upholds the city's appeal and denies the appeal of COLW, for the reasons set forth above, except that the County is directed to consider the extent to which the City has planned for second-home development in any future planning for second homes or destination resorts within the County.

2.6. Whether the City's Decision to Include 2,987 Acres of Land in its UGB that it Determined Were Not Suitable for Urbanization Complies with Goals 10 and 14, and Related State Statutes.

a. Summary of Issue and Related Objections

The City of Bend determined that almost three thousand acres of land adjacent to its urban growth boundary were not suitable for urbanization. Most of these lands contain existing rural residential development, and are planned by Deschutes County as exception lands (UAR and rural residential). The City nevertheless included these lands within its UGB expansion area even though it also determined that they were not suitable for urbanization. Bayard objected to the inclusion of these lands. Bayard Objection, at 43-46.

b. Legal Standard

ORS 197.298 provides that lands planned as an exception area or as non-resource lands are a higher priority for inclusion in an urban growth boundary than resources lands (lands planned for agricultural or forest uses). Goal 14 provides that "land within urban growth boundaries shall be considered available for urban development consistent with plans for the provision of urban facilities and services." Under the Goal 10 implementing rule, OAR 660-008-0005(2), land for general residential needs (as opposed to specific identified land needs) is generally considered to be "buildable" and "suitable and available" unless it meets certain criteria specified in that rule or is shown to be unlikely to develop during the planning period based on an analogous specific reason.

c. Summary of Local Actions, Director's Decision, and Appeal

The City included 2,987 acres of land in its UGB expansion that it determined were not suitable for urban development. The Director found that:

The city has provided no justification or explanation for the inclusion of these lands [in the UGB expansion] in its findings. As a result, the director remands the city and county decisions, with direction to remove the approximately 3,000 acres of lands from the UGB expansion area that the city has found are not suitable for urbanization, or explain with specificity why their inclusion is justified under Goal 10 and Goal 14." Director's Decision, at 51.

The City appealed, arguing that:

"These 2,987 acres are comprised of entire parcels that were deemed unsuitable, unsuitable portions of otherwise suitable parcels, and existing rights-of-way. Unsuitable land includes developed land that is not likely to be redeveloped within the 20-years planning period and other land that is not suitable for residential or employment use, such as schools and park land. It also includes land covered by steep slopes and those within the 100-year floodplain. The record adequately justifies the location of the unsuitable land and provides sufficient justification for its inclusion. * * * * [The] maps show how extensively unsuitable land is interspersed with suitable lands, making it impossible to exclude the unsuitable land." City Appeal, at 37-38.

d. Analysis

The City relies on *Hummel v. LCDC*, 152 Or App 404 (1998) for the proposition that a city may include unbuildable lands in its UGB if those lands are necessary to provide urban services to buildable lands, and where excluding the lands would create an illogical boundary. City Appeal at 38. The commission does not agree that the City has shown that these lands are not "buildable" or "suitable" as those terms are used in Goals 10 or 14. Further, even if the lands

were not "buildable" or "suitable" the City has failed to show that inclusion of almost 3,000 acres of such lands is necessary to provide urban services to lands that are buildable.

When a city analyses lands for suitability for a specific identified land need, it may identify characteristics, such as parcel size, topography or proximity, necessary for the land to be suitable for that identified need. Goal 14, OAR 660-024-0060(5). Bend's analysis of expansion lands included a criterion that all parcels smaller than three acres with an existing home are unsuitable to meet any of the city's 20-year residential land needs. In the Director's Decision, the Department determined that this criterion is not consistent with state law, and the Commission agrees. While not all rural exception areas with developed suburban uses are likely to develop at target urban densities during the 20-year planning period, some portion of these parcels will. A city may not include large suburban parcels in its UGB and assume that no further development will occur over a 20-year period.

The Commission also agrees with the Department that a city may not include lands that it has determined are unsuitable for urbanization within its urban growth boundary, except in very limited cases. In this case, the City has made a generalized decision to include lands that it determined to be unsuitable because those lands are mixed with lands it determined are suitable.

Existing rural subdivisions on the periphery of a city always will include a mix of large and smaller parcels, with some developed parcels and some not. State law (ORS 197.298) makes inclusion of such areas a high priority for cities in order to avoid urbanization of resource lands, and in order to address public facility and land inefficiency issues associated with such development. A city may not parse existing rural subdivisions into suitable and unsuitable parcels (portions of parcels) in order to avoid efforts to urbanize such subdivisions when they are added to an urban growth boundary or in order to avoid counting any future development capacity in such lands. A city *may*, with the appropriate factual basis, determine that the quantity of residential land need that is likely to be met on such lands over the 20-year planning period is low due to the existing development patterns. But a city may not determine both that such lands are unsuitable, and then include them in its UGB while determining that they will provide no residential land supply.

The Oregon Court of Appeals addressed this issue directly in *Milne v. City of Canby*, 195 Or App 1 (2004). In that case, the City of Canby amended its UGB to include 30 acres of land that was entirely surrounded by lands already within the UGB. The city did not determine that

the land was needed, but instead included the land in its UGB because it found that the land was committed to urban uses by the surrounding urban development.

The *Milne* court began by noting that under Goal 14, a local government must apply the “need” factors of Goal 14 and establish a need for land before it may amend its UGB to include that land. *Baker v. Marion County*, 120 Or App 50, 54, *rev den* 317 Or 485 (1993). The City of Canby (and the applicant below) argued, however, that the “unneeded but committed” doctrine justified its decision to add the 30 acres to its UGB. That doctrine originated in LCDC’s acknowledgment of the City of Salem’s UGB, where the commission approved inclusion of an area that was not shown to be needed, but that was shown to be committed to urban use. *City of Salem v. Families for Responsible Govt.*, 64 Or App 238 (1983), *rev’d and rem’d* on other grounds, 298 Or 574 [on remand, 73 Or App 620 (1985)]. That doctrine was again noted with regard to the acknowledgement of a city’s *initial* UGB in *Collins v. LCDC*, 75 Or App 517 (1985). There, the City of Jacksonville projected a need of 96.49 acres for planned development, but its UGB contained 792.9 acres. The court rejected the generalized inclusion of large lot rural residential lands that the city had found were not suitable for urbanization in the UGB, and held that the “unneeded but committed” doctrine requires a *property-specific* showing of commitment to urbanization.

In *Milne*, the Court of Appeals was directly confronted with the question of whether the “unneeded but committed” doctrine extends to *amendments* of an urban growth boundary (as opposed to the initial establishment of a UGB). The court held that the text of Goal 14 did not allow it to extend the doctrine to UGB amendments, overruling two prior cases.¹⁶

As noted below, the Court of Appeals decision in *Hummel* did uphold an LCDC order approving a UGB expansion for the City of Brookings that included a substantial amount of unbuildable land that the city determined must be included within the UGB in order to provide urban services to more distant lands that were suitable for urbanization. The facts of the Brookings case are unusual, however, and Bend has made no similar showing that specific lands cannot be developed without including other specific lands that are unsuitable in order to provide urban services. Instead, the city’s decision is more analogous to the efforts of Jacksonville and Salem to include rural subdivisions in their UGBs without a need showing and while ascribing

¹⁶ The two cases that the court overruled are *Halvorson v. Lincoln County*, 82 Or App 302, 305 (1986), and *Baker v. Marion County*, 120 Or App 50 (1993).

no future development potential to them.

Milne was decided by the Court of Appeals in 2004, and the text of Goal 14 was amended in 2006. However, the Commission finds that the amendments did not alter the law on this issue. If anything, the more recent text of Goal 14 is more explicit that the change of urban growth boundaries shall be based on “* * * [d]emonstrated need to accommodate long range urban population, consistent with a 20-year population forecast * * *,” e.g., that Goal 14 does not authorize the inclusion of “surplus” lands.

The Commission has previously remanded a city’s inclusion of unbuildable lands within a 100-year floodplain for reconsideration. In its partial approval and remand order 04-WKTASK- 001645, the commission remanded to the City of McMinnville for further consideration of the portions of certain UGB expansion areas that lie within the 100-year flood plain in light of *Milne*.

e. Conclusion

The Commission affirms the Director's Decision on this issue (including the Director's disposition of objections, for the reasons set forth in the Director's Decision), denies the appeals, and remands the city's urban growth boundary amendment for it to address the 2,987 acres of land it included within its expansion area. On remand, the City may continue to include these lands in its UGB expansion area if it determines that, in fact, the lands in question are "buildable" (e.g., "suitable and available" under OAR 660-008-0005) and will meet *some part of* the city’s land needs over the planning period. As part of this determination, the City could, with an adequate factual base (such as evidence of development trends within other rural subdivisions added to the Bend UGB in recent years), determine that the amount of residential or other future land need that these lands are likely to meet is limited.

2.7. Whether the City's Inclusion of 500 Acres of Land in its UGB in Addition to the Total Land Supply that it has Determined are Needed for Urbanization Complies with Goal 14 and State Statutes.

a. Summary of the Issue and Related Objections

In addition to the 2,987 acres that it found unsuitable, the City also included over 500 acres of "suitable and available" land in its UGB expansion beyond its estimated total need. Rec. at 1058 (4,956 acres of land needed to accommodate forecast growth, and 5,475 acres of suitable

and available land included (in addition to the 2,987 acres of unsuitable land)). Rec. at 1058. Bayard, Swalley and COLW filed objections, arguing that state law does not allow a 519-acre surplus. Bayard Objection at 46; COLW Objection at 11; Swalley Objection at 63.

Newland filed an objection arguing that the "theoretical" surplus of 519 acres was needed to fulfill land needs, and to provide for effective delivery of infrastructure and complete communities.

b. Legal Standard

Goal 14 provides that:

"Establishment and change of urban growth boundaries shall be based on the following:

(1) Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments * * *."

OAR 660-024-0040(1), the commission's rule implementing Goal 14, provides that:

(1) The UGB must be based on the adopted 20-year population forecast for the urban area described in OAR 660-024-0030, and must provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period consistent with the land need requirements of Goal 14 and this rule. The 20-year need determinations are estimates which, although based on the best available information and methodologies, should not be held to an unreasonably high level of precision.

c. Summary of Local Actions, Director's Decision, and Appeal

As noted above, the City included 519 acres of suitable and available land in its UGB expansion area beyond the amount it estimated as needed. Rec. at 1058. This amount of land represents half of the land need the City estimated over a twenty-year period for new housing units. Rec. at 1054, 1058, Table I-1.

The Director found that once the City *makes* its estimate, state law does not allow the City to simply add a cushion. Instead, state law requires the City to makes its best effort to arrive at a reasonable estimate of land need and then stick with that number. The inclusion of a specific amount of land in the UGB in addition to estimated need appears to be driven by its desire to include particular properties in the expansion area. Director's Decision, at 49.

The City agreed, on appeal, to substantially reduce the amount of surplus land. City Appeal, at 38.

d. Analysis

The Commission concurs with the Director's Decision on this issue. OAR 660-024-0040(1) recognizes that local government estimates of land need for housing, employment and other urban uses are just that, estimates. However, the rule does not allow a local government to make estimates based on an adequate factual base, and consistent with the specific requirements for such estimates, and then add a "modest cushion against the possibility that the total estimate * * * is too conservative." R. at 39.

The Court of Appeals addressed the surplus land issue under Goal 14 in *Milne*, as described at some length above, and (most recently) in *1000 Friends v. City of Woodburn*, __ Or App __ (slip op, Sept. 8, 2010). In *Woodburn*, the court again discussed Goal 14 in terms of a limit on the size of an urban growth boundary, based on a 20-year land supply. *Hummel* (relied on by the City in its appeal) stands for a different proposition, that a city may include specific lands within its UGB that are *not* suitable for urbanization, if the City shows that such lands are necessary to provide urban services to other lands that are suitable for urbanization. The City does not argue that the 500 acres are not suitable and, in any event, has not made that showing in its decision. There are no specific findings showing why the 500 acres are needed to provide services to particular lands or why they are necessary to provide a logical boundary.

As to Newland's appeal, the city's findings do state that "these additional acres are the by-product of the City's desire to configure the expanded UGB in a manner that is logical, provides the best opportunity for cost-effective and efficient provision of public services, and excludes high value farmland to the maximum extent feasible." R. at 39. The findings point to one specific area, Area 6 on the Alternative 4-A map, as an example of lands needed "to facilitate the development of complete neighborhoods * * *." R. at 39. These conclusory findings do not explain why specific lands are necessary for these purposes, or why the one area that is identified as desirable for a complete community must be added to the UGB *in addition* to the quantity of lands the City determined are needed to meet its housing and employment needs. Without such findings, the Commission finds that the City has not made the showing required under Goal 14 and ORS 197.296 to include land for these purposes.

e. Conclusion

For the reasons stated above, the Commission affirms the Director's Decision on this issue (including the Director's denial of Newland's objection and the Director's disposition of

other objections, for the reasons set forth in the Director's Decision), denies the appeals, and remands the city's Ordinance No. NS-2112 for the City to reduce the acreage of the UGB expansion area by 519 acres. The City may include lands to avoid splitting parcels or to create a logical boundary, but those amounts would then be included in the overall acreage added, and result in corresponding reductions elsewhere unless the amount of surplus is very small.

2.8. Whether the City's UGB Expansion Is Consistent with Certain Housing Policies of the Bend Area General Plan.

a. Summary of Issue and Objectors/Appellants

The Director found that the city's decision was inconsistent with policies 4, 17 and 21 of Chapter 5 of its comprehensive plan.

b. Legal Standard

Goal 2 and ORS 197.175 require that the city's decision be in compliance with its comprehensive plan. Policies 4, 17 and 21 of chapter 5 of the city's housing element provide:

"4. Implement strategies to allow for infill and redevelopment at increased densities, with a focus on opportunity areas identified by the City through implementation strategies associated with this policy.

* * *

17. Implement changes to the City's code that facilitate the development of affordable housing for very low, low and moderate-income residents, as determined by appropriate percentages of Area median Family income, consistent with recent updates to the City's development code and/or new strategies identified in this Plan.

* * *

21. In areas where existing urban level development has an established lot size pattern, new infill subdivision or PUD developments shall have a compatible lot transition that compliments the number of adjoining lots, lots size and building setbacks of the existing development while achieving at least the minimum density of the underlying zone. New developments may have similar lots or varying housing types internal to the development." Rec. at 1312-1313.

c. Summary of Local Actions, Director's Decision, and Appeal

No objections were received concerning consistency of the action with Bend's General Plan. However, the Director found that the city's limitation of its efficiency measures to the

Central Plan Area and undefined areas along some transit routes was inconsistent with its plan policy to support higher-density residential use in proximity to commercial services, parks and schools. In addition, the Director determined that the city's findings failed to explain how its decision complied with the policies set forth above. The City appealed, arguing that the Director applied the wrong legal standard, and that its decision was not inconsistent with the identified plan policies. City Appeal at 41-44.

d. Analysis

Upon further review, including review of the city's appeal, the Department agreed with the City that its decision could be found to be consistent with the identified policies of its comprehensive plan. The Department continued to argue, however, that the city's findings on this issue were conclusory, and that the decision should be remanded for the City to provide an explanation of why its decision is consistent with the plan policies. The City agreed to adopt findings clarifying why its decision is consistent, and the Commission concurs that this issue can be resolved by the adoption of findings explaining why the city's decision is consistent with its plan policies.

e. Conclusion

The Commission denies the city's appeal for the reasons stated above, but also clarifies that its remand is solely for the lack of adequate findings by the City. The Commission has not determined that the city's decision fails to comply with the identified policies of the city's comprehensive plan – that question is for the City to address in the first instance through adequate findings.

3. The Capacity of the Prior UGB to Reasonably Accommodate Future Residential Land Needs, and the City's New Efficiency Measures -- Goal 14 and ORS 197.296

3.1. Whether the City's Findings for its Urban Growth Boundary Amendment Adequately Explain How it Met the Requirement in Goal 14 to Determine that it Has "Reasonably Accommodated" its Projected Need for Future Residential Land Uses Over the Planning Period Within Its Existing UGB, Rather than Expanding onto New Lands

a. Summary of Issue, Objectors and Appellants

State law generally requires the city to "reasonably accommodate" as much of its future growth as possible within its existing UGB. The Director found that the City's findings were inadequate with regard to this issue. Director's Decision, at 38-45. The City of Bend, Newland Communities, Bayard, COLW, and Swalley appealed the Director's Decision regarding this issue or filed related objections to the city's decision with regard to this issue. City of Bend Appeal, at 26-33; Newland Appeal at 8-11; Bayard Objections, at 56-57; COLW Objections, at 9, and Swalley Objections, at 63-65, 72, and 77-78.

b. Legal Standard

Before expanding the UGB, Goal 14 and OAR 660-024-0050(4)¹⁷ require the City to establish that its projected needs for future land uses cannot reasonably be accommodated on land within its existing UGB. One of the main ways that the City establishes how much of its future residential land need will be accommodated within its existing UGB is through its estimate of the future development capacity of the vacant and redevelopable lands in its buildable lands inventory. As described previously, beginning at page 26, the city's determination of that capacity must include an analysis of development trends since the city's last period review. ORS 197.296(5). The requirement in Goal 14 to "reasonably accommodate" projected needs for future land uses within the existing UGB before expanding the UGB places

¹⁷ OAR 660-024-0050(4)(2007) provided that:

(4) If the inventory demonstrates that the development capacity of land inside the UGB is inadequate to accommodate the estimated 20-year needs determined under OAR 660-024-0040, the local government must amend the plan to satisfy the need deficiency, either by increasing the development capacity of land already inside the city or by expanding the UGB, or both, and in accordance with ORS 197.296 where applicable. *Prior to expanding the UGB, a local government must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB.* Changes to the UGB must be determined by evaluating alternative boundary locations consistent with OAR 660-024-0060. (Emphasis added).

an additional gloss on the determination of future capacity. The city's determination of its capacity based on its existing planning and land use regulations cannot be unreasonably conservative in the sense of underestimating capacity in order to increase the amount of land added to the UGB.

A second way that the City may accommodate its future residential land need within its UGB is through the adoption of *new* efficiency measures. ORS 197.296(6)(b). Again, Goal 14 applies in addition to this statutory provision, to require the City to consider additional, reasonable, efficiency measures.

Goal 10 and ORS 197.296(9) also require that the City "ensure that land zoned for needed housing is [planned] in locations appropriate for [needed] housing types * * * ." These locational requirements depend on the nature of the City's housing needs, and are in addition to the "efficiency" provisions of Goal 14.

c. Summary of Local Actions, Director's Decision, and Appeals

The City found that under its existing plan designations, the City would accommodate two-thirds of its projected future (2008-2028) need for housing within its existing urban growth boundary. R. at 1071-1072. As noted above, this finding was based on the city's projection that residential development on vacant and redevelopable lands in the RL, RS, and RM plan districts would occur at the minimum densities allowed by the city's code, and that development in the RH plan district would occur at less than the minimum density allowed due to existing parcelization patterns. R. at 1071-1072 (including Table III-4). The total number of housing units that the City estimated could be accommodated within its prior UGB for the twenty-year period from 2008-2028 (including the two new efficiency measures) was 11,159. R. at 1071.¹⁸ The City also reported, however, that the total number of housing units that were built within the same area during the seven-year period (after its last periodic review) from 1998 to 2005 was 12,798. R. at 1074. Nonetheless, the City found that its estimate of " * * * 11,159 new housing units [assumed] that all vacant and redevelopable residential land (2,909 net acres) is developed for housing at recent built densities." R. at 1072.

¹⁸ The estimate for the residential capacity of the prior UGB in the city's findings, of 11,159, differs from the estimate in the city's comprehensive plan, which is 10,789 (R. at 1303, Table 5-20, and R. at 1307, Table 5-26). This results in a difference between the projected future need for residential units (beyond what can be accommodated in the prior UGB) of 5,892 in the comprehensive plan (R. at 1303 and 1307) and 5,422 in the city's findings. R. at 1071-1072. This discrepancy should be resolved by the City on remand.

With regard to efficiency measures, the City stated that under ORS 197.296, it has the option either to expand its UGB, or to adopt efficiency measures (or do both). R. at 1082. The city then described two new efficiency measures that it adopted as amendments to the housing element of its comprehensive plan. R. at 1085. The two new comprehensive plan policies called for the City to: (a) plan for and zone for an unspecified area and amount of "long-term redevelopment along main transit corridors," and (b) complete a two-part, long-term land use and transportation plan for the Central Area ***, [with] special attention *** to redevelopment of the 3rd St. corridor in this area to promote higher-density housing and mixed-use development to strengthen the Central Area's role as the economic and cultural hub of the community." R. at 1311-1312. The measures were described in more detail in the city's *findings* as planning for an additional 500 units of housing in the Central Area Plan, and to plan for up-zoning in areas along transit corridors for another 600 units. R. at 1082-1085.

The Director determined that the City failed to explain adequately how its decision complied with ORS 197.296, Goal 14 and OAR 660-024-0050(4) with regard to the requirement that the City show that its future residential needs could not be reasonably accommodated within the prior urban growth boundary before expanding the UGB. Director's Decision, at 38-45. The City and Newland appealed the Director's Decision. City Appeal, at 26-33; Newland Appeal, at 8-11.

d. Analysis.

In terms of the projected capacity of the prior UGB for additional residential development, the Commission concurs with the Director's conclusion that the city's findings are inadequate in light of the record and other aspects of the city's decision for the following reasons. First, as determined above, the City must reexamine its buildable lands inventory to assure that it complies with state statutes and rules concerning what lands are vacant and what lands are redevelopable. To the extent that the city's BLI is revised with regard to what lands are included, those revisions will affect the projected development capacity of lands within the prior UGB and the amount of development that can be reasonably accommodated.

Second, with regard to the *capacity* of the lands inventoried as vacant or redevelopable, and as found above in connection with ORS 197.296, Goal 14 also requires that in light of the city's data concerning the amount of residential development that occurred in the *seven*-year period between 1998 to 2005 within the prior UGB (12,798 units) (R. at 1074) the City must

explain why it is projecting *less* development (11,159 units) in the same area over the *twenty*-year period from 2008 to 2028. R. at 1072. This explanation also must address the city's findings that the density of redevelopment and infill was *increasing* during the 1998-2005 period. R. at 1083, 1308. The Commission understands that a likely reason for diminished residential capacity within the prior UGB is that the rapid rate of development during 1998-2005 utilized much of the vacant and redevelopable land, but the extent to which this is the case is not clear, and improved findings would assist in clarifying this point.

Third, Goal 14 and OAR 660-024-0050(4)(2007) require the City to show that it cannot reasonably accommodate future projected land uses and their accompanying land needs within its prior UGB before expanding the UGB to add lands for urban development. The city has described steps it took in 2008 revisions to its development code to increase the capacity of its prior UGB, and summarized those steps as:

- "Removal or easing of approval standards or procedures;
- Establish minimum density ranges;
- Authorize housing types not previously allowed by the plan or regulations."

R., at 1084 (see also Table III-13, describing those measures in more detail). These measures are laudable, but in spite of them (as described above) the City is projecting that lands in 3 of 4 plan districts will meet minimum densities (which are relatively low), and that lands in the RH district will develop *below* the minimum allowed density. R. at 1071-1072. The city's minimum density levels in its plan districts are low, and (as noted above) most of its residential lands are in low density plan districts. More specifically, 87 percent of the lands within the prior UGB planned for residential use are planned for low-density, single family residential use (either the RL plan district (1.1 dwelling per gross acre minimum density) or the RS plan district (2.2 dwellings per gross acre minimum density)). Multi-family housing (buildings with more than 3 units) is not allowed outright within the RL and RS plan districts (duplexes and triplexes are allowed as conditional uses in the RS district). [Bend Code section 2.1.200, R. 1287-1288].

The City indicates in its Housing Element that it elected not to change allowed densities in the residential districts because its BLI shows recent development is already occurring at higher densities than it did prior to 1999, and because of its new minimum density provisions. R. at 1308. Given that the city's findings show that development is occurring at levels well above its minimum densities (*average* residential density within the City for single family dwellings

has risen to 5 units to the acre, R. at 1083), while minimum density in the predominant single-family (RS) district is 2.2 units per acre, the Commission finds that the City has not shown that it is complying with the requirement in Goal 14 to reasonably accommodate its future land needs for residential uses within its prior urban growth boundary. On remand, the City must address both prior trends (as required by ORS 197.296(5)) and recent existing steps it already has taken to increase density and meet its housing needs. The requirement of Goal 14 to reasonably accommodate future land needs within its UGB does not allow the city to use an unreasonably conservative projection of future development capacity.

Fourth, under Goal 14, the city must *consider* taking additional steps to plan for its projected future residential land needs within its urban growth boundary *and* show that such steps are not reasonable before expanding its boundary, particularly in light of the record and its own findings concerning actual development trends in the 1998-2005 (or 1998-2007) period and its description of its future housing needs. For example, during the period between 1998 and 2007 Bend saw 1,823 acres of residential land within its prior UGB subject to a plan or zone change to increase allowed density. R. at 1827. Much of this increase appears to have been for lands annexed into the city and then planned for the city's standard residential zone (RS). Another 145 acres of land was up-zoned from RS to RM or RH. The Commission understands that the city's projected capacity is based on its plan designations and not its zoning (and that, as a result, upzoning is not directly relevant to projected capacity). Nevertheless, given the apparent market demand for increasing density relative to existing planning and zoning designations, the City must explain why increasing the density allowed, particularly for large blocks of vacant land outside of existing established neighborhoods, is not reasonable during the 20-year planning period.¹⁹ The Director's Decision identifies a number of other efficiency measures that the City should consider (drawn from the city's own Residential Lands Study²⁰), but that list is not intended to be exclusive or directive; it is up to the City to determine in the first instance what is reasonable to accommodate its future housing needs within its UGB.

¹⁹ The city's BLI map depicts several areas where there are substantial blocks of vacant lands.

²⁰ The city's 2007 Residential Lands Study identified other efficiency measures. R. at 1825-1835. One of these, the adoption of refinement plans, appears to have been a successful tool in planning for additional needed housing and providing for higher densities in a form that the market has been responsive to. R. at 1828. On remand, the City should address this and other existing and potential future measures in determining the projected residential capacity of lands within its prior UGB in order to assure that it is complying with the Goal 14 "reasonably accommodate" standard.

The City and Newland argued on appeal that ORS 197.296(3) gives the City the choice of whether to accommodate future need for residential land by expanding its UGB or adopting new measures. The Commission does not agree. The City determined that its UGB will accommodate less development than it has since its last periodic review, that there will be no upzoning except (possibly) in two areas. At the same time, the City found that it has a significant need for affordable multi-family and workforce housing. Under those circumstances, Goals 10 and 14, and ORS 197.307(3), require the city to consider and explain why its determination of capacity based on existing measures is reasonable, and why other, new, measures are not reasonable.

While the Commission agrees with the Director's determination that the City has made the case that a significant expansion of the Bend UGB for future residential growth is justified, the Commission also wants the City to understand that it was not persuaded that the City is meeting its obligations under Goals 10 and 14, and ORS 197.307(3) to plan for an adequate amount of land for needed housing, particularly for land in plan districts that authorize multi-family housing. The Commission is *not* asking the City to amend its plan and zoning designations in established residential neighborhoods; the City has several areas of vacant and redevelopable residential lands where it could consider planning for more multi-family housing.

e. Conclusion

The Commission affirms the Director's Decision on this issue, including the Director's disposition of objections, for the reasons set forth in the Director's Decision. The Commission concludes that the City must reconsider the projected capacity of lands within its prior UGB for residential development during the planning period in light of its revised BLI, recent development trends, and existing and potential new measures to increase that capacity. The measures the City considers must include, but are not limited to, evaluating the infill capacity (including plan and zone changes) of residential lands with more than five acres that are vacant or partially vacant. The City also should consider the measures as listed in the Director's Decision, at 45-46, that are related to efficiency measures. While the Commission concludes that the City's decision does not comply with the "reasonably accommodate" requirement of Goal 14, it also notes that there is no fixed standard under this aspect of Goal 14. The requirement is read in light of the provisions of ORS 197.296(5)-(9), and the unique factual situation of Bend. *It is up to Bend to determine in the first instance what is reasonable to*

accommodate its future housing needs within its own UGB. It will make this determination in the context of prior trends, projected needs, and adopted policies.

3.2. Whether the City's Findings Show that it's Two New Efficiency Measures "Demonstrably Increase the Likelihood that Residential Development will Occur at the Housing Types and Density and at the Mix of Housing Types Required to Meet Housing Needs Over the Next 20 Years."

a. Summary of Issue and Appellants/Objectors

For new measures to increase the capacity of buildable lands within its urban growth boundary, ORS 197.296(5) requires that the City show that the measures " * * * increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next twenty years." Bayard objected that the efficiency measures that were adopted lacked documentation to assure that they will be effective. Bayard Objection, at 57. The Director upheld the objection. Director's Decision, at 41. And the City and Newland appealed. City Appeal, at 27; Newland Appeal, at 10.

b. Legal Standard

To the extent that the City elects to meet its future need for residential land by adopting new measures to promote infill and/or redevelopment, ORS 197.296(7) requires that it demonstrate that such measures "demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet needs over the next 20 years." In addition, ORS 197.296(9) provides that:

"(9) In establishing that actions and measures adopted under subsections (6) or (7) of this section demonstrably increase the likelihood of higher density residential development, the local government shall at a minimum ensure that land zoned for needed housing is in locations appropriate for the housing types identified under subsection (3) of this section and is zoned at density ranges that are likely to be achieved by the housing market using the analysis in subsection (3) of this section. Actions or measures, or both, may include but are not limited to:

- (a) Increases in the permitted density on existing residential land;
- (b) Financial incentives for higher density housing;
- (c) Provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer;
- (d) Removal or easing of approval standards or procedures;
- (e) Minimum density ranges;
- (f) Redevelopment and infill strategies;
- (g) Authorization of housing types not previously allowed by the plan or

regulations;

(h) Adoption of an average residential density standard; and

(i) Rezoning or redesignation of nonresidential land [to residential uses]."

c. Summary of Local Action, Director's Decision and Appeals

The city's submittal included two new efficiency measures. As described above, the two new efficiency measures were adopted as amendments to the housing element of its comprehensive plan. R. at 1085. The two new comprehensive plan policies called for the City to: (a) plan for and zone for an unspecified area and amount of "long-term redevelopment along main transit corridors," and (b) complete a two-part, long-term land use and transportation plan for the Central Area ***, [with] special attention *** to redevelopment of the 3rd St. corridor in this area to promote higher-density housing and mixed-use development to strengthen the Central Area's role as the economic and cultural hub of the community." R. at 1311-1312. The measures were described in more detail in the city's *findings* as planning for an additional 500 units of housing in the Central Area Plan, and to plan for up-zoning in areas along transit corridors for another 600 units. R. at 1082-1085. However, the city's adopted plan policies do not include any description of or commitment to particular amounts or specific types or locations of housing. The plan policy for transit corridors does state that this planning will be completed "prior to 2012." R. at 1311.

The Director determined that the city's two new measures were too indefinite to meet the requirements of ORS 197.296(7) and (9). The Director noted that the measures as adopted did not anticipate or commit the City to any particular outcome, and that the City did not provide a timeframe for completing its planning for the Central Area Plan. Director's Decision, at 38-39. The City and Newland appealed. City Appeal, at 27; Newland Appeal, at 10. In its appeal, the City stated that "[t]he City has determined, based on evidence in the record, that these measures will be effective. (Rec.1084-85.)" City Appeal at 27. Newland stated in its appeal that "the City committed to adopt these measures during the planning period." Newland Appeal, at 10.

d. Analysis

Goal 10, ORS 197.296, and OAR chapter 660, division 8 require the City to ensure it has provided a 20-year supply of buildable residential land for needed housing in locations appropriate for the needed types of housing. If the City relies on new measures, they must do more than merely adopt policies encouraging future planning for the development of needed

housing. Under Goal 10 and ORS 197.296 the City must adopt definitive measures and find, based on an adequate factual base, that those measures demonstrably increase the likelihood that residential development will occur at the housing types and density and at the mix of housing types required to meet housing needs over the next 20 years.

Although the City and Newland argued that the city had determined that the measures would be effective, there are no findings relating to the requirements of ORS 197.296(7) and (9), and the measures themselves are commitments to a planning process, not to any outcome, let alone any outcome tied to the city's housing needs analysis. The City agreed, on remand, to include provisions in the General Plan requiring adoption and implementation of the Central Area Plan and rezoning of lands along transit corridor as described in its findings. City of Bend's Exceptions at 12.

e. Conclusion

The Commission affirms the Director's Decision on this issue, including the Director's disposition of objections for the reasons set forth in the Director's Decision, and directs the City on remand to address the requirements of ORS 197.296(7) and (9) with respect to any new efficiency measures that it relies on. The City may do this by adopting specific timelines for initiation and completion of efficiency measures, including detail about the outcomes that will be achieved as part of the Housing Element of its comprehensive plan. The City also must adopt findings that show why those outcomes are more likely to occur as a result of the measure(s), and how they relate to needed housing types and locations. In addition, in coordination with its Work Plan for Outstanding Metropolitan Transportation Planning Work (issue area 8), if the City continues to rely on these two particular measures, it must:

1. Within two years following acknowledgement, complete and adopt the Central Area Plan. The Plan must include provisions that plan for at least 500 additional medium-density and high-density housing units over the planning period.
2. Within two years following acknowledgement, complete and adopt provisions of its comprehensive plan that authorize at least 600 additional medium-density and high-density housing units on lands abutting or within ¼ mile of existing or planned transit routes.

4. Other (Non-employment) Land Needs – Goal 14

4.1. Whether the city adequately justified inclusion of an additional 15 percent factor for all “other lands” in its identified need.

a. Summary of Issue and Related Objections and Appeals

Central Oregon LandWatch objected that the City did not establish that its identified need for land for institutional or private rights-of-way and private open space is a need under Goal 14, when land for public parks (and streets) is already included in the city's estimate of future land needs. COLW objected that:

“There is no showing that these uses are needed for residential purposes over and above the public rights of way, parks and institutions already counted. Just because such private uses may exist due to past policies and decision does not mean that they are needed over and above what is considered needed in a true needs analysis.” Central Oregon LandWatch Objections at 10.

The Director sustained this objection. Director's Decision, at 53. The City appealed. City Appeal, at 36-37.

b. Legal Standard

The Commission concluded above that submittals under ORS 197.626 must be supported by substantial evidence and present adequate findings. Goal 14 requires that change of an established UGB be based on *demonstrated* need. OAR chapter 660, division 24 provides clarification of procedures and requirements of Goal 14. OAR 660-024-0000(1). Regarding land need, the rule requires that land need be based on the adopted 20-year population forecast and “provide for needed housing, employment and *other urban uses* such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period.” OAR 660-024-0040(1).

c. Summary of Local Action, Director’s Decision and Appeal

The City applied a fifteen percent factor to its projected net residential, school, park and employment lands need to reflect the amount of land that is not for housing, employment, public facilities or rights-of-way. R. at 1091. The application of the fifteen percent factor led the City to include 442 acres for other land uses (institutional, private open space, private rights-of-way). R. at 1092. The City testified that it analyzed the present UGB parcel by parcel and determined that 12.8 percent of the land is utilized for uses that it does not categorize as either for housing,

employment opportunities, public facilities, or rights-of-way. The City then determined that 12.8 percent for other land uses was reasonable going forward. In addition, the City sought to account for land that would be utilized for stormwater facilities by increasing the factor to fifteen percent. The “institutional” uses accounted for in this factor include “churches, fraternal/benevolent organizations, utilities, cemeteries, golf courses, and irrigation districts properties.” City Appeal at 37.

The Director remanded the city's decision with direction to either remove the fifteen percent factor for private open space and private rights-of-way as categories of land need, or to provide findings to establish that private open space and private rights-of-way are needed within the UGB expansion area in addition to land needs for public parks and public rights-of-way. Director's Decision, at 49. The Director determined the submittal lacked findings to explain why prior development patterns that involved a relatively large amount of private open space are needed in the expansion area, concluding “[s]imply adopting past development patterns is not a sufficient basis to demonstrate a land need under Goal 14 or under ORS 197.296.” *Id.*

The City appealed, arguing that the inclusion of the fifteen percent factor is necessary to achieve the overall goal of maintaining Bend as a high-quality, desirable place to live and work. City Appeal, at 36-37; City Exceptions, at 17. The City argues that if the “other land” factor is not added, then land for residential uses will be displaced by these uses. Appeal at 37.

d. Analysis

OAR 660-024-0040(1) requires the City to provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period consistent with the land need requirements of Goal 14 and division 24. The City opted not to use the safe harbor at OAR 660-024-0040(10).²¹ Absent the safe-harbor, the City must demonstrate that the identified need for institutional, private open space and private rights-of-way is an urban need that must be accommodated within the expansion area. The City states that the fifteen percent factor is based on an analysis of the prior UGB, and an increase for future surface stormwater management. Recognizing that the 20-year need

²¹ OAR 660-024-0040(10) provides:

“As a safe harbor during periodic review or other legislative review of the UGB, a local government may estimate that the 20-year land needs for streets and roads, parks and school facilities will together require an additional amount of land equal to 25 percent of the net buildable acres determined for residential land needs under section (4) of this rule, and in conformance with the definition of “Net Buildable Acre” as defined in OAR 660-024-0010(6).”

determinations are estimates that (although based on the best available information and methodologies) are not be held to an unreasonably high level of precision, the City's findings must explain why the City believes that the increase from 12.8 percent to fifteen percent is justified.

e. Conclusion

The Commission remands the city's UGB decision for the City to adopt findings that explain why an increase in the amount of land required for these uses from 12.8 percent to fifteen percent is justified. To the extent the City is basing its estimate on the need for stormwater facilities, it should explain why such facilities can't be located within open space and right-of way areas. While this amount of land need for these uses may well be reasonable, the city's findings should not be based only on past trends, but should include consideration of *future* conditions and needs (and explain why the trend will continue or change over the future planning period).

4.2 Whether the submittal includes adequate findings to support the amount of land identified as needed for parks and schools

a. Summary of Issue and Related Objections

The City of Bend added land to its identified need to provide for parks and schools as required by OAR 660-024-0040(1). Central Oregon LandWatch objected that the City did not justify the projected 192 acres for schools or the projected 474 acre land need for parks. COLW argued that the parks projection was based on plans that have not incorporated into the city's comprehensive plan, and that the city's estimate failed to account for the amount of the identified park need that could be met on lands outside the UGB. COLW Objections, at 10.

b. Legal Standard

The Commission concluded above that submittals under ORS 197.626 must be supported by substantial evidence and adequate findings that explain the city's reasoning connecting the evidence in the record with the legal standard(s). OAR 660-024-0040(1) requires the UGB to include land for needed urban uses, including schools and parks. ORS 195.110 requires large school districts to prepare and adopt a school facility plan in consultation with affected cities and counties. ORS 197.296(6)(a) requires a city to include sufficient lands for new public school

facilities the need for which is derived from a coordinated process between the affected public school district and the city and county that adopt the UGB.

c. Summary of Local Action, Director's Decision and Appeal

The City estimated land need for several uses related to residential use. The City estimated a land need of 192 acres for schools. R. at 1089. The City estimated a land need of 474 acres for parks and trails. R. at 1090. The City based the estimates of land need for public schools and parks on per-capita service standards recommended by the school district and the parks district. The school district facilities plan under ORS 195.100 had not been adopted at the time of the city's decision.

The Director remanded to the city to adopt findings related to whether the identified need could be accommodated within the existing UGB, discussed below. Director's Decision, at 47. The Director also remanded for the City to adopt findings relating the facts relied upon to the city's conclusions concerning the amounts of land needed for these uses. *Id.*

The Bend-La Pine School District No. 1 filed an exception to the director's report. The District has a Sites and Facilities Plan that identifies the need for schools. The District relied on that plan to develop the calculations that it summarized in memo to the City on school land requirements. R. at 10560. The District stated the importance of having flexibility in location and an ample land supply for schools.

The Bend Metropolitan Parks and Recreation District filed an exception. The District adopted a 2005 Parks and Recreation and Green Space Comprehensive Plan, incorporated by reference into the Bend Urban Area General Plan, which includes target standards for providing parks and trail facilities based on acres and miles per one thousand residents. Based on estimated population growth, the District applied the target standard of seven acres per one thousand for combined neighborhood and community parks to estimate a future park need of 362 acres. The District revised its estimate of land need during the planning period to 474 acres, based on providing a distribution of community parks service to specific quadrants of the District. R. at 2724-2727.

d. Analysis

The Commission determined that there is an adequate factual basis supporting the City's determination of the *overall amount* of land needed for parks and schools, but that the City's

findings need to be revised to explain clearly what evidence the city relied on for types of projected school and parks needs and siting criteria and the relation to the districts plans. In addition, to satisfy the requirements of ORS 197.296(6)(a), the city's findings should explain how the City has coordinated with the Bend-La Pine School District. As the school district had not adopted a facilities plan under ORS 195.110 at the time of the city's UGB decision, the City may, but is not required to, consider any such plan subsequently adopted by the school district.

e. Conclusion

The Commission remands the decision to the City to adopt revised findings explaining what evidence it relied on in determining the amount of land needed for parks and schools, and how that evidence relates to the districts plans and analyses. The City may, but is not required to, consider any school district plan adopted under ORS 195.110.

4.3. Whether the submittal includes adequate findings concerning whether the need for land for parks and schools may be accommodated within the prior UGB and (for parks) on lands outside of the UGB.

a. Summary of Issue and Related Objections and Appeals

The Director's Decision remanded the submittal because it lacked findings to establish that the identified need for land for parks and schools could not be accommodated (in part or in whole) within its prior UGB, and (for parks) whether some portion of the need (rural facilities) could be located on lands outside of the UGB. There were no objections on this issue. The City appealed. City Appeal, at 34.

b. Legal Standard

The Commission concluded above that submittals under ORS 197.626 must be supported by substantial evidence and present adequate findings. Goal 14 and OAR 660-024-0050(4) require that prior to expanding a UGB, local government must demonstrate that needs cannot reasonably be accommodated on land already inside the urban growth boundary. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 390, *aff'd* 130 Or App 406, 882 P2d 1130 (1994).

c. Summary of Local Action, Director's Decision and Appeals

The City estimated land need for several uses related to residential use. The City estimated a land need of 192 acres for schools. R. at 1089. The City estimated a land need of

474 acres for parks and trails. R. at 1090.

The Director determined that city's estimated land need, based on per-capita service standards recommended by the school district and the parks district, assumes that all new school and park facilities to serve new residents in Bend will be located on expansion lands *outside* of the prior UGB, even though a major of future housing needs are projected to be met within the prior UGB. The Director found:

“The findings do not address whether the estimated land needs for schools can reasonably be accommodated within the UGB, as required by OAR 660-024-0050(4). Similarly, the findings for parks do not address whether the estimated need can be met within the UGB, or the extent to which the need may already be met by existing or planned facilities outside of the UGB (some types of park facilities are allowed outside of UGBs; *see* OAR chapter 660, division 34).” Director's Decision, at 47.

The Director remanded the city and county decisions, with direction to determine whether the need for land for public schools could reasonably be accommodated within the existing UGB; and whether the need for land for public parks (including trails) could reasonably be accommodated within the existing UGB, and whether this need is already met in whole or in part by facilities planned or existing outside of the UGB. *Id.* at 47-48.

The City appealed the Director's Decision, contending that it had adequately addressed whether the need for additional land for parks and schools could be met within the existing UGB. Appeal at 34. The Bend Metro Park and Recreation District filed an unrelated objection regarding OAR 660-023-0160 addressed below, but appealed the Director's Decision contending that the need for lands for public parks, including trails could not reasonably be accommodated in the existing UGB, and disagreed that the need for additional parks is already met in whole or in part by facilities planned or existing outside the UGB. The Bend-La Pine School District likewise filed an unrelated objection regarding Goal 2 coordination,²² but appealed the Director's Decision contending that the need for land for public schools and related facilities could not reasonably be accommodated in the existing UGB and disagreed that the need for additional public school facilities is already met in whole or in part by facilities planned or existing outside the UGB.

²² The Director determined that the City complied with coordination requirements of Goal 2. Director's Decision, at 152.

d. Analysis

Cities must provide for schools and parks needed over the 20-year planning period consistent with the requirements of Goal 14 and OAR 660-024-0040. OAR 660-024-0040(1). In providing for the identified need for schools and parks, cities must demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB. OAR 660-024-0050(4). Submittals under ORS 197.626 must be supported by substantial evidence and present adequate findings. The City and appellants all provide reasons why the identified need for parks and schools cannot be reasonably accommodated in the existing UGB, but neither the city nor the appellants point to any findings that establish the school and park uses cannot be accommodated in the existing UGB at all. Given that much of the city's future housing and population growth is projected within its prior UGB, the city's findings should explain how it will meet its future needs for these uses.

e. Conclusion

The Commission concludes that the City must make findings to address OAR 660-024-0050(4), regarding the extent to which the estimated need for future parks and schools can reasonably be accommodated inside the existing UGB. The required findings must address how the needs analysis accounts for lands already owned by the districts that are outside of the prior UGB, particularly if those lands were determined to not be suitable for urbanization.

5. Employment Land Needs -- Goals 9 and 14

5.1. Whether the Submittal Establishes that the City Estimated its 20-year Employment Land Need in the Manner Required by OAR 660-009-0015, OAR 660-024-0040 and OAR 660-024-0050.

a. Summary of Issue, and Objectors and Appellants

The Director's Decision concluded that the City had not established that it followed the required analytical steps in determining the amount of employment land need. Swalley Irrigation District, Brooks Resources, and Central Oregon LandWatch had challenged whether the submittal provides an adequate factual basis for the findings and conclusions drawn in the City's Economic Opportunities Analysis (EOA). Swalley Irrigation District Objection, at 47-53, Brooks Resources Objection, at 2-9, and Central Oregon LandWatch Objection, at 11-12. The City appealed, contending the 2008 EOA follows the "main steps" in satisfaction of the rule requirements. City Appeal, at 51. Toby Bayard and Terry Anderson appealed, concurring with the Director's Decision, and asserting in particular that the City did not analyze developed employment land likely to redevelop during the planning period. Bayard Appeal, at 5-7; Anderson Appeal, at 5 and 9-11.

b. Legal Standard

Statewide Planning Goal 9 is "[t]o provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity." The goal requires that comprehensive plans for urban areas provide for at least an adequate supply of sites of suitable sizes, types, locations, and service levels for a variety of industrial and commercial uses. OAR chapter 660, division 9 implements Goal 9. Cities develop an economic opportunities analysis (EOA) that compares the demand for land for industrial and other employment uses to the existing supply of such land. OAR 660-009-0015. In general, an EOA includes an analysis of trends that influence the long-range economic conditions of the city and its competitive advantages in terms of types of employment that it is most likely retain or attract; a description of the characteristics of suitable sites needed for employment activities; an inventory of existing suitable sites, and an evaluation of economic development potential. OAR 660-009-0015. The EOA provides the basis for the determination of 20-year employment land need for an urban area as required by OAR 660-024-0040(5) and provides the inventory of suitable vacant and developed land designated for industrial or other employment use required by OAR 660-024-0050.

c. Summary of Local Action, Director's Decision and Appeal

The Director's Decision describes the city's EOA submittal:

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

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

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

“The EOA includes a note that the analysis and conclusions were modified by the city [R. at 1585]. The modifications, based on input from the planning commission, UGB technical advisory committee, and stakeholders, are discussed in appendices A-H [R. at 1642-1727].

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

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

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

designation of employment lands, and findings related to uses with special siting requirements.

“In summary, the EOA says there is need for 1,008 acres of commercial land and between 100 and 250 acres of land for each of the following use categories: industrial and mixed employment, public facilities, economic uses in residential zones, medical, new hospital site, a university site, and two 56-acre industrial sites. The total employment land need shown is 2,090 acres. [R. at 1114] This compares to the “Scenario A” conclusion that there is a 1,380-acre need, which was the result of a relatively simplistic formula of dividing employment projections by employment densities.” Director's Decision, at 60-61.

The Department determined that the analysis for the EOA did not follow the methodology of division 9, and that the record is unclear and confusing regarding how the City determined the amount of land needed for employment. Director's Decision, at 62. The Department could not identify any analysis in the submittal that distinguishes developed employment land likely to be developed during the planning period from that not likely to redevelop. *Id.* at 63. The Director remanded, in order for the City, based on factual evidence, to determine the 20-year supply of employment land; inventory existing employment land categorized into vacant, developed land likely to redevelop within the planning period, and developed land unlikely to redevelop within the planning period; identify required site types that are not in the inventory of either vacant or likely to redevelop sites; identify serviceable land; and reconcile need and supply. *Id.* at 64.

The City appealed, contending that it had indeed followed the “main steps” required by law in the 2008 EOA. The Department ultimately agreed. Department Report on Appeals, at A-24. The report states:

“The city’s appeal clarifies the bases for its determination of needed employment lands. The city’s 2008 EOA is incorporated by reference into its findings for this part of its decision. R. at 1106, 1137, 1138. The findings and the 2008 EOA contain both an analysis of trends and a projection of employment in 2028 by industry sectors. The city projects 22,891 employees in 2028. R. at 1108, 1139 (findings), R. at 1588 (2008 EOA). The department agrees that the city’s projection of employment in 2028 complies with Goal 9 and OAR chapter 669, division 9.” *Id.* at 25-26.

The Department recommended that the Commission find that the city followed the main rule requirements, with specific exceptions, discussed below. However, the Department suggested that the City clarify its findings to state that its determination of employment land need is based on scenario B from the 2008 EOA.

d. Analysis

The Department's Report summarizes the “main steps” for determining the amount of employment land supply needed for the 20 year planning period:

“Determine the total 20-year employment land supply need by reviewing trends (OAR 660-009-0005(13), 660-009-0015(1) and 660-009-0025(2));

“Subtract existing sites that are defined as vacant (OAR 660-009-0005(13))

“Subtract existing sites that are defined as “developed” (e.g., developed, but likely to redevelop) (OAR 660-009-0005(13))

“Add needed sites not available in the inventory of vacant or likely to redevelop (OAR 660-009-0025(2)).” Director’s Report at A-25.

The 2008 EOA compares the demand for land for industrial and other employment uses to the existing supply of such land as required by OAR 660-009-0015. The EOA contains an analysis of trends and a projection of employment by industry sectors. The Director’s Report explains the steps the City took to convert the projection of employment in the year 2028 into a projection of employment land need. *Id.* at A-26. While the City followed the main requirements of Goal 9 and division 9, as discussed below, the Commission is sustaining objections and appeals related to the factual basis for projecting redevelopment of developed lands, and the inclusion of a “market choice” factor.

e. Conclusion

The Commission concludes that the City established that it has followed the steps required under OAR 660-009-0015 for estimating land need. The submittal is remanded for the City to clarify in adequate findings that it is utilizing its 2008 EOA, scenario B, as the basis for estimating employment land needs.

5.2. Whether the City’s Use of a 10 percent Factor to Estimate the Amount of Employment Need that Will be Met through Redevelopment of “Developed” Lands is Supported by an Adequate Factual and Policy Base, and Justified by Adequate Findings.

a. Summary of Issue, Objectors and Appellants

This issue is whether the submittal includes an adequate factual base to support use of a 10 percent factor for the amount of employment need that the City estimates will be met through redevelopment of developed lands. Swalley Irrigation District, Brooks Resources, and Central

Oregon LandWatch had challenged whether the submittal provides an adequate factual basis for the findings and conclusions drawn in the City’s EOA. Swalley Irrigation District Objection, at 47-53, Brooks Resources Objection, at 2-9, and Central Oregon LandWatch Objection, at 11-12. The Bayard and Anderson appeals assert that the city did not properly analyze whether employment land needs would be met on “developed” lands (e.g., redevelopment) within the city’s prior UGB during the 20-year planning period.

b. Legal Standard

Pursuant to OAR 660-009-0015(3) and 660-024-0050(1), the city must determine the amount of land within the prior UGB that is likely to be redeveloped for employment uses during the planning period. OAR 660-009-0015(3) provides the requirements for what a city must included in an EOA with regard to an inventory of “vacant” and “developed” lands:²³

“Inventory of Industrial and Other Employment Lands. Comprehensive plans for all areas within urban growth boundaries must include an inventory of vacant and developed lands within the planning area designated for industrial or other employment use.

“(a) For sites inventoried under this section, plans must provide the following information:

“(A) The description, including site characteristics, of vacant or developed sites within each plan or zoning district;

“(B) A description of any development constraints or infrastructure needs that affect the buildable area of sites in the inventory; and

“(C) For cities and counties within a Metropolitan Planning Organization, the inventory must also include the approximate total acreage and percentage of sites within each plan or zoning district that comprise the short-term supply of land.”

The OAR 660-009-0015 inventory of land inside a UGB, which must include suitable vacant and developed land designated for industrial or other employment use, is a prescribed step in amending a UGB. OAR 660-024-0050(1). The inventory facilitates the analysis of whether the development capacity of land inside the UGB is able to accommodate the estimated 20-year need, including by increasing the development capacity of such land. Ultimately, the city must

²³ The Goal 9 rule provides definitions for the terms “vacant” and “developed.” OAR 660-009-0005(14) defines the term “vacant” to mean “a lot or parcel:

“(a) Equal to or larger than one half-acre not currently containing permanent buildings or improvements; or

“(b) Equal to or larger than five acres where less than one half-acre is occupied by permanent buildings or improvements.”

OAR 660-009-0005(1) defines “developed land” as “non-vacant land that is likely to be redeveloped during the planning period.”

demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB prior to expanding the UGB. Goal 14, OAR 660-024-0050(4).

The Commission concluded above that submittals under ORS 197.626 must be supported by substantial evidence and present adequate findings.

c. Summary of Local Action, Director's Decision and Appeal

The City decided that redevelopment of “developed” lands will accommodate 10 percent of the projected future employment, thus, the 2008 EOA simply adopts a 10 percent factor for “developed land.” The EOA states that this factor is based on research by Metro, and other EOAs. R. at 1611. The 2008 EOA notes that the chosen factor is well below the amount of redevelopment for employment that other jurisdictions have determined is likely. Record at 1611. The City also added 119 acres to its UGB as a component of residential land need to account for future employment that would be provided on lands in residential plan districts. (“Economic Uses in Residential Zones” – 119 acres. R. at 1114 (Table 4-3)).

The Department concluded that the City had not adequately justified employing a 10 factor for the amount of employment land need that will be met through redevelopment. Director’s Report at A-24-A-25. The Department also questioned whether the factor satisfies the requirement of Goal 14 to demonstrate that land needs cannot reasonably be accommodated on lands within the existing UGB. *Id.* at A-27.

d. Analysis

The City based its redevelopment factor on analyses prepared for the Portland metro region. The City argued that it used the Metro infill/refill factor due to difficulty of predicting what is likely to redevelop in the planning period. The City contends that the 10 percent redevelopment factor is based on best available and readily collectible information in compliance with OAR 660-009-0010(5). The Metro materials the city referred to data collected between 1999 and 2002. However, the City did not explain through findings both how the Metro factor is current and why it is applicable to Bend. The redevelopment factor is not supported by findings examining how the selected rate accounts for differences in commercial redevelopment near the downtown compared to the edge of the UGB or differences between commercial and industrial redevelopment. Additionally, where a premise of the EOA is that some future employment will occur within residential zones, the findings should establish the factual and policy base that

produce a 10 percent factor for the City. This is particularly the case where EOAs for other cities referenced in the city's EOA use a factor of "15 percent or more."

The 10 percent redevelopment rate does not derive from the factual basis required by the rule. As the Department recommended:

"If the city employs a city-wide factor rather than analyzing particular sites, it *at least* needs to document what the trend has been for the proportion of new employment within the city that has been met through redevelopment, and must project whether that trend is likely to continue. If the city wishes to alter that trend, it must adopt some policy basis for why doing so is consistent with applicable state and local requirements. Those requirements include the Goal 14 requirement that before expanding its UGB, the city demonstrate why its land needs cannot reasonably be accommodated within the prior UGB." *Id.* at A-27.

The City has agreed to provide more detailed findings related to the redevelopment factor. City of Bend's Exceptions at 19.

e. Conclusion

The Commission remands the UGB decision to the City to provide an adequate factual base to support use of a 10 percent redevelopment factor, including an analysis of the amount of redevelopment that has occurred in the past and a reasoned extension of that analysis over the planning period. Alternatively, the City may satisfy Goal 9 and division 9 by other means, for example through a site-by-site redevelopment analysis. However, a site-by-site analysis is not required; the Commission determines that using a factor is acceptable where findings explain evidentiary basis and address the Goal 14 requirement to reasonably accommodate development within the existing UGB.

5.3. Whether the City Must Update its EOA to Reflect More Recent Trends Resulting from the Current Recession.

a. Summary of Issue, Objectors and Appellants

Central Oregon Land Watch argues that the Commission must require the City to update its trends analysis to reflect the more recent downturn in economic conditions. COLW objected that the findings and EOA are outdated, so there is no basis for need demonstrated. COLW Objection, at 11–12. The Director's Decision did not sustain this objection.

b. Legal Standard

OAR 660-024-0040(2) provides that the 20-year planning period for a UGB amendment commences either on the date initially scheduled for final adoption of the amendment specified

by the local government in the initial notice of the amendment required by OAR 660-018-0020, or (if the beginning date for the city's coordinated population forecast is more recent) the beginning date for the population forecast. Regarding what constitutes an adequate planning effort by a city in developing an EOA, OAR 660-009-0010(5) provides that 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."

c. Summary of Local Action, Director's Decision and Appeal

The city's 45-day notice for its UGB amendment stated that the date initially scheduled for final adoption was November 24, 2008. The city's coordinated population forecast also begins in 2008.

Central Oregon LandWatch objects that the EOA is based on trend analysis that is based on a market bubble that popped two years before the City adopted the EOA and UGB expansion. COLW argues that the Commission must require the City to update its trends analysis to reflect the more recent downturn in economic conditions. COLW objected that the findings and EOA are outdated, and that as a result there is no basis for need demonstrated.

d. Analysis

Applying OAR 660-024-0040(2) to the facts here, the city's 45-day notice for its UGB amendment stated that the date initially scheduled for final adoption was November 24, 2008. The City's coordinated population forecast also begins in 2008. As a result, the Commission's rules do not require the City to review trend or forecast data that became available after that time.

Turning to whether Goal 9 as implemented by division 9 *requires* the City to review the EOA to reflect current downturn in economic conditions, the Department determined that the trend analysis was not so out of date that the City could not rely on it. Director's Report at A-29. The Department stated the "intent" of division 9 provisions requiring review is "to ensure that the local jurisdiction investigates, considers and makes policy decisions regarding significant influences on *long-range* economic and employment conditions." *Id.* Although a local government is certainly not prohibited from revisiting its EOA trends analysis to reflect changing economic conditions, nothing in the Commission's rules requires a local government to continually update an EOA or its estimate of land need to reflect changing economic conditions. If a trend analysis became so out of date that a local government would not reasonably rely on it, the adequate factual base requirement of Goal 2 would then require the City to update the

analysis, but the Department determined that neither the objection nor the appeal established that the City's 2008 EOA is at that point yet.

e. Conclusion

The Commission concludes that although the City may update its EOA to reflect current economic trend data, nothing in the Commission's rules require it to do so under the circumstances presented here.

5.4. Whether the City Established Adequate Factual and Policy Bases for its Decision to Increase its Estimate of Employment Land Need for Commercial, Medical, Residential and Public Facility Plan Districts by Fifty Percent (Except its CG plan (Commercial General) District, which it Increased by 25 percent). Whether the City may Include Additional Employment Lands Beyond What it Shows are Needed Over the Planning Period to Allow for "market choice."

a. Summary of Issue, Objectors and Appellants

Central Oregon LandWatch and Swalley Irrigation District filed objections that the EOA impermissibly adds surplus employment land to the inventory and as a result the UGB was expanded to include more employment land than the City has established a need for. The Director upheld the objections.

The City of Bend appealed, noting that OAR 660-009-0025(2) provides “* * * the total acreage of land designated [for employment land need] must *at least* equal the total projected land need for each industrial or other employment use category identified in the plan during the 20-year planning period.” City Appeal, at 53 (emphasis added). The City argues that this language means that it is allowed to include an amount of land in addition to its projected land need for the 20-year period. The City also argues that it is allowed to include additional lands to provide for market choice during the 20-year planning period and that this is, in essence, an element of its 20-year need. City Appeal, at 54.

Toby Bayard and Terry Anderson also appealed on this issue, arguing that the expansion includes more employment land than is justified. Bayard and Anderson argue that in order to justify a need for employment land within the UGB to provide for efficient market functions or to respond to market conditions, the record must contain an adequate factual base and policy directives to support such a decision. Bayard Appeal at 5-7; Anderson Appeal at 5-7.

b. Legal Standard

Goal 14 requires cities to plan for and include in their urban growth boundaries an amount of land estimated to meet the need for a 20-year supply of land for residential, employment and other land uses. Goal 9 does not alter that basic provision of Goal 14. *Volny v. City of Bend*, 37 Or LUBA 493, *aff'd* 168 Or App 516, 4 P3d 768 (2000).²⁴ The Court of Appeals recently stated that:

“In other words, even if a local government designates a needed supply of industrial land for use over the 20-year planning period consistently with Goal 9, an amendment to the UGB cannot be accomplished without demonstrating compliance with the requirements of Goal 14.”

1000 Friends of Oregon v. LCDC, __ Or App __, __P3d __ (A135375) (September 8, 2010) slip op at 3. The Commission’s Goal 9 rule states that the amount of land included in the expansion area must “at least” equal the total projected land need over a 20-year period..²⁵

OAR 660-009-0005(13) defines “total land supply” as “* * * *the supply of land estimated to be adequate to accommodate industrial and other employment uses for a 20-year planning*

²⁴ “* * * To the extent petitioners argue that Goal 9 itself requires that the city and county designate enough industrial and commercial lands to meet the identified shortfall over the 20-year planning period, Goal 9 merely requires that local governments provide for ‘an adequate supply of sites’ for industrial and commercial uses, without imposing, as the Goal 9 rule does, any requirement that the supply of sites be adequate over a particular planning horizon.” *Volny*, 37 Or LUBA at 518.

²⁵ OAR 660-009-0025 provides in part:

“(1) Identification of Needed Sites. The plan must identify the approximate number, acreage and site characteristics of sites needed to accommodate industrial and other employment uses to implement plan policies. Plans do not need to provide a different type of site for each industrial or other employment use. Compatible uses with similar site characteristics may be combined into broad site categories. Several broad site categories will provide for industrial and other employment uses likely to occur in most planning areas. Cities and counties may also designate mixed-use zones to meet multiple needs in a given location.

“(2) Total Land Supply. Plans must designate serviceable land suitable to meet the site needs identified in section (1) of this rule. Except as provided for in section (5) of this rule, the total acreage of land designated must at least equal the total projected land needs for each industrial or other employment use category identified in the plan during the 20-year planning period.

“* * *

“(5) Institutional Uses. Cities and counties are not required to designate institutional uses on privately owned land when implementing section (2) of this rule. Cities and counties may designate land in an industrial or other employment land category to compensate for any institutional land demand that is not designated under this section.”

period.” The Commission’s rule governing a city’s determination of land need, OAR 660-024-0040(1), provides:

“*The UGB must be based on the adopted 20-year population forecast for the urban area described in OAR 660-024-0030, and must provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period consistent with the land need requirements of Goal 14 and this rule. The 20-year need determinations are estimates which, although based on the best available information and methodologies, should not be held to an unreasonably high level of precision.*”

In considering the land supply within a UGB, the applicable goals and rules all provide for a 20-year planning period.

A local government is authorized to include employment lands in a UGB expansion for market choice, but only in order to meet the requirements of the commission’s rules. This certainly includes lands required for a competitive short-term supply of employment lands. OAR 660-009-0005(10) defines “Short-term Supply of Land” as

“suitable land that is ready for construction within one year of an application for a building permit or request for service extension. * * * ‘Competitive Short-term Supply’ means the short-term supply of land provides a range of site sizes and locations to accommodate the market needs of a variety of industrial and other employment uses.”

OAR 660-009-0005(13) defines “Total Land Supply” as

“the supply of land estimated to be adequate to accommodate industrial and other employment uses for a 20-year planning period. Total land supply includes the short-term supply of land as well as the remaining supply of lands considered suitable and serviceable for the industrial or other employment uses identified in a comprehensive plan. Total land supply includes both vacant and developed land.”

In short, the Commission’s rules do allow the city to plan for a “competitive short-term supply” of employment land that includes a “market choice” element. Whether a local government may include a market choice factor as part of its overall total employment land need over a 20-year planning period is not clear after the court’s decision in *Woodburn*, but if it is permissible the local government must establish the policy and factual basis for it.

c. Summary of Local Action, Director’s Decision and Appeal

The City included market choice adjustment factors ranging from 25 to 50 percent to increase its determination of the amount of employment land need. *Id.* at A-25. The inclusion of

a redundant supply for market choice added 421 acres to the UGB. R. at 1622. The Director sustained the objections and remanded. Director's Decision, at 66. The City appeal argues “The rules make it clear that plans must at least provide a 20-year supply, but are not limited to a 20-year supply.” City Appeal, at 53.

d. Analysis

While OAR 660-024-0040(1) does not require precision in estimates of land need, that recognition does not authorize cities to plan for more than a 20-year employment land need, as the City’s decision in this case effectively did for commercial and certain other uses (through its use of adjustment factors). The city may be able to establish a factual and policy basis why it needs more employment land in order to assure that it meets its projected need for employment uses over a 20-year period, but that analysis is not contained in the record at present.

State policy is to require periodic review of comprehensive plans and land use regulations in order to respond to changes and to ensure adequate provision for economic development. ORS 197.628(1). Every ten years, a city the size of Bend must review whether the UGB complies with Goal 9 by revising its plans to provide a 20-year supply of land for economic needs. ORS 197.629(1)(b). Thus, the periodic review process is designed to determine whether the 20-year supply in fact exists on a regular basis. In this context, it will be more difficult to justify the inclusion of lands to provide market choice.

The Department determined that the City’s findings and 2008 EOA establish an adequate factual basis and policy rational for including lands beyond the “minimum” (*e.g.* 20-year) estimate based on projected employment in Scenario A. The report stated:

“For industrial lands, the city documented a need for two large industrial sites. R. 1124-1125. The city notes that without including these additional sites, the only newly-added industrial lands to its UGB would be at the city-owned Juniper Ridge site at the north end of the city. The city also documents a particular need for a new hospital site (112 acres in the south of Bend), and for a new university site (225 acres at Juniper Ridge). R. at 1122-1124. These site needs are based on factual information in the record, as described in the city’s findings and the 2008 EOA. The department concurs with these components of the city’s decision on employment lands, which together comprise 449 acres (112 acres for new hospital site, 225 acres for university site, and 112 acres for two large industrial sites). R. at 1114, Table 4-3. As noted in the Director’s Decision, however, the city does not identify whether there are sites that could reasonably accommodate these particular site needs within the prior UGB. Director’s Decision at 69. The department believes that it is highly unlikely that suitable sites are available for these uses within the

prior UGB; however, the city needs to document this aspect of its decision and adopt findings explaining its determination.

“For medical land uses (other than a new hospital site) the city identifies a land need of 252 acres, which is more than double the amount indicated in Scenario A. R. at 1120; R at 1114, Table 4-3. The city’s explanation in its findings simply assumes two 100-acre sites, one adjacent to a new hospital site, and the other to the north. R. at 1120. Given the degree to which the size of the sites exceeds the city’s employment forecast based estimate, the department believes additional justification is needed for the amount identified as new MDOZ land. Unlike the hospital site, which the city justifies in some detail (R. at 1122-1123), there is little information provided in the findings or the 2008 EOA regarding why particular site needs for medical offices should be added to the city’s overall employment projection based estimate of land need. See also, Bayard and Anderson Appeals. Bayard Appeal at 6; Anderson Appeal at 11.” Director’s Report at A-32 – A-33.

The Department recommended that the Commission remand the submittal, directing the City to eliminate the 50 percent and 35 percent factors used to increase the amount of commercial and industrial land (25 percent for CG) need over the 20-year planning period. *Id.* Appellant Bayard pointed to conflicting acreage (225 and 175) related to identification need for a university site and the City agreed to clarify acreage on remand. The City also agreed to make findings under Goal 14 that particular employment land needs could not reasonably be accommodated on vacant or developed land within the prior UGB.

On September 8, 2010, after the Commission heard this matter, the Court of Appeals issued its decision in *1000 Friends of Oregon v. LCDC*, __ Or App __, __P3d __ (A135375). The court reiterated that a local government may not amend an UGB to include more land than it needs for the planning period. *Id.* at slip op 3. The court described “market choice” as “an infinitely pliable and elastic term,” and remanded the case to the Commission for it to explain how market choice is considered under Goals 9 and 14. *Id.* at slip op 7. As a result, in this case, to the extent that the city continues to base some portion of its employment land need on market choice, it must explain how doing so in the factual context provided by the record for the Bend UGB expansion is consistent with the requirements of Goal 9, OAR 660-009-0025, and the “need” factors of Goal 14.

e. Conclusion

The Commission concludes that the City may not include *more* land than is estimated as needed over the 20-year planning period. The City’s determination should be based on a

description of past and projected future trends, long-term employment needs, and other policy bases articulated in its findings. On remand, the City must make findings addressing applicable law, including addressing consistency with Goals 9 and 14 as required in *1000 Friends of Oregon v. LCDC*, __ Or App __, __P3d __ (A135375) (September 8, 2010).

5.5. *Whether the City adopted adequate plan policies to manage the short-term supply of employment land.*

a. *Summary of Issue, Objectors and Appellants*

The Director’s Decision concluded that the short-term land supply management plan does not include detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed, as required by OAR 660-009-0020(1) and (2). The City of Bend appealed.

b. *Legal Standard*

OAR 660-009-0020(2) requires that comprehensive plans for cities within a Metropolitan Planning Organizations (MPOs) “include detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed.” The “Short-term Land Supply” includes a “Competitive Short-term Land Supply” that provides a range of site sizes and locations to accommodate the market needs of a variety of industrial and other employment uses.” OAR 660-009-0005(10).

c. *Summary of Local Actions, Director's Decision, and Appeal*

The City adopted economic development policies in chapter 6 of the Bend Area General Plan. R. at 1339. The policies accept the 2008 EOA and associated land needs, establish the short-term supply management plan, establish emphasis on large-lot industrial, and established mixed-use and commercial development guidance.

d. *Analysis*

Division 9 is flexible, but for MPOs, there is a requirement that certain lands be ready in the short term. Under OAR 660-009-0015(3)(a)(C), the EOA Inventory of Industrial and Other Employment Lands for cities and counties within a Metropolitan Planning Organization, must include the approximate total acreage and percentage of sites within each plan or zoning district that comprise the short-term supply of land. This short-term supply analysis required for jurisdictions within MPOs is in addition to the EOA inventory requirements applicable to all comprehensive plans for areas within urban growth boundaries. OAR 660-009-0015(3)(a).

Furthermore, division 9 requires that comprehensive plans for cities such as Bend “include detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed.” OAR 660-009-0020(2). These policies must describe dates, events or both, that trigger local review of the short-term supply of land.

e. Conclusion

The Commission concludes that the Goal 9 rule requires the City to include policies for maintaining a short-term supply. The City must plan for required infrastructure and have identified the funding mechanisms, although it is not required to have money "in the bank" to fund required infrastructure.

5.6. Whether the record supports the conclusion that Bend will experience a fifteen percent vacancy rate in its employment lands over the 20-year planning period.

a. Summary of Issue, Objectors and Appellants

The Department commented by letter dated November 21, 2008, that the use of a fifteen percent vacancy rate as a component of the 20-year land supply would require “additional factual evidence supporting its projected vacancy rate based on an evaluation of local conditions.” R. at 3765-3766. The Department commented that a fifteen percent vacancy rate may be justifiable for the short-term. *Id.* The City appealed.

b. Legal Standard

Cities are required to conduct an Economic Opportunities Analysis to determine demand for land for industrial and other employment uses and the existing supply of such land. OAR 660-009-0015. As described above, under OAR 660-009-0015(3)(a)(C), the City’s EOA Inventory of Industrial and Other Employment Lands, must include the approximate total acreage and percentage of sites within each plan or zoning district that comprise the short-term supply of land. Division 9 requires that the City’s comprehensive plans “include detailed strategies for preparing the total land supply for development and for replacing the short-term supply of land as it is developed.” OAR 660-009-0020(2). The “Short-term Land Supply” includes a “Competitive Short-term Land Supply” that provides a range of site sizes and locations to accommodate the market needs of a variety of industrial and other employment uses.” OAR 660-009-0005(10). A “vacancy rate” can be a component of “market needs” under the competitive short-term land supply. The Goal 2 requirement of an adequate factual base applies to identification of the “vacancy rate” and requires that the record, viewed as a whole,

would permit a reasonable person to make the finding. Here, because the vacancy rate involves both basic findings of fact and inferences drawn from those facts, substantial evidence review involves two related inquiries: “(1) whether the basic facts or facts are supported by substantial evidence, and (2) whether there is a basis in reason connecting the inference to the facts from which it is derived.” *City of Roseburg v. Roseburg City Firefighters*, 292 Or 266, 271, 639 P2d 90 (1981).

c. Summary of Local Actions, Director's Decision, and Appeal

In calculating the gross employment land need during the planning period, one of the three factors that the City applied to convert the anticipated employment land demand into gross acres for economic use is a 15 percent vacancy rate. R. at 1615, 1616 and 1111-1112. The City identified the vacancy rate for office and industrial land between 1993 and 2005. R. at 1562, Figure 23. During that time, the identified vacancy rate for industrial fluctuated between four and nine percent; the identified vacancy rate for office ranged from four to 13 percent. R. at 1562, 1616. The City acknowledged that a 15 percent vacancy rate is higher than Bend has experienced, but reasons that the rate is only slightly higher than historic and current conditions. R. at 1616. Further, the City decided the higher rate is warranted to both “lower land and rent prices for business” and “the desire of the Planning Commission and the City Council to increase land supplies in the expanded UGB.” R. at 1617. The City determined that a vacancy rate of 15 percent would account for 1,587 acres of land. R. at 1618, Table 40.

The Director determined that the City had not established an adequate factual base for the assumed 15 percent vacancy rate. Director's Decision, at 63. The order decided:

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

The City appealed, contending the vacancy rate is supported by substantial evidence. The Director found the rationale for varying from the trend data unpersuasive. Director's Report at A-34. The Department determined that the short-term evidence cited by the City, some of which was not in the record, does not demonstrate that vacancy rates will ever reach, much less be

sustained at 15 percent. *Id.* The Department recommended that that Commission remand with instructions to utilize a long-term vacancy rate that is consistent with available trend data.

d. Analysis

The City’s assumed 15 percent vacancy rate is neither consistent with either the historic or current conditions trend data in the record nor has the City established that it is otherwise based on substantial evidence in the record. Under that circumstance, the City must establish a basis in reason connecting the inference that the planning period will present higher vacancy rates for industrial and office than historic and current conditions to the trend data from which it is derived. The City points in part to the rate range stated in the Department’s “Industrial and Other Employment Lands Analysis—Advanced Guidebook 2005 (Guidebook).” In determining long-term demand analysis, the guidebook states:

“Vacancy rates also apply to built space. As they tend to be cyclical, the assumption should reflect a long-term average and provide a range of choices. For efficient market operation, a minimum vacancy rate for built space is between 5% and 15%. The estimate of total acres of demand should be increased by this percentage as the market often requires more options than the employment estimates seem to require.” Guidebook at 2-32.

In commenting on the daft EOA, the Department clarified for the City that the five to 15 percent vacancy rate range applies only to the short-term supply of built commercial and industrial lands. R. at 3765-3766 n 5. However, because a “vacancy rate” can be a component of “market needs” under the competitive short-term land supply, the City may pursue a mechanism to make industrial and commercial rents affordable under the competitive short-term supply, but not by inflating the long-term need beyond what may be supported by substantial evidence in trend data or reasoned inferences there from.

e. Conclusion

The Commission concluded that under division 9, the long-term vacancy factor should be based on past and projected future trends over the planning period. The City has not established that a 15 percent vacancy factor is based on substantial evidence.

5.7. Whether an Urban Expansion Must Consider the Impact on Displaced non-Urban Industries, such as Agriculture and Agricultural Irrigation.

a. Summary of Issue, Objectors and Appellants

Swalley Irrigation District objected and filed an appeal asserting *inter alia* that a provision of Goal 9 requires the City to analyze the impacts of the UGB expansion on Swalley,

and in turn protect Swalley’s existing operations. Swalley Irrigation District Appeal at 2; Swalley Objection at 48. Swalley contends that the submittal significantly adversely impacts an existing industry – the industry of providing irrigation water – an agricultural/utility type of industry. Significantly adversely impacting an agricultural water provider likewise impacts the dependent agricultural industry, an impact which Swalley argues the City failed to address in its findings. *Id.*

b. Legal Standard

Statewide Planning Goal 9 provides planning guidelines. Guideline A(4) provides “Plans should strongly emphasize the expansion of and increased productivity from existing industries and firms as a means to strengthen local and regional economic development.”

c. Summary of Local Actions, Director’s Decision, and Appeal

The Director’s Decision denied the objection on this matter, treating it as a locational issue, citing OAR 660-024-0060(8)²⁶ that specifies how cities apply the Goal 14 boundary location factors to the land in a statutory priority category in order to select the parcels to fulfill the city’s 20-year land need for a particular urban use. The Director’s Decision did not address the issue as a Goal 9 compliance issue, the position that Swalley initially made in its written appeal. The City agreed with the Department’s recommendation and analysis. City of Bend’s Exceptions at 26. At the LCDC hearing, Swalley waived this argument.

²⁶ This rule provides:

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

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

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

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

d. Analysis

OAR 660-009-0020(3) and (4) provide that local governments, as part of their Goal 9 responsibilities, *may* adopt policies and take other actions to maintain and encourage the expansion of existing industries. Such industries could include agricultural industries. However, in this case, neither the city nor the county have adopted comprehensive plan policies that require them to manage the urban growth boundary in a manner that maintains or expands agricultural operations. To the extent that Goal 14 and ORS 197.298 require local governments to maintain agricultural industries, those requirements are addressed under those provisions and not generally under Goal 9.

e. Conclusion

The Commission concludes that neither the objection nor the withdrawn appeal present a basis for remand of the submittal and they are rejected.

5.8. Whether the City justified the inclusion of 119 acres of residential land for employment uses

a. Summary of Issue, Objectors and Appellants

The City identified a need for 119 gross acres to accommodate employment uses taking place on residentially zoned land (RH, RM, RS), but not in residential structures. Record at 1113-1114, table 4-3. Objectors questioned the factual basis for the identified need and argued that the City should retain the land for high density residential use. Swalley Irrigation District Objection at 53; Central Oregon Land Watch Objection, at 11. The City appealed.

b. Legal Standard

OAR chapter 660, division 9 requires that a city determine the need for employment land by preparing an EOA. OAR 660-009-0015. Determination of 20-year employment land in an urban area must comply with Goal 9 and division 9. OAR 660-024-0040(5).

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

“All non-industrial employment activities including the widest range of retail, wholesale, service, non-profit, business headquarters, administrative and governmental employment activities that are accommodated in retail, office and flexible building types. Other employment uses also include employment activities of an entity or organization that serves the medical, educational, social service, recreation and security needs of the community typically in large buildings or multi-building campuses.”

OAR 660-009-0025 requires local governments to adopt measures adequate to implement economic development policies and appropriate implementing measures include amendments to plan and zone map designations. Goals 10 and 14 and OAR chapter 660, divisions 8 and 24 establish the requirements for designation of residential land and UGB expansion considerations for residential uses.

c. Summary of Local Actions, Director's Decision, and Appeal

The City determined that it was appropriate to consider employment uses in residential zones because such uses, which are encouraged by the development code, consume residential land. Record at 1113. To account for neighborhood commercial and other uses that the code permits outright or conditionally, the City identified a need for 119 gross acres to accommodate employment uses taking place on residentially zoned land. Record at 1114.

The Director sustained the objections and remanded the inclusion of 119 acres of residential need for employment land need. Order 001775, at 66-67. The Department decided:

“It is appropriate to define the portion of projected employment that is expected to take place on residential land in order to gain an accurate approximation of how much will locate in employment zones. However, OAR 660, division 9 does not permit designation of residential land for employment use. Residential land is designated according to the standards of OAR 660, division 8, which permits adjustments to the residential buildable lands inventory to account for non-residential uses.” Order 001775 at 67.

The City appealed, reasoning “Where the city has accurately estimated employment taking place in residential general plan designations, the “appropriate implementing measure” is to add small supplies of residential land to the proposal to account for such uses.” City Appeal at 55.

d. Analysis

The Department clarified that it had misunderstood the method the city used to determine the need for the 119 acres of residential land. Director’s Report on Appeals, at A-35. The City’s appeal clarified that a certain percentage of other employment uses (other than home-based employment) is allowed and takes place within its residential zones, and that this percentage is higher in Bend than in most other communities. The City based the forecasted need on an analysis of the demonstrated use at a point in time. Record at 1609. The Department agreed that the acreage at issue represents a small percentage of the overall employment land need and did not necessitate an in-depth analysis in order to make an adequate finding. *Id.* at A-35.

The Department rejected the City’s contention that the absence of an express prohibition of designating residential land for employment uses in Goal 9 or division 9 means that it is allowed. *Id.* The Department determined:

“The entire context of OAR chapter 660, division 9 involves lands designated for industrial or other employment use. Because the rule does not repeat this term at every opportunity does not change the overall framework of the rule. That said, nothing prevents a city from permitting employment uses within residential zones; the statewide planning program in fact promotes mixed-use development. (Although most jurisdictions do this within mixed-use zones, Bend has chosen to allow such development through permitting, rather than planning, decisions.) In order to ensure an adequate supply of residential land, non-residential uses must be accounted for.

“The land need for employment uses in residential zones should be considered within the context of the residential land needs analysis. Accommodation of this neighborhood employment is not part of the city’s economic development strategy, but rather a recognition of an existing land use pattern that the city wishes to maintain. There appears to be no strategy regarding where or how many of these uses should be established, since the city does not plan for them; again, the EOA simply recognizes and accounts for them.

“While the EOA is the appropriate location for the analysis of future need for these uses, the need should be demonstrated based on data and analysis in the city’s housing needs analysis under Goal 10. This would provide the proper accounting and put these non-residential uses in the context of other residential land needs.” *Id.*

The City agreed that on remand it would move the analysis and calculation to the residential/other lands analysis and calculation. City of Bend Exceptions at 26.

e. Conclusion

The Commission remands the submittal to incorporate analysis of land needs for employment uses within residential zones in the City’s housing needs analysis.

5.9. Whether the City’s decision on employment lands, including its Framework Plan designations, is consistent with Policy 27 and Policy 28 of Chapter 6 of the Bend General Plan.

a. Summary of Issue and Related Objections

Rose & Associates, LLC contend that the submittal did not follow policies of the Bend Area General Plan that prohibit extending commercial development along specific street corridors.

b. Legal Standard

The Bend General Plan includes policies that are statements of public policy, and are used to evaluate any proposed changes to the General Plan. Chapter 6 of the Bend Area Plan

relates to *The Economy and Lands for Economic Growth*. It includes polices on Commercial Development, two of which provide:

“The existing pattern of commercial designations shown on the Plan Map along Highway 97 and Highway 20, and along arterial streets such as Newport Avenue, Galveston Avenue, SW 14th Street, 27th Street and O.B. Riley Road shall not be extended farther along the street corridors.

“No new strip commercial development or extensions of the commercial designations shall be permitted along arterial or collector streets.”²⁷

The Commission must review objections, appeals, and exceptions that contend that a local government did not explain how an analysis complied with its local provisions. *City of West Linn v. LCDC*, 201 Or App at 447.

c. Summary of Local Actions, Director’s Decision, and Appeal

The Director’s decision did not address these policies. Rose & Associates, LLC appealed, maintaining that the City failed to address certain policies of the Bend Area General Plan. The Department agreed that the findings did not address the policies cited by Rose & Associates.

d. Analysis

The City designated a substantial amount of land as Commercial General along Highway 20 in the expansion area. The City concedes that it did not make findings related to the General Plan policies cited by appellant, but agrees to develop findings addressing the policies on remand.

e. Conclusion

The Commission remands the submittal to the City to allow it to address Commercial Development Policy 27 and 28 contained in Chapter 6 of the Bend Area Plan.

²⁷ Following the January 5, 2009– Ordinance NS-2112 amendments to the General Plan, this provision now states:

“The city shall discourage long continuous strips of primarily commercial development along expressways, principle arterials, arterials or collector streets.”

The objection was based on the previous policy language.

6. Natural Resources and Hazards -- Goals 5 and 7

6.1. Whether prior to or contemporaneously with its UGB expansion the city must comply, and to what extent, with the requirements of Goal 5 and OAR chapter 660, division 23.

a. Summary of Issue, Objectors and Appellants

The Department received objections based on Goal 5 generally asserting either that the City failed to apply Goal 5 to the UGB expansion area or that the City identified land within the proposed expansion areas as protected land without adequate justification for the designation. The objections of Central Oregon LandWatch, Swalley Irrigation District, Bayard, Bend Metro Park and Recreation District, Elkins, Department of State Lands, and Tumalo Creek Development, LLP are described in the Director's Report. Director's Decision, at 141-142. The Director's remand of the UGB amendment and the public facility plan submittals was appealed. City of Bend appeal at 98-99, Toby Bayard appeal at 15-17, Terry Anderson appeal at 22-24.

b. Legal Standard

Statewide Planning Goal 5 and OAR chapter 660, division 23 address protection of significant natural, scenic and historic resources and open space. Division 23 specifies the resource categories that local governments must protect in comprehensive plans and which are subject to local discretion and circumstances; the rules establish procedures and criteria for completing inventories and protection programs, and when the rule requirements apply. Division 23 requires cities to inventory significant riparian areas, wetlands and wildlife habitat.

For certain Goal 5 resources the rule authorizes 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 resource protection program includes development restrictions, a city must account for any resulting loss of buildable land from such restrictions when determining the amount of land need.

OAR chapter 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 required Goal 5 resources inventories for which the rule does not rely on state or federal inventories. These are riparian corridors, wetlands, and wildlife habitat
- Adopt local state and federal inventories for resources that require inventories, specifically: 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 the local government:

- Collects existing and available information about Goal 5 resource sites. OAR 660-023-0030(2).
- Determines the information on the location, quantity, and quality of the resource is adequate. OAR 660-023-0030(3).
- Determines the significance of resource sites. OAR 660-023-003(4).
- Adopts a list of significant resources as part of the comprehensive plan. OAR 660-023-0030(5).
- Completes an analysis of the economic, social, environmental and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use. OAR 660-023-0040.
- Develops and adopts a program to achieve Goal 5 based on the conclusions of the ESEE analysis. OAR 660-023-0050.

c. Summary of Local Action, Director's Decision, and Appeal

The City's findings state that the proposed UGB expansion and Public Facilities Plan element of the city's General Plan satisfy Goal 5 because, "it avoids to the extent practicable lands with county-inventoried Goal 5 resources." The findings for Goal 5 further state that Deschutes County's Goal 5 program "does not identify any acknowledged riparian corridors, wetlands, wildlife habitat or other Goal 5 resources within the proposed urban growth boundary." R. at 1215. The findings also state that review of the National Wetlands Inventory shows no wetlands within the proposed expansion area, and this serves to satisfy Goal 5 requirements.

The findings describe the county's knowledge of wildlife habitat within its jurisdiction, and explain that the proposed expansion area does not include any lands in the Wildlife Area Combined Zone, "applied to Goal 5 wildlife habitat," and does not include county-mapped deer winter range or elk habitat. R. at 1216. The findings do not state when the county's inventories were last updated.

The findings identify two significant riparian corridors within the proposed expansion area and explain that they are protected through the county's plan and code. The findings also state that "approximately 22 additional [riparian] acres are located in the proposed UGB expansion area outside of the Deschutes River and Tumalo Creek." R. at 1216. The findings also consider the possibility that additional Goal 5 resources will be identified through future planning efforts. The record states that existing city code implementing its Waterway Overlay Zone and its areas of special interest will apply to newly identified Goal 5 resources. R. at 1216.

New policies commit the city to perform "a complete Goal 5 inventory once the new UGB is acknowledged." Other policies prevent urbanizable land from becoming urban until the Goal 5 inventory is complete and protection measures are in place. R. at 1217. The findings apparently use the term "Goal 5 resource" only to refer to resources that have, or will at some point, be identified as significant Goal 5 resources.

The findings do not include information about the approach to areas of special interest (ASI), a city classification described in the Bend General Plan. The ASI classification includes Goal 5 scenic, open space and habitat resources. R. at 1247. Some discussion of the city's intention to identify and manage impacts to ASIs is presented in the findings on the UGB locational analysis. R. at 159. Although the term "Areas of Significant Interest" is not used, the

findings state that about 299 acres will not be available for urban uses, “because of their significance as scenic or natural resource.” R. at 159. The bulleted list of evidence for these resources in the proposed expansion area describes landscape features that fit the ASI classification. These include: the presence of the Deschutes River viewshed; presence of the Deschutes River Canyon State Scenic Waterway; and past surveys documenting prominent rock outcroppings, which are potential scenic resources.

Bend has included the Bend Area General Plan as amended January 5, 2009 in the record. Chapter 2, “Natural Features and Open Space,” provides some information on riparian areas, wetlands and wildlife habitat, and the city’s commitment to protecting these resources. The preservation of water resources, riparian areas and wildlife habitats is identified as one of the goals necessary to ensure Bend’s livability by provide long term protection of open space and natural features. R. at 1244. In several places, the Natural Features and Open Space chapter recognizes that the Deschutes River and Tumalo Creek provide important habitat for a variety of aquatic life, birds, reptiles and mammals, both big and small. On page 1251 of the record, it is stated that all of the significant wetlands identified for the local wetland inventory, conducted in 2000, are located along the Deschutes River.

The plan includes several policies for natural features and open space. Policy 4 states:

Prior to the completion of the Goal 5 inventory, analysis and ordinance by the city, properties seeking annexation shall conduct a Goal 5 inventory pursuant to OAR 660-023. Where a significant Goal 5 resource is identified, amendments to the Bend Area General Plan and the Bend Development Code shall be proposed and adopted, consistent with inventory findings and OAR 660-23, to ensure appropriate protection of the resource, prior to approval of any land use action.

The Director surmised that Policy 4 is one of the policies the City mentioned in the findings. R. at 1217. It would allow development to proceed and provide for a property-by-property approach to the inventory and protection of Goal 5 resources.

The “Natural Features and Open Space” chapter of the plan explains that the identification and preservation of ASIs and natural features is part of an effort to “retain and conserve the natural character of Bend as the community grows and changes.” R. at 1247. ASIs are identified as “features typical of Central Oregon, or represent important wildlife areas.” R. at 1247. The association of river canyons with wildlife habitat is recognized in this section.

The analysis for UGB amendment alternative 4A includes information on the

environmental consequences of selecting the alternative, and discusses Goal 5 resources for each quadrant. It appears that the term “Goal 5 resource” is used to refer to a resource that has already been identified as significant and placed on the Deschutes County inventory of significant resources, or that may be identified by the city as significant in the future. There are findings of no Goal 5 resources for the northeast priority 2 and priority 4 quadrants and the southeast priority 2 and priority 4 quadrants. It is stated that the southeast priority 4 quadrant is near Townsend bat habitat and has features that could qualify as an ASI. The northwest priority 2 quadrant is described as having one Goal 5 resource, a 200-acre aggregate site, and potential Goal 5 resources within the Tumalo Creek corridor. It is also stated that a State Scenic Waterway designation is recognized for portions of the Deschutes River that run through this quadrant. R. at 2460-2461.

There are findings of “no naturally occurring wetlands” for four of the six quadrants, presumably based on the National Wetlands Inventory. The analysis states that the southwest quadrant “contains some soils that have characteristics that may be indicative of potential areas of special interest,” and that the northwest quadrant contains a band of lowlands along the canyon bottom of the Deschutes River and Tumalo Creek which is in the 100-year floodplain. R. at 2430-2462.

Appellants Bayard and Anderson contend that Goal 5 requires the City to inventory wetlands, riparian corridors, and wildlife habitat as part of its UGB expansion. Bayard and Anderson argued that neither the City nor the County have inventoried Goal 5 resources in the 3,196 acres of areas designated Urban Area Reserve. The City of Bend contended that its plan policies commit the City to perform a complete Goal 5 resource inventory and protection program prior to development or annexation.

d. Analysis

OAR 660-023-0250(3) provides, in part:

“Local governments are not required to apply Goal 5 in consideration of a PAPA unless the PAPA affects a Goal 5 resource. For purposes of this section, a PAPA would affect a Goal 5 resource only if:

“* * *

“(c) The 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 rule requires the city to evaluate the expansion area where resources are identified and evaluate them for significance and possible protection. The resource sites at issue in this rule are not only sites that have already been identified by the county as significant. 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.

e. Conclusion

The Commission understands that the Department and the City negotiated a resolution to Goal 5 issues. The Commission concludes that the resolution establishes a manner for the City to comply with Goal 5 as implemented by division 23 on remand and, consistent with that resolution, orders as follows:

- State scenic waterway – Should a revised UGB expansion area include any areas within the Middle Deschutes River Scenic Waterway as described in OAR 736-040-0072, the city must adopt local requirements to implement the state plan for protecting the Middle Deschutes Scenic Waterway, including a setback from the canyon rim for structures.
- Riparian protection – Should a revised UGB expansion area include areas along the Deschutes River, Tumalo Creek, or both, the city must prepare and adopt an inventory of the significant riparian area that either: 1) finds that the topography along the river does not restrict the use of the safe harbor inventory under OAR 660-023-0090(5)(d) and apply the 75 feet upland from top of each bank safe harbor width provided in OAR 660-023-0090(5)(a); or 2) apply the standard inventory methodology, used within the current UGB, to the expansion area. In either case, the significant riparian area will fall within the canyon walls. For a protection program the city will adopt the county measures that serve to protect the scenic waterway and add restrictions for vegetation removal within the significant riparian area. The City must develop the protection program to meet the safe harbor protection measure standards.
- Wildlife habitat – Should a revised UGB expansion area include areas along the Deschutes River, Tumalo Creek, or both, the city must apply OAR 660-023-0110, the Goal 5 wildlife habitat rule, by conducting a safe harbor inventory under OAR 660-023-0110(4). The rule allows the city to limit consideration of significant habitat to the five habitat categories specified in subsections (a)-(e). The Commission understands that the City anticipates that ODFW will provide the City a letter stating that the agency does not have information that any of the five habitat categories are documented, identified or mapped within the portion of the Deschutes River or Tumalo Creek corridors that pass through the expansion area.
- Tumalo Creek – Should a revised UGB expansion area include Tumalo Creek in the final expansion area, the city must apply the Goal 5 safe harbor inventory and protection measures for riparian areas along the creek.

The City has identified areas of special interest (ASIs) – mainly areas of rock outcropping). The City established that such areas are *not* inventoried as Goal 5 resources. Therefore, the Commission concludes that the City may not exclude identified ASIs from its BLI (if they are already inside the prior UGB), or excluded ASIs from inclusion in the expansion area. The Commission understands that this may result in a 299-acre adjustment to expansion area.

6.2. Whether the City is Required to Address Wildfire Risk in Evaluating Alternate UGB Expansion Areas. Whether Goal 7 Requires the City and County to Include Wildland Fire Safety Planning as a Consideration in Planning for its UGB Expansion. Whether Other State Laws Would Implicate an Action through Goal 7.

a. Summary of Issue, Objectors and Appellants

Central Oregon LandWatch, joined by Swalley Irrigation District, objected that the submittal neither describes the risk of wildfire nor acknowledges the recent catastrophic fire near the proposed westside expansion area. COLW Objection, at 17-18. After the Director suggested that the City and County *should consider* the information in the Community Wildfire Protection Plan for the Greater Bend Area even though compliance with Goal 7 is not a requirement of a UGB expansion, the City of Bend appealed, arguing that Goal 7 does not require the City to do anything more than it has done. City Appeal, at 100. COLW appealed, arguing that the Director erred in rejecting its objection and determining that Goal 7 did not require the City to address the threat of catastrophic wildfire. COLW Appeal at 4-5.

b. Legal Standard

Goal 7 is to “protect people and property from natural hazards.” For purposes of Goal 7, “natural hazards” include “wildfires.”

c. Summary of Local Action, Director's Decision and Appeal

Pursuant to the federal Healthy Forests Restoration Act (2003), Deschutes County adopted a Community Wildfire Protection Plan for the Greater Bend Area (2006) that identifies significant wildfire risks for the area and outlines the priorities, strategies and action plans for fuels reduction treatments in the greater Bend wildland urban interface. It also addresses special areas of concern and makes recommendations for reducing structural vulnerability and creating defensible spaces in communities at risk. The Bend City Council and Deschutes County both adopted the Greater Bend Community Wildfire Protection Plan by resolution in 2006. Citing staff meetings with state and county staff to discuss provisions of the Community Wildfire

Protection Plan for the Greater Bend Area and how to incorporate the provisions into annexation agreements and implementing development plans, the City responds that it has taken wildfire risks into consideration in evaluating boundary locations for the UGB expansion. City of Bend's Exceptions at 28.

d. Analysis

COLW contends that the Community Wildfire Protection Plan for the Greater Bend Area (2006) is the type of new data that should trigger natural hazard planning. Goal 7 provides a specific process for addressing new hazard inventory information. When federal and state agencies provide the department with new hazard information, the department reviews such information with affected state and local representatives. Thereafter, the department notifies local governments if the new hazard information requires a local response, which must transpire within three years. Central Oregon LandWatch does not contend that the department notified the City of new wildfire hazard information, thereby triggering a city obligation to respond. As a matter of fact, the department has not done so. Under those circumstances, Goal 7 does not *obligate* the City to respond to the wildfire hazard inventory information in the Community Wildfire Protection Plan for the Greater Bend Area.

Goal 2 requires that city actions related to land use are consistent with *inter alia* county comprehensive plans. Goal 2 also requires that plan and implementation measures be coordinated with the plans of affected local governments, which include those local governments that have programs or responsibilities within the area included in the plan. Deschutes County has not adopted the Community Wildfire Protection Plan for the Greater Bend Area (2006) as part of its comprehensive plan. Under that circumstance, Goal 2 does not *obligate* the City to respond to the wildfire hazard inventory information in the Community Wildfire Protection Plan for the Greater Bend Area.

e. Conclusion

The Commission concludes that under these circumstances, neither Goals 2 nor 7 requires the City to address wildfire risk. This conclusion does not imply that the City should not explain in its findings how it has addressed wildfire risk. It is entirely appropriate and permissible for the City to consider relative risk of wildfire in alternate UGB expansion candidate areas in considering the environmental, energy, economic and social consequences of the alternatives under locational factor 3 of Goal 14.

6.3. Whether the Surface Mining Plan Map Designation for the Shevlin Sand and Gravel Property is Supported by an Adequate Factual Base.

a. Summary of Issue, Objectors and Appellants

Shevlin Sand and Gravel, Inc.²⁸ owns about 700 acres of land in Bend Urban Reserve Area that the City included in the proposed UGB. Shevlin operates an aggregate extraction and processing facility on a portion of the 700 acres. Shevlin filed an objection and subsequent appeal pertaining to the designation of a portion of its property.

b. Legal Standard

Goal 2 requires an adequate factual base for the establishment of land use plans. Goal 5 requires local governments to adopt programs to protect natural resources and requires that local governments inventory specific resources, including mineral and aggregate resources. Goal 5 provides in part: “In conjunction with the inventory of mineral and aggregate resources, sites for removal and processing of such resources should be identified and protected.” OAR chapter 660, division 23 establishes procedures and criteria for inventorying and evaluating Goal 5 resources. OAR 660-023-0000. OAR 660-023-0180 provides specific procedures and criteria for inventorying and evaluating mineral and aggregate resources.

c. Summary of Local Action, Director’s Decision and Appeal

A 280-acre portion of the Shevlin property is designated surface mining on the Bend Area General Plan Map dated December 12, 2008. R. at 1226. The Director’s Decision presumed the Deschutes County had designated the site a significant Goal 5 resource under OAR 660-023-0180. Order 001775 at 144-145. Shevlin appealed Order 001775, contending that Deschutes County had not designated the property a significant Goal 5 resource and that the Director erred in not sustaining Shevlin’s Goal 2 objection that the submittal lacked an adequate factual base to designate a specific 280-acre portion of the property for surface mining. Shevlin appeal at 1. Shevlin argued “the 280 acres designated Surface Mining on the Bend Urban Area General Plan Map (R. 1226) should include only portions of the SSG property that are legally capable of being used as part of SSG’s mining operation.” Shevlin appeal at 4. Shevlin proposed that the City and County resolve its objection by changing the boundaries of the 280-acre Surface Mining area to include only land subject to DOGAMI Permit 09-0018. *Id.* The

²⁸ Jon Skidmore appeared as an authorized representative on behalf of the appellant pursuant to ORS 183.457(1)(j).

City agreed that on remand it will reconsider the plan designation for the site. City of Bend exceptions at 28.

d. Analysis

The appellant's property includes an area permitted by Department of Geology and Mineral Industries (DOGAMI) for surface mining and an area that is not on the county's inventory of significant natural resources sites. As in *Urquhart v. Lane Council of Governments*, 80 Or App 176, 179-80, 721 P2d 870 (1986), here, the area raised in the appeal, was not included in the inventory before the amendment was enacted, and the amendment does not affect the county's inventory. The Commission effectively codified the holding in *Urquhart* in OAR 660-023-0250(3) and (4). *Johnson v. Jefferson County (A138263)*, 221 Or App 156, 165, 189 P3d 30 (2008), *rev dismissed* 347 Or 259 (2009). Goal 5 does not provide for land use plans to limit development on property based on potential or actual presence of natural resources without having first completed the inventory, significance determination, conflicting use analysis, and program development process provided in OAR chapter 660, division 23. Because the area subject to the appeal is not on the county's inventory, and no factual information has been submitted to demonstrate the presence of a resource site, there is not an adequate factual basis for placing the SM designation on property outside of the area subject o DOGAMI permit 09-0018.

e. Conclusion

The Commission concludes that the submittal does not comply with Goal 2, Goal 5, and OAR chapter 660, division 23. On remand, if the City includes the property in the revised UGB expansion area, the City should only plan for surface mining that portion of the property within the DOGAMI permit 09-0018 area, as the site is not on the county's acknowledged surface mining inventory. The City agrees to reconsider the plan designation on remand.

7. Public Facilities Planning – Goal 11

7.1. Whether the PFPs Submitted by the City Comply with Goal 11 and the Goal 11 Rules as to Lands Within the City's Prior UGB. Should the Commission Acknowledge the PFPs as to Lands Within the Prior UGB, Even if the PFPs Must be Remanded as to the UGB Expansion Area? May the City, on Remand, First Adopt Amended PFPs for the Lands Within the Prior UGB, and then (later) Amend the PFPs to Address Land Uses Within the Revised UGB Expansion Area?

a. Summary of Issue, Objectors and Appellants

The City submitted amendments to its public facilities plans to the Department for review in connection with its UGB amendment. R. at 35-36. The amendments pertain to facilities needed to serve lands both within the prior UGB of the City, and lands in the UGB expansion area. R. at 211. On appeal, the City asked the Commission to acknowledge the PFP amendments with respect to lands within the prior UGB, and (in the alternative) asked for clarification from the Commission concerning whether it could serially amend its PFPs to address lands within the prior UGB first, and then (at a later date) amend the PFPs to address lands within any proposed UGB expansion area.

b. Legal Standard

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

The required contents of a public facility plan are set forth in OAR 660-011-0010(1). At a minimum, public facility plans must include plans for water, sewer and transportation facilities that contain:

"(a) An inventory and general assessment of the condition of all the significant public facility systems which support the land uses designated in the acknowledged comprehensive plan;

(b) A list of the significant public facility projects which are to support the land uses designated in the acknowledged comprehensive plan. Public facility project descriptions or specifications of these projects as necessary;

(c) Rough cost estimates of each public facility project;

(d) A map or written description of each public facility project's general location or service area;

(e) Policy statement(s) or urban growth management agreement identifying the provider of each public facility system. If there is more than one provider with the authority to provide the system within the area covered by the public facility plan, then the provider of each project shall be designated;

(f) An estimate of when each facility project will be needed; and

(g) A discussion of the provider's existing funding mechanisms and the ability of these and possible new mechanisms to fund the development of each public facility project or system." OAR 660-011-0010(1)

For a UGB amendment, OAR 660-024-0060(8) requires that the Goal 14 boundary location determination include evaluation and comparison of the relative costs, advantages and disadvantages of alternative UGB expansion areas with respect to the provision of public facilities and services needed to urbanize alternative boundary locations. This evaluation and comparison must be conducted in coordination with service providers, including the Oregon Department of Transportation with regard to impacts on the state transportation system. "Coordination" includes timely notice to service providers and the consideration of evaluation methodologies recommended by service providers.

The evaluation and comparison for the UGB amendment must include:

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

(b) The capacity of existing public facilities and services to serve areas already inside the UGB as well as areas proposed for addition to the UGB. * * *" OAR 660-024-0060(8).

In addition, under Goal 11 itself, the City must find in connection with a UGB expansion that the expansion area can be adequately served in terms of water, sewer and other public facilities identified under OAR 660-011. *1000 Friends v. City of North Plains*, 27 Or LUBA 372 (1994), *aff'd* 130 Or. App. 406 (1994).

c. Summary of Local Actions, Director's Decision, and Appeal

Immediately before it adopted a UGB expansion, the City repealed its 1996 Utilities System Master Plan, and adopted certain specific utilities plans as amendments to the Public Facilities Element of the city's comprehensive plan. R. at 35. Those plans address current and future land uses both within the prior UGB and within the proposed UGB expansion area. R. at 211. The public facility plans adopted by the City are the public facility plans for water and sewer service under Goal 11. R. at 211. The water facility plans are:

- The Water System Master Plan (WSMP) Update – Final Report (2007). Murray, Smith, and Associates;
- The Airport Water System Master Plan (2007). Murray, Smith, and Associates. R. at 211.

The sewer facility plans are:

- Collection System Master Plan (CSMP) Final Report (2007). MWH
- CSMP Addendum #1: Final Executive Summary and "Alternative Technical Analysis; North East Bend" (2007) prepared by MacKay & Sposito, Inc.
- CSMP Addendum #2: Collection System CIP Analysis and Report (2008). Murray, Smith, and Associates.
- CSMP Addendum #3: Technical Memorandum 1.5 – Hamby Road Sewer Analysis (2008). CAMES and CH2M Hill.
- Water Reclamation Facilities Plan (2008), Carollo Engineering. Including technical memoranda nos. 1-10. R. at 211.

The Director reviewed the plans to determine whether they could be acknowledged, either with regard to land uses in the proposed UGB expansion area, or independently with regard to land uses in the area within the prior UGB. The Director found that the plans could not be acknowledged for either purpose because the plans were based on assumptions relating to the location and intensity of future development both inside and outside of the prior UGB that the Director had remanded and that were likely to change as a result. According to the Director, these issues had to be resolved before the public facilities plans could be acknowledged either with regard to the prior UGB or with regard to the proposed expansion. The Director also found that the City must complete its public facility plan for water by including information called for in OAR 660-011-0010 for areas served by the Avion Water Company and Roats Water Company, consistent with the city's urban growth management agreement with each water company. OAR 660-011-0015. As a result, the Director determined that he could not partially

acknowledge the city's public facilities plan based on the current submittal. Director's Decision, at 82.

The city's appeal argued that the Director's Decision confused: (1) the acknowledgement of the city Public Facilities Plans (PFPs) for the area within the current (prior) UGB; and (2) whether the PFPs provide an adequate basis for adoption of the UGB expansion. City Appeal at 61, 67. The City asked the Commission to acknowledge the PFPs for areas within the prior UGB. City's Appeal, at 61, 67.

d. Analysis

As a factual matter, with two exceptions, all of the city's facilities plans address either planned development in the UGB expansion area or development within the prior UGB, or both. The levels and locations of planned future development in these areas may change significantly as a result of the Commission's remand and, as a result, the Commission finds that the "land uses designated in the [city's] comprehensive plan" may change as well, necessitating corresponding changes in the city's facilities plans. OAR 660-011-0010(1). As one example, the "Collection System Master Plan (CSMP) Final Report (2007). MWH" assumes that future development will occur in areas that are not consistent with either the final UGB expansion decision that the city made (the CSMP was based on extending service to areas planned by the City and County as Urban Area Reserve), or with this order in terms of the amount and location of future residential and other development that the city has planned for within the prior UGB (to the extent that the City plans for additional infill or redevelopment).

OAR 660-011-0010(1) requires the public facility plan to include "* * * an inventory and general assessment of the condition of all of the significant public facility systems which support land uses designated in the acknowledged comprehensive plan." And OAR 660-011-0010(2) requires that the plan include a list of significant public facility projects which are to support land uses designated in the acknowledged plan. The City argues that its plans only need address land uses within its prior UGB, because land uses within the expansion area are not acknowledged. That *may* be true,²⁹ but because its plans do, in fact, address land uses in its expansion area it is impossible for the Commission to determine separately whether the public

²⁹ Although, as noted above, when the City amends its UGB Goal 11 requires it to address the adequacy of public services to serve development planned within the UGB expansion area. Exactly how that is done and at what level of detail will depend on how the City plans for lands within the expansion area. *1000 Friends v. City of North Plains*, 27 Or LUBA 372 (1994).

facility systems described in the plans support the land uses designated within the acknowledged (prior) UGB.

In addition, the city notes that the Department has advised the City that it should not rely on amendments to its public facilities plans that are not adopted and incorporated as elements of its comprehensive plan. City Appeal, at 61 (fn 23). That is correct, and results from the Goal 2 requirement for consistency and from the Goal 2 requirement that the comprehensive plan provide the basis for land use actions. *See, e.g., 1000 Friends of Oregon v. City of Dundee*, 203 Or App 207, 216 (2005) (an acknowledged comprehensive plan and information integrated into that plan must serve as the basis for land use decisions); *Lengkeek v. City of Tangent*, LUBA No. 2006-076 (9/11/2006)(same). In this case, the City repealed its 1996 Utilities System Master Plan, requiring that it adopt some form of valid public facility plan prior to amending its UGB. If the city had repealed the Utilities System Master Plan and adopted a public facility plan that *separately* addressed facilities and projects needed for development under its acknowledged comprehensive plan for its existing, acknowledged UGB, and then separately addressed those additional or different facilities needed for planned land uses as a result of its UGB expansion, that approach would have been consistent with Goal 11 and Goal 2. However, that is not what the City did.

Two of the master plans adopted by the City do not depend on or concern planned land uses within the UGB expansion area. These plans are independent of the city's UGB expansion decision. They are the: "Airport Water System Master Plan (2007);" and the "Water Reclamation Facilities Plan (2008), Carollo Engineering. Including technical memoranda nos. 1-10." These two master plans concern facilities outside of the city's UGB that are required regardless of the configuration of the UGB. The City has withdrawn the Airport Water System Master Plan (2007), and (as a result) that plan is not addressed in this order. The Water Reclamation Facilities Plan (2008), contains the elements required by OAR 660-011-0010, and the plan shows that the facilities addressed in it are required regardless of the amount of land added to the city's UGB and regardless of the location of the UGB. As a result, the Commission finds that the Water Reclamation Facilities Plan complies with applicable goals and implementing rules, and acknowledges that plan.

e. Conclusion

The Commission denies the appeal of the City in part, except with regard to the Water Reclamation Facilities Plan, which it acknowledges. Otherwise, the Commission affirms the Director's Decision on this issue. The City may adopt public facilities plans as needed for acknowledged land uses within its prior, acknowledged UGB on remand. The city may then, subsequently, adopt revisions to its public facilities plans for any revised UGB expansion proposal and any other related amendments to its acknowledged comprehensive plan.

7.2 May the city's sewer plans include facilities and capacity intended to serve lands outside the UGB, so long as the plans provide that no service will be permitted or provided until such lands are located inside the UGB and urbanized (rezoned to urban designations)?

a. Summary of Issue, Objectors and Appellants

In connection with its appeal, the City has raised the question of whether it may adopt new or amended public facility plans that include facilities and projects to serve land uses outside of its prior UGB (before it amends its UGB or before its UGB expansion is acknowledged). COLW objected that the city's sewer and water plans impermissibly allowed facilities outside of the UGB. COLW Objection, at 16.

b. Legal Standard

Goal 11 requires local governments to adopt public facility plans and to coordinate the type, locations and delivery of public facilities and services in a manner that best supports the existing and proposed land uses. ORS 197.712(2)(e) and OAR 660-011-0000 and 660-011-0010 require local governments to develop and adopt public facility plans for areas *within* an urban growth boundary.

c. Summary of Local Actions, Director's Decision, and Appeal

The City adopted public facility plans for land uses both within its existing, acknowledged urban growth boundary, and for land uses within its UGB expansion area. The Director remanded the city's decision adopting the public facility plans for a number of reasons, including that the plans were premised on locations and levels of future development both within and outside of the acknowledged UGB that would likely change as a result of the Director's remand of the city's UGB expansion decision. The City appealed, arguing that its decisions to amend its public facilities plans should be reviewed independently of its UGB decision, and that

it could and should consider anticipated future development outside of its acknowledged UGB in its public facilities plans.

d. Analysis

Goal 11 and ORS 197.712(2)(e) require cities and counties to develop and adopt public facility plans for areas *within* an urban growth boundary. However, there is no prohibition in these authorities on a city planning for public facilities on lands that it anticipates adding to its UGB in the future,³⁰ and (as noted above) if a city is relying on public facility planning in making a UGB expansion decision, the plan may be updated to reflect the proposed expansion and incorporated into the city's or county's comprehensive plan. However, such planning, if adopted into a comprehensive plan, must be consistent with the applicable urban growth management agreement (OAR 660-011-0015), and be coordinated with the appropriate county(ies), any adjoining city(ies), and other service providers. *Id.*, *Goal 11, Guideline A.1.*

e. Conclusion

The City may adopt a public facility plan that plans for future facilities and capacity to serve lands outside its UGB. If the City does so, must follow the applicable provisions of its urban growth management agreement, coordinate with other service providers, and may not authorize sewer systems outside of its acknowledged UGB (except as provided in OAR 660-011-0060 or by exception).

7.3. Whether the City's Public Facilities Plans Were Improperly Used to Determine the Location of the UGB Expansion?

a. Summary of Issue, Objectors and Appellants

Swalley, COLW, Bayard, Anderson, Rose & Associates, and Hunnell United objected that the city's public facilities plans were improperly used to determine the location of the UGB. Swalley Objection, at 25-26; COLW Objection, at 16; Bayard Objection, at 10; Rose & Associates, at 3. Hunnell United Objection, at 2.

b. Legal Standard

Under ORS 197.298(3)(b), exception lands such as lands zoned rural residential may be excluded from a UGB expansion if: "[f]uture urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints." ORS 197.298(3)(b).

30 LUBA has noted that "[t]he first sentence of Goal 11 simply requires planning for 'a timely, orderly and efficient arrangement of public facilities and services.' That language does not prohibit providing public facility capacity that exceeds current or planned demand." *SEIU v. City of Happy Valley*, 58 Or LUBA 261 (2009).

In effect, the appellants argue that the City is attempting to use its public facilities plans to make the showing required by the statute, and that this is improper.

c. Summary of Local Actions, Director's Decision, and Appeal

The city's water and sewer master plans primarily analyzed lands planned as urban area reserve (UAR) that were proposed for inclusion in the expanded UGB in 2007. For the most part, the city did not prepare revised public facilities plans for water or sewer to address the additional exception (rural residential) or resource (EFU) lands added to its UGB expansion study area in 2008. R. at 450-453. Exception lands and agricultural lands to the east that are included in the UGB expansion area are not analyzed in the sewer system collection master plan, while other lands that were dropped from the expansion (such as the DSL lands) are included in the analysis. Exception lands to the south of the city are not analyzed. The water system master plan only examined Tetherow and Juniper Ridge outside of the prior UGB. R. at 249.

The Director remanded the public facility plans due to their inconsistency with the proposed UGB expansion, and due to his finding that they failed to contain the comparison of relative costs, advantages, and disadvantages of alternative UGB expansion areas required by OAR 660-024-0060(8). Director's Decision, at 78-79. The Department noted, however, that "[t]he fact that both the city's water and sewer facilities plans include areas that are outside of the UGB expansion area suggests that the plans were not coordinated as closely with the UGB expansion analysis as appellants suggest." Department Report on Appeals, at A-44.

Swalley, Bayard, Anderson and Hunnell United appealed the Director's Decision on this issue. Bayard Appeal, at 7; Anderson Appeal, at 2-3 and 13-15; Hunnell United, at 1-3.

d. Analysis

According to Bayard and Anderson:

"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." Bayard Appeal, at 7.

As noted above, the City may rely on provisions of its public facility plans in evaluating where to expand its UGB. In order to exclude high priority lands (such as rural residential, urban area reserve, or other exception lands) from consideration for a UGB expansion on the basis of public facilities, the City must determine that "[f]uture urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints." ORS 197.298(3)(b). The legal standard for an exception to the normal statutory priorities regarding which lands must be included within an urban growth boundary expansion is intended to be exacting, as addressed in more detail under Issue 9, below. However, there is nothing wrong with a city using its public facilities plan to examine whether services can reasonably be provided to a particular area as long as the city's analysis compares areas as required by Goal 14 and OAR 660-024-0060(8). For the reasons set forth with regard to the preceding subissue, the City may address lands outside of its current UGB in its public facilities plans.

e. Conclusion

The Commission affirms the Director's Decision on this issue. If the City utilizes its public facilities plans as the basis for the comparative analysis required by Goal 14 and OAR 660-024-0060(8), it must analyze lands in a manner consistent with the priorities established in ORS 197.298. The role of public facility costs and feasibility in determining the location of a UGB expansion is addressed in connection with issue area 9, below.

7.4. Whether the City's Public Facility Plans Must be Consistent with Proposed Land Uses, Including Measures to Provide Land for Needed Housing.

a. Summary of Issue, Objectors and Appellants

The city maintains that it does not have to examine measures intended to plan for needed housing as part of an effort to gain acknowledgment of its public facility plans for the prior UGB. City Appeal at 62, 66.

b. Legal Standard

Goal 2 requires internal consistency in comprehensive plan provisions, and that comprehensive plans provide the basis for land use actions.

c. Summary of Local Actions, Director's Decision, and Appeal

The city's public facility plans do not consider additional development within the prior urban growth boundary that may be required in order to provide needed housing. The Department agreed with the City on appeal that if the City limits its public facilities plans to acknowledged land uses within its prior UGB, it is not required to address the timing and availability of public facilities for infill and redevelopment or other measures to provide needed housing associated with the City's evaluation of a UGB expansion.

d. Analysis

As noted above, the City could have amended its public facility plans to address only land uses within its existing, acknowledged urban growth boundary. However, the city elected to address areas outside of its prior UGB in connection with its proposed UGB expansion. R. at 211. In order to have an internally consistent, coordinated comprehensive plan that complies with Goal 2, if the city amends its public facility plan to address lands in a proposed UGB expansion area, the facilities plan also must address other measures that the city proposes to comply with ORS 197.296.

Conversely, the City may adopt a public facility plan to meet the requirements of Goal 11 and the Goal 11 rule for land uses only within the prior UGB if it does so prior to acting on its UGB amendment on remand. If it limits its plan to existing acknowledged land uses, it is not required to examine measures intended to meet needed housing at that time. The requirement to consider land uses related to needed housing occurs when the City undertakes a legislative review of its UGB pursuant to ORS 197.296 and OAR 660, div. 24.

e. Conclusion

The city may adopt public facilities plans for its prior UGB only. If it does so, those plans must consider current and potential future land uses allowed under its acknowledged comprehensive plan.

7.5. What Are the City's Obligations Under ORS 195.065 and OAR 660-011-0010(2), if any, with Regard to Coordination with Private Water System Providers?

a. Summary of Issue, Objectors and Appellants

The City of Bend argues that it is not obligated to secure urban service agreements with two private water districts that provide services within the prior UGB and portions of the UGB expansion area. City Appeal at 65. However, the City has agreed to include existing plans of

private water companies in its public facilities plan, and to consider the adequacy of those systems in its revised facilities plan on remand.

b. Legal Standard

ORS 195.065 provides that "units of local government and special districts that provide an urban service to an area within an urban growth boundary that has a population greater than 2,500 persons * * * shall enter into urban service agreements" that specify their respective responsibilities for providing urban services, including future service areas.

OAR 660-011-0010(1)(e) provides that the public facility plan must include: "(e) Policy statement(s) or urban growth management agreement[s] 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." OAR 660-011-0010(1)(g) provides that the plan must include: "(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." Finally, OAR 660-011-0015 provides that:

"(1) Responsibility for the preparation, adoption and amendment of the public facility plan shall be specified within the urban growth management agreement. * * *

(2) The jurisdiction responsible for the preparation of the public facility plan shall provide for the coordination of such preparation with the city, county, special districts and, as necessary, state and federal agencies and private providers of public facilities. * * *"

c. Summary of Local Actions, Director's Decision, and Appeal

The Public Facilities and Services element of the city's comprehensive plan identifies that there are no remaining special districts or private service providers for sanitary sewer systems within the City. R. at 215 (findings), and 1482 (plan).³¹

The Public Facilities and Services element of the city's comprehensive plan identifies that there are three water suppliers within the City and the UGB expansion area. R. at 215 (findings), and 1484 (plan). The city's 2007 Water System Master Plan Update addresses water facilities

³¹ Chapter 8 of the city's comprehensive plan does not state whether there are other service providers for sanitary sewer services within the UGB expansion area. When the City addresses its UGB expansion on remand, it should address whether there are other providers within the expansion area and, if so, comply with the coordination requirements of OAR 660-011-0010(e) and (g).

and projects required to serve the city's service territory within the prior UGB. R. at 1484, 1486. Avion Water Company and Roats Water Company also provide water service within the prior UGB, to approximately 30 percent of the customers in this area. R. at 1486.

The city's findings for Ordinance NS-2111 state that "[t]he water system master plan covers those areas already inside the Bend UGB, and areas outside the current Bend UGB that are not already served by Avion Water Company or another private water utility." R. at 211. The findings also state that the sewer master plans include a Collection System Master Plan (CSMP) that covers those areas inside the existing Bend UGB, areas identified under the Bend Area General Plan as urban reserves, and areas east of Bend under consideration for expansion of the UGB. *Id.*

The Director determined that:

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

The UGB expansion proposal includes areas served by the city, Avion Water Company, and Roats Water Company. However, there is no evidence that the WSMP includes plans for these expansion areas, as required by the Goal 11 and 14 rules. The WSMP also does not appear to satisfy the coordination requirements in Goals 2 and 11." Director's Decision, at 81.

The City of Bend appealed the Director's Decision on this issue, arguing that:

"The coordination requirements of Goal 2 do not apply here because Avion Water Company and Roats Water Company are private utilities, not special districts that provide water service. Both Avion and Roats are regulated by the PUC, and they answer to the PUC for their ability to meet water quality and service criteria within their service areas.

The Water PFP does identify the areas served by each system, thereby providing sufficient information for the City to plan for water service. (Rec. 249, 261, 315.) The City relied on the city's Water System Master Plan and Avion Water Company's master plan to evaluate potential areas for UGB expansion, based on whether the City or Avion would service these areas. (Rec. 6318, 6400-21.) The City included sufficient information about the private water systems to meet the standards of OAR 660 Division 11 and coordinated sufficiently with the two private water system providers." City Appeal, at 66.

The City also argued that the urban service agreement and coordination requirements of ORS 195.065 do not apply to Avion and Roats.

d. Analysis

The Commission concurs with the City that the coordination and urban service provider and agreement provisions of ORS 195.065 do not apply to Avion Water Company or to Roats Water Company. These companies are private water companies, rather than special districts as that term is defined in ORS 195.065 and 195.060.³²

However, the provisions of OAR 660-011-0010(1)(e) and (g) and 011-015 clearly require the city's public facility plan to designate who the service providers are within the area addressed by the plan, and to include an inventory and assessment of significant systems and projects needed to support the land uses in that area as provided in OAR 660-011-0010(1)(a)-(d) and (f), including systems and projects which are the responsibility of other providers including Avion and Roats.

e. Conclusion

ORS 195.065 (requiring agreements with urban service providers for future urban service areas) does not apply to Avion and Roats water companies. However, the Commission finds that the City must identify what areas are served by these companies within the area it is planning for, and provide the existing plans of these companies and consider those plans in developing its revised public facility plan elements relating to water supply for these areas.

7.6. What Was the City's Obligation to Provide Notice to DLCD of Amendments to its Public Facilities Plans as Part of its October 8, 2008 Supplemental Notice of a Revised UGB Amendment?

The City has agreed to provide new 45-day and adoption notices of its Public Facilities Plan amendments on remand. As a result, the Commission finds that any defects in the city's notices of its plan amendments under ORS 197.610 to 197.625 will be remedied.

³² ORS 195.060 states that: "[a]s used in ORS 195.020, 195.065 to 195.085 and 197.005, unless the context requires otherwise:

(1) "District" has the meaning given that term in ORS 197.010. In addition, the term includes a county service district organized under ORS chapter 451."

In turn, ORS 197.010 defines "district" as a variety of types of districts, but does not include private water companies.

7.7. Whether the City's Wastewater System Collection Master Plan and Water System Master Plan Must Cover All Areas in the UGB Expansion Area?

a. Summary of Issue, Objectors and Appellants

The city's wastewater system collection master plan and water system master plan did not address all areas in the UGB expansion area despite the fact that the city's findings for its public facilities plan adoption state that they do. R. at 211. Several objections raised this as an issue, and the Director remanded the city's Ordinance NS-2111 on this basis. Director's Decision, at 79-80.

b. Legal Standard

Goal 2 requires that the different elements of the city's comprehensive plan be internally consistent. Goal 2 also requires that the city's comprehensive plan be founded on an adequate factual base. And, both Goal 14 and Goal 11 require that the City determine that public facilities can adequately serve the lands and land uses proposed for a UGB expansion area. *1000 Friends v. City of North Plains*, 27 Or LUBA 372, aff'd 130 Or App 406 (1994); *Smith v. Douglas County*, ___ Or LUBA ___ (2000) (Goal 14, Factor 3 (now locational factor 2) requires a local government to demonstrate that public facilities and services can reasonably be provided to the expansion area over the planning period, without leaving the area already within the UGB with inadequate facilities and services). Neither OAR 660-011-0010 nor 660-024-0060 require that the City make this determination through an amendment of its public facilities plan to address urbanizable lands within a UGB expansion area at the time of the expansion (that normally will occur later), although that approach is one permissible means of addressing Goal 11 and Goal 14 location factor 2 as they relate to the UGB expansion.

c. Summary of Local Actions, Director's Decision, and Appeal

The City adopted new water and sewer plans as amendments to the city's public facilities plan in Ordinance NS-2111. R. at 35. Those plans replaced the city's 1996 Utilities System Master Plan. *Id.* The city's findings state that the plans cover both the acknowledged (prior) UGB and the expansion area. R. at 211. The Director remanded the city's adoption of the plans, partially on the basis that the plans, in fact, did not cover the entire UGB expansion area. Director's Decision, at 79-80. The City appealed, arguing that its plans were not required to address the UGB expansion area.

d. Analysis

As described above, the Commission agrees that the City could have adopted public facility plan amendments addressing only land uses in the area within the prior (acknowledged) UGB. However, that is not what the City did. It purported to amend its public facility plan to address the entire UGB expansion area as well as the area within its prior UGB. However, as found by the Director, the amendments did not address the entire expansion area, and included some areas outside of the expansion area. This created an internal conflict between the city's public facilities plan and the UGB expansion that it subsequently adopted, violating the Goal 2 requirement for internal consistency in the city's comprehensive plan as well as the requirement under Goal 11 and Goal 14 locational factor 2 to show that the UGB expansion area can be adequately served.³³

The City was not required to address Goal 11 and Goal 14 locational factor 2 as they applied to its UGB expansion through amendments to its public facilities plans, but the City chose to do so. Having elected to use its water and sewer system master plans in this fashion, the plans were required to address the entire expansion area.

e. Conclusion

On remand, the City must address the entire expansion area under Goal 11 and Goal 14, locational factor 2. The City is not required to do so through amendments to its public facilities plan, although it may do so. If the City elects to carry out the analysis(es) of the feasibility of serving the expansion area independently of its public facilities plan, it should nevertheless

³³ Goal 11, Guidelines 4 and 5 clarify how the Commission intends public facility planning and services to apply to areas that are included in a UGB expansion, but that are not yet urbanized.

"4. Public facilities and services in urbanizable areas should be provided at levels necessary and suitable for existing uses. The provision for future public facilities and services in these areas should be based upon: (1) the time required to provide the service; (2) reliability of service; (3) financial cost; and (4) levels of service needed and desired.

5. A public facility or service should not be provided in an urbanizable area unless there is provision for the coordinated development of all the other urban facilities and services appropriate to that area."

Public facility plan amendments to address the area within a UGB expansion in the detail required by OAR 660-011-0010 normally are adopted at the time such lands are rezoned with urban zoning designations. Often, this will be at the time such lands are annexed. ORS 197.752(1) provides that: "[l]ands within urban growth boundaries shall be available for urban development concurrent with the provision of key urban facilities and services in accordance with locally adopted development standards."

formally adopt the analysis and incorporate it into the city's comprehensive plan (and the analysis must not conflict with existing provisions of the public facilities plan).

7.8. *Whether Swalley Irrigation District is a "Rural Irrigation System" or a "Service Provider" Under OAR 660-024-0060(8), Such that There Is an Additional Coordination Obligation (in Addition to Goal 2) to Evaluate the Relative Costs, Advantages and Disadvantages of Alternative UGB Expansion Areas with Respect to Swalley Irrigation District. Whether the City is Required to Compare the Costs, Advantages and Disadvantages of Alternative UGB Expansion Areas with Respect to Public Facilities and Services Regardless of Whether it is Including Particular UGB Expansion Areas on the Basis of Such Costs.*

a. *Summary of Issue and Related Objections*

Swalley filed objections to the city's decisions, arguing that Swalley is a “service provider” under OAR 660-024-0060(8) and that, as a result, the City was required to evaluate and compare alternative UGB expansion areas with respect to public facilities and services with Swalley (as a service provider). Swalley Objection, at 74; Swalley Appeal, at 8.

b. *Legal Standard*

OAR 660-024-0060(8) provides that:

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

- (a) The impacts to existing water, sanitary sewer, storm water and transportation facilities that serve nearby areas already inside the UGB;
- (b) The capacity of existing public facilities and services to serve areas already inside the UGB as well as areas proposed for addition to the UGB; and
- (c) The need for new transportation facilities, such as highways and other roadways, interchanges, arterials and collectors, additional travel lanes, other major improvements on existing roadways and, for urban areas of 25,000 or more, the provision of public transit service."

c. *Summary of Local Actions, Director's Decision, and Appeal*

The City states that Swalley is not a service provider as that term is used in OAR 660-024-0060 and that, as a result, the City was not required to coordinate with Swalley under that rule. The City also states that it did coordinate with Swalley as that term is used in Goal 2. The

Director denied Swalley's objection, treating it as a locational issue, and determining that an “irrigation system” is not a “water system,” based on the definition of that term in Goal 11 as a piped system for human consumption. Director’s Decision, at 126. The Director’s Decision determined that Swalley Irrigation District is a “rural irrigation system” and therefore is not a “service provider” for purposes of OAR 660-024-0060(8). Swalley appealed, continuing to argue that it is a service provider for purposes of OAR 660-024-0060(8). Swalley Appeal, at 12.

d. Analysis

OAR 660-024-0060(8) concerns the application of Goal 11 to urban growth boundary amendments, and must be read in context with Goal 11. Goal 11 defines “water system” as “a system for the provision of piped water for human consumption subject to regulation under ORS 448.119 to 448.285.” (emphasis added). Swalley provides water for irrigation purposes, and therefore is not a water system under Goal 11. As a result, OAR 660-024-0060(8) does not apply to Swalley, and the City was not required to coordinate with Swalley as specified in that rule.

The City has agreed, however, to coordinate its planning on remand with Swalley, in the sense that coordination is used in Goal 2.

e. Conclusion

The Commission concurs with the Director that the City is not required to coordinate with Swalley as a service provider under OAR 660-024-0060(8). However, the City has agreed to coordinate further with Swalley generally as it considers its options on remand.

7.9. Whether the City’s Analysis of Public Facilities and Services Underestimates the Cost of Providing Such Facilities and Services to the UGB Expansion Area and, if so, Must the City Revise both its Goal 11 Analysis and its Housing Needs Analysis to Evaluate Whether it is Planning for Needed Housing in Locations Appropriate for the Needed Housing Types.

a. Summary of Issue, Objectors and Appellants

Swalley argues that in evaluating alternative UGB expansion areas, the city's analysis of the relative costs and availability of public facilities and services is inaccurate, and therefore the City fails to comply with ORS 197.296(6) and(9) and 197.752(1). Swalley Appeal at 1-2.

b. Legal Standard

ORS 197.296(6) provides that: “[i]f the housing need determined pursuant to subsection (3)(b) of this section is greater than the housing capacity determined pursuant to subsection

(3)(a) of this section, the local government shall take one or more of the following actions to accommodate the additional housing need: [expand the UGB and/or adopt measures to increase the capacity of the existing UGB]."

ORS 197.296(9) requires that:

"In establishing that actions and measures adopted under subsections (6) or (7) of this section demonstrably increase the likelihood of higher density residential development, the local government shall at a minimum ensure that land zoned for needed housing is in locations appropriate for the housing types identified under subsection (3) of this section and is zoned at density ranges that are likely to be achieved by the housing market using the analysis in subsection (3) of this section."

c. Summary of Local Actions, Director's Decision, and Appeal

The city analyzed the relative costs of providing public facilities and services to the alternative expansion areas. The adequacy of that analysis is addressed under issue 9 in this order.

d. Analysis

ORS 197.296(6) and (9) are concerned (in this context) with measures to increase the residential development capacity of buildable lands within an existing UGB, not with a UGB expansion area. As a result, these statutes do not provide a basis for the type of analysis that Swalley appears to seek.³⁴ To the extent that Swalley is arguing that the city's analysis of public facility and service costs is inadequate because it underestimates those costs for the expansion areas relative to infill or redevelopment, Swalley's arguments are not sufficiently developed to be capable of review.

e. Conclusion

Under both Goal 11 and Goal 14, the city will need to reevaluate the relative public facility costs of alternative UGB expansion areas. ORS 197.296 and 197.752 do not provide a legal basis for Swalley's appeal, and as a result the Commission denies the appeal and affirms the Director's Decision.

³⁴ The requirements for analysis of the feasibility of serving a UGB expansion area stem from Goal 11, Goal 14 locational factor 2, and OAR 660-024-0060(8), as described in more detail above.

8. Transportation Planning – Goal 12

8.1. Whether the City’s Findings Adequately Explain the Relative Costs of Providing Transportation Improvements to Serve Alternative UGB Expansion Areas.

a. Summary of Issue, Objectors and Appellants

The Director found that the city had analyzed the relative costs of transportation improvements needed to serve individual UGB expansion areas at the transportation analysis zone (TAZ) level. Department Report on Appeals, at 51. However, the Director determined that the city's findings failed to aggregate these data to allow comparison between different areas in the same priority class under ORS 197.298. The city appealed the Director's decision, arguing that its analysis was adequate.

b. Legal Standard

ORS 197.298 prioritizes which lands a local government must include in a UGB expansion. If there are more lands in a particular priority category than needed, however, the local government must use the locational factors of Goal 14 to compare "alternative UGB expansion areas." OAR 660-024-0060(8). The comparison must include the relative need for new transportation facilities, including existing roadways, and including public transit. OAR 660-024-0060(8)(c). In addition, OAR 660-024-0060(6) provides that:

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

c. Summary of Local Actions, Director's Decision, and Appeal

The city analyzed the relative costs of required transportation improvements of lands it studied for possible inclusion in its UGB expansion area at the TAZ level. City Appeal, at 72. The costs included only costs of required facilities within each TAZ. The city then aggregated the data into ten UGB subareas, which contain lands in a variety of priority classes. City Appeal, at 72. This analysis could be re-aggregated to compare lands in the same priority category under ORS 197.298, but this was not done.

d. Analysis

The city is required to compare lands in the same priority classes under ORS 197.298,

Goal 14 and OAR 660-024-0060 (except when lower priority lands are included as necessary to serve higher priority lands under ORS 197.298(3)(b)). The city may aggregate its underlying data, by TAZs and priority category, and address the results in revised findings.

e. Conclusion

The Commission denies the city's appeal, and upholds the Director's decision. On remand, the city must analyze the relative costs of lands in the same priority category, rather than aggregating its analysis into subareas without regard to the priorities under ORS 197.298.

8.2. Whether the City Must Provide More Detailed Analysis or Findings Regarding the Extent to Which the Costs of Improvements for Major Roadway Improvements in the North Area (Including Proposed Improvements to Highways 20 and 97) Are a Result of and Should be Assigned to Development in the North Area Rather than the City as a Whole. Whether the City's Analysis and Evaluation Assess Whether the Extent of Improvements in the 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?

a. Summary of Issue, Objectors and Appellants

According to the City, several major transportation improvements are required in the future regardless of which lands are added to its UGB. In particular, the City identified improvements to Highway 97 north of Colorado Avenue, as improvements that will be needed regardless of the amount or location of lands added to the UGB. City Appeal, at 73. The Director found that the city's findings did not explain why the City was not analyzing the relative costs of these improvements for different areas being evaluated for possible addition to the city's UGB. Several objectors filed objections concerning this issue. Swalley Objection, at 75-76; DSL Objection, at 5; Rose & Associates, Newland Objection, at 21-22; see generally, Director's Decision, at 87-88 (summarizing objections concerning this issue).

b. Legal Standard

As noted above, ORS 197.298, Goal 14 and OAR 660-024-0060 require a local government to compare the relative costs of public facilities and services of alternate areas in the same priority category of lands (under ORS 197.298) proposed for addition to a UGB.

c. Summary of Local Actions, Director's Decision, and Appeal

The city did not compare the relative costs of alternate areas in the same priority category for the costs of major transportation facilities because the city's analysis showed that these costs

would be required regardless of which lands were included. City Appeal, at 73-74. The Director remanded the city's decision for the city to carry out the required comparative analysis.

Director's Decision, at 88. The City appealed, and identified some evidence in the record that supported its argument that these costs will be required regardless of what areas are added to the city's UGB. City Appeal, at 74, 77.

d. Analysis

Although the city has identified analysis in the record that supports its argument that there will not be any relative cost differential between areas for improvements required to Highways 97 and 20, the city's findings do not rely on or describe this analysis in determining which lands to include within the UGB expansion area.

e. Conclusion

The Commission denies the appeal and upholds the Director's Decision. On remand, the city must revise its findings to address this issue. If the city chooses to rely on existing analysis that there is no cost differential between alternate lands in the same priority category, that decision must be supported by substantial evidence in the record as a whole. While no specific method or outcome is required, the city must explain its basis(es) for assigning the costs of extraordinary improvements to expansion areas in the same priority category, and consider whether changes in the extent or location of the UGB expansion would reduce the need for major improvements in this area.

8.3. Whether the City Must Provide Comparable Estimates for the Costs of Needed Roadway Capacity for Areas that (Because of Topographic Constraints) May Need to be Served by Different Types of Roadway Networks.

a. Summary of Issue, Objectors and Appellants

The City found that the cost of providing transportation facilities on the west side of the UGB would be lower than on the east and south sides, and justified its inclusion of lands on the west side, in part, on that basis. The Director questioned the city's conclusion, and found that the city's findings were inadequate on this point.

b. Legal Standard

As noted above, OAR 660-024-0060(8) requires a comparison of the relative costs, advantages and disadvantages of lands being evaluated for inclusion in a UGB. The city's findings need to describe these comparisons (of lands in like priority categories) in a manner that

shows that the required factors were considered by the decision-maker.

c. Summary of Local Actions, Director's Decision, and Appeal

The Director's Decision found that the city's analysis of transportation costs of serving different expansion areas was incomplete, because lower costs are assigned to Westside expansion areas – where a complete grid of streets cannot be provided – while higher costs were assigned to other areas where topography and other factors would allow a more complete grid of streets. Director's Decision, at 89. Rose & Associates Objection, at Exhibit 2. The Director questioned whether additional improvements would be needed to adequately serve the Westside areas to compensate for the sparser grid of streets available in that area.

The city's appeal provided further explanation of its analysis of street improvements needed to serve different potential expansion areas. City Appeal at 76-77. The City indicated that during work sessions the planning commission was advised that Westside roads were an exception to the city's street grid spacing due to several factors including existing development pattern, the limited density of the adjacent land uses in the areas the roads would serve, and the lack of future development potential farther west (i.e., the Forest Service lands) and topographic barriers. City Appeal at 76. Topography was considered at a scale that was appropriate to prepare rough cost estimates. City Appeal at 76-77.

The city's response partially addressed the department's concern. Several factors led the city to conclude that a sparser network was appropriate to serve proposed land uses on the west side, and that topographic factors were considered. However, while these factors were apparently presented to and discussed with the planning commission, they were not fully reflected in the city's adopted findings.

d. Analysis

It appears that the city has completed the required analysis, although (again) that analysis must compare areas in the same priority category. However, the results of the city's analysis are not explained in the city's findings as a basis for favoring lands to the west of the city over lands to the east and south.

e. Conclusions

The Commission denies the appeal and upholds the Director's Decision. On remand, the city must revise its findings to address this issue including not only the relative cost of required transportation improvements, but the relative advantages and disadvantages as well. OAR 660-

024-0060(8) (which may include the relative amount of development capacity the city can support for a particular unit of cost). On appeal, at oral argument, the city agreed to strengthen its findings in this area to the extent that lands on the west of the city are included in the UGB expansion area on remand.

8.4. What is the Planning Status of the Deschutes River Bridge? Is Removal of the Proposed Deschutes River Bridge from the City's TSP Sufficient to Resolve the Planning Status of this Facility, Consistent with OAR 660-012-0025(3)?

The city clarified, on appeal, that the bridge is not anticipated or planned during the 20-year planning period. The city agreed to clarify its findings regarding expansion areas on the west of the city (to the extent that they are included in a revised UGB expansion area) to indicate clearly that the bridge is not an improvement or project that is planned within the planning period, and to evaluate the adequacy of the planned transportation system without the bridge.

8.5. Whether the City's Findings Are Sufficient to Show that its Transportation Analysis for Goal 14 is Consistent with City Policies That Restrict Widening of Newport and Galveston Streets Beyond Three Lanes?

a. Summary of Issues, Objectors and Appellants

The Director's Decision upheld objections from Central Oregon Landwatch that asserted that proposed UGB expansions in the northwest area would trigger need for expansion of Newport and Galveston streets from three to five lanes and that such a widening would violate a city plan policy which restricts widening of these streets. Director's Decision, at 88 - 89.

b. Legal standard

The city's UGB expansion must comply with applicable policies in its comprehensive plan. ORS 197.175.

c. Summary of Local Actions, Director's Decision, and Appeal

The city's appeal identified a traffic study included in the record that analyzed potential impacts of inclusion of certain UGB expansion areas on Westside streets, including Newport and Galveston. That traffic analysis, prepared by DKS and Associates, concludes that neither street needs to be widened to accommodate expected traffic from the areas in question. City Appeal, at 75, R. at 2624-2626.

d. Analysis

The city has identified evidence in the record that clearly supports that the UGB expansion complies with the specified plan policy. The city's traffic analysis shows that the UGB expansion would not violate its adopted plan policy concerning Newport and Galveston streets.

e. Conclusion

For the foregoing reasons, the Commission affirms the City Appeal on this issue. On remand, the city's findings should address the DKS analysis if these lands continue to be included in the proposed expansion area.

8.6. What Must the City of Bend do to Comply with the Transportation Planning Rule (TPR) Requirements for Metropolitan Planning Organization (MPO) Areas in Conjunction with its UGB Amendment?

a. Summary of Issues and Related Objections

The Director's Decision found that:

- The metropolitan planning requirements of the TPR are applicable to Bend at this time;
- Bend has not complied with provisions of the TPR applicable to metropolitan areas for adoption of standards and benchmarks to reduce reliance on the automobile; and
- The metropolitan area planning requirements in the TPR must be met prior to a significant amendment of the UGB. Director's Decision, at 96-103.

The City appealed this aspect of the Director's Decision, arguing that it is not required to comply with these requirements before amending its urban growth boundary. City Appeal, at 79-80. The City did not dispute that the requirements are applicable, or that it had not complied with those requirements. Its appeal was limited to the question of whether it may amend its UGB without first complying. The City argued that its obligations are limited by OAR 660-024-0060(8), which only requires an "evaluation and comparison of relative costs, advantages and disadvantages of alternative expansion areas with respect to the provision of public facilities and services [including transportation facilities]."

b. Legal standard

OAR 660-024-0060(1) states that:

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

* * *

(d) The transportation planning rule requirements under OAR 660-012-0060 need not be applied to a UGB amendment if the land added to the UGB is zoned as urbanizable land, either by retaining the zoning that was assigned prior to inclusion in the boundary or by assigning interim zoning that does not allow development that would generate more vehicle trips than development allowed by the zoning assigned prior to inclusion in the boundary * * *."

This rule clearly states that *all* goals and rules apply to a UGB amendment, except for the listed exceptions. The listed exception for the TPR is limited to "the requirements under OAR 660-012-0060." There is no exception for the metropolitan area planning requirements specified in OAR 660-012-0035. Those requirements include provisions requiring Transportation System Plans (TSPs) to include standards and policies to increase transportation choices and to reduce reliance on the automobile. OAR 660-012-0035(3)-(7).

In addition, OAR 660-012-0055 specifies when the requirements of 0035 must be met (within one year of adoption of the regional transportation plan). OAR 660-012-0055(1)(b). The rule provides for an extension, but only under certain specific circumstances. OAR 660-012-0055(1)(d).

c. Summary of Local Actions, Director's Decision, and Appeal

As noted above, the city agreed that it has not completed the required elements of its transportation systems plan, but argued on appeal that it was not required to at this time. City Appeal, at 79-80.

d. Analysis

OAR 660-012-0055 allows a local government that is subject to the metropolitan area planning requirements of OAR 660-012-0035, but that is not in compliance with them, to amend its comprehensive plan or land use regulations only under the conditions set forth in OAR 660-012-0055(1)(d). Alternatively, the City could come into compliance with the requirements of OAR 660-012-0035 if it can show that "* * * adopted plans and measures are likely to achieve a five percent reduction in VMT per capita over the 20-year planning period [and adopts interim benchmarks]." OAR 660-012-0035(6).

At oral argument, the City agreed that on remand it will comply with OAR 660-012-0035 through one of three alternative methods, as specified in the conclusions below.

e. Conclusions

The City is required to comply with OAR 660-012-0035 before it may complete its UGB

expansion. The City has agreed to prepare analyses of its baseline VMT per capita in 2003 (with VMT as defined in OAR 660-012-0005), along with an analysis of projected VMT per capita over the planning period with proposed "packages" of land use and transportation measures to reduce VMT per capita. If the City demonstrates that its revised UGB expansion, along with proposed land use and transportation measures, results in an estimated change in VMT per capita:

(a) of a decline of 5% or more per capita, then the City is in compliance with this aspect of the TPR under 0035(6);

(b) of a decline of between 0% and 4.99 percent per capita, then the City may proceed by preparing for DLCD/LCDC review and approval concurrently with the revised UGB, a work program/plan to achieve a reduction of 5% or more over the planning period; or

(c) of an increase in VMT per capita, then the city must prepare, submit and obtain DLCD/LCDC approval of an integrated land use and transportation plan as provided in OAR 660-012-0035(5) prior to approval of a revised UGB.

The Commission concludes that these methods will assure that the city's UGB expansion will comply with the applicable requirements of OAR 660-012-0035 and 0055.

8.7. May the City of Bend rely on its Partially-Acknowledged Transportation Systems Plan (TSP) for its UGB Amendment?

a. Summary of Issues, Objectors and Appellants

Swalley filed an objection asserting that the city's transportation systems plan (TSP) has not been acknowledged and that, as a result, the city could not rely on its TSP in its UGB expansion. Swalley Objection, at 57. Swalley argued that the commission must direct the city to complete an acknowledged TSP before the city may expand its UGB. Swalley Appeal, at 8-9.

b. Legal standard

OAR 660-012-0015(3) provides that:

"Cities and counties shall prepare, adopt and amend local TSPs for lands within their planning jurisdiction in compliance with this division:

(a) Local TSPs shall establish a system of transportation facilities and services adequate to meet identified local transportation needs and shall be consistent with regional TSPs and adopted elements of the state TSP;

(b) Where the regional TSP or elements of the state TSP have not been adopted, the city or county shall coordinate the preparation of the local TSP with the regional transportation planning body and ODOT to assure that regional and state transportation needs are accommodated."

c. Summary of Local Action, Director's Decision and Appeal

According to the city's findings:

"The city of Bend and Deschutes County comply with OAR 660-012-0015(3) because the city of Bend and Deschutes County have adopted coordinated Transportation System Plans that address the proposed Urban Growth Boundary (UGB). The City's TSP was adopted by the City Council when they approved Ordinance No. NS-1756 on October 11, 2000, and subsequently amended the TSP by approving Ordinance Nos. NS-1852, NS-1912, NS-1915, NS-1953, NS-2013, NS-2026, NS-2032, NS-2038, NS-2043 and NS-2047 to address DLCDC remanded items. Deschutes County adopted a TSP for the Urban Reserve Area, on August 26, 1998, by adopting Ordinance No. 98-044." City of Bend, Exhibit E, TPR Findings, at 2.

d. Analysis

The Bend TSP, adopted in 2000, was *partially* acknowledged. The commission's approval of the TSP itemized a number of relevant TPR requirements with which the City had not fully complied. However, notwithstanding this remaining work, the existing TSP is partially-acknowledged and the City may rely upon it. The TSP complies with Goal 12 and OAR 660-012-0015 for the reasons stated in the city's findings, and the objection does not identify any specific areas of remaining work required by the remand that render the TSP inadequate as a basis for the city's evaluation of its UGB expansion.

e. Conclusions

The City has a substantially complete, commission-approved TSP. The objector has not identified specific TPR provisions that require additional work by the City that affect the city's evaluation of its UGB. As a result, the Commission denies the appeal, and upholds the Director's Decision.

9. Location of the UGB Expansion Area

9.1. Whether the City's Use of Suitability Criteria to Determine What Lands to Include Within Its UGB Expansion Area Complied with State Statutes, Goal 14 and the Commission's Goal 14 Implementing Rules

a. Summary of Issue and Appellants/Objectors

The City applied certain criteria as a screen to exclude lands from further evaluation for inclusion in its UGB expansion area. See generally, R. at 1059-1065, 1166-1207, and 7772-7775. Tony Aceti, Terry Anderson, COLW, Hilary Garrett, Miller Tree Farm, Paul Shonka, Tony and Cyllene King (McGraw and Associates, LLC), the Oregon Department of State Lands, Rose and Associates, LLC, Barbara McAusland, Swalley Irrigation District, Newland Communities, Harold Sampson, and Brooks Resources Corporation filed objections to the city's locational analysis for its UGB expansion. Director's Decision, at 113-115 (summarizing the objections on this issue). The City, Swalley Irrigation District, COLW, Garrett, Bayard, and Anderson appealed the Director's Decision on this issue. Department Report on Appeals, at A-59 to A-68.

b. Legal Standard

ORS 197.298,³⁵ Goal 14³⁶ and OAR 660-024-0060 (2007)³⁷ contain the applicable state requirements that establish *where* a city may expand its urban growth boundary (UGB). The

³⁵ ORS 197.298 Priority of land to be included within urban growth boundary:

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

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

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

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

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

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

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

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

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

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

³⁶ Statewide Planning Goal 14 (as amended April 28, 2005) requires the following:

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

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

³⁷ OAR 660-024-0060 (adopted 10-5-06) provides in pertinent part that:

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

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

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

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

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

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

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

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

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

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

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

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

Commission's division 24 rules were adopted in 2006, following the Commission's action in 2005 to amend Goal 14. The Commission's division 24 rules, and specifically section 0060, were intended (in part) to clarify the relation between ORS 197.298 and the locational factors of Goal 14 for urban growth boundary expansions.

c. Summary of Local Action, Director's Decision and Appeal(s)

In January 2006, the city established a study area of approximately 27,000 acres for both a proposed UGB expansion and a proposed urban reserve area designation. R. at 45, 1060. In June 2007, the first UGB expansion scenario was prepared and sent to the Department with a 45-day notice prior to the city's first scheduled public hearing. On August 7, 2007, the City and Deschutes County withdrew the urban reserve amendment until the UGB expansion was resolved. DLCD Form 3 Notice of Denial/Withdrawal, Supplemental Record at 1423. In the fall of 2007, the city enlarged the study area to over 44,000 acres (R. at 1061) and to respond to direction from the city council to consider the need for land for employment uses as well as housing. R at 1060.

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

- Could be served [with sewer] by an existing or proposed city facility detailed in the 2008 Collection System Master Plan [e.g., the amended Public Facilities Plan];
- Is serviceable according to the 2007 City Water Master Plan, as amended, or a private water district service area;
- Scores medium or high for street connectivity;
- Is not an active surface mine, not a state of local park, not a landfill, and is not a destination resort;
- Is vacant or improved with improvement value below \$20,000;
- If the parcel is improved with a dwelling, it is a parcel greater than 3 acres;
- If improved with a school or church, it is a parcel greater than 5 acres;
- Is not recreational land;

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

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

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

- Is not owned by the Bend/La Pine School District;
- Is not in a commercial farm classification with 23 acres of irrigation water rights;
- Is not subject to restrictive CC&Rs; and
- Is not in private open space. R. at 1169

Lands that did not meet *all* of the criteria were excluded from further study. Director's Decision, at 112. The City then took the remaining properties, and divided them according to the statutory priorities in ORS 197.298. Finally, the City then developed five scenarios of potential new UGB expansion areas, and applied the Goal 14 locational factors to compare the areas and select a preferred scenario. Director's Decision, at 112.

The Director found that the screening criteria used by the City were not sufficiently linked to specific identified future urban land needs to be used to exclude lands under ORS 197.298(3)(a), that the criteria extended beyond what is allowed under OAR 660-024-0060, and that the City lacked an adequate factual base to use its criteria as *per se* screens. The Director also found that the City failed to separate its suitable lands by the statutory priority categories, and then apply the Goal 14 locational factors. See generally, Director's Decision, at 115-123.

d. Analysis

The City argues that under *Hildenbrand v. City of Adair Village*, 217 Or App 623 (2008) and *City of West Linn v. LCDC*, 201 Or App 419, 440 (2005), it was authorized to exclude lands on the basis of locally-developed suitability criteria. In *City of West Linn*, the court determined that, under the former Goal 14, the locational factors of Goal 14 may be used (along with the criteria in ORS 197.298(3) to determine whether there is "inadequate land to serve a need." *Id.*

The Commission notes that the *Hildenbrand* and *West Linn* opinions involve local decisions made *before* the Commission's amendments to Goal 14 and adoption of Goal 14 implementing rules for urban growth boundary amendments took effect. OAR 660-024-0060 (Boundary Location Alternatives Analysis) was adopted to provide guidance to local governments concerning how to evaluate lands for inclusion into a UGB, harmonizing ORS 197.298 and the Goal 14 location factors.

The Court's basic point in *Hildenbrand* was that the "exceptions" of ORS 197.298(3) and the Goal 14 location factors, together with the "priorities" of ORS 197.298(1), have roles to play in determining whether there is adequate land to serve an identified need for urbanizable land. That remains the case after the Commission's amendments to Goal 14 and its adoption of OAR 660-024-0060, but the roles and relationship between these statutory and rule provisions

has been clarified in OAR 660-024-0060.

Under OAR 660-024-0060, when evaluating lands for possible inclusion in its urban growth boundary for *general* residential and employment needs, the first step for the City is to determine whether land in the highest priority category under ORS 197.298(1) (here, exception lands) is "suitable to accommodate" those general land needs. OAR 660-024-0060(1)(a). This legal standard is intended to be exacting. The fact that it may cost more to provide services to some lands than others does not, by itself, mean that the land will not accommodate a general land need. Similarly, the fact that certain lands will yield few new homes or little development relative to other lands does not mean that they will not accommodate a general need for residential or employment uses during the planning period.

If the City can show that lands would not provide any residential or employment uses over the planning period, it may exclude them at this stage. For example, lands that are not "buildable lands" as that term is defined in the Commission's rules interpreting Goal 10 (Housing) (OAR 660-008-0005(2)) would not be included in the city's buildable lands inventory if they were included in the UGB and, as a result, should not be included in the UGB expansion area (unless needed for some other purpose).³⁸ Similarly, lands that are not "serviceable" and "suitable" as those terms are defined and used in the Commission's rules interpreting Goal 9 (Employment) (OAR 660-009-0005(9) and (12) and 660-009-0025(1) and (2)) would not meet the city's need for employment lands during the planning period if they were included in the UGB and, as a result, should not be included in the UGB expansion area (unless needed for some other purpose).

³⁸ Under OAR 660-008-0005(2)(e), land is not buildable if it "cannot be provided with public facilities." This test is intended to reflect both physical and practical limitations, including financial limitations. E.g., if it is clearly financially infeasible to provide public facilities to lands during the planning period, they should not be included within the buildable lands inventory or included within a UGB expansion area,

The City may use other suitability criteria based on the Goal 14 locational factors,³⁹ but in order to exclude lands for generalized housing or employment land needs the City must show, with an adequate factual base, that the lands will not accommodate any of its general land needs during the planning period.⁴⁰ Such a showing also may be based on ORS 197.298(3)(b) – e.g., that "[f]uture urban services could not reasonably be provided to the higher priority lands due to topographical or other physical constraints." Again, the showing will depend of the City having an adequate factual base and supporting findings showing that lands excluded under this provision meet the statutory standard.

As noted above, the Commission intended in adopting OAR 660-024-0060 that this, initial, step in the locational analysis for general land needs of excluding lands *before* any comparative analysis is done between alternatives be a "high bar," in line with how the Land Use Board of Appeals (LUBA) had applied the exceptions test to local decisions excluding exceptions lands from urban growth boundary expansions. See, e.g., *DLCD v. Douglas County*, 36 Or LUBA 26 (1999) ("Factors that may have the effect of eliminating alternative sites because they are somewhat more expensive to develop are inadequate to demonstrate the eliminated alternative site cannot reasonably accommodate the identified need."); *1000 Friends of Oregon, et al v. Metro*, 38 Or LUBA 565 (2000) ("Metro must determine whether exception lands can reasonably accommodate the proposed use. As we stated in *Parklane I* and *Residents of Rosemont*, exception criterion (ii) is not satisfied by findings that alternative sites to resource lands cannot accommodate the proposed use 'as well as' those resource lands ... a finding that the resource land has relatively fewer developmental constraints or a higher percentage of buildable lands than an alternative site is not sufficient to satisfy the 'reasonably accommodate'

³⁹ OAR 660-024-0060(1)(e) provides that:

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

And, OAR 660-024-0060(5) provides that:

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

⁴⁰ The reference in OAR 660-024-0060(5) to "specified characteristics" * * * "for land to be suitable for an identified need," is to ORS 197.298(3)(a) "specific types of identified land needs," not to general land needs for future residential and employment uses.

standard”).⁴¹

For specific types of identified land needs (ORS 197.298(3)(a)), where the City has made a determination supported by an adequate factual base that a particular use with particular locational requirements is needed during the planning period and must be located in a particular location within the expansion area (as a result of its locational requirements), the City may use those requirements to exclude other lands as unsuitable (for that use) at this first stage (before a comparison between alternative sites is done). OAR 660-024-0060(5). This issue is addressed in more detail, in connection with issue 9.2, below.

e. Conclusion

The Commission remands the city's decision for it to conduct a locational analysis for its UGB expansion consistent with the procedures described below. To the extent that any objection or appeal is inconsistent with the analysis above, the Commission denies the objection and denies the appeal, for the reasons stated above.

In evaluating which lands to include within its UGB expansion on remand, the City must follow the following steps:

1. Establish suitability criteria for general housing, employment, and related land needs. These criteria must be consistent with (in the sense of implementing, or being in harmony with) the definitions in OAR 660-008-0005(2) (for lands planned for future general residential uses), and 660-009-0005(9) and (12) and 660-009-0025(1) and (2) (for lands planned for future general employment uses) as well as other provisions of law applicable in determining whether the land will meet the city's general land needs.

2. Document the criteria used to locate lands required to meet any "specific identified needs" as allowed by ORS 197.298(3)(a). The identified land needs include a future university site, a medical center, and two large-lot industrial uses.

3. Document (through existing or supplemental findings) that the sites identified by the City for a university, a medical center, and two large-lot industrial uses. The Commission agrees with the City that these identified future uses are justified under 197.298(3)(a). The City must demonstrate, however, through additional findings, that these future uses cannot reasonably be accommodated within the prior UGB.

⁴¹ See also, *Residents of Rosemont v. Metro*, 38 Or LUBA 199 (2000) and *1000 Friends of Oregon v Metro*, 38 Or LUBA 565 (2000).

4. Apply the suitability criteria (from step 1, above) for general housing, employment and related land needs to exception lands within the expansion study area. In this step, the City must identify exception lands (including lands designated by the City as urban area reserve) that will not accommodate any of its general land needs during the planning period. These lands may be "screened out" from further analysis.

5. For its remaining (general) future land needs over the planning period, the City must compare the remaining (after the screening described above for suitability) exception lands using the Goal 14 locational factors to determine which of those lands are best to include in its UGB expansion area.⁴² In this step, the City may rely on ORS 197.298(3)(c) (maximum efficiency of land uses *** requires inclusion of [resource lands] *** to include or to provide services to [the exception lands]) to *include* resource lands, particularly resource lands interspersed with exception lands, within its UGB expansion area. Resource lands included under ORS 197.298(3)(c) need not be evaluated for soil capability, as called for under ORS 197.298(2).

6. If the City is unable to accommodate its need for additional lands during the planning period after undertaking the preceding steps, it may then evaluate lands in the next priority category under ORS 197.298(1) (e.g., resource lands) for its general land needs. If the City does so, it must consider resource lands with lower soil capability first, as specified in ORS 197.298(2). To the extent that resource lands are needed to meet remaining (general) future land needs over the planning period, the City must apply the general suitability criteria used in Step 1 (above) and then compare suitable resource lands using the Goal 14 location factors to determine which of those lands are the best to include in its UGB expansion area.

9.2. Whether the City Applied the Exception (to the Statutory Priorities of What Lands to Include in a UGB Expansion Area) for “Specific Types of Identified Land Needs” (ORS 197.298(3)(a)) in a Manner that Complies with Applicable Statutes, Goal 14, and the Commission's Rules

a. Summary of Issue, Objector and Appellants

The City included three types of employment uses within its UGB expansion area (on resource lands) on the basis that it had a specific need for those particular uses, and that those

⁴² “The goal of consideration under [the Goal 14 boundary location factors] is to determine the ‘best’ land to include within the UGB, based on appropriate consideration and balancing of each factor.” The Goal 14 location factors “must be considered together and balanced, but individual factors are not independent approval criteria.” *Alliance for Responsible Land Use v. Deschutes Cty*, 40 Or LUBA 304, 318-319 (2001), *aff’d* 179 Or App 348 (2002). Also see OAR 660-024-0060(1)(b).

uses had particular locational requirements under the commission's Goal 9 implementing rule (for site suitability). R. at 1181-1182. The issue is whether the city's decision was supported by an adequate factual base and adequate analysis and findings to include land for these uses within the UGB expansion area, and at the particular locations specified. The Director found that the City had adequately justified its need for these three uses, but that the City had not explained why the uses needed to be located in particular locations in the UGB expansion area rather than within the existing UGB. Director's Decision, at 134. The City appealed this aspect of the Director's Decision, arguing that its findings were adequate. City Appeal, at 86-90.

b. Legal Standard

ORS 197.298(3)(a) provides:

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

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

c. Summary of Local Action, Director's Decision, and Appeals

As described above, the City included land in its UGB expansion for a future university site, a medical center, and two large-lot industrial uses. The Director agreed with the City that it had shown a specific need under ORS 197.298(3)(a), but remanded the decision for adoption of adequate findings explaining why the need could not be accommodated within the prior UGB. The City appealed, arguing that its finding that there were no lands in the current supply for these uses was adequate. City Appeal, at 90.

d. Analysis

The Commission has established site suitability criteria for these three uses. The Director found that those criteria complied with the applicable Commission rules under Goal 9, and the Commission concurs. The remaining work for the City on remand is simply to show, using those criteria, that the uses "cannot reasonably be accommodated" within the prior UGB. The Commission concurs with the Director that the city's present findings are conclusory and lack the required reasoning tying the criteria to the facts found.

e. Conclusion

The Commission concludes that the City has made an adequate showing under ORS

197.298(3)(a) that there is a specific identified land need for a future university campus, a site for a future medical center, and for two 50-acre large lot industrial sites. The City must, however, analyze whether these needs could reasonably be accommodated within the prior UGB using its site suitability criteria and buildable lands inventory, and adopt findings explaining its reasoning. The Commission affirms the Director's Decision on this issue, including the Director's disposition of objections for the reasons stated in the Director's Decision, and denies the city's appeal.

9.3. Whether the City Properly Applied ORS 197.298(3)(c), in Determining that the Maximum Efficiency of Land Uses within the Urban Growth Boundary Requires Inclusion of Lower Priority Lands in Order to Include or to Provide Services to Higher Priority Lands

a. Summary of Issue, Objectors and Appellants

The City included some agricultural lands on the east side of the city in its UGB expansion area, and argued that inclusion of these lands was justified under ORS 197.298(3)(c). The Director generally agreed, but remanded the city's decision because it was based on the city's public facilities plan, which the Director had determined did not comply with state requirements. Department Report on Appeals, at A-62. The City and Swalley appealed.

b. Legal Standard

ORS 197.298(3)(c) authorizes a local government to *include* lands that would otherwise be a lower priority for inclusion in an urban growth boundary (typically, resource lands), when those lands are required in order to include higher priority lands or in order to provide services to higher priority lands.

c. Analysis

This issue is addressed, for the most part, under issue 9.1 above. The Commission has previously approved local decisions under this authority that have been upheld by the Oregon Court of Appeals. Examples include the City of Brookings, where agricultural lands were included in order to extend services to exception lands in the hills above the city, and the Bethany area in Washington County, where agricultural lands were included in order to allow a looped sewer system to serve more distant exception lands. The City will need to work through the particular application of ORS 197.298(3)(c) to the facts on remand, and that application may depend, in part, on what the City does with its public facilities plans.

d. Conclusion

The Commission affirms the Director's Decision on this issue, and denies the appeals. ORS 197.298(3)(c) may be used, as described above under issue 9.1., where resource lands are interspersed with exception lands, and in order to urbanize (provide public services to) exception lands that couldn't otherwise be served.

9.4. Whether the County's Urban Area Reserve Lands are Exception Lands or Resource Lands Under ORS 197.298(2)

a. Summary of Issue, Objectors and Appellants

Swalley argued in its objections, and continued to argue on appeal, that lands designated as Urban Area Reserve (UAR) are resource lands because no valid exception was taken to Goal 3 when the lands were planned and zoned UAR. Swalley and COLW also argue that the Director erred in interpreting ORS 197.298(2), because this statute (requiring consideration of lowest quality agricultural soils first for a UGB expansion) applies to all of the priorities in ORS 197.298(1), not just to resource lands. COLW Appeal at 5.

b. Legal Standard

ORS 197.298(1) makes exceptions lands a higher priority for inclusion within a UGB than resource lands. In this context, lands are exceptions lands if they were planned for a rural use other than agriculture or forestry on the basis of existing development or commitment to other uses, or on the basis of a reasons exception.

c. Summary of Local Action, Director's Decision and Appeals

In the applying the statutory priority of lands to be included within an UGB under ORS 197.298, the City considered parcels designated UAR as exception lands. R. at 162, 1177. In addition, the Bend Area General Plan (the city's comprehensive Plan) states that "Lands in this Urban Reserve area [land zoned UAR] are considered first for any expansion of the Urban Growth Boundary." Because of this plan provision, the City ranked UAR-zoned land higher than other exception land and included it in the UGB expansion before considering the other exception parcels zoned Suburban Residential 2.5-acre minimum, MUA 10-acre minimum, and Rural Residential 10-acre minimum. R. at 175, 1190.

d. Analysis

The Director's Decision determined:

“On June 25, 1981, LCDC acknowledged the City of Bend comprehensive plan, which included city and county exceptions to Goals 3 and 4 for approximately 6,858 acres of land outside the 1981 UGB. These lands were designated UAR, 10-acre minimum parcel size (UAR-10), Suburban Residential, 2.5-acre minimum parcel size (SR 2½), and Surface Mining (SM). Parcels zoned UAR are therefore exception lands. UAR parcels in Deschutes County have not been designated as urban reserves under ORS 195.145. UAR lands in Deschutes County are exception lands.” Director's Decision, at 131 (citations and footnote omitted).

On appeal (Swalley Appeal, at 12-15), Swalley confused the issue by ignoring what the Director's Decision said (which is quoted above). The Director determined that LCDC acknowledged the city's comprehensive plan in 1981. The city's proposed UGB included the UAR lands, and the City and County co-adopted the ordinances as referenced in Exhibit A to the Department's Report on the Appeals. The commission's acknowledgement order states that: “Based on these considerations, the City and County are taking an exception to Goal 3 and 4 as they relate to the land between the IUGB and UGB.” Exhibit A to Bend UGB, Director's Decision, at 6. The Commission takes official notice of the 1981 Acknowledgement Order of the city's UAR land designations.

In sum, the city's acknowledged plan included Goal 3 and 4 exceptions for the UAR lands, which were placed in several zoning districts including UAR-10 and SR 2 ½, and these lands are exceptions areas for purposes of ORS 197.298.

e. Conclusion

The Commission concludes that the county UAR lands are exceptions lands under ORS 197.298, denies the appeals and related objections for the reasons stated above and in the Director's Decision and in the Department's Report on Appeals, and affirms the Director's Decision on this issue.

9.5 Whether the City Was Required to Exclude Lands from its UGB Expansion Area Because they Would be So Expensive to Develop that They Would Not Meet the City's Need for Affordable Housing

a. Summary of Issue, Objectors and Appellants

Central Oregon LandWatch (COLW) argued on appeal that the city should have excluded exception land west of the Bend UGB from its UGB expansion area because the land will be so expensive to develop that it will not meet the city's need for affordable housing.

COLW Appeal, at 5.

b. Legal Standard

Under ORS 197.298(3)(a), land of lower priority may be included in a UGB if land of higher priority “is inadequate to accommodate the amount of needed land” or because “specific types of identified land needs cannot be reasonably accommodated on higher priority land.”

c. Analysis

ORS 197.298(3)(a) provides authority for a local government to *include* particular lands needed for a particular type of use. The statute does not provide a basis for *excluding* lands from a UGB expansion area, particularly to exclude a general type of land need such as land for the housing types a city has determined are needed under Goal 10. Further, the cost of land is not the type of locational requirement for a specific use that is contemplated by ORS 197.298(3)(a), Goal 14, and the Commission's implementing rules.

d. Conclusion

The Commission denies the appeal and affirms the Director's Decision, for the reasons set forth above, and in the Director's Decision.

9.6. Whether the City May Exclude (as Unsuitable) all Lots and Parcels of Less than Three Acres that Contain a House

This issue is a specific application of the general issue addressed above, as issue 9.1. The Commission concludes that due to the scope of the remand, it is premature to determine whether particular suitability criteria may be used as a screen by the City to eliminate lands from further consideration for inclusion in the expansion area. On remand, the City must reexamine its criteria and determine whether and how to apply them, using the steps described above under issue 9.1.

9.7. Whether the Threshold Suitability Criteria Used by the City Have an Adequate Factual Base

This issue is a specific application of the general issue addressed above, as issue 9.1. The Commission concludes that due to the scope of the remand, it is premature to determine whether particular suitability criteria may be used as a screen by the City to eliminate lands from further

consideration for inclusion in the expansion area. On remand, the City must reexamine its criteria and determine whether and how to apply them, using the steps described above under issue 9.1.

9.8. Whether the City and County Must apply Deschutes County Code Section 23.48.030 as a Standard for this UGB Expansion Decision

a. Summary of Issue, Objectors and Appellants

Deschutes County lists the *former* Goal 14 factors in the urbanization element of its comprehensive plan. Swalley Irrigation District argues that these are more restrictive local approval criteria that the County and City must comply with in making a UGB decision.

b. Analysis

Appellant Swalley withdrew its appeal at oral argument. In addition, the Commission does not agree that the cited county comprehensive plan provisions are more restrictive local requirements. Rather, the county's codification of the *former* Goal 14 need and location factors conflicts with the amended Goal 14 and Goal 14 rules (OAR 660-024). In this circumstance, ORS 197.646(4) applies and the local plan provisions are preempted by the revisions to Goal 14 and the Goal 14 rules. Under Swalley's argument, the commission's amendments to Goal 14 and the Goal 14 rules would never become effective until a local government had amended its comprehensive plan to adopt corresponding local plan and code provisions. ORS 197.646(4) was enacted to prevent this result.

c. Conclusion

The Commission denies the appeal, and affirms the Director's Decision on this issue, for the reasons stated above and in the Director's Decision.

9.9. Whether the Commission Should Remand the Submittal Specifically for Reconsideration of the Exception Areas to the Northwest of the Prior UGB

This issue is a specific application of the general issue addressed above, as issue 9.1. The Commission concludes that due to the scope of the remand, it is premature to determine whether these lands should or should not be included in the UGB expansion area. On remand, the City must reexamine these lands and determine whether to include them or not, using the steps described above under issue 9.1.

9.10. Whether the City Established that Excluding the Buck Canyon Area is Consistent with the Statutory Priorities of ORS 197.298

This issue is a specific application of the general issue addressed above, as issue 9.1. The Commission concludes that due to the scope of the remand, it is premature to determine whether ORS 197.298 applies in such a manner as to require the City to meet some of its identified need in the Buck Canyon area. On remand, the City must reexamine these lands and determine whether to include them or not, using the steps described above under issue 9.1.

10. Other Issues

10.1. Whether the Validity of Objections to the City's Decision Is Relevant to the Commission's Decision on Appeals of the Director's Decision?

a. Summary of Issues, Objectors and Appeals

The City argued on appeal that certain objections filed by other parties were not valid under the commission's rules, and argued that those objections should not have been considered by the Commission.

b. Legal Standard

OAR 660-025-0140(2) establishes the commission's requirements for objections. However, OAR 660-025-0150(4) allows *both* persons who filed valid objections, *and* persons who participated orally or in writing at the local level during the local process on the work task to appeal a decision by the director to remand or partially remand a work task to the commission.

c. Summary of Director's Decision and Appeals

The Director rejected the objections of several objectors as being invalid. Director's Decision, at 11. However, the City appealed, arguing that additional objections were invalid under OAR 660-025-0140(2). City Appeal, at 13 and at Appendix B.

d. Analysis

The objections challenged by the City were filed by persons who participated orally or in writing in the proceedings before the city. As a result, under OAR 660-025-0150(4), these persons had the right to participate in the appeal even if a specific objection they raised did not meet the requirements of OAR 660-025-0140(2). In addition, while the Director must consider all objections, the Director is not limited to issues raised by objectors in his evaluation of the submittal (the Director may consider issues even if they also are raised in an invalid objection). As a result, the city's appeal provides no basis for relief under the circumstances of this case.

e. Conclusion

The Commission determines that the parties participating in the appeals properly were before the Commission, and that the issues considered by the Commission were properly raised. At oral argument before the Commission, the City agreed not to contest this issue. As a result, the Commission denies the appeal of the City on this issue.

10.2. Whether the City and County Applied Appropriate Comprehensive Plan and Zoning Designations to the UGB Expansion Area?

a. Summary of Issue and Related Objections

The Director determined that the comprehensive plan and zoning designations adopted by the city and county for the UGB expansion area did not comply with state law. Director's Decision at 56-58. Specifically, the Director found that the zoning designations adopted by the County allowed more intense development than the prior county zoning, that the City and County failed to adopt comprehensive plan designations for lands added to the UGB to meet a "specific identified land need," and that the effect of the city's framework plan in light of the urban growth management agreement between the City and County needed to be clarified. This last point also was raised in an objection filed by Tumalo Creek Development LLC, which contends Bend violated Goal 2 by assigning future plan designations in the proposed Framework Plan to lands outside its jurisdiction. Tumalo Creek Objection, at 2.

b. Legal Standard

Goal 14 provides, in pertinent part, that:

"Establishment and change of urban growth boundaries shall be a cooperative process among cities, counties and, where applicable, regional governments. An urban growth boundary and amendments to the boundary shall be adopted by all cities within the boundary and by the county or counties within which the boundary is located, consistent with intergovernmental agreements* * *."

* * *

Urbanizable Land

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

The statewide planning goal definitions as amended April 28, 2005 define "urbanizable land" as:

"Urban land that, due to the preset unavailability of urban facilities and services, or for other reasons, either:

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

OAR 660-024-0050(6) provides that:

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

c. Summary of Local Actions, Director's Decision, and Appeals

The lands added to the UGB were given a comprehensive plan designation of "urban growth boundary" by Deschutes County, and were zoned Urban Holding 10 and Urban Holding 2.5 (some lands were zoned "Public Facilities" and some zoned "Surface Mining"). Within these zones, cluster development is allowed with a minimum lot size of 15,000 square feet and a maximum lot size of ½ acre. DCC section 19.60. The prior zoning of these lands was largely Urban Area Reserve (allowing one home on ten acres) Multiple Use Agriculture 10, and Exclusive Farm Use. In addition, although the city does not have land use jurisdiction over the lands added to the UGB, it adopted a "Bend Urban Area Proposed General Plan Map" with both proposed comprehensive plan designations (for some areas), and proposed master plan designations and general land allocations (for the remaining areas). The county's comprehensive plan text "* * *recognizes the city's comprehensive plan as the policy document that provides the basis for implementing land use plans and ordinances in Bend's Urban Growth Boundary." In addition, the county adopted by reference the city's plan provisions for the UGB – evidently including the proposed general plan map and master plan designations noted above.

d. Analysis

OAR 660-024-0050(6) requires that the comprehensive plan designations for lands added to an urban growth boundary be consistent with the local governments' need determination. In this case, the City of Bend has determined a need to expand its UGB based on three specific identified land needs under ORS 197.298(3)(a) (225 acres for a future university site, 112 acres for a new hospital site, and two, 50-acre Industrial Sites (Targeted Sector and Heavy Industrial Site). Under OAR 660-024-0050, the comprehensive plans of the county and city (maps and

text) must clearly designate the areas planned for these uses to assure that they are, in fact, used for their intended purpose. The adopted plans and maps do not clearly do so.

OAR 660-024-0050(6) also requires that "* * * [t]he local government must also apply appropriate zoning to the added land consistent with the plan designation or may maintain the land as urbanizable land until the land is rezoned for the planned urban uses, either by retaining the zoning that was assigned prior to inclusion in the boundary or by applying other interim zoning that maintains the land's potential for planned urban development." The zoning designations adopted by Deschutes County allow a higher level of development than that permitted under the prior UAR, MUA and EFU designations. Of particular concern are several areas of UAR 2.5 zoning and areas where the zoning has changed from EFU to UAR 10. The City and County should either maintain the former county zoning until areas added to the UGB are ready to urbanize, or the City must specifically determine that the new zoning maintains the likelihood that the land will develop for the uses and at the intensity that the city's underlying analysis of the capacity of the lands is based on.

Similarly, under OAR 660-024-0020(1)(d) "the transportation planning rule requirements under OAR 660-012-0060 need not be applied to a UGB amendment *if* the land added to the UGB is zoned as urbanizable land, either by retaining the zoning that was assigned prior to inclusion in the boundary or by assigning interim zoning that does not allow development that would generate more vehicle trips than development allowed by the zoning assigned prior to inclusion in the boundary." On remand, the City and County must either retain the prior zoning (before the UGB expansion) or expressly analyze and determine that the assigned interim zoning will not generate more vehicle trips than development allowed by the prior zoning.

The final aspect of this subissue is the applicability of the city's comprehensive plan map and policies within the UGB expansion area. The county's comprehensive plan indicates that the city's plan map and policies will control within the expansion area. However, the city's plan map and policies do not contain similar corresponding provisions. On remand, the City and County should clarify the applicability of the city's plan map and plan policies within the UGB expansion area, including the city's Framework Plan map.⁴³

⁴³ Ideally, such provisions should be included within the city's comprehensive plan, and should reference the intergovernmental agreement between the city and the county that details responsibilities for administering planning and zoning responsibilities in this area.

e. Conclusions

For the reasons stated above, the commission denies the city's appeal and affirms the director's decision. On remand, the city and county must:

- Clearly designate on the appropriate comprehensive plan map, the areas planned for the specific identified land needs described in the city's analysis under 197.298(3)(a), and include policies to assure that the lands are, in fact, used for their intended purpose;
- Either maintain the former county zoning districts until areas added to the UGB are ready to urbanize, or specifically determine that interim zoning designations maintain the likelihood that the land will develop for the uses and at the intensity that the city's underlying analysis of the capacity of the lands is based on;
- If the County or City adopt interim zoning for the UGB expansion area, they must determine that the assigned interim zoning in each area will not generate more vehicle trips than development allowed by the zoning designations in place before the UGB expansion; and
- The City and County must coordinate, and clarify the applicability of the city's plan map and plan policies, including its Framework Plan map, within the UGB expansion area.

10.3. Whether the City Complied with ORS 197.610 by Failing to Provide Adequate Notice of the Proposed Amendments to its General Plan?

Several objectors argued that the City failed to comply with applicable requirements for public notice of its hearings on the UGB expansion as well as its public facility plan amendments. The Director's Decision upheld those objections, Director's Decision, at 148-150, and the Commission concurs for the reasons set forth in that decision. The City has agreed to re-notice its hearing(s) on remand on the UGB expansion and related amendments to its General Plan (including its public facilities plan), including providing a new 45-day notice under ORS 197.610.

10.4. Whether the City Met its Goal 2 Coordination Obligations with Regard to Swalley Irrigation District?

a. Summary of Issues and Related Objections

Swalley Irrigation District (Swalley) and Toby Bayard allege that the City and County failed to coordinate with the Swalley and other governmental entities, as required by Goal 2. In particular, Swalley alleges that the submittals were not coordinated with the district in the sense that the district's needs were considered and accommodated as much as possible. Goal 2; ORS 197.015(5). Swalley Objection 2(A), at 28-34. Bayard Objection 2, at 27-33. On appeal, Swalley did not pursue this objection, nor did Bayard. However, neither did they withdraw their objections and, as a result, the Commission addresses them.

b. Legal Standard

The coordination elements of Goal 2 require local governments to exchange information with affected governmental units. In addition, information received from affected governmental units must be used by the adopting local government. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 553, 558-559 (2007); *DLCD v. Douglas County*, 33 Or LUBA 216, 221 (1997); *Brown v. Coos County*, 31 Or LUBA 142, 145 (1996). The adopting government must provide "notice clearly explaining the nature of the proposal and soliciting comments concerning the proposal." *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 394, *aff'd* 130 Or App 406 (1994). A local government's 45-day notice to DLCD is not sufficient for this purpose. *Id.*

Similarly, newspaper notice is not sufficient. *Adkins v. Heceta Water District*, 23 Or LUBA 207, 218 (1992). Finally, the local government's findings must address the concerns raised; simply rejecting the concerns or deferring addressing them to a later time is not sufficient. *Cox v. Polk County*, 49 Or LUBA 78, 89 (2005). *DLCD v. Douglas County, supra*. Goal 2 and ORS 197.015(5) do not mandate success in accommodating the needs or legitimate interests of all affected governmental agencies, but they do mandate a reasonable effort to accommodate those needs and legitimate interests "as much as possible." *Turner Community Association v. Marion County*, 37 Or LUBA 324, 353-354 (1999). From the foregoing, the coordination requirement of Goal 2 is satisfied where the local government has engaged in an exchange of information regarding an affected governmental unit's concerns, put forth a reasonable effort to accommodate those concerns and legitimate interests as much as possible, and made findings

responding to legitimate concerns.

c. Summary of Local Actions, Director's Decision and Appeals

The City adopted findings summarizing its coordination with irrigation districts, including Swalley. [R. at 1214-1215] Those findings describe how the City and Swalley communicated, and the city's consideration of the concerns raised by the district.

According to the city's findings, it removed a 332-acre area entirely within the district. Also according to the City it "cannot balance SID's opposition to urbanization with the need for urbanization of the identified lands, for all of the reasons explained in the city's findings." [R. at 1215]

d. Analysis

The Director concluded that the City complied with the coordination elements of Goal 2. Director's Decision, at 152. The City met with the district; conducted an analysis of the acreage of irrigated lands affected by the proposal; removed some irrigated lands from the proposal; and adopted findings describing the district's concerns and how they were accommodated. Although the notice provided by the City was confusing, it met the requirements of Goal 2, and the district itself has indicated that it was able to make its concerns known in writing.

e. Conclusion

The Commission concurs with the director's conclusion that the city's and county's actions (the three City ordinances, and the two County ordinances) were adopted in compliance with the coordination requirements of Goal 2.

10.5. Whether the City Violated Goal 1 in How it Considered and Provided for Public Participation Regarding its Public Facility Plans?

a. Summary of Issues and Related Objections

Toby Bayard (and to some degree Swalley and Central Oregon LandWatch) alleges that the City failed to provide critical information to the public in a timely fashion, and made substantial last-minute changes in its proposal that had the effect of not allowing the public adequate time to comment. [Bayard Objection 1 at 1-26; Central Oregon LandWatch Objection at 6-8]

b. Legal Standard

Goal 1 is to “develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.” [OAR 660-015-0000(1)] Goal 1 establishes requirements for local citizen involvement programs. Its provisions do not apply to comprehensive plan amendments unless those amendments include the government’s citizen involvement program. The city and county submittals do not amend or affect either the city’s or county’s citizen involvement program. Under those circumstances, the submittals are in violation of Goal 1 only if the submittals include provisions that are inconsistent with the city or county citizen involvement programs. *Homebuilders Assoc. v. Metro*, 42 Or LUBA 176, 196-197 *aff’d Homebuilders Assn. of Metropolitan Portland*, 184 Or App at 669. No objector attempts to establish that the submittals include provisions that are inconsistent with either citizen involvement program. In addition, the objectors do not identify any specific provision of the city’s citizen involvement program that has been violated. See, General Plan, Chapter 1.

c. Summary of Local Actions, Director's Decision, and Appeals

The city did not amend its citizen involvement program.

d. Analysis

Because the City is not amending its citizen involvement program, Goal 1 does not establish requirements for the local government actions under review by the Commission.

e. Conclusion

The Commission upholds the director's decision and denies the Bayard, Central Oregon LandWatch and Swalley objections and appeals concerning Goal 1, because the goal does not establish legal requirements for the actions under review.

10.6. Did the City place information in the record after the public hearing was closed and, if so, does this require remand?

The City has agreed to re-notice its hearing(s) on the urban growth boundary expansion, and to allow new evidence to be introduced into the record. As a result, this subissue is no longer relevant to the commission's decision.

10.7. Should the commission more clearly define the scope of the remand?

COLW argued on appeal that the Commission should more clearly identify specific tasks

that the city must complete on remand relative to the Director's Decision. COLW Appeal, at 7-8. The Commission, through this order, has provided an appropriate level of detail in its remand to the City. COLW identified four specific objections that it argues should be sustained or denied:

"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."

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

"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."

"* * * 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." COLW Appeal, at 7-8.

The objections listed above are denied, for the reasons set forth earlier in this order.

VII. Compliance with Applicable Statutes, Statewide Land Use Planning Goals and Implementing Rules

Except as specifically modified in this order, the Commission concurs with the Director's Decision concerning the applicability of the statewide planning goals and their implementing rules to the city's decisions, and whether those decisions comply with the goals and rules. See, Director's Decision, at 154-156 (goal findings). Except as modified in this order, the Commission concurs with the Director's Decision concerning whether the city and county decisions comply with applicable state statutory requirements and applicable implementing rules of the Commission.

Conclusion

Based on its consideration of the record as a whole, including the city's and county's submittals, the objections, the Director's Decision, the appeals of the Director's Decision, the Department's Report, exceptions and oral argument, the Commission concludes and orders that:

1. The City of Bend's Water Reclamation Facilities Plan (2008), Carollo Engineering (including technical memoranda nos. 1 – 10 (2008)), submitted in connection with Ordinance Number NS-2111, complies with the applicable statewide planning goals, their implementing rules and state statutes, and is hereby approved pursuant to OAR 660-025-0150 and 660-025-0160 (partial approval);
2. The remainder of the City of Bend's Ordinance Number NS-2111 and the other accompanying public facilities plans (except the Airport Water System Master Plan, which the City has withdrawn) do not comply with the applicable statewide planning goals, their implementing rules and state statutes for the reasons set forth in this order, and are hereby remanded to the City for further proceedings consistent with this order and (to the extent not appealed) the Director's Decision;
3. The City of Bend's Ordinance Number NS-2112, concerning the city's legislative amendment of its urban growth boundary, along with the accompanying amendments to the city's comprehensive plan (listed R. at 1050-1051) do not comply with the statewide planning goals, their implementing rules and state statutes for the reasons set forth in this order, and are hereby remanded to the City for further proceedings consistent with this order and (to the extent not appealed) the Director's Decision;
4. The City of Bend's Ordinance Number NS-2113, concerning certain amendments to the city's development code to adopt urban holding districts and provide for master plan development within such districts, along with the accompanying amendments to the city's code (R. at 1836-1848) do not comply with the statewide planning goals, their implementing rules and state statutes for the reasons set forth in this order, and are hereby remanded to the City for further proceedings consistent with this order and (to the extent not appealed) the Director's Decision;
5. Deschutes County's Ordinance No. 2009-001, concerning amendments to the county's code, comprehensive plan map, and transportation system plan map, does not comply with the statewide planning goals, their implementing rules and state statutes for the reasons set forth in

this order, and is hereby remanded to the County for further proceedings consistent with this order and (to the extent not appealed) the Director's Decision; and

6. Deschutes County's Ordinance No. 2009-002, concerning amendments to the county's code, and zoning map does not comply with the statewide planning goals, their implementing rules and state statutes for the reasons set forth in this order, and is hereby remanded to the County for further proceedings consistent with this order and (to the extent not appealed) the Director's Decision.

IT IS FURTHER ORDERED THAT:

Pursuant to OAR 660-025-0160(6)(b), the Commission establishes May 2, 2013 (2.5 years from date of this order) as the city's deadline to submit a revised determination under ORS 197.296 concerning its urban growth boundary. As set forth above in this order, the City may separately adopt a post-acknowledgement plan amendment for a public facilities plan or plans addressing facilities serving only lands within the city's prior UGB.

The Commission has considered every objection to the city's decisions and every appeal of the Director's Decision. Except for those that the Commission specifically sustained in this Order, all other objections are denied for the reasons set forth in this order or, if not addressed in this order, in the Director's Report. The Commission also has considered every appeal of the Director's Decision. Except for those appeals that the Commission specifically sustained in this Order, all other appeals are denied for the reasons set forth in this order or, if not addressed in this order, in the Department's Report on the Appeals.

DATED THIS 2nd DAY OF NOVEMBER 2010.

FOR THE COMMISSION:



John VanLandingham, Chair
Land Conservation & Development Commission

NOTE: You may be entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this final order. Judicial review is pursuant to the provision of ORS 183.482 and 197.650.

Copies of all exhibits are available for review at the department's office at 635 Capitol Street NE, Suite 150, Salem.