Exceptions to Director's February 25, 2010 Report to the Land Conservation and Development Commission's Report on the Bend Urban Growth Boundary Decision

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Introduction

Newland Communities appreciates the Director's and the City's significant efforts to narrow the issues on appeal to the Commission. Both the Director and the City seem to share the objective of resolving as many issues before the Commission as legally and factually appropriate and to limit a remand, if any, to only those issues that cannot be resolved on the record. This mutual strategy will help mitigate the time and monumental expense of Bend's UGB planning effort while ensuring that the City's decision complies with state law.

Newland's exceptions to the Director's February 25, 2010 Report to the Commission ("Director's February Report") address six grounds: (1) Newland urges the Commission to accept new evidence into the record where it is offered to clarify or resolve an appeal issue as it is permitted to do under OAR 660-025-0160(5). The new evidence, when offered by the City, will facilitate a more timely resolution of the appeal issues. All parties will have an opportunity

to hear and rebut the evidence during the Commission hearing process; (2) Newland agrees with the Director's decision that certain resource lands in the northeast quadrant of the new UGB should be included in the UGB under ORS 197.298(3) and supports the Director's determination that the current record supports such a determination; (3) Newland urges the Commission to independently review the record and findings offered by the City of Bend on residential land need and find that the City appropriately applied the definitions of buildable and redevelopable land in reaching its residential land needs acreage; (4) Newland continues to object to the Director's application of the efficiency measures under ORS 197.296(7); (5) Newland agrees that to the extent the UGB location is modified on appeal or on remand, the PFP must be amended to be consistent with the final boundary location; and (6) Newland urges the Commission to uphold the City's determination that a Goal 8 destination resort land planned to develop at rural densities of residential development that is committed to recreational and visitor-oriented development is not suitable for inclusion in the Bend UGB meet Goal 10 housing.

Lastly, we have included Exhibit 1 which contains factual corrections to the findings that we believe are relevant for the commission on appeal or remand.

For ease of reference, each of these grounds are cross-referenced to Attachment A of the Director's February Report and identified using the Director's classifications of issues into categories A through J and Issue Areas for the March 18, 2010 hearing agenda.

A. **Required Findings and Standard of Review (Issue Area 1)**

Newland requested that where appropriate to facilitate timely resolution of the Bend UGB process, the Commission accept new evidence from the City where it would further explain why the City reached a particular determination. The Director's February Report denies this request by stating:

> "The department recommends that the commission not ask the city or other parties to provide additional evidence, with the exception of the request for the site visit for a general orientation to the city and the expansion area, as described in the letter from the Director dated February 24, 2010. Any additional evidence or findings should be prepared by the city and approved by the city and the county on remand, not presented to the commission without local review." (Director's February Report at page A-3).

The Director's February Report is a blanket denial regardless of the issue and regardless of the evidence. The Director seems to assume that all new evidence or findings will be a matter of first impression that should be reviewed by the local decision-makers before the commission exercises its jurisdiction. This is not the case and paints too broad a brush on the request. An example may be helpful.

In the UGB decision, the city and county approved a determination that land was not buildable if it was less than half an acre and if the land value exceeds the improvement value. The Director concludes that this may be a "reasonable application of OAR 660-008-0005(6)" but the "city's findings do not identify what the factual basis for the assumption is." (Director's February Report at A-3). The City's findings show that it defined the development status of lots less than .5 acres, updated and refined this data by considering building permit and land use activity tracked by the City of Bend and used aerial photos to verify the data and correct errors. Further, the full Buildable Lands Inventory with this data was placed in the record. From the record, the City made a reasonable deduction and found that a lot was not redevelopable if it was less than .5 acres in size and land value exceeded improvement value. The Director agrees that this is a reasonable conclusion. The City's error, if any, and according to the Director, was not further describing the specific factual steps that led it to conclude that some lands could not be redeveloped. Put simply, perhaps the City needed to include an additional paragraph or two in its findings explaining the deductions that it clearly made from the larger record.

In this example, the *county and city agreed with the conclusion that lands with less than .5 acres were not redevelopable*. If the city needs to further explain how its data led to what the Director calls its "reasonable application of OAR 660-008-0005(6)" then it should be permitted to do so before the commission. It will not be a matter of making a new finding that has not been reviewed locally. Rather it will be an effort to clarify a decision that has already been made by the city and county with additional facts to avoid more time and expense on a remand. This appears to fall squarely within the purpose of OAR 660-025-0085(5)(d) which specifically allows the Commission to hear new evidence to help resolve an issue on appeal. Requiring the City to be silent in its further explanation and instead return the matter to the city to reconfirm its facts seems onerous, unnecessary and against the fundamental tenet of Oregon's land use law to expediently resolve issues pertaining to the use of land. ORS 197.805("It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use . . .").

Newland therefore renews its request to allow the City and affected parties to offer new evidence to the commission where the following circumstances exist;

(1) The City has made a finding on the matter at the local level;

(2) The Director cannot reach a recommendation approving the finding based on a factual deficit;

(3) The City has evidence both in the current record and outside of the record supporting the finding; and

(4) All parties have an opportunity to rebut any new evidence outside the current record.

With these measures the Commission can be assured that the local decision makers have already passed judgment on the issue and that the commission's role will be to review that judgment on the entire factual record.

Finally, Newland agrees that the substantial evidence standard applies to the commission's review of the Bend UGB decision. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make the same finding. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P.2d 608 (1993). The Director seems to advise the commission to address only the findings in determining whether the City's decision is supported by substantial evidence. The Director is correct that the findings must be reviewed by the commission but the commission is also required to look to the whole record to determine whether the City's decision reflects the reasonable person standard. Newland therefore requests that the commission look to the whole of the record in its review.

B. Residential Land Need (Issue Area 2)

The City and the Director now agree on the applied definition of buildable land and redevelopable land. The question on appeal has been narrowed to whether the city was correct in its judgment of which lands were buildable and which lands were redevelopable. As stated above, the Director finds that at least some of the City's conclusions on this point "may be a reasonable application of OAR 660-008-0005(6)" but "the city's findings do not identify what the factual basis for the assumption is." Newland requests that the commission allow the City to cite evidence in the record that supports its findings on each category of buildable or redevelopable land, and to the extent further evidence is necessary to support a conclusion the city already reached, accept new evidence to further explain that conclusion under OAR 660-025-0085(5)(d).

The Director appears to treat OAR 660-008-0005(2)(b) as a complete list of lands that are unbuildable. If this is correct, this approach should be rejected by the commission for a number of reasons. First, OAR 660-008-0005(2)(b) lists lands that are unbuildable but does not prohibit a city from identifying other lands as unbuildable. For example, Goal 10 and ORS 197.295(1) also provide that land is buildable only if it is "suitable, available and necessary for residential uses." Land that lacks the conditions listed in the rule may, in fact, be unsuitable for residential use. If so, that land cannot be treated as "buildable." Second, under ORS 197.296, additional lands must or may be excluded from the buildable lands inventory. *See*, ORS 197.186 (open space tax-assessed land is not buildable); ORS 197.296(4)(b)(A)&(B)(must consider land use development restrictions and prohibitions and long-term lease for radio, telecommunications or electrical facilities in buildable lands inventory). It is not clear whether the Director is requesting that the City ignore or not implement these additional statutory exclusions to buildable land. However, to do so would prevent a city from complying with its obligation under ORS 197.296(2) to provide a 20-year supply of land for needed housing.

.5 acre standard and land value to improvement value

The evidence in the record that supports the City's decision to adopt the .5 acre and the land value to improvement value as factors to define the buildable lands inventory is found at Supplemental Record 1257, Table 5-4 of the 2009 Housing Model, Record at 1288, the BLI database, Planning Commission meeting minutes and summaries at Supplemental Record 1213-88, and Record at 8660-67, 8406-08 and 8278.

The findings which adopt a conclusion based on this record are found at pages 127, 265 and 418. There the City explains its BLI that assigned a "development status" to each tax lot or parcel in the UGB. The findings explained the methodology used to determine the development status which included lot size, improvement values and assessor improvement codes for properties. This data was further updated and refined by considering building permit and land use activity tracked by the City. Aerial photos from 2204 to 2006 were used to verify and correct any errors and determine development areas. The full BLI has been submitted to DLCD. As part of this analysis lots less than .5 acres were evaluated.

Based on this data, and a specific evaluation of each parcel, the City concludes that on lots less than .5 acres and on lots with land values that exceed improvement values there is *not a strong likelihood* that existing development will be converted to more intensive residential uses during the planning period. The record and findings are clear that the City and County together reached the same conclusion.

If the City needs to further explain the connection between the data and the conclusion, it is appropriate to allow them to do so at the commission. It will not be a new decision on a new issue. It will simply be a supplemental explanation of why the City did what it did at the local level. Newland therefore requests that the commission invoke OAR 660-008-0005(6) to hear the City's further explanation.

CC&Rs

The record contains the discussion of CC&Rs in the context of buildable land at pages 156 through 159 of the findings. There the City specifically identified 16 existing subdivisions with rural residential development. The City identified these areas as exceptions areas and identified the zoning of each parcel. Most importantly, the City evaluated each of the subdivisions based on the presence of CC&Rs, specific restrictions within those CC&Rs and the existing development patterns, to make a reasonable judgment on whether any of these lands had a strong likelihood of increasing density through the planning period. The City found that the subdivisions represented 816 acres of land and 405 lots. Of the 405 lots, 357 are developed with a home. Eighty-eight percent of the lots are developed. Nine of the 16 subdivisions have prohibitions on future land divisions. Two of the 8 have setback standards that would limit redevelopment. Of the subdivisions that did not have express prohibitions on future

development, the City evaluated their size and development pattern and determined that they were not likely to be re-divided over the planning period.

While the Director may disagree with the City's judgment, the question for the commission is whether a reasonable person would similarly conclude based on the whole record that there does not exist a strong likelihood that these subdivisions will accommodate increased density over the planning period. OAR 660-008-0005(6). The City maintains that the evidence supports a conclusion that no such strong likelihood can be shown. The City's determination should be upheld.

50% or More Constrained

On page A-5 of the Director's February Report, the Director states that the City's areas of special interest have not been protected under Goal 5. This is not correct.[1] The City's ASIs protect Goal 5 natural resources. *See* BDC 2.5.300(B). These Goal 5 resource areas are mapped on the City's comprehensive plan map as "areas of special interest" (ASI). These ASI's protect significant rock outcrops and geological features and the less developed parts of the Deschutes River Canyon.

The City correctly determined that certain lots that contain acknowledged areas of special interest are constrained and, therefore, are not buildable. Specifically, if more than 50% of a lot is an Area of Special Interest, it is not buildable. This is consistent with OAR 660-008-0005(2)(b) which allows the City to exclude lands that contain inventoried Goal 5 resources, like the City's ASIs. This is a reasonable determination as the City's development code places significant development restrictions on land adjacent to ASIs. We believe that the City is concluding, based on its review of lands that are burdened with over 50% of an ASI, that there is not a strong likelihood that the land will accommodate more density than its current zoning. If the Director's position is that there is not enough evidence in the record to reach a reasonable conclusion on each of these constrained parcels then the City can offer that evidence to the commission or can remand this issue for development of further evidence.

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[1] The record contains much discussion of the fact that lands outside the City of Bend lack Goal 5 protections. The same is not true for lands inside the city limits. The City has an acknowledged Goal 5 inventory inside the City limits. ASIs had been shown on lands outside the City on the Bend Area's first State-acknowledged comprehensive plan map and on the 1998 comprehensive plan update map. These areas are no longer shown on the City's comprehensive plan map and may have been repealed when the City conducted and adopted a Goal 5 inventory of ASI for upland areas of special interest around 2002.

Collapsed housing types

At page A-8 of the Director's February 25 Report, the Director proposes a remand to the City because the City collapsed multiple categories of housing types and failed to address housing needs by tenure. The Director asserts that the relevant statutes require the City to evaluate housing needs by owner or renter-occupied and by type; attached single-family, detached single-family and attached multi-family. ORS 197.296 and 197.303.

The statutes require that the determination of housing capacity and need be based on data relating to land within the urban growth boundary collected since the last periodic review or five years, whichever is greater. The data must 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.

The City's findings under this requirement are found at pages 59 through 66 and in the record at pages 1295-1298; Supplemental Record at 1987-2002. The City used multiple housing types to evaluate housing needs over the planning period. For example, Table III-5 provides data on the actual housing types that were constructed in Bend between 1998 and 2005. This table includes SF dwellings (attached and detached), manufactured homes in parks and on lots, 2-4-unit-plexes and multi-family buildings with 5 or more units. The data shows that 77% of the residential building permits issued between 1998 and 2005 were for single family detached dwellings and 12% were for MF dwellings. Combined permits for 2-, 3- and 4-unit-plexes accounted for the remaining 11% of permits.

With this data the City reasonably concluded that the average mix of housing types as 77% SF, 12% MF and 11% 2-4-unit-plexes. The City then applied a trend analysis based on its demographics, population and economics and concluded that the historic trend of 77% SF and 23% MF or attached housing would most likely trend towards 65% SF detached and 35% attached whether the attached is SF, MF or 2-4-unit plexes. (Record at page 63). Thus the City did not collapse housing types in its analysis. Instead once it collected the data from its analysis on attached, detached, SF, MF and multi-unit attached it grouped the data into 2 categories. In

the end, the City adopted a trend analysis that will reduce SF detached homes from 77% of the housing stock to 65% of the housing stock and increased attached homes whether they are single family townhouses, multi-plexes or MF homes from 23% to 35%.

The City also reasonable assumes based on its trend data that the SF detached homes will most likely be owner-occupied while the attached units, for the most part, will be renter-occupied. This results in a planned housing stock for lower income residents of up to 35% of the housing market. The City's ACS data showed that the attached housing in Bend has a tenure split oriented towards renter-occupied units (38% owner, 62% renter). The City plans for this trend to increase. (Record at page 64).

Table III-12 then converts the attached and detached housing into residential land needs. (Record at page 65). To meet the new 35% push for attached housing, the City assumed densities of 6 units per acre in the RS designation, 12 units per acre in the RM designation and 22 units per acre in the RH designation for a total of 1,933 new attached units.

These findings provide substantial evidence that the City reasonably evaluated its past and future trends in housing mix, density and tenure, projected a more rigorous mix of attached and detached units to meet the needs of lower income residents and provided sufficient land to meet these needs through 2028.

<u>2,987-acre unsuitable land analysis</u>

The City included 2,987 acres of land within the UGB but found that this land would not meet residential or urban land needs over the planning period for a number of reasons: (1) the land was already committed as an existing right of way; (2) the land is not likely to be redeveloped based on steep slopes or floodplain; (3) the land is a school or park site; and (4) the unsuitable land is extensively interspersed with suitable lands making it impossible to exclude.

The Director finds that a city can include unsuitable land in a UGB if it is committed to urban uses, if it meets some limited land need or if suitable lands cannot be developed without including the suitable lands in order to provide public services. (Director's February Report at pages A-12, A-13). In particular, the Director states that "as part of this determination the city could, with an adequate factual base (such as evidence of development trends on other rural subdivisions added to the Bend UGB), decide that the amount of residential or other future land need that these lands are likely to meet is limited." (Director's February Report at page A-14).

The City has already taken this advice from the Director. The City has included the "unsuitable" land in the UGB. The City has reached a conclusion that this land will not meet any discernible land need over the planning period. However, the City could, before the commission, or on remand, develop a greater factual base of information on these lands that demonstrates under the substantial evidence standard that these lands are likely to meet a limited land need based on the

development trends evident on like rural subdivisions. Newland requests that the Commission confirm that such a showing would be satisfactory to either include some or all of the 2,987 acres in the UGB or exclude those acres creating an illogical UGB boundary. To avoid confusion on remand, the commission should confirm this analysis of the "unsuitable" land category before considering a remand to the City.

C. Efficiency Measures (Issue Area 3)

The statutes governing efficiency measures are found at ORS 197.296(6)(b), (7) and (9). There the statutes provide that the city shall consider the effects of measures taken pursuant to ORS 197.296(6)(b) and include new measures that "demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without a UGB expansion." In establishing the actions and measures that will demonstrably increase the likelihood of higher housing densities the city must "ensure" that land zoned for needed housing is zoned at density ranges "that are likely to be achieved by the housing market." ORS 197.296(9).

The city is then permitted to consider the measures articulated on Subsection (9) as well as any additional or different measures that would ensure the densities necessary to accommodate needed housing without a UGB amendment. In Bend's particular case, this means that the City needs to either: (1) demonstrate that all of the 16,681 new housing units needed through 2028 can be provided inside the UGB through measures that demonstrably increase the likelihood that new residential development will occur at densities sufficient to accommodate all of those units in the UGB and that such densities are likely to be achieved by the housing market; or (2) the City can find that some of those units can be accommodated in the UGB under these standards and some may be provided in an expanded UGB. Based on the housing market in Bend and the existing character of the City as evidenced by past growth patterns and comprehensive plan and zoning code provisions, the City decided to include two-thirds of the new growth inside the City using efficiency measures leaving only one-third of the new growth in the expanded UGB. Roughly 5,500 of the housing units will be within the expanded UGB and over 11,000 will be provided inside the UGB.

The question for the commission is whether the City can fit *more than two-thirds* of the new homes inside the UGB and "ensure" that land zoned for needed housing is zoned at density ranges "that are likely to be achieved by the housing market." ORS 197.296(9). The law is clear that there are no required or target densities for Bend. The Director has echoed this statement in meetings with the City Council and in City forums.

In what appears to be a statement to the contrary in the February Director's Report, the Director remands to the City to, among other things:

- "Adopt an average residential density standard for subdivisions and refinement plans;"

- "Increase the minimum density in its residential zones, particularly the RS zone, or split that zone into two single-family zones with one reflecting well established residential neighborhoods that are unlikely to have significant redevelopment, and the other for neighborhoods where there is more redevelopment potential;"

- "Up-zone a portion of land currently zoned RS to RM or RH." (February Director's Report at page A-21).

The efficiency measures are considerations *not* requirements. There is no disagreement between the Director and the City that the law does not require any particular efficiency measure. The law does require the City to demonstrate that measures will demonstrably increase the likelihood of increased densities and that those densities will be achieved by the housing market. On this law there is agreement as well. The City and DLCD simply disagree on the City's conclusions under this requirement.

The City's findings demonstrate that it cannot accommodate more than 11,000 new homes in the existing UGB within the unique characteristics of the Bend housing market. The commission should defer to this well documented local determination.

The City finds that moving from a historic split of 77%/23% SF/MF to a split of 65%/35% is pushing the housing market in Bend to the point where it may be reasonable to conclude that the target densities "are likely to be achieved." The new split is a significant shift in a well-documented market environment. Every decision-maker in the local process from outside consultants to staff, the Technical Advisory Committee, Planning Commission, City Council and county agreed based on substantial evidence that the housing market in Bend could not likely achieve a greater shift from single-family to multi-family and there is no substantial evidence in the record to the contrary. Asking the City to look again at this density shift seems inappropriately onerous given the established record on this issue and the limitations on DLCD's authority to require any particular efficiency measure or pre-set level of density.

This Issue Area still seems as though it is marred by some misunderstandings of the data. For example, there still appears to be a disconnect between the density permitted by a zone designation and that allowed by a comprehensive plan district. The City uses zoning districts to dictate the density of development but the plan assumes that residential land will, in some cases, develop at higher densities. The Director recognizes this difference in his Report but the full impact of the distinction on densities does not seem to be resolved. (Director's February Report at page A-6). The City used the plan district designations to project and accommodate housing need in its BLI. These plan district designations assume a higher density than can be achieved by the existing zone designations for some residential land. Also, the Director's Report seems to make erroneous findings on this issue. For instance, the Director suggests that past trends indicate the City has increased density over time through a "significant amount of zone changes

that provided an increase in the residential capacity of the prior UGB…It is unclear whether this trend is expected to continue, or whether the potential for up-zoning within the prior UGB is limited." *Id.* From this, the Director seems to conclude that there is more potential to up-zone beyond the 11,000 new units the City is expecting to accommodate inside the prior UGB – a figure that was calculated assuming that all under-zoned land would be up-zoned to its plan density.

The 2007 Housing Study shows that only **7** of 87 City-approved zone change applications filed from 1999 through 2006 required approval of a plan amendment. (Record at page 1827). This means that 7 zone changes had the effect of increasing density to the comprehensive plan district density. This also means that 83 zone changes did not increase density to the higher level permitted in the comprehensive plan map. If there is a trend being forced on the City, it is by the City's own hand. Recall that the density the City assumed in its BLI for future development is all based on the higher plan densities. Thus, the City has already effectively assumed what the Director urges; that over 11,000 new units will be provided in the prior UGB using this measure, among others.

Further, the June 30, 2005 BLI and BAGP adopted by the City in support of the UGB show that no more than 150 vacant acres zoned RL have a higher plan designation that would allow more intense development. (Compare pages 1288 of the Record with BAGP Pages 5-9 and Page 6 of 2005 BLI submitted to DLCD by the City with its 45-day notice in 2007). It is fair to say based on this evidence that the trend of up zoning of RL to RS will flatten or decline even if it is to match the zoning designation to the plan designation.

Lastly, the rapid growth and increased densities over the last 6 to 8 years in Bend consumed a lot of land within the UGB, necessitating this UGB amendment. Additional increased density beyond the 11,000 additional units proposed under the City's UGB decision is not feasible and is not likely to occur as evidenced by the City's comprehensive analysis of this issue at pages 66 through 84 of the record.

In another possible misunderstanding, the Director points to particular areas of the City where he believes additional density could be provided. One of these areas is Northwest Crossing. This is a refinement plan area according to the City's comprehensive plan map. The City of Bend has adopted overlay zoning districts and maps that implement the Northwest Crossing Master Plan and act as refinement area plans. These rules allow RS-zoned land to develop with attached housing types, such as row houses and increase the net density of development possible on RS-zoned lands. Whether some of the land division approvals for this community are expiring has little relevance to whether the area has a strong likelihood to accommodate increased density over the planning period. The development of this area is dictated by overlay zoning districts and a special street plan that implement the master plan that are not expiring. In addition, much of the land that remains undeveloped is industrial and commercial land that is not available to

meet Goal 10 housing needs. The City has made an informed judgment based on substantial evidence that this planned community will not redevelop with additional density. There is no evidence to the contrary in the record.

The City did include several efficiency measures that the City and county agreed would be feasible in the Bend housing market. A list of those measures is found at pages 26-29 of the City's Appeal Statement.

In sum, consistent with the applicable statutes, the City considered a wide range of efficiency measures, adopted those that are supported by substantial evidence in the record and that would "demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without a UGB expansion." Measures that failed this test were not adopted.

Newland requests that the commission review the City's record and findings on efficiency measures and affirm the City's determinations regarding efficiency measures. If the City's efficiency measures are remanded for reconsideration, Newland asks that the City be allowed to determine whether the measures it identified in its UGB expansion review (transit corridor rezoning and Central Area Plan) can or cannot be implemented in the way suggested by the Director's February Report. (*See* Director's February Report at page A-18).

The Director's February Report appears to mandate the approval of quasi-judicial zone changes (transit corridor) and a legislative program (Central Area Plan) that cannot be adopted with a prior notice, public participation and legislative or quasi-judicial review. It directs the City to adopt a particular plan policy and should be subject to review by the public. The mandates on page A-18 are therefore not appropriate as they foreclose any meaningful citizen participation – participation required by Goal 2 – by dictating the outcome of the review of these measures. Only if all applicable land use approval criteria, including OAR 660-012-0060, are met can the steps required by the Director's February Report be implemented.

Newland asks the Commission to act in conformance with Goal 2 by simply remanding without the specific directions provided on page A-18 or by asking the City to consider these measures, as was required for the efficiency measures identified on pages A-20 and A-21 of the Director's February Report.

G. Public Facilities Planning-Goal 11 (Issue Area 7)

Newland agrees with the Director that the Public Facility Plans (PFPs) must be consistent with Goal 11 and OAR 660-024-0060(8) which provides that a local government considering a UGB expansion must analyze the comparative costs, disadvantages and advantages of public facilities and services need to urbanize alternative boundary locations. The City specifically evaluated the costs, advantages and disadvantages of providing public services to the various quadrants of the

expanded UGB when it was assessing boundary locations. To the extent the boundary is altered on review by the commission or by any remand, the City will likely conduct the same comparative analysis. Newland agrees that the most expedient resolution to this appeal issue is to amend the PFP to be consistent with any amended UGB location or to ensure that an un-amended PFP does not serve lands that are ultimately not included in the UGB.

I. ORS 197.298(3) UGB Location (Issue Area 9)

Land Priority

Newland agrees with the Director's conclusion on page A-63:

> "The department believes that the city likely will be able to justify application of an exception to the normal priority of lands requirements under ORS 197.298(3)(c) to include the resource lands on the eastern and northeastern sides of the prior UGB in its expansion area." (Director's February Report at page A-63).
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> "

The Director also specifically states:

> "...if the city continues to plan its interceptor along Hamby, then at least some of the resource land east of Hamby appears required in order to efficiently serve exceptions areas that are interspersed." (Director's February Report at pages A-62 to A-63).

We recognize that the Director and the commission need to first resolve the questions about total land supply before either can reach a final conclusion on the final location of the UGB. However, we agree with the Director's legal analysis that an ORS 197.298(3) exception has been justified for some resource lands in the east and northeast.

To reiterate, Newland's 143-acre parcel is comprised of Class VII and Class VIII soils. Pursuant to ORS 197.298(2) higher priority shall be given to land of lower capability as measured by the capability classification system. Thus, amongst the resource lands included in the UGB, the Newland acreage has the highest priority. There are several other well documented reasons on the record for including the Newland acreage each of which were likely relevant to the Director's conclusion:

(1) Inclusion of the Newland Property is justified under ORS 197.298 (3) because it is located between two exception areas that are also included within the UGB and inclusion allows the efficient delivery of services to each of these Priority 2 exceptions lands and to land within the existing UGB that is not yet served with sewer;

(2) Development of the Newland Property presents an opportunity to build a whole master planned community, consistent with city council adopted development criteria and

preference for jobs and residential uses in close proximity to each other. This proximity will reduce vehicle miles traveled, will lower carbon and greenhouse gas emissions and will help alleviate or cause less congestion on Highway 97, Highway 20 and the bridges that cross the Deschutes River compared to other Priority 2 land;

(3) Compared to other higher and lower priority land, extension of sewer services to the Newland Property allows maximum efficiency of land uses by providing a cost effective delivery of sewer to Priority 2 lands as well as the Newland Property. The Newland Property topography is relatively flat and more cost effective to efficiently develop at target densities resulting in housing for a broad segment of the Bend market and greater housing equity than other Priority 2 land;

(4) Water service is already available in the area of the Newland Property at appropriate capacities to accommodate the master planned community; and

(5) Transportation services can be provided to the Newland Property by the development of a local street system which has unused capacity. The local street grid will connect the Newland Property to the nearby and surrounding job centers reducing new AM and PM trips on an already constrained state highway system and river crossings.

In sum, we concur with the Director's decision to include a limited amount of resource land on the east and northeast side of the UGB subject to final resolution of land need and the sewer service plan.

Suitability/UGB Location

The Director has asked the Commission to adopt the restrictive legal position that lands are suitable for inclusion in an urban growth boundary as residential lands if they are buildable as defined by OAR 660-008-0005 and it is reasonable to provide urban services to the land. (See Director's February Report at page A-68). Newland disagrees that OAR 660-008-0005 provides a complete list of buildable lands, as discussed earlier. Additionally, the issue of whether land is suitable for inclusion in a UGB is necessarily different than the question of whether land already inside a UGB can be developed for residential housing. Land that has been platted as a destination resort is clearly unsuited to urban development as it has been committed to meeting recreational and visitor needs. The City's decision to exclude large lot subdivisions with CC&Rs from the UGB as unsuitable is appropriate as these lands are not suited to providing the type and density of housing required by the Director for the urban expansion area (six dwelling units per acre; more low-income and work force housing).

The City correctly determined that the Tethrow destination resort should remain outside of the City limits under Deschutes County's jurisdiction. (Record at page 1233). Tethorow is an approved destination resort on exceptions lands on the City's west side. The resort is approved

for development on 706 acres and will include 300 to 350 units of housing, a rural density of development. *See* OAR 660-004-0040(5)(a)(rural residential development includes subdivisions with lots of 2 acres or greater). Due to its destination resort status, the land is not suited for inclusion in an urban growth boundary because:

A. Goal 8 Destination Resorts Not Allowed In Cities

Goal 8 and ORS 197.435 to ORS 197.467 give counties, and only counties, the authority to plan for and allow for the development of destination resorts. Both sets of rules refer only to counties. Only lands mapped as eligible for destination resort development by a county may be developed as a Goal 8 resort. OAR 660-015-0000(8)(Eligible Areas)(1); ORS 197.435(3). The map of eligible lands is to be made a part of a county's comprehensive plan – a document that applies to lands outside of city limits only. ORS 197.455(1). The county is required to review and approve destination resort plans and, after approval, to monitor compliance with destination resort lodging requirements. ORS 197.445(7)(f)&(9).

B. Goal 8 Destination Resorts Must be "Self-Contained" and Serve Visitors

Goal 8 requires that a destination resort be "a self-contained development providing visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities." OAR 660-015-0000(8); ORS 197.445. Resorts serve visitor needs rather than the needs of area residents. Land committed to that purpose cannot reasonably be said to be "suitable, available and necessary for residential use" as required to be "buildable land" by Goal 10 and ORS 197.295(1).

The self-contained development requirement requires a destination resort to pay all costs related to service extensions and capacity increases if served by public sewer and water systems. ORS 197.435(6). This obligation would be compromised and shifted to all City residents if Tetherow were included in the city where it would be entitled to water and sewer service on the same terms and conditions as City residents.

ORS 197.435(6) also requires that a "self-contained development" provide developed recreational facilities on-site. These facilities may not be used and are not suited for residential development or redevelopment.

C. Commercial Use Required in Tetherow

Land in destination resorts must be developed with transient lodging facilities, a commercial use that cannot meet Goal 10 housing needs. Deschutes County requires that one third of all dwelling units built in the resort be transient lodging facilities (2:1 ratio). State law imposes a similar but less stringent requirement that has not been adopted by

Deschutes County. The Tetherow resort and development in the community is bound to comply with the 2:1 ratio due to its destination resort land use approvals.

D. Permanent Open Space Required/Not Suited for Urban Residential Use

Tetherow is a large destination resort. Goal 8 requires that it provide at least 50 percent of the site as "permanent open space excluding yards, streets and parking areas." OAR 660-015-0000(8)(Definitions). No part of Tetherow's open space, therefore, can be found to be buildable or suitable for residential use.

E. Recreational Facilities Investment/Purpose of Goal 8

Goal 8 and state law also requires that at least $7,000,000 in onsite developed recreational facilities and visitor-oriented accommodations must be provided. 660-015-0000(8)(Definitions); ORS 197.445(3). These investments are designed to meet Goal 8's objective to provide for recreational needs rather than Goal 10's housing needs. The approved and partially completed Tetherow is a Goal 8 resource that should be protected to meet recreational needs by remaining outside the city limits of Bend. A requirement that this area be converted to a city and then be compelled to meet Goal 10 needs for the City of Bend would violate the intent of Goal 8 and, therefore, should not be required by the commission.

F. Resort Development Controlled by Final Master Plan

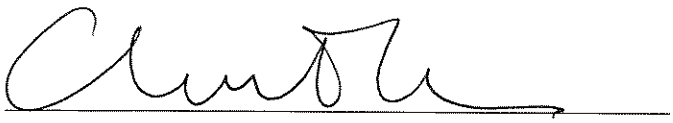
Development in Tetherow is controlled by a county-approved final master plan. This means that the land is bound to provide promised open spaces, recreational amenities, transient lodging and resort facilities to lot owners and the community. Those committed uses make the land unsuited for urban density residential development. Promises to provide open space and specific development that were made by developers of master planned communities are binding commitments. *Mountain High HOA v.Ward,* 228 Or App 424, 209 P3d 347 (2009)(required Ward to maintain nine holes of golf course for the benefit of planned development homeowners). *See also, Frankland v. City of Lake Oswego,* 267 Or 452,517 P2d 1042 (1973)(development must occur as promised in planned development proposal).

Tetherow cannot then, as a matter of law, accommodate the City's residential land needs.

Conclusion

Newland respectfully requests that the commission consider these exceptions and narrow any remand to the City consistent with the legal and factual analysis provided here.

Submitted by:



Christen C. White
OSB No. 95474-1
On behalf of Newland Communities

Exhibit 1
Factual Corrections

Newland Communities requests that DLCD staff correct the following information contained in the Director's Decision and Attachment A of the Director's February Report:

Page A-5

Request: Acknowledge that City of Bend areas of special interest protect inventoried Goal 5 resources and that land with ASIs should not be included on the City's Buildable Lands Inventory per OAR 660-008-0005(2)(b).

Error: "The city's areas of special interest, as the department understands them, have not yet been protected under Goal 5."

Facts: The City's areas of special interest have been inventoried and are acknowledged Goal 5 resources as a part of the City's latest periodic review.

A. In Order 0001525, LCDC approved the City of Bend's inventory of areas of special interest (river canyon, rock outcropping, fault blocks and other natural features) and special development standards for these areas on June 6, 2003.

B. In Order 001616, LDCD approved the City of Bend's inventory of wetland, riparian corridor and sensitive fish and wildlife habitat resources areas and changes to the comprehensive plan to protect significant Goal 5 resources.

C. The City's comprehensive plan also contains a Goal 5 inventory of historic resources.

No ASIs are located outside the city limits on the current comprehensive plan map. ASIs were shown outside the city limits on the 1998 comprehensive plan map adopted when the City rewrote its comprehensive plan in 1998. It may be ASIs were removed from the plan map when the City made changes to comply with their periodic review order re ASIs and other Goal 5 resources.

Page A-7

Request: Acknowledge the fact that the City of Bend's Buildable Lands Inventory assumes an average gross density of 3.09 dwelling units per acre rather than 2.2 dwelling units per acres.

Error: "Most vacant and redevelopable land is in the RS plan district (2,410 acres out of 2,909 acres total). R., at 1071 (Table III-3). In other words, the city appears to be assuming that infill and redevelopment will occur at a density of 2.2 dwellings per gross acres (just under half-acre lots) for a large proportion of its buildable lands."

Facts: The correct facts are contained in Footnote 6 on pages A-6 and A-7 of Attachment A of the Director's February Report. According to the Report, those facts show that the assumed density is "very close to the average actual density of single-family housing city-wide at present." (Record at 1289). As shown by the City's findings, the City assumed vacant and redevelopable RS land will develop at an average gross density of 3.09 dwelling units per acre. The City's findings project that 7458 homes will be built on the 2410 acres of RS land inside the city limits. R. 1071(Tables III-3 and III-4), R. 1071. The City did not use a density figure of 2.2 dwelling units per gross acre.

A density of 2.2 dwellings per gross acre is not "just under half-acre lots." Road right-of-way and stormwater retention facilities will consume about 25% of the gross acreage meaning lots built at 2.2 dwellings per gross acre will be about one-third of an acre in size.

Pages 27 & 28

Request: Advise the Commission that SR-2-1/2 zoned lands (2.5 acres per lot) were included in the Buildable Lands Inventory as RS-zoned land the City assumed will develop at an average density of 3.09 dwelling units per acre.

Error: The Director faulted the City for failing to analyze lands zoned SR 2-1/2.

Facts: The City studied residential lands by plan designations. There is no SR 2-1/2 plan designation. These lands have a plan designation of RS and were studied, in the BLI, as if they were zoned to allow that level of development.

Pages 27 & 28

Request: Advise the Commission that the City did not err in failing to inventory lands zoned UAR-10 as a part of its inventory.

Error: The Director faulted the City for failing to analyze lands inside the City that are zoned UAR-10 as a part of its inventory.

Facts: The City studied residential lands by plan designations. The UAR-10 zoned land either had an RS zone designation and was studied assuming development at 3.09 dwelling units per acre or was not studied because the plan designates the land for non-residential development.