

## **J. Natural Resources and Hazards**

The department submitted comments and received objections related to compliance with Statewide Planning Goal 5 and received one objection related to Statewide Planning Goal 7. These goals relate to natural resource areas and natural hazards.

### **1. Did the city and county comply with Goal 5 and its implementing rules in amending the city's UGB?**

The department received a variety of objections that the city failed to comply with Goal 5 by not adequately applying Goal 5 to the UGB expansion area, and by identifying land within the proposed expansion area as protected land without adequate justification for the designation.

#### **a. Legal Standard**

Statewide Planning Goal 5 and OAR 660, division 23 address protection of significant natural, scenic and historic resources and open space. Rules in OAR 660, division 23 specify which resource categories must be protected by comprehensive plans and which are subject to local discretion and circumstances; the rules provide guidance on how to complete inventories and protection programs, and when the rule requirements apply. OAR 660, division 23 requires cities to inventory significant riparian areas, wetlands and wildlife habitat.

For some Goal 5 resources the rule allows cities to rely on inventories compiled by other agencies, and for other resources the local government must complete their own inventory of the resource. For all inventoried significant Goal 5 resources, a local government must complete a process to develop and implement appropriate protection measures. If a local program to protect a Goal 5 resource includes development restrictions, the loss of buildable land that results from these restrictions must be accounted for when determining the amount of land need.

OAR 660, divisions 23 and 24 both specify that a UGB expansion triggers applicability of Goal 5. [OAR 660-023-0250(3)(c) and OAR 660-024-0020(1)(c)] At a minimum, a local jurisdiction expanding its UGB must complete the following for the expansion area when factual information is submitted that a Goal 5 resource or the impact area of a Goal 5 resource is included in the UGB expansion area:

- Conduct an inventory of Goal 5 resources that are required to be inventoried and for which the rule does not rely on state or federal inventories. These are riparian corridors, wetlands, and wildlife habitat
- Adopt the local state and federal inventories as described in the rule for resources that require inventories. These are: federal Wild and Scenic Rivers, Oregon Scenic Waterways, state-designated critical groundwater areas and restrictively classified areas, approved Oregon Parks and Recreation Commission recreation trails, Oregon

State Register of Natural Heritage Resources sites, federally designated wilderness areas, and certain specific energy sources.

- Develop a local protection programs for all significant Goal 5 resources that are identified in an inventory, as required by the rule specific to the resource category.

Local jurisdictions have the option of conducting inventories and developing protection programs for historic resources, open space, and scenic views and sites. When using this option at the time of a UGB expansion, the Goal 5 process for these resources must be complete before land can be designated unbuildable or limitations on building can be considered in sizing the expansion area. [OAR 660-023-0070] The Goal 5 process is complete for these resources when:

- Existing and available information about Goal 5 resource sites is collected [OAR 660-23-0030(2)]
- Information on the location, quantity, and quality of the resource is determined to be adequate [OAR 660-23-0030(3)]
- The significance of resource sites is determined [OAR 660-23-003(4)]
- A list of significant resources is adopted of as part of the comprehensive plan [OAR 660-23-0030(5)]
- An analysis is completed of the economic, social, environmental and energy (ESEE) consequences that could result from a decision to allow, limit, or prohibit a conflicting use [OAR 660-23-0040]
- A program to achieve Goal 5 is developed and adopted based on the conclusions of the ESEE analysis [OAR 660-23-0050]

### **b. Summary of Local Actions**

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

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

The findings identify two significant riparian corridors within the proposed expansion area and explain that they are protected through the county’s plan and code. The findings also state that “approximately 22 additional [riparian] acres are located in the proposed UGB expansion area outside of the Deschutes River and Tumalo Creek.” [R. at 1216]

The findings also consider the possibility that additional Goal 5 resources will be identified through future planning efforts. The record states that existing city code implementing its Waterway Overlay Zone and its areas of special interest will apply to newly identified Goal 5 resources. [R. at 1216]

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

The findings do not include information about the approach to areas of special interest (ASI), a city classification described in the Bend General Plan. The ASI classification includes Goal 5 scenic, open space and habitat resources. [R. at 1247] Some discussion of the city’s intention to identify and manage impacts to ASIs is presented in the findings on the UGB locational analysis. [R. at 159]. Although the term “Areas of Significant Interest” is not used, the findings state that about 299 acres will not be available for urban uses, “because of their significance as scenic or natural resource” [R. at 159] The bulleted list of evidence for these resources in the proposed expansion area describes landscape features that fit the ASI classification. These include: the presence of the Deschutes River viewshed; presence of the Deschutes River Canyon State Scenic Waterway; and past surveys documenting prominent rock outcroppings, which are potential scenic resources.

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

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

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

This appears to be one of the policies mentioned in the findings. [R. at 1217]. It would allow development to proceed and provide for a property-by-property approach to the inventory and protection of Goal 5 resources.

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

The analysis for UGB amendment alternative 4A includes information on the environmental consequences of selecting the alternative, and discusses Goal 5 resources for each quadrant. It appears that the term “Goal 5 resource” is used to refer to a resource that has already been identified as significant and placed on the Deschutes County inventory of significant resources, or that may be identified by the city as significant in the future. There are findings of no Goal 5 resources for the northeast priority 2 and priority 4 quadrants and the southeast priority 2 and priority 4 quadrants. It is stated that the southeast priority 4 quadrant is near Townsend bat habitat and has features that could qualify as an ASI. The northwest priority 2 quadrant is described as having one Goal 5 resource, a 200-acre aggregate site, and potential Goal 5 resources within the Tumalo Creek corridor. It is also stated that a State Scenic Waterway designation is recognized for portions of the Deschutes River that run through this quadrant. [R.. at 2460-1261]

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

### **c. Objections and DLCD Comments**

DLCD provided comments regarding Goal 5 requirements to the city in letters of October 24 and November 8, 2008. [R. at 4728-4729 and 3782] There were two main issues raised with respect to Goal 5: the Goal 5 *procedures* that are required prior to land being identified as non-buildable, and the *inventory* requirements for Goal 5 resources that are triggered at the time of a UGB expansion.

In the October 24 letter, DLCD described several Goal 5 resource categories that overlapped with the “areas of special interest” designation used by the city, and described some options for meeting the objectives of preserving the values of these land both within and outside the confines of Goal 5. The November 8th letter recognized the city’s intent to complete the Goal 5 requirements following completion of the UGB expansion, and stated this was not sufficient to comply with the rule. Both letters explained that it was the city’s obligation to inventory riparian areas, wetlands and wildlife habitat and assess

resource sites for significance when factual information was submitted that these resources exist in the expansion area.

Objectors have raised concerns regarding the decision to postpone application of the Goal 5 process to known resources that exist within the proposed expansion area. In particular, riparian areas, wetlands, wildlife habitat and state Scenic Waterways need to be inventoried and protected as part of the UGB expansion planning process.

The following comments have been submitted regarding compliance with OAR 660-023 and OAR 660-024-060.

Swalley Irrigation District – Avoidance of county-designated Goal 5 resources (e.g., big game habitat) does not comply with the Goal 5 rule. At the time of a UGB expansion, resources within the expansion area must be reevaluated due to the new conflicting uses allowed. The city failed to apply Goal 5 protections to state scenic waterways. The designation of land along the Deschutes River and canyon as unbuildable was made without completion of the Goal 5 process. It is premature to adopt the Combined Sewer Master Plan and the transportation plan without an adequate inventory of Goal 5 resources. [Swalley, May 6, 2009, p. 45]

Toby Bayard – The city failed to complete Goal 5 inventories of natural areas, scenic and historic areas and open space. Land set aside for protection within the proposed expansion area was not adequately identified as a Goal 5 resource. Reliance on county Goal 5 inventory is not sufficient to meet Goal 5 requirements that apply to the proposed UGB expansion. The city failed to maintain an inventory of historic, open space, and scenic views and sites. [Bayard, April 29, 2009, pp. 1 and 34]

Bend Metro Park and Recreation District – The city failed to provide an adequate Goal 5 analysis as part of the proposed UGB expansion, pursuant to OAR 660-023-0250. The city inappropriately defers Goal 5 analysis to after the adoption of the UGB. [Bryant Lovlien & Jarvis, PC for Bend Metro Parks & Recreation District, May 5, 2009, pp. 1-2]

Central Oregon Land Watch – The city wrongly interpreted OAR 660-024-0020(1)(c) and 660-023-0250(3)(c) and failed to apply Goal 5 requirements as part of the proposed UGB expansion. The designation of 299 acres as restricted due to the presence of Goal 5 resources is not based on a Goal 5 inventory. The city wrongly relies on existing county Goal 5 inventory information to identify to satisfy Goal 5 requirements triggered by the UGB expansion. [Paul Dewey Attorney at Law for Central Oregon Land Watch, May 7, 2009, pp. 5 and 14-15]

Edward J. and Doris E. Elkins – City failed to justify their designation of available lands and constrained lands since no Goal 5 analysis has been completed. A portion of the land was identified as constrained without adequate inventory and assessment. [Elkins, April 26, 2009, pp 1-3].

Department of State Lands – The city failed to conduct Goal 5 inventories and analysis in the proposed UGB expansion areas. [Vrooman, Oregon Department of Justice for Oregon Department of State Lands, May 7, 2009, p. 4]

Tumalo Creek Development, L.L.P. – The city’s proposed areas of special interest do not comply with Goal 5. The city failed to conduct a Goal 5 process to properly identify the location of and potential conflicts with ASI designated land. [David C. Allen Attorney, for Tumalo Creek Development, LLC, May 7, 2009, p. 3]

Toby Bayard (PFP) – The city failed to meet its Goal 5 obligations. Specifically, the city did not perform a Goal 5 inventory in advance of recommendations to construct a major sewer system interceptor. [Bayard, July 2, 2009, pp. 11-14]

Swalley Irrigation District (PFP) – The city failed to apply the Goal 5 process during adoption of the public facilities plan, which was required due to the presence of a designated State Scenic Waterway in the northwest quadrant. This objection is also included in the objections made to the UGB expansion. The city failed to address the habitat conservation planning effort that is underway for the bull trout and to recognize constraints on sewers and other infrastructure that are likely to result from the federal endangered species listing. Potential impacts to Tumalo Creek have not been evaluated. [Swalley Irrigation District, July, 6 2009, pp. 29-31]

#### **d. Analysis**

The city states that the proposal “avoids to the extent practicable lands with county-inventoried Goal 5 resources,” and that Deschutes County’s Goal 5 program “does not identify any acknowledged riparian corridors, wetlands, wildlife habitat or other Goal 5 resources within the proposed urban growth boundary.” [R. at 1215] These statements may be accurate if Goal 5 resources are understood to mean only resources that the *city* has determined to be significant, but it does not appear that the city made that decision. Even so, there appears to be some contradiction. The findings also state that the Deschutes County Code, Chapter 23.112, identifies two Goal 5 riparian areas within the expansion area. The findings go to explain that “most of these areas are along the Deschutes River and Tumalo Creek...[but] approximately 22 additional acres are located in the proposed UGB expansion area outside of the Deschutes River and Tumalo Creek.” [R. at 1216]

OAR 660-23-0250(3)(c) specifies that that the requirements of Goal 5 apply when a post-acknowledgment plan amendment “amends an acknowledged UGB and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.” The resource sites at issue in this rule are not only sites that have already been identified by the county as significant. The rule requires the city to independently evaluate the expansion area where where resources are identified and evaluate them for significance and possible protection. The city may use the county’s inventory as a starting point, but it must also evaluate other information and make its own determination of significance.

The city has factual information that natural resource sites may exist in the UGB expansion area. The alternatives analysis and associated maps clearly show that the Deschutes River and Tumalo Creek run through proposed expansion areas. The Bend Area General Plan recognizes the association between these two landscape features and important wildlife habitat. [R. at 1251 and 1254]

The plan also recognizes the association between the Deschutes River and wetlands. [R. at 1251] Four out of the six quadrants in Alternative 4 are described as having “no naturally occurring wetlands,” [R. at 2432, 2437, 2442 and 2447] presumably based on National Wetland Inventory data. The southwest quadrant is described as having soils with “characteristics that may be indicative of areas of special interest.” [R. at 2453] The northwest quadrant is described as having land along the Deschutes River and Tumalo Creek that is within the 100-year floodplain. [R. at 2461] The descriptions of these latter two quadrants may indicate the likelihood of wetlands. The record also acknowledges the State Scenic River designation for the Deschutes River [R. at 2460], and the existence of a Goal 5 aggregate resource in the northwest quadrant. [R. at 2460-2461]

Based on the evidence in the record of Goal 5 resources, the city needs to conduct an inventory, identify conflicting uses, and complete the Goal 5 process for the following resources in the proposed expansion area: riparian corridors, wetlands, and wildlife habitat. Potential impacts from new uses that will result from the proposed UGB expansion on the significant Goal 5 resources that are located in the expansion area must also be identified. These include State Scenic Waterways along the Deschutes River and the aggregate resource site in the northwest quadrant.

The city will also need to complete the Goal 5 process for areas of special interest, if these lands are to be considered unavailable for urban use within the proposed UGB expansion area. The Goal 5 process includes the identification of potential impacts from allowed uses and an assessment of the consequences of allowing, limiting or prohibiting uses and activities that conflict with a significant resource. This process is intended to generate findings that justify the final decision to alter or not alter development options. It is possible that the city will be able to rely on significance criteria and portions of the impact analysis that were completed to implement the ASI program within the existing UGB. However, if the ASI program development was completed under OAR 660, division 16, additional work will be needed. The fact that the ASI definition includes wildlife habitat, and implementation of protection measures serve in part to protect habitat, the city will need to consider the requirements of OAR 660-23-0110, when applying Goal 5 to these resources.

Failure to complete an inventory of historic resources was mentioned by one objector, but local governments are not required to identify and protect significant historic resources under Goal 5. If a jurisdiction chooses to identify historic resources, the process and criteria described in OAR 660-23-0200 must be followed. Another objector stated that the city had not adequately addressed current efforts to develop a habitat conservation plan for bull trout in the Deschutes River. Although the listing of bull trout under the

federal Endangered Species Act may be an important consideration for UGB expansion, Goal 5 does not require fish habitat to be included in a wildlife inventory. The inclusion of fish habitat will depend on choices made by the city when applying the rule (OAR 660-23-0110(4)), and is a consideration in protection of riparian corridors.

The director concurs with the objectors that the city has not completed the steps necessary to assess Goal 5 resources within the UGB expansion area for significance, and has not adequately addressed potential impacts to known significant Goal 5 resources as required by OAR 660-023-0250(3)(c) and OAR 660-024-060. The director also concurs that the areas of special interest identified by the city have not been evaluated sufficiently by the city at this point in time for land to be set aside for their protection. Furthermore, the director agrees with objectors that planning for transportation, housing and parks is undermined by the lack of analysis of the location, quantity, and quality of Goal 5 resources.

### **e. Conclusion**

The UGB amendment and the amendments to the Public Facilities Plan do not comply with OAR 660, division 23. The director remands with direction to complete the inventory, assessment, and program development work needed to comply with Goal 5.

## **2. Is the designation of Surface Mining on certain property appropriate?**

### **a. Legal Standard**

OAR 660-023-0180 addresses identification of significant aggregate resources, approval of mining activity, and protection of the resource from conflicting uses. The rule sets criteria for significance and prescribes a process for evaluating potential impacts from the proposed mining activity. The rule requires a plan amendment for amending the local inventory of significant aggregate resources, changes to the mining activities allowed on the site, changes to the post-mining use of the site, and changes to the restrictions imposed in the impact area on new uses that could conflict with a protected mining activity.

### **b. Summary of Local Actions**

The Bend Urban Area General Plan Map, dated December 12, 2008, shows the comprehensive plan designation for property owned by Shevlin Sand and Gravel to be surface mining. [R. at 1226]

### **c. Objection**

One objector, Shevlin Sand and Gravel (SSG), raised a concern about a comprehensive plan map designation of surface mining that does not correlate with the Department of Aggregate and Mineral Industry (DOGAMI) permit authorizing mining. The objector does not cite a violation of local or state regulations, but explains that the plan designation depicted on the Bend Urban Area Proposed General Plan Map creates a problem with making use of their property. More land is designated as surface mining

than is covered under the DOGAMI permit for their mining operation. The land not covered by the DOGAMI permit can't be mined, and it can't be used for other purposes due to the plan designation. The objector does not state when the plan designation was made.

The objection is, "The surface mining designation makes [the] portion of the property [not covered by the DOGAMI permit] useless, because it is legally impossible for SSG to conduct mining and processing operations in this area." The objector recommends that the City of Bend change the boundary of the area designated surface mining to include only the area subject to the DOGAMI permit. The objector has provided a diagram showing the DGAMI permit boundary. Some land would need to be removed and other land added to the area designated as surface mining for the boundaries to be coincident. [Johnson & Sherton Attorney for Shevlin Sand and Gravel, May 7, 2009, pp. 1-2]

#### **d. Analysis**

The map designation is presumably based on a previous action by Deschutes County to designate the Shevlin Sand and Gravel property as a significant aggregate resource. A UGB expansion does not trigger a requirement for the city to conduct a new inventory of aggregate resources within the expansion area. Local jurisdictions are only required to amend the significant aggregate resource inventory in response to an application for a post-acknowledgement plan amendment. [OAR 660-23-0180(2)] A change in the boundaries of this site will require consideration of a separate plan amendment and will need to be based on findings developed consistent with OAR 660-23-0180.

#### **e. Conclusion.**

The objection is not sustained.

### **3. Does the UGB amendment comply with Goal 7 when the findings do not address wildfire hazard?**

#### **a. Legal Standard**

Goal 7 is: "To protect people and property from natural hazards." There is no administrative rule associated with this goal.

The goal requires local governments to "adopt comprehensive plans (inventories, policies and implementing measures) to reduce risk to people and property from natural hazards." The definition of natural hazard includes wildfires. The goal provides how local governments are to implement the goal, and avoiding development in hazard areas is one of the principles to be considered.

#### **b. Summary of Local Actions**

The UGB amendment findings, analysis and conclusions do not address wildfire risk as a consideration regarding where to locate the boundary.

**c. Objection**

Central Oregon LandWatch objected that the UGB amendment does not address wildfire risk and specifically that emergency preparedness and emergency access are not addressed. The objector submitted evidence that the City of Bend “is one of four western cities at the greatest risk of wildfire.” The objector cites to Goal 7 provisions, and states the department should review new fire hazard information and notify local governments (presumably Bend and Deschutes County in this case) that the information requires a local response, as required by Goal 7. The objection does not identify this new information. [Central Oregon LandWatch, May 7, 2009, p. 17]

**d. Analysis**

Deschutes County has adopted a community wildfire protection plan for the Greater Bend Area that identifies significant wildfire risks for the area. The department agrees that the county and city should consider wildfire risk in evaluating the location and type of development for the city’s UGB expansion. However, at present, the Goal 7 does not *require* such an action by the county and city.

**e. Conclusion**

The director denies this objection. However, the director also believes that the city and county should consider the information in the Community Wildfire Protection Plan for the Greater Bend area on remand as they determine where to expand the UGB and how to plan for the expansion area.