

Attachment A

V. Analysis

| | | |
|----|---|----|
| A. | Required Findings and Standard of Review | 1 |
| B. | Residential Land Need – Goal 10, ORS 197.296 and 197.303, and Goal 14 | 3 |
| C. | Efficiency Measures..... | 16 |
| D. | Other (Non-employment) Land Need..... | 22 |
| E. | Employment Land Need – Goal 9 | 24 |
| F. | Goals 5 and 7 – Natural Resources and Hazards | 37 |
| G. | Public Facilities Planning – Goal 11..... | 41 |
| H. | Transportation Planning..... | 49 |
| I. | UGB Location..... | 59 |
| J. | Other Issues..... | 70 |

A. Required Findings and Standard of Review

ISSUE. Must the city adopt findings explaining how its decision complies with applicable statutory, goal and rule requirements? To what extent may the city rely on its briefing on appeal and citations to the record to substitute for findings? What is the evidentiary standard for the agency’s review of the city’s decision?

Appellants: City of Bend, Newland.

Position Taken in Appeal: The city acknowledges that findings have been required [City Appeal, at 9] for urban growth boundary amendments, but infers that because its decision is legislative in nature, that its argument in its appeal, along with citations to the record, may substitute for required findings. Newland requests that the commission apply OAR 660-025-0085(5)(d), and request new evidence from the city, where necessary to resolve issues. Newland Appeal, at 2.

Department’s Position and Analysis: The city and the department (and Newland) agree that the standard of review is “substantial evidence.”¹ That standard means that “* * * after reviewing the whole record [there is evidence that], a reasonable person would find adequate to support a finding. ORS 183.482(8)(c).” *City of West Linn v. LCDC*, 201 Or App 419 (2005) (“* * * ORS 197.650 directs that LCDC’s decision may be appealed ‘in the manner provided in ORS 183.482.’ As the court explained in *1000 Friends of Oregon*, that clearly implicates the substantial evidence standard that is described in the statute.”) This standard of review applies to the commission’s review of the city’s decision (as well as any judicial review of the commission’s decision).

¹ The Goal 2 requirement for an adequate factual base requires that legislative land use decision be supported by substantial evidence. *DLCD v. Douglas County*, 37 Or LUBA 129, 132 (1999).

The department does not agree that argument in the city's appeal (or any other party's), along with citations to the record, may substitute for required findings. Although the department and the city have worked together since the Director's Decision to identify evidence in the record that the city may use to demonstrate compliance with state standards (as noted throughout this report), the department believes that it is essential that the city, in the first instance, *explain* its decision in written findings that connect the applicable standards with the relevant evidence.

As a legal matter, the applicable statutes, goals and rules require the city to adopt findings that explain why the evidence in the record demonstrates that the city's decision complies with applicable state standards for expansion of the city's urban growth boundary. As a practical matter, findings are necessary both so that it is clear that the city council considered the applicable criteria, and so that the agency reviews the city's decision (as required by statute) rather than substituting its own judgment in review of the record. Findings also are important because they 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 v. LCDC*, 121 Or App 497, 502 (1993) ("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.")

The record in this proceeding illustrates the importance of a local government's findings in a complex and significant land use decision. The record is over 15,000 pages, and in a number of instances contains information that has evolved over time and that is either conflicting or can be read as conflicting if read without explanation. In addition, OAR 660-025-0140(4) provides for the agency to review the entirety of the local governments' decision regardless of objections. That review function is different from that of the Land Use Board of Appeals (LUBA), which has before it the focused argument and briefing of parties on specific issues. In this context, DLCD's review necessarily relies heavily on the local governments' findings. Without findings, DLCD must review the entire record *de novo*, and substitute its judgment for that of the local government.

In *City of West Linn v. LCDC*, 201 Or App 419 (2005) the agency argued that, as distinguished from a contested case proceeding under the state Administrative Procedures Act, Metro was not required to adopt detailed findings of fact to justify its urban growth boundary expansion, due to the legislative nature of the decision. In response, the Oregon Court of Appeals instructed that:

Even assuming for the sake of argument that LCDC is correct that there is something distinguishable in the nature of the particular decisions at issue in this case that makes them more "legislative" than, say, an acknowledgment order, we do not understand why that requires a different standard of review. It is true that, as a general rule, legislative decisions need not be supported by findings. Nevertheless, as we explained in *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002),

“there are some instances where controlling statutes, rules, or ordinances specifically require findings to show compliance with applicable criteria. Also, to permit LUBA and us to exercise our review functions, 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.”

In this case, as we have noted, Metro was required to justify its decisions to expand the UGB and, more particularly, to propose specific areas for inclusion within the expanded UGB, under various criteria expressed in state law, administrative rules, and local ordinances. Thus, whether or not the decisions were, strictly speaking, “legislative” in nature, they are subject to review for adequate support in the record. LCDC does not explain, and we do not understand, how that review differs in any significant way from the substantial evidence review that is described in ORS 183.482, at least in the context of this case.

When we say that the substantial evidence test applies, however, we do not suggest that we review the record on our own to determine whether Metro’s decisions, in fact, satisfied that standard. As we explained in *Citizens Against Irresponsible Growth*, “[o]ur role is to determine whether [the agency] applied the correct legal test in deciding whether Metro’s decision is supported by substantial evidence.” 179 Or App at 21, 38 P3d 956.

Recommendation: The department recommends that the commission’s decision clearly articulate that the city’s findings must identify the applicable legal standards, the relevant evidence in the record before the city pertinent to that standard, and explain why the city’s decision complies with the standard based on substantial evidence in the record. The department recommends that the commission *not* ask the city or other parties to provide additional evidence, with the exception of a request for a 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 county on remand, not presented to the commission without local review.

B. Residential Land Need – Goal 10, ORS 197.296 and 197.303, and Goal 14

SUBISSUE 1. Which version of the commission’s Goal 10 and Goal 14 rules apply to the city’s decision?

Appellants: City of Bend.

Position Taken in Appeal: It appears that the city and the department agree that the 2007 version of the commission’s Goal 14 rules apply, and that the current version of the commission’s Goal 10 rules apply.

Department’s Position and Analysis: The city initiated the UGB amendment after April 5, 2007. The commission’s rules specifically define “initiated” for this purpose as: “[the local government] issued the public notice specified in OAR 660-018-0020 [45-day notice of the proposed plan amendment].” OAR 660-024-0000(3). As a result, the version of division 24 effective on April 5, 2007 applies to the city’s UGB amendment.

OAR 660, division 8 (the commission’s Goal 10 rules) were last amended on April 18, 2008, before the city’s decision was made. As a result, the current version of the Goal 10 rules applies to the city’s decision.

Recommendation: The department recommends that the commission clarify in its decision which versions of the pertinent goals and rules it is applying in reviewing the city’s decision. The only rule that appears to be in some question is division 24.

SUBISSUE 2. After estimating its future population and the number of residential units in the planning period, the next step in a UGB expansion is for the city to determine what lands within its existing UGB are “vacant” or “redevelopable” – where future residential development could occur without expanding the UGB. This subissue concerns whether the city’s buildable lands inventory (BLI) is adequate for review, and whether it properly determines what lands are “vacant” and what lands are “redevelopable.”

Appellants: City of Bend, Newland.

Positions Taken in Appeal: The city has provided the department with a map that shows what lands it has inventoried as buildable, by tax lot (the department is providing copies of this map to the other parties, and to the commission with this report, as Exhibit 1). This map is in the record, but in a form that is very difficult (if not impossible) to review. R. at Supplement 1257. The city also has clarified in its appeal that its 2005 BLI was updated with data from 2005 to 2007. City Appeal, at 18. Although the data were not included in the record submitted to the department, they were in the city’s record. City Appeal, at 19-20. The city and Newland also note that OAR 660-008-0010 allows the city to compile its inventory of vacant and redevelopable lands by plan district rather than zoning district. Finally, in its appeal, the city sets forth its reasoning for why it properly categorized lands as vacant or redevelopable in its BLI.

Department’s Position and Analysis: The department agrees that the mapping the city has now provided of buildable lands is sufficient to comply with ORS 197.296(4)(c). The department also agrees that the city’s BLI is properly based on plan districts rather than zoning districts.

The department continues to believe, however, that the city findings do not adequately explain its determination of what lands are “vacant” and what lands are “redevelopable” as those terms are defined by statutes and commission rule.² The city’s findings state that

² There is no statutory or rule definition of the term “vacant,” but it expressly includes lands that are “partially vacant” as well as lands with no improvements at all. The pertinent statutes are set forth below.

“ORS 197.296(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;

* * *

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

it inventoried three types of “vacant” land: vacant acres (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 at all clear how the city utilized those three types of vacant lands. For example, it is not clear whether vacant lands with “minimal improvements” were or should be treated as “vacant” lands or as “redevelopable” lands. This matters because “redevelopable” lands are considered “buildable” only if there is a strong likelihood that they will be converted to a more intensive residential use, while “vacant” lands are not (and are generally considered “suitable and available”).³

Table 5-4 of the city’s Housing Element, which the city identifies as the summary of its final BLI (R. at 1288), does not use the same three types of vacant lands as are used in the findings. Instead, it used the terms: “vacant acres,” “vacant acres - pending land use,” and “vacant acres - platted lots.” The city’s findings do not describe what these types are or how they relate to the types in the findings. For example, the city’s terminology implies that it assumed that vacant platted lots would develop at the platted density, but there is no information about whether these are platted suburban subdivisions or smaller lots closer to the city’s target densities.

There also are several problems with the city’s approach to physical constraints. It appears that the city excluded “constrained” lands from its inventory of vacant and redevelopable lands. It defined “constrained lands” as lands with no public road access or with physical constraints over 50 percent of the lot. Director’s Decision at 26. Physical constraints used to exclude lands included not only lands with slopes over 25 percent (which conforms to the commission’s rule, OAR 660-008-0005(2)(c)) but also lands in “areas of special interest.”

The first problem with the city’s analysis of physical constraints is that the commission’s rule does not authorize a local government to exclude vacant lands from the BLI on the basis that 50 percent or more of the parcel is constrained. That approach would have the city determine that *all* of a parcel is unbuildable, when a significant amount of acreage (in a large parcel) may be buildable. Second, the rule authorizes a city to exclude lands that are protected under Goal 5. OAR 660-008-0005(2)(b). The city’s areas of special interest, as the department understands them, have not yet been protected under Goal 5, and may not be.

The department also believes that additional findings are necessary to clarify how the city considered “redevelopable” lands. Despite some argument to the contrary,⁴ there is not any disagreement about how these lands are defined: the commission’s rule provides that

-
- (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.

³ Compare, OAR 660-008-0005(6) and (2).

⁴ City Appeal at 20-22, Newland Appeal 3-7.

lands are “redevelopable” and included in an inventory as “buildable” only if there is a strong likelihood that 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.

It also appears that the city excluded lands from its inventory on the basis of CC&Rs. However, the city has not explained why the CC&Rs make redevelopment less than highly likely, or why they preclude development of vacant lands covered by CC&Rs.⁵

The city’s summary of its BLI in Table 5-4 of its Housing Element, R. at 1288, shows that it identified that about five percent of its lands in residential plan districts as being “redevelopable.” Without more explanation in its findings about how the city determined what lands were in this category, that amount seems as though it may be low. One, indirect, source of evidence that this may be so is 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. That number of units exceeds (in a seven-year period) the total projected capacity for infill and redevelopment for the 20-year period from 2008 to 2028 of 10,059 units (11,159 less the city’s two efficiency measures). It appears that some of the increase during the 1998-2005 period occurred as a result of a significant amount of zone changes that provided an increase in the residential capacity of the prior UGB of between 4,259 and 5,950 units. R. at 1827. It is unclear 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 also state that it based its analysis of *capacity* of its “vacant” and “redevelopable” lands on its minimum densities – assuming that vacant lands in the RL, RS, and RM plan districts would develop at minimum densities for each plan district, and that vacant lands in the RH plan district and *all* redevelopable lands would develop at lower than minimum densities due to parcelization.⁶ It appears that the city assumed that

⁵ For lands in the expansion area, the city found that many subdivisions were “unsuitable” on the basis of CC&Rs that have “some prohibition or limitation on future land divisions, such as partitions.” R. at 1173. However, the city’s own summary appears to show that the CC&Rs are a significant constraint on redevelopment in only four of the fourteen subdivisions described.

⁶ In its appeal, Newland asserts that the city calculated capacity based on plan districts rather than current zoning, which 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 department also notes that the city’s findings concerning the capacity of buildable lands for

already platted lots would not further divide, but that is not clear from the findings. R. at 1071. In any event, 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 is in the RS plan district (2,410 acres out of 2,909 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 acre (just under half-acre lots) for a large proportion of its buildable lands.⁷ Without additional explanation, the department does not believe this assumption is justified, either in terms of the trends analysis required by the needed housing statutes, or in terms of efficiency measures required by Goal 14.

Without a BLI and findings that follow the commission’s definitions of “vacant” and “redevelopable” and that explain the city’s decisions, the department 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, or neither) and the BLI map. The department does not believe these provide an adequate factual basis or explanation for how the city has compiled its buildable lands inventory, and without that fundamental baseline, the department is not able to evaluate the reasonableness of the city’s projections for the proportion of residential land need that is likely to be met within the city’s prior UGB.

Recommendation: The department recommends that the commission remand the city’s decision with instructions for the city to develop and adopt findings that explain what criteria the city used to determine whether particular lands were vacant or redevelopable, and that show that these criteria are consistent with the commission’s definitions of those terms.

SUBISSUE 3. Do the city’s housing needs analysis and comprehensive plan properly identify needed housing under Goal 10 and the needed housing statutes? Is the city required to analyze housing need by tenure, given that it does not regulate tenure (OAR 660-008-0040), or does ORS 197.296 still require an analysis of housing needs for owner-occupied and rental housing?

Appellants: City of Bend, Newland.

Position Taken in Appeal: The city states that its housing needs analysis and adopted comprehensive plan provisions (chapter 5) comply with the Goal 10 rules (OAR 660-008), the Goal 14 rules (OAR 660, division 24) and the needed housing statutes (ORS 197.296-197.307). The city believes it is not required to analyze housing need by tenure as well as housing type because it does not regulate tenure. OAR 660-008-0040. Otherwise, the city states that it has analyzed housing need for each of the three types identified in the Director’s Decision.

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).

⁷ Although the number *may* be closer to three; see fn. 6 above.

Department's Position and Analysis: Upon further review, the department agrees that 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 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.

However, the department continues to believe that the needed housing statutes require the city to identify housing need by at least three categories of housing types (single-family detached, single-family attached, and multi-family), and to analyze housing need for both owner-occupied and renter-occupied housing. The provision at OAR 660-008-0040 requiring *all* local governments that restrict the construction of either rental or owner-occupied housing to analyze housing need by tenure is supplementary to ORS 197.296, 197.303 and 197.307, which collectively require *larger cities* to determine housing needed at particular price ranges (for owner-occupied housing) and rent levels (for renter-occupied housing). ORS 197.303(1). That same statute also requires larger cities (over 2,500) to determine housing need by at least three types: attached single family, detached single family, and multiple family housing, along with government-assisted housing, mobile homes or manufactured dwelling parks, and manufactured homes on individual lots. ORS 197.303(1).

While the city's 2007 Residential Lands Study appears to contain much, if not all, of the required data concerning these housing types, the city's findings and chapter 5 of the comprehensive plan use different categories of housing types and do not contain the required determinations as they collapse multiple categories of housing types, and fail to address housing need by tenure.

Recommendation: The department recommends that the commission remand the city's decision for it to revise its findings and chapter 5 of its comprehensive plan, as described above.

SUBISSUE 4. Has the city planned for an adequate land supply for needed housing types as required by Goal 10 and the needed housing statutes?

Appellants: City of Bend, Newland.

Position Taken in Appeal: The city states that it has already set ambitious targets for multi-family and higher density housing by planning for housing types that are more dense than what has been built in the city since its last periodic review. City Appeal, at 23-26.

Department's Position and Analysis: ORS 197.307 requires 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). It is not clear from the city's findings, its various housing studies or its appeal, that the city has complied with this important requirement and, until the city clearly identifies needed housing as required by the statute it is not possible to determine whether the city has planned for sufficient buildable lands to meet its housing needs.

The city's findings, studies and the Housing Element of its General Plan also appear to 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 elected to adopt a "transition" forecast of housing needs that is intermediary between its analysis of past trends (HB 2709 forecast) and its analysis of needed housing based on incomes (HCS Housing Needs Model). R. at 1075-1078 (describing the different models). That "transition forecast" is based on an assumed 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.

Given these issues, the department believes the city must (under Goal 10 and the needed housing statutes) plan for an adequate supply of buildable land for more affordable housing. The city's current planning for residential lands has resulted in a shift away from 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, but does not state how maintaining its current planning allocations of land will change the trend away from such housing types.

Recommendation: The department recommends that the commission remand the city’s decision with instructions that the city plan for future development within the prior UGB and within the expansion area so that sufficient buildable lands to provide needed housing are planned within the UGB.

SUBISSUE 5. Are second homes 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? Did the city adequately justify its projected density for second home development, and is the city required to coordinate with Deschutes County on the regional demand for second homes? City Appeal, at 36.

Appellants: City of Bend, Central Oregon LandWatch (COLW)

Position Taken in Appeal: The city states that second-home purchasers and renters will seek both attached and multi-family housing, and that there is no evidence in the record that a separate density projection is warranted. Appeal at 36. The city also states that second homes are *not* identified by the city as a needed housing type, but instead are simply recognized as a type of land need that will compete with needed housing – and that therefore justify an adjustment in the city’s projected land need to assure that it is planning an adequate amount of land for needed housing. City Appeal, at 36.

Department’s Position and Analysis: 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 “high-cost” 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 non-exclusive, and the city had identified high-cost housing as needed in its plan.

The city has identified a need for land for second home residences, but also states that this use does not provide needed housing, R. at 1086 (as that term is used in the needed housing statutes). The city’s 2007 Residential Lands Study identified a need for 377 acres of land for this use, and it was later increased based on testimony to the city. R. at 1819-1820 (RLS identifies need for second homes based on residential building permit data relative to population increase; R 1086, city’s findings).

Upon further review of the City of Bend Housing and Residential Lands element of its comprehensive plan and the city's findings, the department agrees with the city that it has not identified second-home development as a "needed housing type" under ORS 197.303 or Goal 10. As a result, the department agrees that the city was not *legally* required under those laws to coordinate planning for second home development with Deschutes County. However, the department continues to believe that such coordination is highly desirable, if not required, by Goal 2 and by Goals 8 and 14. Determining where within the county local governments should plan for second home development is an important Goal 14 and Goal 8 issue, particularly in a region that has seen such a high volume of this form of development.

As for the city's use of an average density of six units per acre for second home development, the department also agrees upon further review that there is an adequate factual basis for the city's use of that figure in determining the quantity of land need for this use.

Recommendation: The department recommends that the commission find that the city's decision regarding second-home development is supported by an adequate factual base, and that the city's decision regarding second homes is not subject to the needed housing statutes or Goal 10. However, the department also recommends that the commission direct the city to coordinate with Deschutes County concerning what locations within the county should be planned for this form of development.

SUBISSUE 6. May the city include 2,987 acres of lands in its UGB that it has determined are not suitable for urbanization?

Appellants: City of Bend.

Position Taken in Appeal: The city's appeal states:

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.

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.

Department Position and Analysis: When a city analyses lands for suitability for future residential development, it may identify characteristics, such as parcel size, topography or proximity, necessary for the land to be suitable for an identified need. Goal 14, OAR 660-024-0060(5). Bend’s analysis of expansion lands included a criterion that all parcels with an existing home that are smaller than three acres are unsuitable for 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. While the department acknowledges that all areas with developed exception parcels are unlikely to infill or redevelop at target urban densities during the 20-year planning period, some portion of these parcels will infill or redevelop, and the city may not include them in the UGB and then assume that no further development will occur.

More fundamentally, the department disagrees that a city may include lands that the city has determined are unsuitable for urbanization within its urban growth boundary, except in very limited cases where there is a specific showing that particular (otherwise “unsuitable”) lands are necessary to provide urban services to lands already within the city’s existing UGB or to lands outside of the UGB that the city has found to be suitable and that are proposed for inclusion in the UGB. In this case, the city has made a generalized decision to include unsuitable lands that 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 initial 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.⁸ 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 suitable lands cannot be developed without including the unsuitable lands 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 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 department does not believe that the amendments 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 lands within a 100-year floodplain for reconsideration. In partial approval and remand order 04-WKTASK-001645, the commission remanded to the City of McMinnville for further consideration the portions of certain UGB expansion areas that lie within the 100-year flood plain in light of *Milne*.

Milne does not mean that a city may not include lands that are unsuitable for urbanization within a UGB. It does mean, however, that in order to include land within an urban growth boundary when they are not needed, a city must take an exception to Goal 14. The exceptions process continues to allow exceptions for lands that are committed to urban

⁸ 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).

uses, but that are not needed, but the city did not take a Goal 14 exception in this case, and did not provide the site-specific information needed to justify such an exception.

This leaves the city with several alternatives. The city could drop the “unsuitable” lands from its UGB if it can document that the lands will not meet *any* urban land need over the planning period. The department believes this showing would be difficult to make. The city could continue to determine that the lands are not suitable and not needed for urbanization, and include the lands within its UGB based on a “committed” exception to Goal 14. Again, the department believes this showing would be difficult. Or, the city may determine that, in fact, the lands in question are suitable for urbanization and will meet some part of the city’s land needs over the planning period, and include them within the proposed UGB. 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.

Recommendation: The department recommends that the commission remand the city’s decision for it to address the 2,987 acres of “unsuitable” lands in one of the three ways set forth above.

SUBISSUE 7. May the city include 500 acres of lands in its UGB in addition to the total land supply that it has determined are needed for urbanization over the planning period?

Appellants: City of Bend.

Position Taken in Appeal: The city’s appeal states that the 500 acres of land added to its UGB expansion area were for the purpose of making the boundary logical, relying on *Hummel v. LCDC*, and the commission’s recently adopted rule recognizing that estimates of population are not precise. OAR 660-024-0040(1). City’s Appeal, at 36.

Department Position and Analysis: The department disagrees with the city that Goal 14 or ORS 197.296 authorize “surplus” lands to be included in an urban growth boundary. The Court of Appeals addressed the surplus land issue under Goal 14 in *Milne*, as described at some length above. *Hummel* 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.

Recommendation: The department recommends that the commission remand the city’s decision with instructions to remove this acreage from the city’s UGB, or for the city to include only those specific lands beyond the amount it has found is needed based on an exception to Goal 14 showing that specific lands are committed to urbanization or that specific lands are necessary to provide urban services to adjacent lands.

SUBISSUE 8. Is the city's UGB expansion consistent with certain housing policies of the Bend Area General Plan?

Appellants: City of Bend.

Position Taken in Appeal: The Director's Decision determined that the city's decision was not consistent with certain housing policies in the city's adopted Housing Element of its General Plan. Director's Decision, at 54-56. The city disagrees, explaining in its appeal why it believes the identified plan policies are not inconsistent with its UGB decision. City Appeal, at 41-44.

Department's Position and Analysis: Upon further review, including review of the city's appeal, the department believes that the city can develop findings that would conclude that its decision is consistent with its Housing Element. In other words, the department agrees with the city's analysis of its plan policies in its appeals, but believes that the city should include this analysis in its findings on remand.

Recommendation: The department recommends that the commission remand the city's decision with instruction to adopt findings addressing consistency with Housing Policies 4, 17 and 21 in Chapter 5 of the Bend Area General Plan.

SUBISSUE 9. To what extent is the city obligated to review the second-home capacity of existing destination resorts in the area in determining its land need for this use? Is the city obligated to regionally coordinate its second home needs analysis?

Appellant: Central Oregon LandWatch

Position Taken in Appeal: The city's projection of needed second home units must be evaluated in relation to the capacity of destination resorts to serve second home needs in the area, including the Tetherow Destination Resort located adjacent to Bend's UGB. Central Oregon LandWatch Appeal, at 5-6. The appellant also asks for specific clarification of or additions to certain remand language in the Director's Decision.

Department Position and Analysis: In its appeal of the Director's Decision, the City of Bend states that it did not identify second-home development as a needed housing type under ORS 197.303 or Goal 10. Upon further review of the City of Bend Housing and Residential Lands element of its comprehensive plan, the department agrees. As a result, the city is not *required* to coordinate planning for second-home development with Deschutes County (although the department continues to believe that such coordination is desirable).

The question of whether the city has adopted adequate findings and has an adequate factual base to support its inclusion of 500 acres of land for this use is a separate issue (from the question of whether Goal 10 requires regional coordination for second-home

development in this case). The Director's Decision found that there was an adequate basis for the city's decision.

Recommendation: The department recommends that the commission deny this appeal on this subissue.

C. Efficiency Measures

SUBISSUE 1. Do the city's findings adequately explain how it has met the requirement in Goal 14 to determine the extent to which it can "reasonably accommodate" its projected need for residential lands within the existing UGB, prior to expanding onto new lands?

Appellants: City of Bend.

Positions Taken In Appeals: The city adopted two efficiency measures: one involving planning for 600 additional residential units on approximately 50 acres of land along transit corridors, and the other involving planning for 500 additional units in the Central Area Plan district of the city. The city and Newland identify the city's findings at R. 1085 as describing why other efficiency measures beyond the two that it adopted will not be effective. City Appeal at 28; Newland Appeal at 10.

Department's Position and Analysis: The cited findings focus on the city's transit corridor planning. For this efficiency measure, the city assumed that a total of 50 acres could "reasonably be expected" to be rezoned along transit corridors to an average density of 12 units per acre. R. at 1085. As noted above, however, during the period between 1998 and 2007 Bend saw 1,823 acres of residential land within its prior UGB up-zoned. R. at 1827. While much of this up-zoning appears to have been for lands annexed into the city and then planned for the city's standard residential zone (RS), 145 acres was up-zoned from RS to RM or RH. Given this recent trend, the city needs to explain why planning for 50 acres of additional RM zoning along transit routes is all that it is reasonable to plan for during the 20-year planning period.

Transit corridor planning is only one of many possible efficiency measures that the city should consider and address in order to meet the requirement of Goal 14. Other efficiency measures are identified in the 2007 Residential Lands Study. 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. The city does not state why additional refinement plans could not be used in other areas or within its UGB expansion area.

One of the main existing efficiency measures relied on by the city is its 2006 amendments to the Development Code. The department agrees that these changes improved the city's efficiency of use of residential lands. However, as noted above, the minimum densities included in the 2006 amendments are quite low, well below actual densities achieved since 1998.

Finally, the department also notes that the city's BLI map shows several areas where there are substantial clusters of vacant lands, some which also adjoin areas shown as redevelopable (although the latter tend to be scattered in existing residential neighborhoods). As noted above, the city has assumed relatively low densities for development of vacant and redevelopable lands. The department suggests that the city examine whether additional vacant lands could be planned and zoned for medium density multi-family housing to address the city's documented shortages of workforce and affordable housing types.

Recommendations: The department recommends that the commission remand the city's decision for it to explain why additional efficiency measures are not feasible, including those listed in ORS 197.296 and the Director's Decisions at 45-47, as well as expansion of the city's proposed measure for transit corridors to additional acreage.

SUBISSUE 2. Are the city's two proposed efficiency measures sufficiently likely to occur? Do they "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?" ORS 197.296(7).

Appellants: City of Bend.

Positions Taken In Appeals: The city does not appear to dispute that its two efficiency measures should be made more definite on remand.

Department's Position and Analysis: The two new efficiency measures proposed by the city are 500 additional housing units in the Central Area Plan and 600 additional housing units along transit corridors. Those numbers of new units are described as "estimates" that are subject to further planning work. Further, the plan requires completion of that additional work prior to 2012 for the additional residential development planned along transit corridors, but there is no timeframe for any planning associated with the Central Area Plan. R. at 1303, 1311. Under ORS 197.296(7)-(9), the city must show that:

- The measures will demonstrably increase the likelihood that residential development will occur at the housing types and densities and at the mix of housing types required to meet housing needs over the next 20 years;
- Land zoned for needed housing is in locations appropriate for those needed housing types; and
- Land for needed housing is zoned at density ranges likely to be built in the 20-year planning period.

The city's findings do not describe how the proposed efficiency measures will produce the number of needed housing units, types, and mix in the proposed general areas.

Recommendations: On remand, the commission should direct the city to take the following actions in coordination with its Work Plan for Outstanding Metropolitan Transportation Planning Work:

1. By [date], complete and adopt the Central Area Plan. The Plan must include a map with the types, densities, and locations of at least 500 additional medium-density and high-density housing units;
2. By [date], amend zoning regulations to implement the Central Area Plan housing component;
3. By 2012, re-zone at least 50 acres of land abutting or within one-quarter mile of existing or/and planned transit routes to RM and RH to accommodate at least 600 additional medium-density and high-density housing units; and
4. By [date], adopt a policy in the Housing Chapter of the Bend Area General Plan that prohibits conversion of land that is designated and zoned for needed housing to another use, by re-zoning or any other action.

SUBISSUE 3. Has the city met the requirement of Goal 14 and OAR 660-024-0050(4) to demonstrate that the estimated needs cannot reasonably be accommodated on land already inside the UGB? Must the city evaluate and adopt additional efficiency measures?

Appellants: City of Bend; Newland.

Positions Taken In Appeals: The city's appeal states that the council expressly rejected DLCDD argument (in comment letters to the city) that other [efficiency] measures could be effective. City Appeal at 26 (citing R. at 1085). Those findings state that "[t]he city has shown the additional opportunities for redevelopment of existing residential lands are very limited due to the existing pattern of zoning and the pattern of land divisions in the current UGB." R. at 1085. Newland also notes that the city's overall density has increased from 3.8 units per acre to 5 units per acre, and that the city is using an overall density of 6 units per acre for the UGB expansion area. Newland Appeal at 10.

Department's Position and Analysis: Except for the 50 acres for re-zoning along transit corridors for an additional 600 housing units, and an additional 500 housing units to be created in the Central Area Plan, no other location within the existing UGB has been suggested for additional residential density through plan amendments or rezoning. The city determined that infill and redevelopment is most likely to occur at current minimum densities because of "existing and predicted market forces." As explained in the Director's Decision and Order, this position is not supported by substantial evidence in the record.

In fact, there is evidence in the record to the contrary. A January 14, 2008 table entitled "Residential 20006-2007 Partitions Lot Size/Valuation" illustrates a recent pattern of increased residential density through infill partitions. In this short period of time, 50 parcels were divided to create 110 parcels (All but seven were partitioned into two parcels). Forty-six of the 50 parcels were in the RS zone. Forty-six of the 50 parcels

partitioned were smaller than one acre. Forty-one of the partitioned parcels were smaller than one-half acre. R at 8660-8662. Eighty-four percent of the total acreage that the city estimated as redevelopable is in the RS zone. R. at 2131-2132, tables 11 and 12.

Other evidence in the record shows substantial residential density increases as a result of up-zonings. Between 1999 and 2006, the city approved 87 residential up-zones. Sixty-five percent were re-zoned to RS, and 35 percent were re-zoned from RS to RM or RH. Zone changes since 1999 have provided capacity to accommodate 4,259 to 5,950 additional housing units under the current “average” zoned densities⁹. R. at 2143. Considering increasing zoned densities as directed by the director on remand would further increase the residential capacity of the former UGB.

This evidence indicates that the city’s estimate of capacity for redevelopment and infill within the prior UGB significantly underestimates the potential.

In addition to infill and redevelopment opportunities, there are a number of areas that appear to be suitable to accommodate larger numbers of housing units at higher densities. The department believes the city should address these areas as potential efficiency measures on remand. The department reviewed the city’s “2/8/08 Buildable Lands Inventory – Residential Lands” map [R. at 1257] and identified a number of areas that have all of the following characteristics, which the city should evaluate for increased residential development potential:

- Indicated as vacant or redevelopable on the map;
- Larger than 20 acres; and
- Near or along city collectors and arterial streets.

Finally, in the city’s 2007 Residential Lands Study, its consultants described a number of potential efficiency measures that the city did not include in its UGB amendment. These include measures that other Oregon cities have adopted in order to increase UGB capacity. Notwithstanding the statement in its appeal, the city’s findings do not describe why these measure are not feasible as a means of accommodating additional residential development capacity within the prior UGB.

Newland’s argument that the city is using a density for its UGB expansion area of 6 units per acres, while the city-wide average density is 5 units per acre, compares city-wide totals that include well-established neighborhoods with the city’s planned density for its expansion area. The incremental increase in density in the expansion area simply reflects the fact that there is a substantial amount of vacant land in the expansion area. In this context, an increase of one additional unit per acre does not appear to the department to be a significant effort to minimize the amount of land required for the city’s future residential needs.

⁹ Four units per acre for RS, 12 units per acre for RM, and 17 units per acre for RH. The city states that the majority of these zone changes implemented designations in the 1988 Bend General Plan. R. at 2143

Recommendations: 1. The commission should direct the city to demonstrate the number of additional housing units that parcels containing vacant lands could yield through further partitions, based on recent trends. The analysis should include a comparison of parcels in the pre-January 5, 2009 UGB that have experienced an actual increase in residential density (through land division or redevelopment, based on data since the last periodic review or the last five years, whichever is greater per ORS 197.296(5)(a)). Where a future yield estimate is less than the actual past yield for one or more parcels similar in size, shape, development pattern, and physical constraints, the city should provide the data and findings that justify assuming a smaller number of additional residential parcels and housing units for the 20-year planning period.

2. The commission should direct the city to consider increasing residential density in the following areas of the prior UGB:

- Southeast area: Approximately 320 acres of vacant land and vacant land with pending land use approval, on both sides of South 15th Street for approximately one mile. This could be an area that is appropriate for a mixed use center with single-family and multi-family housing, about 1.5 miles east of 3rd Street/Business 97.
- Southeast area: Approximately 100 acres of vacant land, vacant land with pending land use approval, and redevelopable land south of Reed Market Road and west of 9th Street, about ½ mile east of 3rd Street/Business 97. This could be a good area for multi-family housing and transit service.
- South side east of Deschutes River: Two approximately 20-acre vacant parcels, one adjacent to the BNSF rail line, that could be partially up-zoned for multi-family housing, and several vacant parcels with pending land use approval that could be up-zoned if the current development permits expire.
- East side: The area east of the 3rd Street commercial and multi-family housing zones is sprinkled with many vacant, redevelopable, and vacant parcels with pending land use approval that are generally smaller than 20 acres and suitable for increased density, particularly south of Highway 20 and east of Pilot Butte for about one mile.
- West side: The expiration of Northwest Crossing development permits would provide large areas with up-zoning potential, which would make transit service more feasible for this part of the city.

3. The commission should direct the city to consider the following measures, in coordination with its Work Plan for Outstanding Metropolitan Transportation Planning Work:

- Complete Central Area Plan and implement through policies and regulations (see below);
- Implement the strategies and targets in the updated Housing Chapter of the General Plan;
- Policies to require concept planning for areas proposed for annexation, including provisions to achieve production targets for needed housing types;

- Prioritize annexation of areas that demonstrate a commitment to meeting immediate needs for higher density zoning and/or particular housing types;
- Adoption of an average residential density standard for subdivisions and refinement plans;
- Increasing the minimum density in its residential zones, particularly the RS zone, or splitting 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;
- Strategies for infill and redevelopment outside the Central Area Plan and the transit corridors;
- Permit additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer; and
- Up-zone a portion of land currently zoned RS to RM or RH.

D. Other (Non-employment) Land Need

SUBISSUE 1. Did the city adequately justify its addition of a 15 percent factor for all “other lands?” City Appeal, at 36-37 .

Appellants: City of Bend.

Position Taken in Appeal: The city’s appeal clarifies that its 15 percent factor is based on its analysis of the prior UGB and the percentage of land that is *not* for housing, employment, public facilities, or rights-of-way. That analysis showed that 12.6 percent of the land in the prior UGB was for such uses. The city then determined that it should increase that factor to 15 percent largely in anticipation of future land need for stormwater facilities. City Appeal, at 36.

Department’s Position and Analysis: It remains unclear to the department exactly what land uses are included in the 12.6 percent of lands in the prior UGB that the city found were in the “other” land category. It also remains unclear how the city is counting stormwater facilities (as public facilities, or as facilities within private open space or private rights-of-way). The city’s explanation in its appeal concerning why it is increasing the percentage from 12.6 to 15 percent is rational, but without a clearer understanding of what uses are included, it is difficult to analyze (for example, it appears that this category includes golf courses and other private park uses, and there is no documentation of future land need for these uses). Further, it remains unclear why the city is applying an adjustment for private open space and private rights-of-way to public land needs for parks and schools.

Recommendation: The department recommends that the commission remand the city’s decision for it to clarify in its findings what specific land uses are included in the “other” category, and why increasing the percentage of land devoted to these uses from 12.5 percent to 15 percent is consistent with an efficient urban form.

SUBISSUE 2. Do the city’s findings support its decision concerning the amount of land added to its UGB for parks and schools, and has the city reviewed the extent to which these land needs may reasonably be accommodated within the existing UGB? City Appeal, at 34-35.

Appellants: City of Bend.

Position Taken in Appeal: The city states that both the school district and the parks district use siting standards to identify “eligible” properties for future parks and school uses, and that the record contains a parcel-level spreadsheet identifying every developable parcel in the city. City Appeal, at 34.

Department’s Position and Analysis: The department has already agreed with the city that it may consider the districts’ siting criteria, but it is not clear from the city’s decision what those criteria are and how they relate to the commission’s rules concerning vacant

and redevelopable lands within the existing UGB. The city does not directly respond to the Director's Decision requiring the city to determine whether these lands needs can reasonably be accommodated within the existing UGB.

The department also noted that some park needs may be met on rural lands. Without more specific information about the type of uses the parks district anticipates over the planning period (specifically, the extent to which those needs involve uses that are allowed on rural lands, see OAR 660, division 34), the department continues to be unable to evaluate this aspect of the city's proposal.

Recommendation: The department recommends that the commission remand the city's decision with instructions for the city to adopt findings that are supported by an adequate factual base showing what the types of projected school and parks needs are during the planning period, including what siting criteria the districts have adopted for these types of uses; and whether these uses reasonably can be accommodated within the existing UGB, or on rural lands (for passive parks uses).

SUBISSUE 3. Should the Director's Decision be clarified regarding school and park land needs?

Appellants: Bend-La Pine School District; Bend Metro Parks and Recreation District.

Position Taken in Appeal: The appellant does not agree that the need for land for public schools and related facilities can be reasonably accommodated within the existing UGB. The district disagrees that the need for additional public school facilities is already met in whole or in part by facilities planned or existing outside the UGB. Bend-La Pine School District Appeal at 1. Similarly, the parks district does not agree that the need for land for public parks, including trails, can be reasonably accommodated within the existing UGB. The district disagrees that the need for additional public parks is already met in whole or in part by facilities planned or existing outside the UGB. Bend Metro Parks and Recreation District, Appeal at 1.

Department's Position and Analysis: The Director's Decision remands the UGB amendment to "determine whether the need for land for public schools can reasonably be accommodated within the existing UGB." Director's Decision at 47, 53. The remand points to the city's assumption that all new school and park facilities to serve new residents will be located on expansion lands outside the prior UGB. The city's findings have not addressed the extent to which the estimated land need for schools can be reasonably accommodated within the UGB, as required by OAR 660-024-0050(4). To clarify the appeal, the Director's Decision reflects that not all school land needs can be reasonably accommodated within the existing, or prior UGB, but has remanded the matter because the findings simply do not address the requirements of OAR 660-024-0050(4).

Similarly, the Director's Decision remands the UGB amendment to "determine whether the need for land for public parks (including trails) can 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.” Director’s Decision at 48, 54. The submittal assumes that all new school and park facilities to serve new residents will be located on expansion lands outside the prior UGB. The city’s findings have not addressed the extent to which the estimated land need for parks can be reasonably accommodated within the UGB, as required by OAR 660-024-0050(4). The director notes that some types of park facilities are allowed outside of UGBs and the findings have not addressed the extent to which the need may already be met by existing or planned facilities outside of the UGB. To clarify the appeal, the Director’s Decision understands that not all public park land needs can be reasonably accommodated within the existing, or prior UGB, but has remanded the matter because there is no evidence that the findings show that the requirements of OAR 660-024-0050(4) have been met.

Recommendation: The department recommends that the commission affirm the Director’s Decision on this subissue.

E. Employment Land Need – Goal 9

SUBISSUE 1. Did The city follow the steps required by OAR 660-009-0015 And OAR 660-024-0040 and -0050 in estimating the required 20-year employment land need for Bend?

Appellants: City of Bend, Bayard, Anderson.

Position Taken in Appeal: The city states that it followed the “main steps” outlined on page 62 of the Director’s Decision in the 2008 Economic Opportunities Analysis (EOA), but did not use the exact terminology of the rule. According to the city, all of the data required by the rule are contained in the EOA and Findings. Appeal at 51.

Department’s Position and Analysis: The Director’s Decision found that “the analysis for the EOA did not follow [the main steps required by LCDC rules], and the record is unclear and confusing regarding how the amount of land needed for employment was determined.” Director’s Decision at 62. Upon further review, as described in detail below, the department agrees with the city that it has followed the main steps required by the Goal 9 and UGB rules.¹⁰

While the department agrees that the city has carried out the analytical “main steps” required by the commission’s rules, as described in detail below, several more limited problems with the city’s analysis remain. In particular, the city has not adequately justified its use of a 10 percent adjustment factor for the amount of employment land

¹⁰ Toby Bayard and Terry Anderson appealed on this issue, concurring with the Director’s Decision that the city failed to follow the analytical steps required in determining the amount of employment land need. Bayard Appeal, at 5-7; Anderson Appeal at 5 and 9-11. In particular, Bayard and Anderson assert that the city did not analyze developed employment land likely to redevelop during the planning period. That issue is addressed at pages 36-39 of this report.

need that will be met through redevelopment; and the city has not adequately justified its use of adjustment (market choice) factors ranging from 25 to 50 percent to increase its determination of the amount of employment land need (these issues are addressed separately, below). As determined in the Director’s Decision, the department does concur with the city’s identification of specific site needs for a new hospital, a university campus, and two large industrial sites. However, the city needs to explain in its findings whether these sites are available within the prior UGB.

The main steps articulated in the Director’s Decision, as a summary of the pertinent LCDC rules, for determining the amount of employment land supply needed for the 20-year planning period are:

- 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));¹¹
- 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)).

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).

¹¹ The 2008 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 2008 EOA detail characteristics of Bend’s employment lands, discuss the employment projection methodology, and the results of the projections. [R. at 1567-1578]. The 2008 EOA includes a discussion of the use of employment categories instead of the more common employment sectors. [R. at 1583-1584]

The 2008 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.

The department agrees that the city's projection of employment in 2028 complies with Goal 9 and OAR 660, division 9.

The city converted its projection of 2028 employment into a projection of *land* needed for employment by taking the following steps:

- Reducing the 2028 employment projection by 10 percent as an adjustment for the amount of employment it assumed would occur on “developed” lands within the existing UGB (e.g., accommodated through redevelopment). R. at 1108, 1588, 1611-1612.
- The city used the LCDC Goal 9 rule definitions of “vacant” lands (R. at 1128) to identify lands within the prior UGB by plan district that could accommodate some portion of the city's future need for employment lands. R. at 1109 (Table 4-2). The acreage of “vacant land” was later subtracted from the city's various estimates of employment land need.
- The city then developed two scenarios:
 - Scenario A (which the city describes as its “minimum” land need), based on an analysis of existing employment densities for each plan designation in the city and resulting in a projected total employment land need of 950 acres (R. 1614-1620 (see particularly, Table 40 at R. 1618); and
 - Scenario B, based on increasing the land needs determined (with one exception) in Scenario A for commercial, public facility, and certain other (non-industrial) plan districts by 50 percent, and resulting in an alternative projection of total employment land need of 1,522 acres (R. at 1621, 1622, see particularly, Table 42 at R. 1622).
- The city also increased the projected industrial land need in Scenario A by 35 percent in order to provide a potential supply of new industrial lands outside of the city-owned Juniper Ridge site (R. at 1625-1627), and added lands for particular aspirational needs (new hospital site, university district, and two large industrial sites) (R. at 1627-1631).
- The total employment land need as determined in the city's EOA is 2,090 acres, as described in Table 46 of the EOA. R. at 1114 (findings) and 1634 (2008 EOA). That total is derived from Scenario B, adjusted for additional industrial lands, and additional employment lands for other (non-commercial) sites (hospital, university, and two large industrial sites). Although the city's findings could be clearer, reading both the city's findings and the 2008 EOA together, it is relatively clear how the city derived its estimate of land need.

Recommendation: The department recommends that the commission find that the city has followed the main requirements of the Goal 9 and UGB rules in estimating the amount of employment land needed by the city during the 2008-2028 planning period, with the exception of the two items addressed in subissues 2 and 4, below. The department suggests that if the commission remands the city's decision, the city clarify its findings to state that its determination of employment land need is based on scenario B from the 2008 EOA.

SUBISSUE 2. Are there adequate factual and policy bases, and adequate findings, justifying 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?

Appellants: Bayard and Anderson.

Position Taken in Appeal: 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.

Department’s Position and Analysis: The commission’s rules require the city to 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); 660-024-0050(1). The city has determined that 10 percent of the projected future employment will be accommodated through redevelopment of “developed” lands, but it has not provided an adequate factual or policy basis for that factor. The factor also may be inconsistent with the requirement of Goal 14 to demonstrate why land needs cannot reasonably be accommodated on lands within the existing UGB. The city’s 2008 EOA notes that the 10-percent factor is well below the amount of redevelopment for employment that other jurisdictions have determined is likely. R. at 1611.

OAR 660-009-0015(3) states what must be included in an EOA with regard to an inventory of “vacant” and “developed” lands:¹²

(3) 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.

¹² The two terms “vacant” and “developed” are defined terms in the Goal 9 rule. The term “vacant” “* * * means 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(14). The term “developed land” is defined as “non-vacant land that is likely to be redeveloped during the planning period.” OAR 660-009-0005(1).

The city's 2008 EOA simply adopts a ten percent factor for "developed land." The EOA states that this factor is based on research by Portland Metro, and other EOAs. R. at 1611. But the EOA also notes that these

[o]ther EOAs have used infill/refill factors of 15 percent or more. However, these figures often include a factor for home-based or residential-land sited businesses; i.e. businesses for which additional land is unnecessary because they operate in homes and residential zones. In this EOA, that segment of the infill/refill factor is accounted for in the Residential Lands employment land estimates, which specifically account for employees working from their homes.

The department does not understand the statement quoted above. The city has separately accounted for employment in residential plan districts by adding lands to its UGB to account for this segment of its employment projection ("Economic Uses in Residential Zones" – 119 acres. R. at 1114 (Table 4-3)). To the extent that some employment increase in residential zones will not require additional land (home occupations), that would suggest that the city's use of a ten percent factor should have corresponded to the other cities use of "15 percent or more."

In any event, this aspect of the city's decision does not provide the factual basis required by the rule. If the city is going to use 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.

Recommendation: The department recommends that the commission remand the city's decision for additional development of a factual and policy basis concerning the proportion of future employment need that will be met through redevelopment of "developed land" over the 20-year period.

SUBISSUE 3. Must the city update its EOA to reflect more recent trends resulting from the current recession?

Appellants: Central Oregon LandWatch.

Position Taken in Appeal: 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. Central Oregon LandWatch objected that the findings and EOA are outdated, so there is no basis for need demonstrated. [Central Oregon LandWatch May 7, 2009, pages 11–12] The Director's Decision did not sustain this objection.

LandWatch's appeal says that the Director's Decision was wrong to rely on provisions of division 24 that establish that the 20-year planning period begins on the date initially scheduled for adoption of the UGB amendment to conclude that once the EOA analysis begins it need not include new data or circumstances. OAR 660-024-0040(2)(a) (The 20-year planning period begins "[o]n 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[.]") LandWatch also argues that the Director's Decision was wrong to rely on provisions in division 9 that say a jurisdiction's effort is adequate if it uses the best available or readily collectable information to respond to the requirements of this division. OAR 660-009-0010(5). LandWatch's appeal says that the city cannot rely on a trend analysis that is based on a market bubble that burst.¹³

Department's Position and Analysis: The Director's Decision did not sustain this objection. OAR 660-024-0040(2)(a) 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. The city's 45-day notice for its UGB amendment stated that the date initially scheduled for final adoption was November 24, 2008. R. at 4920. 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.

The intent of the review of trends requirements in division 9 is to ensure that the local jurisdiction investigates, considers and makes policy decisions regarding significant influences on *long-range* economic and employment conditions. The city completed its 2008 EOA prior to the beginning of what is now clearly a significant economic recession. 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. At some point in time, a trend analysis may become so out of date that a local government would be required to update the analysis, but the department does not believe that the objection or appeal have established that the city's 2008 EOA is at that point yet.

Recommendation: The department recommends that the commission deny this appeal because Central Oregon LandWatch has not identified specific trend data in the record that undermine the city's analysis to the point where the city's decision is not based on substantial evidence.

SUBISSUE 4. Are there adequate factual and policy bases for the city's decision to increase its estimate of employment land need for commercial, medical, residential and public facility plan districts by 50 percent (except its CG plan (commercial general))

¹³ OAR 660-009-0010(5) The effort necessary to comply with OAR 660-009-0015 through 660-009-0030 will vary depending upon the size of the jurisdiction, the detail of previous economic development planning efforts, and the extent of new information on national, state, regional, county, and local economic trends. A jurisdiction's planning effort is adequate if it uses the best available or readily collectable information to respond to the requirements of this division.

district, which it increased by 25 percent)? May the city include additional employment lands beyond what it shows are needed to allow for “market choice?”

Appellants: Bayard, Anderson. The department also identified this subissue following further review of the city’s decision based on the city’s appeal.

Positions Taken in Appeals: The city notes in its appeal that OAR 660-009-0025(2) provides that “* * * 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.” 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. City Appeal at 54.

Toby Bayard and Terry Anderson also appealed on this issue, arguing that the city’s 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.

Department’s Position and Analysis: The department disagrees with the city that the statewide planning goals or the commission’s rules authorize a city to include more than a 20-year land supply in its UGB. Goal 14 requires cities to plan for and include in their UGBs 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 (itself) 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).¹⁴ The commission’s Goal 9 rule referencing an amount of land that must “at least” equal the total projected land need over a 20-year period, read in context, is a recognition that in some cases not all of the land may be “serviceable” (capable of being provided with needed public facilities and services over the 20-year planning period), in which case additional lands may be required.¹⁵

¹⁴ “* * * 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.

¹⁵ The rule reads as follows:

“(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.

The term “total land supply” is defined as “* * * *the supply of land estimated to be adequate to accommodate industrial and other employment uses for a 20-year planning period.*” OAR 660-009-0005(13) [emphasis added]. Further, the commission’s rule governing a city’s determination of land need is OAR 660-024-0040(1). The rule provides that:

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.

While precision is not required in estimates of land need, that recognition does not authorize cities to plan for a 30-year employment land need, as the city’s decision in this case effectively does for commercial and certain other uses (through its use of a 50 percent adjustment factor), or for a 27-year industrial land need, as the city’s decision in the case effectively does for industrial uses (through its use of a 35 percent adjustment factor for industrial uses). Further, the city’s estimate of employment land need *already* includes a significant cushion in the form of:

- relatively aggressive forecasts of employment growth (in the first 10 years of the 20-year planning period; R. at 1106, 1118, 1140, 1586, 1607-1635);
- in the form of conservative estimates of the amount of employment uses accommodated in the Central Area (the city assumes only one-third of its Central Area Plan (CAP) projections for employment will be met (R. at 1129-1130 (the department notes that the CAP has not been adopted, and has been put on hold));
- assumptions that would increase the City of Bend’s share of regional employment from 60 percent (at present) to 64 percent in 2028 at a time when the city is already struggling to provide needed housing and its housing needs analysis already finds that an increasing proportion of workers are having to drive into the city.

(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. “

OAR 660-009-0025.

A local government is authorized to include employment lands in a UGB expansion for market choice, but the department believes that should be the case only to assure a competitive *short-term* supply of employment lands. This is implied by the commission's goal 9 rules, which expressly provide for "market choice" in short-term supply (but which contain no similar provision for "total land supply"). 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 allow the city to plan for a "competitive short-term supply" of employment land that includes a "market choice" element, and that short-term supply is an element of the overall "total land supply" needed over a 20-year planning period, but a "market choice" factor beyond that needed for short-term supply should not be included in the total amount of employment land need. By providing a 20-year supply that is updated and expanded as needed through periodic review, Goals 9 and 14 already are designed to assure adequate lands are available within a UGB.

The department believes that the city's findings and 2008 EOA do include an adequate factual basis and policy rational for including some lands beyond the "minimum" (e.g., 20-year) estimate based on projected employment in Scenario A. 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 69-69. 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.

Recommendation: The department recommends that the commission remand the city's decision for it 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 (the city may, however, apply such factors in determining its competitive short-term supply so long as there is an adequate factual base for them);
- Review and justify the amount of land identified as needed for sites for medical office uses; and
- Document whether the other particular employment land needs identified by the city (new hospital site, university site, and two large size industrial sites) reasonably may be accommodated on vacant or developed lands within the prior UGB.

SUBISSUE 5. Has the city adopted adequate plan policies to manage the short-term supply of employment land?

Appellants: City of Bend

Position Taken in Appeal: See below.

Department's Position and Analysis: 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. 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).

Recommendation: To comply with the provisions of OAR 660-009-0020(1) and (2), the city needs to have public facilities and transportation plans that identify how improvements necessary to the competitive short-term supply of employment lands is met and continually replenished. This should include plan policies and references to SDC schedules and utility rate plans as part of the city’s strategies to prepare the land supply for development, and for replacing the short-term supply as it develops. The plans and policies should demonstrate that the supply of short-term sites can be competitively priced and available for the anticipated uses.

SUBISSUE 6. Does the record support the conclusion that Bend will experience a 15 percent vacancy rate in its employment lands over the 20-year planning period?

Position Taken in Appeal: The city provides a bulleted list of reasons why the 15-percent vacancy rate it assumed in its employment land needs analysis is supported by substantial evidence. City Appeal at 51-52.

Department’s Position and Analysis: The Director’s Decision, in response to an objection, stated, “a desire to drive industrial and commercial land rents down...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 does not comply with the Goal 9 rule.” Director’s decision at 63.

The list of reasons included in the appeal why the city should not base its analysis on its own trend data is unpersuasive. The evidence cited is short-term or does not demonstrate that vacancy rates will ever reach, much less be sustained at, 15 percent. The city concedes some of this evidence is not in the record.

The department continues to believe that implementation of mechanisms to make industrial and commercial rents affordable is a reasonable and desirable aim. However, the city’s findings and EOA do not support a long-term vacancy rate of 15 percent.

Recommendation: The department recommends that the commission remand the city’s decision, for it to utilize a long-term vacancy rate that is consistent with available trend data.

SUBISSUE 7. Must an urban expansion consider the impact on displaced non-urban industries, such as agriculture and agriculture irrigation?

Appellant: Swalley Irrigation District.

Position Taken in Appeal: The Swalley appeal points to a provision of Goal 9(A)(4) that provides: “[p]lans should strongly emphasize the expansion of an (sic) increased productivity from existing industries and firms as a means to strengthen local and

regional economic development.” Swalley contends that the decision must be remanded to analyze the impacts of the UGB expansion on Swalley, and in turn, protect Swalley’s existing operations. Swalley Appeal, at 2.

Department’s Position and Analysis: The Director’s Decision denied the objection on this matter, treating it as a locational issue, citing OAR 660-024-0060(8)¹⁶ 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 takes on appeal.

Recommendation: The department recommends that the commission deny this appeal. 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 city’s 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.

SUBISSUE 8. Is inclusion of 119 acres of residential land for employment uses justified?

Position Taken in Appeal: The city maintains that the record shows how this land need was defined and why it is appropriate to account for this employment. City Appeal at 54.

Department’s Position and Analysis: The department misunderstood the method the city used to determine the need for the 119 acres of residential land. The Director’s Decision was based on the understanding that this land was needed for home-based

¹⁶ This rule states:

(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.

business and other employment typically located in residential zones such as churches and schools.

On appeal, the city has clarified that a certain percentage of other employment uses (i.e., other than home-based employment) is allowed and takes place within the city's residential zones, and that this percentage is higher in Bend than in most other communities. The forecasted need is based on demonstrated use, although the department notes it was based on point-in-time data without an analysis of trends. R. at 1609. Because the acreage at issue represents a small percentage of the overall employment land need, however, the department agrees that an in-depth analysis is not necessary.

The city contends that, since Goal 9 and the administrative rule do not expressly prohibit designation of residential land for employment uses, then it is allowed. The department does not concur with this reasoning. The entire context of OAR 660, division 9 involves lands designated for industrial or other employment use. Because the rule do 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.

Recommendation: The department recommends that the commission remand the city's decision to incorporate the analysis of land needs for employment uses within residential zones in the city's housing needs analysis.

SUBISSUE 9. Is the city's decision on employment lands, including its Framework Plan designations, consistent with Policy 17 and Policy 18 of Chapter 6 of the Bend General Plan?

Appellants: Rose & Associates.

Position on Appeal: Rose & Associates argues that the city has ignored two provisions in its comprehensive plan, chapter 6:

17. Commercial Development. The existing pattern of commercial designations shown on the plan map along Highway 97 and Highway 20, and along arterial streets such as Newport, Galveston Avenue, SW 14th Street, 27th Street, and O.B. Riley Road shall not be extended farther along the street corridor.

18. No new strip commercial development or extension of the commercial designations shall be permitted along arterial or collector streets.

Department's Position and Analysis: The department agrees that the city's findings did not address these policies, which appear relevant given that the city's Framework Plan Map designates a substantial amount of land as Commercial General along Highway 20 in the expansion area.

Recommendation: The department recommends that the commission uphold the appeal on this subissue, and direct the city to address these two policies on remand.

F. Goals 5 and 7 – Natural Resources and Hazards

SUBISSUE 1. To what extent must the city comply with the requirements of Goal 5 and OAR 660, division 23 prior to or contemporaneously with its UGB expansion?

Appellants: City of Bend, Bayard, Anderson.

Position Taken in Appeal: The city does not agree with the Director's Decision that application of Goal 5 in the UGB expansion area requires new inventories for Goal 5 riparian corridors, wetlands and wildlife habitat resources be conducted throughout the expansion area, or that other elements of the Goal 5 process be completed for these resources to the extent that they are inventoried within the expansion area. The city states that reliance on Deschutes County's acknowledged inventory of Goal 5 resources and current protection measures is sufficient to comply with Goal 5, with one exception – the need to include the Oregon Scenic Waterway within the expansion area on the city's list of significant Goal 5 resources; the city has agreed with this aspect of the Director's Decision. The appeal reiterates Bend's assertion that, "The City's adopted UGB avoids all 2003 Deschutes County acknowledged Goal 5 resources with the exception of the Oregon Scenic Waterway." R. at 1215. Bend also reiterates its position that, aside from the Oregon Scenic Waterway, no factual information has been submitted to demonstrate that a Goal 5 resource site is included in the amended UGB area.

The city also addresses the estimated 299 acres that have been identified as unsuitable for development in their efforts to be consistent with OAR 660-023-0070. The appeal suggests that the methodologies used to estimate the number of acres affected by Goal 5 resources should be sufficient to inform the size of the UGB expansion. The city questions whether it has the authority to conduct Goal 5 inventories and complete the Goal 5 process for resources that are not within an acknowledged UGB.

Department's Position and Analysis: The department's position remains the same on all points, except the area over which an inventory needs to be conducted. The department agrees that the city is not obligated to complete natural resource inventories for the entire expansion area, but rather the geographic scope is informed by the information received on resource sites during the UGB expansion process.

The appeal notes that Deschutes County has a Goal 5 inventory for the county's unincorporated territory that was acknowledged in 2003. The county, however, did not conduct an inventory of Goal 5 resources within some of the expansion area in 2003, because planning responsibility for areas designated Urban Area Reserve in the Bend Area General Plan is assigned to the city. The Findings in Support of the UGB Expansion describe two Goal 5 riparian areas within the proposed expansion area, and explains that they are protected through the county's plan and code. R. at 1216. The findings also state that, "approximately 22 additional acres [of riparian corridor and wetlands] are located in the proposed UGB expansion area outside of the Deschutes River and Tumalo Creek." The city points to the Deschutes County code chapter 23 as a source of this information. Record at 1216.

The city's appeal does not resolve the apparent contradiction between this statement and the assertion that, "The City's adopted UGB avoids all 2003 Deschutes County acknowledged Goal 5 resources, with the exception of the Oregon Scenic Waterway." R. at 1215. The department understands that there is likely considerable overlap of the Oregon Scenic Waterway designated area and the two Goal 5 riparian areas described in the findings. Record at 1216. However, findings addressing compliance with the Goal 5 for each resource category are needed, even if one coordinated protection program is used to address more than one resource category.

In addition to significant Goal 5 riparian corridors described above, OAR 660-023-0250(3)(c) requires the city to apply Goal 5 to other resource sites within the expansion area for which factual information has been submitted.¹⁷ This subsection of the rule does not specify "significant" Goal 5 resources and sites as do subsections (a) and (b) of the rule. A resource site "is a particular area where resources are located. A site may consist of a parcel or lot or portion thereof or may include an area consisting of two or more contiguous lots or parcels." OAR 660-23-0010(10). The Goal 5 inventory process starts with resource sites. The inventory then provides, "the information necessary to locate and evaluate resources and develop programs to protect such resources." OAR 660-23-0030.

If the threshold for factual information demonstrating the presence of a resource site is met, the city is obligated to complete the Goal 5 process for the site. The presence of one

¹⁷ OAR 660-023-0250(3) provides that:

"(3) 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."

or more resource sites in a defined area does not trigger a requirement for an inventory to be conducted throughout the whole UGB expansion area. This conclusion is different than that reflected in the Director's Decision. Director's Decision at 142-144. However, factual information on the presence of a resource site entered into the record obligates the city to address the site. It is thus reasonable to presume that some larger area may need to be inventoried by the city in order to gather sufficient information on the location of potentially significant resources and impacts to those resources so that a boundary can be established and an impact area identified.

The Bend Area General Plan includes information on the wildlife habitat functions of natural and open space resources within the Bend Urban Planning Area, which includes the proposed expansion area. 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. R. at 1247-1254. Also to the extent that the Areas of Special Interest include wildlife habitat attributes, the record indicates that Goal 5 habitat resource sites exist outside the riparian corridors as well. The department believes there is sufficient factual information in the record to prompt the application of Goal 5 for wildlife habitat. At a minimum, the area to be inventoried should include riparian corridors within the expansion areas.

In contrast to the Director's Decision, the department agrees with the city that the information in the record regarding wetlands does not obligate the city to inventory the resource within the expansion area at this time. The plan policies to complete the Goal 5 process at the time lands are urbanized are adequate to address wetlands.

The department does not find information in the appeal regarding areas "unsuitable and unavailable for development" sufficient to cause the conclusions in the Director's Decision on this matter to be changed. The city explains that,

Not unlike the City's methodology for determining future rights-of-way need within the UGB, the City used a GIS analysis to consider potential view corridors and identify prominent rock outcroppings within the landscape. Through the City's land development process, the City encourages and sometimes requires the preservation of natural features as open space, even if they are not significant Goal 5 resources. City Appeal, at 99.

Although this level of documentation is adequate for some planning purposes, it is not sufficient to enable a jurisdiction to remove land from its estimate of buildable land under OAR 660-023-0070.

OAR 660-023-0070(1) is concerned with "measures to protect significant resource sites inside urban growth boundaries." It requires a local government to, "[a]mend its urban growth boundary to provide additional buildable land sufficient to compensate for the loss of buildable lands caused by the application of Goal 5." The area subject to measures to protect significant Goal 5 resources are not known until the Goal 5 process to inventory, evaluate, and protect resource sites has been completed. This has not been

done for the Areas of Special Interest described within the expansion area, thus the mechanism authorized under OAR 660-023-0070 to compensate for land inventoried under Goal 5 is not available to Bend at this time.

The department does not agree there are limits on the city's authority that would prevent the city from completing the Goal 5 process for resource sites for which factual evidence has been entered into the record pursuant to OAR 660-023-0250(3)(c). All steps in the Goal 5 process, except implementing the program to protect significant resources, can be accomplished without the city having regulatory authority over the area. The program to protect significant resources can be adopted at the time the UGB is expanded with county concurrence.

Recommendation: Bend will need to apply Goal 5 to riparian corridors identified in the Bend Area General Plan, wildlife habitat known to be associated with these riparian corridors, and the Oregon Scenic Waterway along the Deschutes River. Goal 5 will be applied for these resources when the city completes the Goal 5 process and adopts a protection/management program for identified significant resources at the time the UGB expansion is adopted. Bend will either need to complete the Goal 5 process for Areas or Special Interest and adjust the buildable lands inventory based on the conclusions of such a process, or remove consideration of Areas of Special Interest from the land needs equation.

SUBISSUE 2. Must the city address wildfire risk in evaluating alternate UGB expansion areas? Does Goal 7 require the city and county to include wildland fire safety planning as a consideration in planning for its UGB expansion? Are there other state laws that would implicate an action through Goal 7?

Appellants: City of Bend, Central Oregon LandWatch.

Positions Taken In Appeals: While the director suggests that the city and county consider information in the Community Wildfire Protection Plan for the Greater Bend Area, he did not require this, citing no requirement in Goal 7. The appellant believes the department does have such authority under Goal 7. Central Oregon LandWatch Appeal at 4.

Department's Position and Analysis: Goal 7 requires that local government plans include inventories, policies and implementation measures to reduce risk from natural hazards. Deschutes County has adopted a community wildfire protection plan for the Greater Bend Area that identifies significant wildfire risks for the area. The Director's Decision agreed that the county and city *should* consider wildfire risk in evaluating the location and type of development for the city's UGB expansion. However, at present, Goal 7 does not *require* such action by the county and city. Director's Report at 146. Furthermore, there is no other state law that would require wildland fire planning as part of the evaluation of an UGB expansion.

Recommendation: The department recommends that the commission deny this appeal. However, the director also believes that the city and county should consider the information in the Community Wildfire Protection Plan for the Greater Bend Area on remand.

SUBISSUE 3. Does the record contain adequate evidence to provide a factual basis for the decision to designate certain property Surface Mining on the plan map?

Appellant: Shevlin Sand and Gravel, Inc.

Positions Taken In Appeals: The property owned by the appellant is not and never has been on an inventory of significant natural resource sites (specifically aggregate). The UGB implementation violates Goal 2 because there is no factual basis to conclude that the portion of the property outside the area permitted for aggregate expansion should be designated Surface Mining on the plan map.

Department's Position and Analysis: Upon further investigation, the department agrees with the appellant that the portion of its property outside of the area permitted by DOGAMI is not on an inventory of significant aggregate resource sites. Statewide Planning 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 processes spelled out in OAR 660, division 23. There is not an adequate factual basis for the SM designation placed on the property outside of the area permitted by DOGAMI.

Recommendation: The department recommends that the commission remand the Surface Mining designation for the portion of the appellant's property outside the area subject to the DOGAMI permit. If the subject property remains in the expansion area upon reconsideration by the city to comply with other aspects of this remand, the city and county must either demonstrate that the Surface Mining designation complies with the requirements of Goal 5 and OAR 660, division 23, or provide an appropriate alternative designation.

G. Public Facilities Planning – Goal 11

SUBISSUE 1. Are the PFPs submitted by the city in compliance 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?

Appellants: City of Bend.

Position Taken in Appeal: The city's appeal states that the Director's Decision confuses (1) the acknowledgement of the city Public Facilities Plans (PFPs) for the area within the current UGB; and (2) whether the PFPs provide an adequate basis for adoption of the

UGB expansion. The city asked the director to acknowledge the PFPs for areas within the prior UGB, but this request was denied. City's Appeal, at 61, 67.

Department's Position and Analysis: The department respectfully points out that the city's UGB expansion proposal and supporting documents, including its PFPs, were prepared to support the city's UGB expansion proposal. The city requests that the department consider recommending acknowledgment of the PFPs for serving the area of the prior UGB. The department believes, however, that even if the city's PFPs for wastewater collection and water service contain the elements required by OAR 660-011-0010, the plans were prepared in a manner that presumes the UGB expansion adopted by the city and county. This is not surprising, given that the requirements in OAR 660-024-0060(8) for examination and evaluation of both the prior UGB and UGB expansion areas.¹⁸

Before the state may acknowledge the city's PFPs as to the area in the prior UGB, the city would need to redraft those portions of its collection system and water system master plans to show service only to those lands within the prior UGB, and to document that any public facility projects planned to serve those lands are feasible independent of what happens with the city's UGB expansion.

The PFPs adopted by the city in conjunction with the UGB expansion appear to at least assume, if not rely on, inclusion of the expansion area in terms of the projects planned and resulting rough cost estimates and discussion of funding mechanisms. OAR 660-011-0010(1); R. at 205.

The department agrees that the city may revise its PFPs to address service only to the area within the prior UGB, and then adopt those revised PFPs as post-acknowledgement plan amendments, with a subsequent amendment of the PFPs addressing the UGB expansion area (this amendment would be co-adopted with the UGB amendment), although the department does not believe the city has to proceed in this manner.

Recommendation: The department recommends that the commission remand the public facility plans for wastewater and water for the city to complete the work described in the Director's Decision, starting at 82. The department will continue working with the city as it revises sewer and water master plans to address only those areas in the prior UGB, if that is what the city elects to do.

SUBISSUE 2. May a city's sewer plans include facilities and capacity intended to serve lands outside the UGB, even if the plan says no service will be permitted or provided until such lands are located inside the UGB and urbanized (rezoned to urban

¹⁸ OAR 660-024-0020(1) requires that adoption or amendment of a UGB meet all statewide goals and administrative rules. Under OAR 660-024-0060(8) a local government considering a UGB expansion must analyze the comparative costs, advantages and disadvantages of public facilities and services needed to urbanize alternative boundary locations. The rule also requires evaluation and comparison of the impacts to existing water, sanitary sewer, storm water and transportation facilities that serve nearby areas already inside the UGB and a capacity analysis both in the current UGB and UGB expansion area.

designations)? City Appeal, at 61. May specific individual components of the city’s PFP be acknowledged individually, or must they be reviewed and acknowledged as a whole? City Appeal at 62.

Appellants: City of Bend, Hillary Garrett.

Position Taken in Appeal: The city has asked the department and commission to acknowledge its PFPs for the area of the prior UGB. The city contends that Goal 11 prohibition on providing sewer service outside of the existing UGB does not prevent it from locating sewer trunk lines outside of the UGB if necessary to serve areas within the prior UGB. City Appeal at 61, 67.

Department’s Position and Analysis: The department agrees that Goal 11 and the commission’s Goal 11 rules allow the city to adopt PFPs that include projects with facilities outside of the prior UGB, so long as those facilities are not planned for and do not provide sewer service to lands outside of the prior UGB. OAR 660-011-0060(2) and Goal 11 prohibit sewer service outside of an UGB (with certain specified exceptions). OAR 660-011-0060(3) provides:

(3) Components of a sewer system that serve lands inside an urban growth boundary (UGB) may be placed on lands outside the boundary provided that the conditions in subsections (a) and (b) of this section are met, as follows:

(a) Such *placement is necessary to:*

(A) *Serve lands inside the UGB more efficiently by traversing lands outside the boundary * * * [or]*

(C) *Connect to components of the sewer system lawfully located on rural lands, such as outfall or treatment facilities; * * * [and]*

(b) The local government:

(A) *Adopts land use regulations to ensure the sewer system shall not serve land outside urban growth boundaries or unincorporated community boundaries * * *. [emphasis added]*

This rule allows Bend to locate sewer system components outside of its prior UGB *if they are necessary to serve lands inside of the prior UGB, and the city adopts land use regulations to ensure no sewer service is provided outside of the prior UGB* from these components.

Recommendation: The department recommends that the commission confirm that if the city wishes to update its PFPs for lands within the prior UGB only, and those PFPs will plan for facilities that are located outside of the city’s prior UGB (even though they will not *serve* lands outside of the prior UGB), the city may do so if it follows OAR 660-011-0060(3). Alternatively, the city could (as it attempted to do in this set of actions) adopt amended PFPs that address both lands inside of the prior UGB and lands in the expansion area.

SUBISSUE 3. Were the cities public facilities plans improperly used to determine the location of the UGB expansion?

Appellants: Swalley Irrigation District, Bayard, Anderson, Hunnell United Neighbors.

Position on Appeal: 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.

Department's Position and Analysis: The appeal alleges that the city prepared public facilities plans to justify an UGB expansion area in advance of systematically analyzing land use options for the same area through the requirements of ORS 197.298, Goal 14 and OAR 660, division 24.

The city completed its Water System Master Plan Update during March, 2007 R. at 225. This plan included the city's existing water service area located within the prior UGB, along with non-UGB areas of Juniper Ridge and the Tetherow destination resort. Only a small portion of the Juniper Ridge area was included in the UGB expansion, and none of Tetherow was included. As noted elsewhere, the city's water service plan did not include the UGB service areas of two private water companies.

The city completed its Collection System Master Plan during June 2007, although pages throughout the document are labeled as being drafted in 2006. R. at 385. Figure 2-4 illustrates the city's wastewater planning areas. R. at 411. These planning areas include three large areas which were not included in the UGB expansion, including the Tetherow-Macalpine Loop area to the west, the Section 11 area to the east and the extended Juniper Ridge area in the far north. Also, the city's record includes a new sewer truck alternative in its Alternative Technical Analysis for North East Bend (May 2007) [R. beginning at 517], which adds significant area to the northeast of the Collection System Master Plan study area.

Two additional technical memos and studies were added during 2008 to augment the coverage area of the original 2007 Collection System Master Plan, as indicated in the Director's Decision at page 72.

The 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. In any event, if the commission determines to remand the UGB expansion as recommended in this report, the city will need to revise its analysis of the relative costs, advantages and disadvantages of alternative expansion areas in terms of public facilities and services, and then when it settles on a final proposal for expansion, develop amended PFPs that address that expansion area.

Recommendation: The department recommends that the commission remand the city's public facilities plans for sewer and water, as found in the Director's Decision beginning on Page 82.

SUBISSUE 4. To what extent must a PFP be consistent with proposed land uses, including any measures intended to meet needed housing?

Appellants: City of Bend.

Position Taken in Appeal: The city maintains that it should not have to examine measures intended to meet needed housing as part of an effort to gain acknowledgment of the PFP for the current UGB. City Appeal at 62, 66.

Department's Position and Analysis: If the city redrafts a PFP to meet the requirements of Goal 11 and its rule for lands only within the prior UGB, it is not required to examine measures intended to meet needed housing. The requirement to examine needed housing measures occurs only when the city commences legislative review of its UGB pursuant to ORS 197.296 and OAR 660, division 24.

Recommendation: The department agrees that the city is not required to examine measures to meet needed housing if its action does not trigger the requirements of ORS 197.296 or OAR 660-024.

SUBISSUE 5. Under OAR 660-011-0010(2), what are the city's obligations, if any, to have service agreements with private water districts?

Appellants: City of Bend.

Position Taken in Appeal: The city infers that it is not obligated to secure service agreements with two private water districts that provide services within the existing UGB. City Appeal at 65.

Department's Position and Analysis: The department believes that ORS 195.065 requires the city to enter into urban service agreements with Avion Water Company and Roats Water Company. The commission has broad authority to review and guide the

coordination of urban services and urban service agreements, especially for the purpose of coordinating the provision of urban services within local comprehensive plans.

Under ORS 195.020 and 195.065, counties and cities are required to enter into urban service agreements with entities that provide “urban services” as those services are defined in ORS 195.065. The statute provides explicit guidance for the content, timing and implementation of urban service agreements, including required responsibilities for planning and coordination between local governments (city and county) and urban service providers. ORS 195.020(5) specifically gives LCDC broad discretion to review and insure that urban service agreements are consistent with local comprehensive plans.

Recommendation: The department recommends that the commission remand the UGB expansion decision and PFP amendments with direction to coordinate and execute urban service agreements compliant with ORS 195, Goal 11, and OAR 660, division 11. Urban service agreements should be coordinated with the City of Bend, Deschutes County, and urban service providers, including Avion Water Company and Roats Water Company, prior to acknowledgment of the UGB expansion and PFP amendments.

SUBISSUE 6. What was the city’s obligation to provide notice to DLCD of PFP revisions as part of its October 8, 2008 supplemental notice of a revised UGB amendment?

Appellants: City of Bend.

Position Taken in Appeal: The city provided the department with notice of its draft UGB expansion proposal, including draft PFPs, on June 11, 2007. The city provided the department with supplemental notice of a revised draft UGB proposal on October 8, 2008, which included several addenda to the city’s sewer PFP. The city maintains that no additional notice was required for the revised PFPs because changes to the PFPs were not significant. City Appeal at 65.

Department’s Position and Analysis: The director remanded the city’s action in part because its October 8, 2008 supplemental notice failed to provide the department with information about updates to the PFPs as required by ORS 197.610.

Recommendation: The department understands that this matter will be resolved as the city works through various remand items and presents a new updated notice to the department pursuant to ORS 197.610.

SUBISSUE 7. Must the city’s sewer PFP cover all areas in the UGB expansion?

Appellants: City of Bend.

Position Taken in Appeal: The city clarifies that, while the sewer PFP and its various addenda cover nearly all of the UGB expansion area, those areas not included in the PFP were evaluated for sewer serviceability. City Appeal at 69.

Department's Position and Analysis: Goal 11 and its rule require the public facility plan to contain an inventory and general assessment of the condition of all significant public facility systems that serve land uses designated in the acknowledged comprehensive plan, along with the other requirements found in OAR 660-011-0010(1).

Recommendation: The department recommends that the commission remand the city's public facilities plans for sewer and water, as found in the Director's Decision beginning on Page 82.

SUBISSUE 8. Does Goal 2 and its coordination requirement apply to private water utilities when those utilities will provide an urban service to areas within the UGB?

Appellants: City of Bend.

Position Taken in Appeal: The city maintains that coordination requirements of Goal 2 do not apply to private utilities such as Avion Water Company and Roats Water Company, since they are not "special districts" that provide water service. City Appeal at 66.

Department's Position and Analysis: ORS 197.015(5) requires that development of comprehensive plans be coordinated regardless of whether a service provider is a public or private entity. The statute clearly identifies when a plan is coordinated. "A plan is 'coordinated' when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible." The city is obligated to coordinate its UGB proposal with any private water companies located or operating within the planning area.

Recommendation: The department recommends that the commission remand this issue with instructions to coordinate planning of water service in its PFPs with Avion and Roats.

SUBISSUE 9. Does the water system plan provide sufficient information about private utility water purveyors who provide an urban service?

Appellants: City of Bend.

Position Taken in Appeal: The city argues that it provides sufficient information about each private water utility to meet the standards of the Goal 11 rule and, even if the information is inadequate, that inadequacy should not be reason to deny acknowledgment of other public facility plans. City Appeal at 66.

Department's Position and Analysis: The record does not clearly demonstrate how the city's water PFP provides required information for the area served by the Avion Water Company and Roats Water Company, pursuant to requirements of OAR 660-011-0010(1).

Recommendation: The department recommends that the commission remand with instructions that the city complete its public facilities plan to include areas where services will be provided by private water companies, pursuant to OAR 660-011-0010(1).

SUBISSUE 10. Is Swalley Irrigation District a “rural irrigation system” or is it 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? Swalley and Hunnell United Neighbors also seek clarification that 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. Swalley Appeal at 8.

Appellants: Swalley; Hunnell United Neighbors.

Position in Appeal: The appellant argues that it is a “service provider” under OAR 660-024-0060(8). Swalley states that it is an “existing water” facility that serves areas both inside and outside of the UGB with irrigation infrastructure in support of agricultural activity. The director erred in determining that an irrigation system is not an existing water system under Goal 11, Goal 14, and their implementing rules, and that a city does not need to consider irrigation systems for purposes a UGB location analysis. Swalley Appeal at 12. Swalley also states that the Director’s Decision erred by inferring that the city only has to analysis relative public facility cost for alternative UGB expansion areas if it is relying on relative costs to include particular areas.

Department’s Analysis and Position: In implementing OAR 660-024-0060(8)(a), the city is required to consider the impacts to existing water, sanitary sewer, storm water and transportation facilities. The Director’s Decision addresses the reasons why 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).

With regard to relative costs, the department agrees that OAR 660-024-0060(8) requires comparison of the relative costs, advantages and disadvantages of alternative UGB expansion areas in terms of public facilities and services.

Recommendation: The department recommends that the commission deny the appeal on the subissue of whether the city must coordinate with Swalley as an “service provider,” and concur with the Director’s Decision. The city is required to coordinate with Swalley under Goal 2, but the specific provisions of OAR 660-024-0060(8) are focused on the capacity of urban service providers to serve the expansion area, along with effects on their systems already inside the UGB. Swalley provides an important service to rural land uses. Coordination and consideration of the impacts is desirable, but is not mandated under this rule. The department agrees that the commission’s decision should be clear

that OAR 660-024-0060(8) requires consideration of the relative costs, advantages and disadvantages of alternate UGB expansion areas regardless of whether the city includes or excludes areas on the basis of such costs.

SUBISSUE 11. Does the city’s analysis of public facilities and services underestimate 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.

Appellant: Swalley Irrigation District.

Position Taken in Appeal: In evaluating alternative UGB expansion areas, the city is required to link its projection of needed housing types with its analysis of the cost and availability of public facilities and services. Swalley Appeal at 1-2.

Department Position and Analysis: The department does not agree that ORS 197.296(9) or 197.752(1) require the type of precise linkage between a city’s housing needs analysis and its locational analysis for where public facility and service costs will be most efficient that Swalley appears to suggest. ORS 197.296(9) refers to ensuring “* * * that land zoned for needed housing is in locations appropriate for the housing types identified under subsection (3) of this section * * *” but that linkage is a general one – to ensure that particular housing types such as high density rental housing is not located in an area where there is little or no likelihood that such housing will be built.

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, Swalley’s arguments are not sufficiently developed to be capable of review.

Recommendation: The department recommends that the commission deny the appeal on this subissue for the reasons stated above.

H. Transportation Planning

The director identified four major deficiencies in the city’s analysis of transportation costs associated with its consideration of UGB expansion alternatives. The city has appealed on all four issues, and cited additional evidence in the record that addresses deficiencies identified by the director. The department’s analysis and response to each issue is presented below.

SUBISSUE 1. Do the city’s findings adequately explain the relative costs of providing transportation improvements to serve individual UGB expansion areas?

Appellants: City of Bend.

Position Taken in Appeal: The city states that it did, in fact, analyze the relative costs of transportation improvements by transportation analysis zone (TAZ). City Appeal at 72-74.

Department's Position and Analysis: The Director's Decision faults the city's analysis of transportation costs because the city fails to identify costs needed to serve individual areas. Director's Decision at 88-89.

The commission's UGB rule regarding the required analysis of alternative areas for a UGB expansion, 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.* [emphasis added]

The city's appeal identifies evidence in the record that shows that the city identified costs of providing transportation improvements to serve individual areas. This includes detailed estimates of the costs of providing arterial and collector street improvements, and assignment of those costs on a per acre basis at the level of individual TAZs. R. at 3441-3455. The additional information identified in the record indicates that the city has the data and analysis to comply with OAR 660-024-0060(6), but the city's findings need to use those data to group lands in the same priority category (under ORS 197.298) instead of the alternative scenarios that the city evaluated. R. at 1202 (city's findings).

Recommendation: The department recommends that the commission clarify item 1 in the description of additional findings needed, to state that areas or parcels group for purposes of comparison must be made up of lands in the same priority category under ORS 197.298. Lands in lower priority categories are analyzed and compared only if the quantity of lands in higher priorities is not sufficient to accommodate the amount of land the city has documented is needed.

SUBISSUE 2. Must the city provide additional information and findings regarding the costs of providing any extraordinary costs related to overcoming topographic barriers or rights of way?

Appellants: City of Bend.

Position Taken in Appeal: The city points to findings that indicate that it considered topographic barriers. City Appeal at 76-77. The city also identifies a portion of the record where the city identified and allocated the costs of extraordinary improvements, including major highway improvements, to individual areas. This is presented in a one-page table that provides a hypothetical rough estimate of extraordinary costs by subarea. R. at 3458.

Department's Position and Analysis: The Director's Decision faults the city's analysis of transportation costs because the city fails to assign costs of extraordinary improvements needed to serve individual areas. Directors Decision at 88-89.

The additional information identified in the record by the city's appeal partially resolves the department's concern on this issue. As noted above, the record includes information that identifies costs of providing transportation facilities to serve individual areas. This includes information that identifies and assigns portions of cost of so-called "extraordinary" improvements to individual areas. As discussed further below, the city's findings do not indicate that it was considered by the city council, and as determined above, the information is not organized by areas that contain lands in the same priority category, as required by OAR 660-012-0060(6). Again, it appears that the city's record contains the data needed to make the required comparisons, but the city has not yet done so.

Recommendation: No change is recommended. As noted above, while the information cited by the city partially addresses the department's concerns, the analysis cited by the city is characterized as hypothetical and was not clearly a basis for the city's findings addressing OAR 660-012-0060(8).

SUBISSUE 3. Must the city provide more detailed analysis or findings of 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? That is, should 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?

Appellants: City of Bend.

Position on Appeal: The city states that it has carried out the required analysis. City Appeal at 77-78.

Department's Position and Analysis: The department, supported by several objectors, expressed concern that the city has not properly considered costs of providing transportation facilities needed to serve the northern area. Director's Decision at 84-89.

As noted in subissue 2 above, the city did prepare and include in the record a rough estimate and allocation of cost of extraordinary transportation improvements. R. at 3458. This includes an estimate of costs of improvements to Highways 20 and 97. It also includes a "hypothetical" assignment of portions of costs of these improvements to properties in the north area. This additional information partially addresses the departments concern. However, while the additional information is helpful, further analysis is required to adequately address OAR 660-024-0060(8) and Goal 14:

- The city does not explain reasons or basis for its assignment of costs to individual projects. The city’s percentage assignments may be reasonable, but without an explanation of how these costs were allocated it’s difficult to conclude that the analysis is, in fact, well-reasoned.
- The estimated costs of improvements in the north area for Highways 20 and 97 of \$125 to 185 million is several years old and may underestimate the cost of improvements in this area. The city’s appeal indicates that costs of north area improvements are likely substantially higher – over \$300 million. (Appeal at 73) The city’s appeal also indicates that various alternatives to downscale this project or consider other alternatives are in process. (Appeal at 77)
- The analysis of extraordinary transportation costs is not clearly incorporated in the city’s findings or its decision about transportation costs. As the department indicated in its initial review the city’s adopted findings on this issue assert that costs of extraordinary projects are properly assigned to the entire city, rather than any individual area. (R. at 1202-1203) Consequently, it is not clear that the allocation of costs of these projects to individual areas presented in Appendix B was considered by the city council in making its decision, even if the areas were properly constituted. To properly apply OAR 660-012-0060(8) the city must not simply do the analysis as an exercise, it must incorporate the analysis as the basis for its decision.
- Additional consideration of the rating and scoring of properties with high costs is needed. The city’s appeal argues that the results of the analysis would not change its decision because its rating of two northern subareas is unchanged by the assignment of extraordinary costs to these areas. (Appeal at 77) The city’s rating system provides three ratings based on cost per acre to serve as follows:

| Table A-2 Cost Rating INDEX (R. at 3456) | | | | |
|--|--------------|-------------------|------|----------|
| <i>Rating</i> | <i>Score</i> | <i>Cost Range</i> | | |
| <i>Low</i> | 1 | Greater | Than | \$50,000 |
| <i>Medium</i> | 2 | 25,000 | To | \$50,000 |
| <i>High</i> | 3 | Lower | Than | \$25,000 |

The city’s evaluation concludes that the two northern subareas (Triangle and Juniper Ridge) are among the most expensive to serve and consequently were rated “low” both before and after the allocation of extraordinary transportation costs. While that’s true, the result appears to be a function of the city’s rating which was developed prior to the allocation of extraordinary costs and which places no upper limit on the costs for areas which receive a “low” rating.

In the city’s initial evaluation of costs, the costs of serving individual subareas ranged from \$10 to \$60,000 per acre, with most areas costing \$45 to 50,000 per acre. R. at 3456. Allocating costs of extraordinary projects changed the cost per acre significantly; the costs per acre range increases to between \$10,000 and \$100,000 per acre. Increased costs

are most pronounced in two subareas – Triangle and Juniper Ridge – where estimated costs increase from just over \$50,000 per acre to over \$90,000 and \$100,000 per acre. R. at 3459.

The city must consider changing its rating system to properly account for the higher and broader range of costs estimated in Table B-1. As presented, the city’s rating system allows projects that have more or less typical impacts at just over \$50,000 per acre to receive the same rating as areas where costs are twice as high or higher. For example, as noted above, the transportation costs for the Triangle and Juniper Ridge subareas are more than double the roughly \$50,000 per acre average cost shown for most other subareas. A rating system that rates and scores areas that have dramatically different costs as essentially equal defeats the purpose of OAR 660-024-0060(8) to compare costs of serving different areas; and the underlying directive in Goal 14. Furthermore, assigning equal rating to more or less typical costs per acre as to costs twice as high or higher is not reasonable and does not provide an adequate factual basis for the decision.

Recommendation: No change is recommended. The commission should remand the city’s decision to properly consider costs of providing transportation facilities needed to serve the northern expansion area.

SUBISSUE 4. Must the city provide comparable estimates for providing needed roadway capacity for areas that because of topographic constraints, may need to be served by different types of roadway networks? For example, growth on the east side can apparently be served by a fairly complete grid of streets, while topographic barriers limit potential for a full street grid in this area.

Appellants: City of Bend.

Department Position and Analysis: The department, supported by several objectors, expressed concern 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. At issue for the department is whether additional improvements might be needed to provide adequately serve the Westside areas to compensate for the sparser grid of streets available in that area. Absent this information it is unclear whether the city’s analysis is a fair comparison of costs of serving the different areas.

The city’s appeal provides further explanation of its analysis of street improvements needed to serve different potential expansion areas. City Appeal at 76-77. The city indicates that during work sessions the planning commission was advised that West side 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 the lack of any 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 addresses and narrows the scope of the department's concern. It does appear that 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. While these factors were apparently presented to and discussed with the planning commission, they are not fully reflected in the city's adopted findings.

The key question that remains to be resolved is whether other improvements would be needed to meet transportation needs on the west side. The consequence of not providing a full grid on the west side is that expected traffic must be handled in some other way – i.e., through additional capacity on some other portion of the system. This might be done, for example, through additional travel lanes on the sparser grid of streets that can be provided or improvements to other streets. While the city's appeal points to information in the record that partially addresses this question, the results of its analysis are not fully reflected in its findings. In places, the record suggests there may be additional costs on the Westside that need to be accounted for, including the proposed Deschutes River crossing.

The record includes conflicting information about whether the proposed Deschutes River Crossing is needed to meet future transportation needs. The city's appeal asserts that the crossing is an anticipated need beyond the 20-year planning period. City Appeal at 79, R. at 2626. However, elsewhere in its appeal, the city points to portions of the record which indicate that three subareas it proposes to include within the UGB might be assigned responsibility for up to 90% of the cost of the proposed bridge crossing. Table B-1 includes as an extraordinary cost a "Deschutes River Bridge crossing" estimated to cost a total of \$20 million. Three subareas are estimated to be responsible for most (90 percent) of the cost of the bridge (\$18 million); Coats and the NW UGB area are estimated to be responsible for \$8 million each, while Miller-Day is listed as responsible for \$2 million. City Appeal at 77, R. at 3458.

Recommendation: The department recommends the commission uphold the Director's Decision on this subissue.

SUBISSUE 5. 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)?

Appellants: City of Bend; Bayard and Anderson.

Department's Position and Analysis: The Director's Decision directs the city to amend the plan to clarify the planning status of a proposed new bridge crossing of the Deschutes River. The city's plan includes conflicting provisions about the bridge which make it unclear whether it is a planned facility (i.e. needed to accommodate planned land uses in the 20 year planning period as a result of the UGB expansion, and authorized by the

city's plan) or whether the city is deferring planning decisions to a subsequent refinement planning process as allowed by OAR 660-012-0025(5). Director's Decision at 92-94.

The city does not appeal Director's Decision on this issue, but does indicate that if the Commission sustains the Director's Decision that "... the City will simply remove the Deschutes River Crossing from any maps." City Appeal at 79.

The city's decision to remove Deschutes River Crossing must be consistent with other elements of its adopted plan, including its UGB expansion decision. Currently, the record includes conflicting information about whether the crossing would be needed to meet 20-year needs. The city's appeal asserts that the crossing is an anticipated need beyond the 20-year planning period. City Appeal at 79, R. at 2626. However, elsewhere in its appeal, the city points to portions of the record which indicate that three subareas it proposes to include within the UGB might be assigned responsibility for up to 90 percent of the cost of the proposed bridge crossing. City Appeal at 77, R. at 3458. In the Goal 14 section of this report, the department concludes that the city must conduct further analysis of need for bridge to comply with OAR 660-024-0060(8). If the city concludes that the bridge crossing is needed to meet transportation needs associated within including those areas in the UGB, and if those areas are subsequently proposed for inclusion in the UGB, then the city would need to do further work to either include the bridge in its TSP or add provisions to the TSP which properly defer elements of the decision about the bridge to a refinement plan consistent with OAR 660-012-0025.

In the event the city determines that the bridge is unneeded, removal from maps would only partially address remand. The text of the plan, as well as the maps, would need to be revised to make it clear that the bridge is neither needed nor planned to meet transportation needs.

Recommendation: The department recommends the commission uphold the Director's Decision on this subissue.

SUBISSUE 6. Are city's findings sufficient to show that its transportation analysis for Goal 14 is consistent with city policies which restrict widening of Newport and Galveston Streets beyond three lanes?

Department's Position: The Director's Decision upheld objections from Central Oregon Landwatch which argue 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 and 89.

The city's appeal points to a traffic study included in the record which 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. Appeal at 75, R. at 2624-2626.

Revisions to the Director’s Decision and recommendation: The analysis included in the record and cited by the city shows that city’s action is not inconsistent with this plan policy. Consequently, the commission should overrule this objection and conclude that city has adequate findings in the record to show that its decision is consistent with its plan policies restricting widening of Newport and Galveston streets.

SUBISSUE 7. What must the City of Bend do to comply with the Transportation Planning Rule requirements for Metropolitan Planning Organization areas in conjunction with its UGB amendment?

Appellants: City of Bend, Hunnell United Neighbors.

Position Taken on Appeal: The city argues that although it is subject to this aspect of the Transportation Planning Rule, it is not required to complete this work prior to amendment of its UGB. City Appeal, at 80.

Department’s Position and Analysis: The Director’s Decision finds that the city is subject to the metropolitan transportation planning requirements in the TPR, that work addressing relevant requirements is overdue, and that the work must be complete prior to or contemporaneously with the city’s UGB amendment. Director’s Decision at 95-103. The city agrees that it is subject to the relevant requirements and that the city’s work is overdue and accepts the remand to complete this work. However, the city also contends that it is not obligated to complete this work as part of its UGB expansion work. The city argues that its work complies with OAR 660-024-0060(8) and “is not required to do more in connection with the UGB expansion.” City Appeal at 80.

The department disagrees with the city’s interpretation of the UGB rule. The implication of the city’s argument is that transportation planning associated with UGB expansion is either subject only to compliance with OAR 660-024-0060(8) or that the city may defer those other requirements to some subsequent planning process. The plain language of division 24 is contrary to the city’s position:

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* * *. OAR 660-024-0020(1) [emphasis added]

In addition, not only are the relevant TPR requirements applicable to the city’s UGB decision they are important to city’s decisions about how to address urban development

needs. As explained in the Director's Decision, reducing reliance on the automobile is most likely to be accomplished through changes to land use designations and densities that result in planning and zoning additional areas for compact, mixed use development, higher densities, increased infill and redevelopment and through designation of transit oriented developments and mixed use centers or neighborhoods. Director's Decision at 102. Consequently, as a practical matter, the city's decision about how to accommodate future urban growth should simultaneously consider how to build in transportation options and reduce reliance on the automobile To do otherwise – i.e. to address planning for reduced reliance *after* the UGB is expanded – would likely frustrate compliance with the TPR or require city to revisit its expansion decisions.

Recommendation: As provided in OAR 660-012-0016(2)(b), the department recommends that the commission direct the city to complete the following work in conjunction with its work to amend the UGB in order to comply with for completion of outstanding work necessary to comply with portions of the TPR specified below.

The City of Bend shall, in conjunction with adoption of a UGB amendment and by the dates specified below, complete the following tasks:

1. By September 1, 2010, the city shall prepare and present a report to the commission which estimates the status of the city's adopted plans in reducing vehicle miles per travelled (VMT). The report must include:

- An estimate of VMT per capita in the baseline year (2000 or 2003)
- An estimate of expected VMT per capita for the planning period (i.e. 2030) for the current adopted UGB area
- An estimating expected VMT per capita for the planning period (i.e. 2030) for an expanded UGB which reflects the city's most current UGB expansion proposal

The purpose of this report is to identify the extent of additional planning the city will need to undertake to comply with requirements in OAR 660-012-0035(4)-(7) (Requirements vary depending on whether the city's adopted plans are likely to result in an increase in VMT per capita, a reduction of zero to five percent per capita, or a reduction of five percent or more per capita.)

2. The city shall as part of its work on Goal 14 efficiency measures, evaluate land use changes to increase availability and convenience of alternative modes or reduce reliance on the automobile as necessary to comply with OAR 660-012-0035(5)(c). This must include:

- Preparing an estimate of VMT per capita in individual transportation analysis zones (TAZs) and proposed UGB expansion areas in 2030 based on the adopted TSP;
- Consider increasing future housing and employment densities beyond the current two efficiency measures through:

- strengthening minimum density requirements in the city’s development code;
- planning for and providing incentives for additional development in the central city area, along transit corridors and/or in neighborhood centers, and in areas where there is a substantial concentration of vacant and/or redevelopable lands;

3. By September 1, 2010, the city shall prepare and submit to the commission a draft work plan for completing outstanding work necessary to complete outstanding metropolitan transportation planning requirements as outlined in (a)-(c) below. If the report presented by the city in item #1 indicates that VMT per capita will increase over the planning period under the city’s adopted plan or the city’s most current UGB expansion proposal, the city’s work plan shall provide for completion of the TPR work plan prior to or in conjunction with adoption of a UGB expansion.

(a) Development and evaluation of potential standards for measuring increased transportation options and reduced reliance on the automobile to comply with OAR 660-012-0035(4)-(7). This should include:

- i. Review and document existing and planned actions and programs to increase transportation options and reduce reliance on the automobile
- ii. Identify barriers and opportunities to significantly expanding availability and convenience of alternative modes (walking, cycling, transit) and to reducing reliance on the automobile (shorter trips, ridesharing)
- iii. Considering measures of reduced reliance as provided for in the TPR
- iv. Conducting public review of items a-c.

(b) Preparation of amendments to TSP to compete a transit plan and a parking plan consistent with OAR 660-012-0020(2)(c) and (2)(g), and OAR 660-012-0045(4) and (5). The transit plan must identify planned transit trunk routes and major transit stops. The parking plan must either accomplish a 10 percent reduction in parking spaces per capita as provided in OAR 660-012-0045(5)(c) or include plan and code changes that carry out the parking management measures specified in OAR 660-012-0045(5)(d).

(c) Formulate and submit to LCDC for approval proposed standard and interim benchmarks, and supporting rationale to meet requirements of OAR 660-012-0035(5)-(7). This must include preparation of a proposed amendment to the TSP that sets forth a proposed standard and interim benchmarks and the supporting findings for adoption by the city and for approval by LCDC.

SUBISSUE 8. May the City of Bend rely on its partially acknowledged transportation systems plan (TSP)?

Appellants: Swalley Irrigation District.

Position Taken on Appeal: Swalley argues that there is no information in the record that the city’s TSP is acknowledged or partially acknowledged. Swalley Appeal at 8-9. As a result, Swalley argues that the city may not rely on its TSP in its UGB decision.

Department's Position and Analysis: The Director's Decision found that the city's TSP has been partially approved and that, notwithstanding the remaining work, the city may rely on the TSP in its UGB decision. Directors Decision at 90. The department continues to believe that, with the exceptions stated above, there are no unacknowledged portions of the city's TSP relevant to the city's UGB decision. Swalley does not identify any particular respects in which any unacknowledged portion of the city's TSP is relevant to the UGB decision. The department does recommend that the commission take official notice of the 2001 report on the city's TSP. A copy of that report is attached as Exhibit 2.

Recommendation: The department recommends that the commission deny the appeal on this subissue for the reasons stated above.

I. UGB Location

The city's appeal identifies three main areas of disagreement between the city and the department. City Appeal at 81-84. The department's report on the appeals is organized to respond to the city's main appeal issues first, followed by other issues raised by the city and other appellants. The three main issues raised by the city are:

1. How may suitability be considered in determining the location of the city's UGB expansion. Are city-defined suitability criteria on an "equal footing" with the statutory priorities for the order in which different types of lands may be considered for inclusion in an urban growth boundary? How do the Court of Appeals decisions in *West Linn* and *Adair Village* affect this issue?
2. How does the exception to the normal statutory priority of lands for "specific identified land needs" under ORS 197.298(3)(a) apply in this case?
3. How does the exception to the normal statutory priority of lands, where lower priority lands are required in order to include or provide services to higher priority lands under ORS 197.298(3)(c) apply in this case?

SUBISSUE 1. How may suitability be considered in determining the location of the city's UGB expansion. Are city-defined suitability criteria on an "equal footing" with the statutory priorities for the order in which different types of lands may be considered for inclusion in an urban growth boundary? How do the Court of Appeals decisions in *West Linn* and *Adair Village* affect this issue?

Appellants: City of Bend.

Positions Taken In Appeals: The city argues that it was authorized to use its threshold suitability criteria to exclude certain category 2 (exception/UAR lands) from consideration for its UGB expansion.

Department's Position and Analysis: As previously explained in the Directors Decision, many of the city's "general suitability criteria" cannot be used to exclude land for general residential, employment and other urban land needs, except to the extent they are consistent with the commission's general suitability rules for buildable lands in

divisions 8 and 9. The city's use of threshold suitability criteria for lands intended for general urban uses would have the effect of excluding lands from the UGB expansion area that would be "buildable" if they were located within the UGB.

ORS 197.298(3)(a), Goal 14, and the commission's division 24 rules allow local government's to develop specific suitability criteria as a threshold test for inclusion within a UGB, but *only* where they are being used in conjunction with a city's proposal to add land to a UGB for a "specific identified land need," such as a need for land for a specific type of urban land use that requires particular site or locational characteristics. For example, the city identified a specific identified need for a 200+ acre site for a new university campus in its EOA. Once it demonstrated a need for that use, the city was authorized to limit its locational analysis to sites that could serve that use (e.g., sites containing at least 200 acres of land).

The city would have its own suitability criteria for general residential, employment and other urban land needs serve on an "equal footing" with the statutory priorities for what lands must be included in an urban growth boundary first. That approach is *not* required by either of the Court of Appeals decisions cited in the city's appeal, and (taken to an extreme) would eviscerate the statutory priorities in that a local government could simply create "suitability" criteria for residential and employment uses that require expansion onto flat farmland.

In contrast, the commission's division 8 criteria for "buildable lands"¹⁹ and division 9 criteria for "suitable vacant and developed land"²⁰ are designed to exclude only those lands that will not yield any significant residential or employment uses (such as slopes over 25 percent and publicly owned lands).

The city argues that "[t]he interrelationship between ORS 197.298, Goal 14 and OAR 660-024-0060 allows consideration of the Goal 14 factors in determining whether land is suitable and adequate." In making this argument, the city incorrectly interprets case law and the relevant goal, statute, and LCDC rules. The *Hildenbrand* decision stated that "adequacy" of land *in the ORS 197.298(3) priority exceptions* covers both amount and suitability. *Hildenbrand v. City of Adair Village*, 217 Or App 823 (2008). This decision did *not* put the ORS 197.298(1) priorities of lands on an "equal footing" with a local government's consideration of suitability except to the extent that there is a surplus of land in the priority of land classification being considered. Thus, for example, if there is more buildable exception land available for inclusion in an urban growth boundary

¹⁹ OAR 660-024-0010(1) defines "buildable land" for UGB amendment purposes. That rule provides that: "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. (Emphasis added)

²⁰ OAR 660-024-0010(8) defines "suitable and developed land" for UGB amendment purposes.

than is needed for general residential land needs, the local governments must apply the Goal 14 locational factors in determining which exception lands to include. Those factors may include consideration of a variety of features of the lands being reviewed, including what lands would provide the most efficiency for future urbanization.

In Bend's case, its threshold tests for "suitability" are not tied to "specific identified land needs" identified under ORS 197.298(3)(a). Similarly, they are not tied to a showing that "future urban services cannot reasonably be provided" to the exception or UAR lands under ORS 197.298(3)(b). In *Hildenbrand*, the City of Adair Village documented that certain exception parcels could not reasonably be served under ORS 197.298(3)(b), and LUBA agreed the city met its burden of proof, allowing Adair Village to remove those lands from consideration. But the bar under ORS 197.298(3)(b) is a high one. A showing that the lands are more difficult to serve, or less efficient in terms of the amount of residential or employment uses that they will support is not sufficient to exclude them. In *Hildenbrand*, the city was authorized to exclude the lands based on a showing that extending services to the lands was "cost-prohibitive" due to the need to bore sewer and water lines under state highway 99W. *Id.*, at 634-635.

The city *may* be able to make findings under ORS 197.298(3)(b) that future urban services cannot reasonably be provided to some of the rural subdivisions that it has excluded from the expansion area. In particular, the city's appeal (with some support in its findings) indicate that it cannot reasonably provide sewer to the subdivision area south of Buck Canyon during the planning period. However, it does not appear that the city's findings clearly applied and relied on ORS 197.298(3)(b) in excluding this area from consideration.

Recommendations: The department asks that the commission make its interpretation of the interplay of "suitability" and the statutory priorities clear. While the department believes that the commission's rule at OAR 660-024-0060 is clear when read in context, the wording of the rule could be clearer and specific direction on this point is desirable not only for the City of Bend but also for other jurisdictions considering UGB expansions. The department believes that its application of ORS 197.298, Goal 14 and the commission's division 24, 8 and 9 rules harmonizes all of their provisions and is consistent with the history of the commission's rule and goal amendments.

SUBISSUE 2. How does the exception to the normal statutory priority of lands for "specific identified land needs" under ORS 197.298(3)(a) apply in this case?

Appellants: City of Bend.

Positions Taken In Appeals: The Director's Decision found that the city had adequately justified application of ORS 197.298(3)(a) to include land for three types of specific identified land need: (a) for a new university site; (b) for a new medical campus; and (c) for two new large industrial sites of approximately 50 acres each. The city argues that its findings that sites for these uses cannot reasonably be accommodated within its existing UGB are adequate.

Department's Position and Analysis: The department agrees with the city that it has justified three specific identified needs for future urban lands as described above. The department notes, however, that the Director's Decision did not approve the 357-acre general employment site located on the eastern edge of the UGB expansion area (although one of the 50-acre industrial sites appears to be a part of this larger area). It appears that most of the uses planned for the larger 357-acre site are commercial uses planned along Highway 20.

The city's findings identify certain locational characteristics that are required for each of these three employment land needs. The department agrees with the city that its findings are adequate under ORS 197.298(3)(a) to justify locating the university site and one of the large-site industrial sites on resource lands rather than exception lands. However, the department continues to believe that the city's findings that it cannot reasonably accommodate these uses on lands within the prior UGB are conclusory, and require a clear statement that explains the locational needs of each of the uses, and verifies that no sites with such characteristics are within the prior UGB.

Recommendations: The department recommends that the commission affirm the Director's Decision on this subissue, along with the city's determination that there is an ORS 197.298(3)(a) specific need for these uses.

SUBISSUE 3. How does the exception to the normal statutory priority of lands, where lower priority lands are required in order to include or provide services to higher priority lands under ORS 197.298(3)(c) apply in this case?

Appellants: City of Bend, Swalley Irrigation District.

Positions Taken In Appeals: ORS 197.298(3)(c) authorizes a local government to include resource lands within its UGB even if higher priority (exception) lands are available, where "[m]aximum 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 * * *." The city's appeal focuses on why including agricultural lands on the northeastern and eastern edges of the prior UGB is required in order to efficiently serve interspersed exception lands.

Department's Position and Analysis: In general, the department agrees with the city that the particular pattern of exception and resource lands, together with the current and planned transportation, sewer and water facilities in this area justify application of ORS 197.298(3)(c). The city's specific findings on this issue, however, are dependent on its public facilities plan amendments – particularly the wastewater collection master plan which has the proposed southeast interceptor running north-south along Hamby Road. Given the issues relating to the master plan, and to the overall amount of land need, the director was not able to reach a final conclusion on this issue, and that remains the department's position: *if* the city continues to need significant additional lands on the east side of the city, and *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 exception areas that are interspersed. The department suggests, however, that it may not be necessary to extend onto resource lands to the extent that the city has in this decision.

In addition, the department notes that under Goal 11 and the Goal 11 rules, the city (legally) could locate its sewer interceptor on resource lands without including them in the expansion area. The city would have to adopt measures prohibiting service to lands outside of the UGB, and it appears that the city is relying on future revenue from development on these lands in order to make its planned wastewater project financially feasible. If that is the case, the city's findings should just say so.

Recommendations: 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 resource lands on the eastern and northeastern sides of the prior UGB in its expansion area. However, before a final determination is made, the commission should ensure that the city is working with the correct total land supply required in the UGB expansion, along with wastewater facility planning that reflects that quantity of land being served within the 20-year planning period.

SUBISSUE 4. Are the county's Urban Area Reserve lands exception lands or resource lands under ORS 197.298(2)? Has the director correctly applied ORS 197.298(2)?

Appellants: City of Bend, Swalley Irrigation District, Central Oregon LandWatch, Bayard, Anderson.

Positions Taken In Appeals: Swalley argued in its objections, and continues to argue on appeal, that the UAR lands 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.

Department's Position and Analysis: As explained in the Director's Decision:

The ORS 197.298(2) requirement to rank parcels by soil capability applies only to designated resource lands under ORS 197.298(1)(d). The types of land specified in ORS 197.298(1)(a)–(c) being considered for addition to a UGB (*i.e.*, urban reserves, exception areas, non-resource lands, and marginal lands) are not ranked by soil capability, and soil capability is not a criterion or factor to determine whether those parcels are added to the UGB.

LUBA has agreed that the ORS 197.298(2) priority ranking scheme is applicable only to resource lands. In its decision remanding expansion of the Myrtle Creek

UGB, LUBA stated: “ORS 197.298(2) and Goal 14, factor 6²¹ establish a second priority system for including agricultural lands.”²²

The relationship between the elements of ORS 197.298(1)–(3) is essentially the same as the relationship between the elements of OAR 660-021-0030(3) and (4), and LUBA’s and the Court of Appeals’ interpretation of the latter should guide the interpretation of the former.”²³ The statutory exceptions to the priorities to add land to a *UGB* in ORS 197.298(3), enacted in 1995, were based on the statutory exceptions to the priorities to add land to *urban reserves* in OAR 660-021-0030(4), which LCDC had previously adopted in 1992. Therefore, appellate interpretations of the OAR 660-021-0030(4) priority exceptions²⁴ apply to Bend’s use of the ORS 197.298(3)(a) and (c) priority exceptions in this UGB amendment, including assigning the same meaning to the second sentence of OAR 660-021-0030(3)(c) and ORS 197.298(2). In 2000, the commission amended OAR 660-021-0030 to move the text that was a separate sub-rule, OAR 660-021-0030(3)(d), into 660-021-0030(4), apparently for consistency with ORS 197.298. In 1995, the rule text originally adopted as OAR 660-021-0030(3)(d) was codified in its own statutory subsection, ORS 197.298(2), instead of being included within ORS 197.298(1)(d).

The language of ORS 197.298(2) and the second sentence of OAR 660-021-0030(3)(c) indicates that their use is limited to resource lands by referring to the resource capability as “appropriate for the current use.” This could not apply to exception land or non-resource land (ORS 197.298(1)(b) and OAR 660-021-0030(3)(a) because once an exception has been taken to land outside a UGB, it is no longer farm or forest land.

Director’s Decision at 131-132.

The Director’s Decision also determined that:

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

²¹ Before LCDC amended Goal 14 in 2005, the goal contained seven factors. Factor 6 was: “Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority.” The 2005 amendments separated the factors into two groups: need criteria and location factors. At the same time, location factor 6 was deleted because LCDC considered a reference to ORS 197.298 in the new preface to the location factors an adequate representation of state policy to retain agricultural land. [See April 14, 2005 staff report to LCDC, attached as Exhibit B]

²² *DLCD vs. Douglas County*, 36 Or LUBA 26, 36-37 (1999). LUBA also stated: “Like ORS 197.298(2), Goal 14, factor 6 requires that when agricultural lands are added to the UGB higher priority must be given to land of lower agricultural capability.” *DLCD vs. Douglas County*, 36 Or LUBA at 37, fn 14.

²³ *Residents of Rosemont*, 38 Or LUBA at 249.

²⁴ See, e.g., *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

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 195.145.78 UAR lands in Deschutes County are exception lands. [R. at 7268; Excerpts from the July 7, 1981 LCDC Compliance Acknowledgment Order for the Bend comprehensive plan are attached as Exhibit A] Director's Decision, at 131

On appeal [Swalley Appeal at 12-15], Swalley confuses 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 1981.²⁵ The city's proposed UGB included the UAR lands, and the city and county co-adopted the ordinances as referenced in Exhibit A. 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 department asks the commission to take official notice of the exhibits to the Director's Decision, including Exhibit A. 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.

Recommendation: The department recommends that the commission deny the appeals on this subissue for the reasons stated above and in the Director's Decision.

SUBISSUE 5. May a city exclude land from its UGB because the cost of developing it would be a barrier to affordable housing? If yes, on what legal basis?

Appellant: Central Oregon LandWatch

Position Taken in Appeal: The barrier of high land cost to affordable housing may justify rejecting otherwise suitable exception land in favor of resource lands under ORS 197.298(3)(a). The record must provide adequate evidence to justify this exception to the statutory priorities. In this case, the city is justified in excluding high cost exception land west of the Bend UGB as a barrier to affordable housing under ORS 197.298(3)(a). Central Oregon LandWatch Appeal at 5

²⁵ The commission also acknowledged the county's comprehensive plan as complying with the statewide planning goals on May 11, 1981. That decision was subsequently reversed with respect to Goal 5 by the Oregon Court of Appeals in 1984 (*Coats v. LCDC*, 67 Or App 504), which had the effect that the county's plan was not acknowledged until 1986, when the commission acknowledged the county's plan and land use regulations except for areas zoned surface mining and surface mining reserve outside of the county's urban growth boundaries, and except for mineral and aggregate resources under Goal 5 (Order 86-ACK-004 and Order 86-CONT-003).

Department’s Position and Analysis: 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.” This applies when there is an inadequate *amount of suitable* land in the higher category. Suitability is determined by specific physical site need characteristics, if any, that were determined for the particular use during the earlier housing and residential lands needs analyses. Cost of land is not a physical site need characteristic. Therefore, it may not be used to justify an exception to the statutory land priorities under ORS 197.298(3).

Recommendation: The department recommends that the commission deny this appeal.

SUBISSUE 6. May the city exclude lands from its UGB expansion area if they are a lot or parcel of less than three acres that contains a house?

Appellants: City of Bend, Central Oregon LandWatch, Hillary Garrett, Bayard, Anderson.

Positions Taken In Appeals: The city argues that its findings for use of this suitability criterion are adequate. City Appeal at 93. COLW asks that the commission clarify that the city does not have an adequate factual base for its use of this suitability criterion. COLW Appeal at 8. Hillary Garrett argues that the Director’s Decision was wrong to reject this as a suitability criterion.

Department’s Position and Analysis: The department addressed the city’s use of threshold suitability criteria generally, above, under subissue 1 for UGB location.

Table 3 on pp. 118-122 of the Director’s Decision is the department’s analysis of the “Threshold Suitability Criteria” that the city used as its first step in its boundary location analysis. The Director upheld objections that:

- “The amendment does not justify excluding parcels that have a house and are smaller than three acres,” and
- “Suitability criteria, including exclusion of parcels smaller than three acres with a dwelling, are not consistent with State law.”

The city, more generally, “* * * takes the position that the interrelationship between ORS 197.298, Goal 14 and OAR 660-024-0060 allows consideration of the Goal 14 factors in determining whether land is suitable and adequate.” City Appeal at 88. The department agrees with that general proposition, but disagrees that a local government may use such a factor (in this case, the three acre threshold) as a screen, such that lands are disqualified if they do not meet the criterion. The Goal 14 locational factors are just that, factors to be weighed and balanced, not criteria (unless they stem from application of ORS 197.298(3)(a)(specific identified land need).

As noted in the section of the Director's Report addressing housing need, the city has not analyzed the actual level of redevelopment that has occurred on such lands, making it impossible to reach definitive conclusions about the amount of redevelopment that is likely to occur, as those terms are used in OAR 660-008-0005(2) and 660-024-0010(1) and OAR 660-024-0060(1)(e) and (5). The city appears to have excluded a substantial amount of exception lands based on this criterion.

Recommendations: The COLW appeal focuses on the adequacy of the factual base for the city's three-acre with a home screen rather than the legal issue of whether such a screen may be used for general residential and employment land needs at all. The department agrees that the city's findings do not identify facts in the record showing that such parcels are not "buildable" (residential) or "suitable and available" (employment). The department, therefore, recommends that the commission uphold the COLW appeal on this issue and deny the Garrett and City of Bend appeals.

SUBISSUE 7. Do the other suitability criteria used by the city have an adequate factual base (if they may be used as threshold criteria to exclude exception lands)?

Appellants: City of Bend.

Positions Taken In Appeals: The Director's Decision determined that there was not an adequate factual base for a number of the city's suitability criteria, even if they legally may be used to exclude exception lands from consideration. The city disagrees, and its appeal sets forth its argument for each of the criteria. City Appeal at 91-93.

Department's Position and Analysis: As noted by the city, there are some criteria that the city and the department agree on. Three other particular criteria that the department and the city do *not* agree on, and that the department believes are not supported by an adequate factual basis are:

- The land has been permitted as a destination resort by Deschutes County;
- The land has CC&Rs that limit future development;
- The land has improvements that exceed \$20,000 in value;

The first criterion is used to exclude the Tetherow resort from consideration for inclusion in the expansion area. The Tetherow resort is largely undeveloped, and could provide lands to meet the city's needs for residential development, or for second-home development.

The second criterion is explained in the city's findings. R. at 1173-1174. The city excluded 18 rural subdivisions on the basis of their CC&Rs (although some of them appear to be included although they were found to be unsuitable). If the city's findings are examined closely, however, they provide that further land divisions are prohibited in only four of those 18 subdivisions. The other subdivisions may have some limits on how much additional development can occur as a result of their CC&Rs, but further development is not prohibited.

In other Central Oregon communities the department has not allowed lands to be excluded from urbanization on the basis of CC&Rs. Doing so conflicts with the ORS 197.298(1) priorities and the general direction of the state land use program to direct that rural exception lands be urbanized first, before resource lands. This is not only a matter of resource land protection. The strong mandate for inclusion of rural residential lands also was designed to provide long-term efficiency in terms of public facilities and services, and to reduce environmental effects of growth. These subdivisions are served by on-site septic systems, and the department strongly urges the commission to direct the city to include them within the UGB expansion area so that long-term service issues may be appropriately addressed.

Finally, the city also excluded lands with improvements exceeding \$20,000. There may be some evidence in the record for such a criterion, but the city has not adopted findings that relate it to why urban services can't be provided to the lands or any other basis for not following the statutory priorities under ORS 197.298(1).

Recommendations: The department recommends that the commission specifically direct the city on remand that it may not utilize these three criteria unless they are tied directly to a showing (with an adequate factual base) that it is not reasonable to provide urban services to the lands, or the lands are not “buildable” as that term is defined in OAR 660-008-0005 or “suitable and available” as that term is defined in OAR 660-009-0010 (if the lands are planned for future industrial use).

SUBISSUE 8. Must the city and county apply Deschutes County Code section 23.48.030 as standards for this UGB expansion decision?

Appellants: Swalley Irrigation District.

Positions Taken In Appeals: Swalley argues that the county's comprehensive plan provisions on urbanization are standards that are supplemental to state statutes, goals and rules that must be met for the UGB expansion. DCC section 23.48.030²⁶ consists of the former seven UGB factors under Goal 14 before it was amended in 2004. Swalley argues that the county's comprehensive plan provisions are more restrictive local requirements that are supplemental to requirements of state law.

²⁶ b. Urban growth boundaries shall be established or expanded based upon the following:

1. Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;
2. Need for housing, employment opportunities and livability;
3. Orderly and economic provision for public facilities and services;
4. Maximum efficiency of land uses within and on the fringe of the existing urban area;
5. Environmental, energy, economic and social consequences;
6. Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,
7. Compatibility of the proposed urban uses with nearby agricultural activities.

Department's Position and Analysis: Respectfully, the department 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.

Recommendations: The department recommends that the commission deny the appeal on this subissue for the reasons stated above.

SUBISSUE 9. Should the commission specifically remand the city and county decisions with respect to inclusion of the exception areas in the northwest?

Appellants: Swalley Irrigation District.

Positions Taken In Appeals: Swalley argues that the director should have specifically determined that there was an inadequate factual base for inclusion of the northwest area in the UGB expansion. Swalley Appeal at 11-12.

Department's Position and Analysis: The Director's Decision remanded the city and county decisions with regard to the UGB expansion on multiple bases. The director did not remand those decisions with respect to specific areas because such a decision would be premature until the city has completed the required analyses determining the *amount* of land that is needed in a UGB expansion. Only then can the city apply the locational requirements of ORS 197.298, Goal 14, and the Goal 14 rules (along with other relevant laws) to determine which lands to include.

Recommendations: The department recommends that the commission deny the appeal on this subissue for the reasons stated above.

SUBISSUE 10. Was exclusion of the Buck Canyon exception area from the City of Bend's UGB consistent with the ORS 197.298 priorities for adding land to a UGB?

Appellants: Terry Anderson

Position Taken in Appeal: The city should have included appellant's property in the Buck Canyon exception area southwest of the prior UGB before it included any resource lands. Failure to do so violated ORS 197.298. Anderson Appeal at 1-2.

Department Position and Analysis: The director determined in his decision that the city's boundary location analysis did not comply with the ORS 197.298 priorities for adding land to a UGB. Director's Decision at 136. He sustained Mr. Anderson's objection, which was the same as his current appeal issue, to include the Buck Canyon

exception area “if needed.” Director’s Decision at 124. The director remanded the UGB amendment for further work on both the need and boundary location tasks of the UGB analysis. Until the city does this work on remand, the department cannot determine how much, if any, of the Buck Canyon area exception land is needed to ensure a 20-year supply of residential land in the Bend UGB, which parcels in the Buck Canyon area, if any, should be added, and whether any of those parcels include some or all of Mr. Anderson’s property. In addition, the city *may* be able, on remand, to demonstrate that inclusion of this area in the UGB expansion area is not required, based on one or more of the statutory exceptions in ORS 197.298(3). Any determination on this issue before the city has the opportunity to consider it on remand would be premature.

Recommendation: The department recommends that the commission remand the city’s UGB amendment with instructions to revise its housing needs analysis, residential land needs analysis, and urban growth boundary location analysis according to the instructions set out in the Directors’ Decision.

J. Other Issues

SUBISSUE 1. Is the validity of objections to the city’s decision relevant to the commission’s decision on appeals of the Director’s Decision?

Appellants: City of Bend.

Positions Taken In Appeals: The City of Bend argues that the Director’s Decision should have found that a number of objections were invalid.

Department’s Position and Analysis: The department believes that under the commission’s rules governing appeals of a Director’s Decision remanding a work task in periodic review, the validity of objections is irrelevant.²⁷ For appeals of a director’s remand or partial remand, the local government(s) and any person who participated orally or in writing at the local level may appeal. OAR 660-025-0150(4)(b) and (4)(d).

Recommendations: As the validity of an objection is not a prerequisite to an appeal, the department recommends that the commission not address any appeal directed at the validity of objections to the extent that they seek to have a party to the appeal dismissed. (the appeal may be relevant to some substantive issue raised on appeal).

SUBISSUE 2. Did the city and county apply appropriate comprehensive plan and zoning designations to the UGB expansion area?

Appellants: City of Bend.

²⁷ The validity of objections is relevant if the appeal is of a director’s *approval* or *partial approval* of a work task. OAR 660-025-0150(4)(a).

Positions Taken In Appeals: The city states that it and the county applied appropriate comprehensive plan and interim zoning designations to the UGB expansion area. City Appeal at 94.

Department's Position and Analysis: The commission's rules allow (and require, until urban services are available) local governments to defer urbanization of lands included within a UGB expansion area. In this circumstance, the local government(s) apply an urban comprehensive plan designation and either the existing rural zoning or a new interim zoning designation that maintains the capacity of the area to urbanize efficiently. OAR 660-024-0050(6).

It is not clear from the county's comprehensive plan map (Exhibit B to the county's decision) what comprehensive plan map designation the county has applied to the UGB expansion area (its comprehensive plan map simply identifies the expansion area as "proposed urban growth boundary"). The *city* has adopted a Framework Plan map for the expansion area that shows what appear to be future urban comprehensive plan designations, but the status and effect of the Framework Plan is not clear (the plan also includes rough land allocations for some, but not all, of the expansion area where future master plans are required). City of Bend, Exhibit K.

As noted in the Director's Decision, at 57, the interim *zoning* applied to the UGB expansion area (UH-10 and UH 2½), allows cluster subdivisions and other forms of development that does not "[maintain] the land's potential for planned urban development," because it would allow both more development than was formerly allowed by the county (particularly on lands formerly planned for agricultural uses), and because the cluster development provisions could interfere with future urbanization of the expansion area (as seen in other rural subdivisions with large lots and private open space protected by CC&Rs). As a result, the department believes the county and city's plan and zoning designations do not comply with OAR 660-024-0050(6).

For the same reasons, the interim zoning also does not comply with OAR 660-024-0020(1)(d), which allows deferral of OAR 660-012-0060 in conjunction with a UGB amendment only if the interim zoning "*** does not allow development that would generate more vehicle trips than development allowed by the zoning assigned prior to inclusion in the boundary."

In addition, for those areas where the city has relied on ORS 197.298(3)(a) for a specific land need, the commission's rules require that the city and county adopt plan and zoning provisions that assure that the lands so identified will, in fact, be used for these uses. OAR 660-024-0050(6). The city's Framework Plan appears to comply with this requirement, but as noted above the effect of that plan is not clear.

Recommendations: The department recommends that the commission remand the county and city decisions for clarification consistent with the analysis presented above, and for revisions of the interim zoning applied to the expansion areas to conform to the provisions of OAR 660-024-0020(1)(d) and OAR 660-024-0050(6).

SUBISSUE 3. Did the city fail to comply with ORS 197.610 by failing to provide adequate notice of the proposed amendments to its General Plan? Did the city meet its Goal 2 coordination obligations with regard to Swalley Irrigation District? Did the city violate Goal 1 in how it considered and provided for public participation regarding its public facility plans?

Appellants: City of Bend; Swalley Irrigation District, Bayard, Anderson, Hunnell United Neighbors.

Position Taken in Appeal: The city argues that its June 11, 2007 and October 8 and October 20, 2008 notices complied with ORS 197.610. City Appeal at 100. Swalley asks for clarification on whether the Director’s Decision remanded the city’s decision on this issue, and (more generally with regard to coordination) argues that the Director’s Decision errs in determining that the city adequately coordinated with Swalley Irrigation District. The appeal states that “there is a difference between showing up at a meeting and cooperatively exchanging information and accommodating Swalley’s concerns as much as possible as Goal 2 requires. The later is the essence of the coordination obligation and the later is what has been neglected in this process.” Swalley Appeal, at p. 17-21. The appeal provides a narrative of events where it maintains that the city failed to adequately coordinate with the district. Swalley also argues that the city’s process for consideration of the public facility plans violated Goal 1. Swalley Appeal at 3.

Department’s Position and Analysis: The Director’s Decision determined that the city did not comply with ORS 197.610 in providing 45-day notice of its amendments to its General Plan and its public facility plans, and the department continues to believe that the city’s notice was inadequate, and will require re-noticing the city’s decisions on remand.

More generally with regard to coordination under Goal 2, assuring that there is adequate coordination is an important issue for both the city and the district. The director has defined the Goal 2 standard in his description of the legal standard for “coordination”. Director’s Decision at 151-152. The director found that the city had met legal requirements and complied with the coordination elements of Goal 2. Director’s Decision at 152.

With regard to Goal 1, the department’s position is set forth in the Director’s Decision, and has not changed.

Recommendation: The department recommends that the commission deny the appeals on these subissues, and remand the city’s decision for it to reissue notice in compliance with ORS 197.610 and the commission’s rules for post-acknowledgement plan amendments.

SUBISSUE 4. Did the city place information in the record after the public hearing was closed and, if so, does this require remand?

Appellants: Central Oregon LandWatch.

Positions Taken In Appeals: COLW argues that it is a “basic requirement of Oregon law that the public is entitled to comment on the materials and basis for legislative amendments such as this UGB expansion.” COLW Appeal at 7.

Department’s Position and Analysis: COLW does not identify the source of the “basic requirement” it describes and the department has not identified a legal flaw in the city’s process with the exception of the notice issue described previously.

Recommendations: The department recommends that the commission deny this appeal on this subissue.

SUBISSUE 5. Should the commission more clearly define the scope of the remand?

Appellants: Central Oregon LandWatch.

Positions Taken In Appeals: COLW suggests that the remand expressly state that the city’s action on remand must address certain items where the director sustained particular objections. COLW Appeal at 7.

Department’s Position and Analysis: The department does not object to COLW’s suggestion. Where the commission upholds a particular appeal, the decision on remand should specify what actions the city must take.

Recommendations: The department recommends that if the commission remands the city’s decision, its remand order list any specific actions the commission is directing the city to take.