

Tentative LCDC Decisions: City of Bend UGB Appeal (5/11/10)

The following is a summary of the department's understanding of the commission's tentative decisions on the Bend UGB expansion. The department notes that these decisions are *tentative*, and that the commission will need to discuss the issues and deliberate to a final decision. The City of Bend also has provided a summary of its understanding of the commission's tentative actions, which is enclosed with this summary. For the most part, the two summaries appear to be in agreement. Areas where there appears to be some difference between the department and the city's understandings are marked with an asterisk.

Issue Area 1 – Findings

The city's findings must:

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

The commission also agreed that: findings that fail to identify the evidence in the record that support them will be upheld *if* the city on appeal identifies that evidence, *and* the evidence clearly supports the finding. Note that this is the same as the approach used by LUBA. The "clearly supports" requirement is intended to create an incentive for the city to identify the evidence in its original findings, rather than wait until there is an appeal/review.

The commission wanted to consider this issue in context of specific findings issues, but it then consistently followed the approach outlined above (0.5 acre and redevelopable lands, subdivision CC&Rs, planning for need housing types (mix), parks and school district findings re ability to accommodate w/i UGB)

Issue Area 2 Residential Land Need

Subissue 2.1: Which version of the LCDC rules apply?

The 2007 division 24 (UGB) rules apply to the city's decision. Note that for other rules, current versions apply.

Subissue 2.2: BLI, what lands are counted as "vacant" and what lands are counted as "redevelopable"?

The findings must identify how the city defined/determined whether lands were "vacant" (including partially vacant), "redevelopable," or developed. This is likely a findings issue.

However, the commission also agreed that there were three specific findings where there may be substantive issues:

- The city's definition of vacant parcels as being greater than 0.5 acres *and* with land values exceeding improvement values. If city excluded parcels smaller than 0.5 acres with no improvements, that likely conflicts with the definition of "buildable." The city also needs to explain/define why parcels larger than 0.5 acres with improvements are not "partially vacant" (e.g. some portion of the parcel is defined as buildable)
- Exclusion of lands w. CCRs. The city's summary of CC&Rs does not explain why further development is not possible in many of the subdivisions.
- Exclusion of constrained lands. City has agreed to reexamine whether these lands are "buildable."

***Subissue 2.3: Does 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?**

- The city must analyze housing need by (at least) three types: single family detached, single family attached, and multifamily.
- *Goal 10 requires analysis of *future* housing need; while ORS 197.296 requires an analysis of *past* market trends; the city may not base its planning on how far it believes it can push the market. The purpose of the analysis of past trends and future needs is to show the difference between the past market trends and future needed housing, as context for what measures the city must take or what lands the city must designate to plan for needed housing.
- The city is not required to analyze housing need by tenure (rental and owner-occupied).

***Subissue 2.4: Has Bend planned for needed housing types?**

- *The city must clearly identify what its needed housing types are over the planning period (again, at least single family detached, single family attached, and multifamily). This includes identifying its housing needs in terms of the mix between single family and multifamily. If the city continues to project a needed housing mix of 65% single family and 35% multifamily, it needs to develop an adequate factual basis for projecting that future need.
- *The commission did not reach a clear decision on whether the city is required to push the proportion of multifamily housing higher (that will depend on the outcome of a revised housing needs analysis (see above)).

Subissue 2.5: Are second homes a needed housing type, and is coordination required between the city and the county?

- Second homes are not a needed housing type under the city's housing needs analysis and comprehensive plan.
- The commission agreed that the county must *consider* the city's planning for second homes if it amends its destination resort ordinance.

Subissue 2.6: Inclusion of 3,000 acres of unsuitable lands

- The commission agreed that these lands are suitable, and should be included within the city's UGB, even if they will not yield a significant quantity of additional housing units during the planning period. The city, however, must analyze capacity for infill and redevelopment of these lands on remand.

***Subissue 2.7: Inclusion of 500 acres of surplus lands**

The city may not plan for a "surplus" amount of land. A *small surplus or deficit* is allowed if necessary to avoid splitting parcels or to create a logical boundary.

Subissue 2.8: Consistency w. General Plan

The city has agreed to supplement its findings on remand to address consistency with its General Plan.

Subissue 2.9: Consideration of amount of land needed for second homes in light of existing destination resorts.

The city is not required to consider existing destination resort housing in determining needed housing within its UGB.

Issue Area 3 Efficiency Measures

Subissue 3.1: 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?

The city needs to consider additional efficiency measures. This should include, but is not limited to, evaluating residential lands with more than 5 acres that are vacant or partially vacant for infill. Other measures listed in the department/director's reports also should be considered.

Subissue 3.2: 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?" OAR 197.296(7).

The city must adopt more specific timelines for initiation and completion of efficiency measures.

Subissue 3.3: Has the city met the requirement of Goal 14 and OAR 660-24-0050(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?

Same as subissue 1, above.

Issue Area 4 Other Land Needs

Subissue 4.1: Did the city adequately justify its addition of a 15 percent factor for all "other lands"?

The city needs stronger findings to explain why it increased its percentage for this land need category from 12.8 to 15 percent. Its land need analysis should not be based only on past trends, but should include consideration of *future* conditions and needs (explain why the trend will continue or change).

Subissue 4.2: Do the city's findings support its decision concerning the amount of land added to its UGB for parks and schools?

The commission tentatively agreed with the amount of land need determined by the city for parks and schools, but improved findings are needed to address the types of projected school needs, siting criteria, and whether the needs may be accommodated within the existing UGB. *The findings also should address 195.110 requirements. (Note: this was not fully addressed at the first hearing)*

Subissue 4.3: Does the city need to adopt or improve its findings concerning whether its need for land for parks and schools may be accommodated within its prior UGB or (for parks) on lands outside of the UGB?

The city's findings must address the extent to which the need for future parks and schools can be accommodated within the prior UGB. The city's findings also must address how it accounts for lands already owned by the districts outside the prior UGB (appears that the city determined these lands are not "suitable" – did that result in double counting?).

Issue Area 5: Employment Land Needs

Subissue 5.1: 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?

The city followed the main steps required under the Goal 9 rule for estimating land need for employment. City must clarify that it is utilizing its 2008 EOA, scenario B.

***Subissue 5.2: Are there adequate factual and policy bases, and adequate findings, justifying the city's use of a 10% factor to estimate the amount of employment need that will be met through redevelopment of "developed" lands?**

The city must provide more evidence to support its use of the factor, such as analysis of actual amount of redevelopment that has occurred, and a reasoned extension of that analysis over the planning period. Use of a factor is acceptable (site by site analysis not required), but findings must explain evidentiary basis and address the Goal 14 requirement to reasonably accommodate development within the existing UGB.

Subissue 5.3: Must the city update its EOA to reflect more recent trends resulting from the current recession?

The city is not required to update its EOA.

***Subissue 5.4: 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 fifty percent (except its CG plan (commercial general) district, which it increased by 25%)? May the city include additional employment lands beyond what it shows are needed to allow for "market choice?"**

No. The city may not include *more* land than is estimated as needed over the 20-year planning period. The city's determination should be based on a description of past and project future trends, long-term employment needs, and other policy bases articulated in its findings.

Subissue 5.5: Has the City adopted adequate plan policies to manage the short-term supply of employment land?

The city must include policies for maintaining a short-term supply. It does not have to have money "in the bank" to fund required infrastructure, but must plan for required infrastructure and have identified the funding mechanisms.

Subissue 5.6: 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?

The 15 percent vacancy factor is too high. Long-term vacancy factor should be based on past and projected future trends over the planning period.

Subissue 5.7: Must an urban expansion consider the impact on displaced non-urban industries, such as agriculture and agriculture irrigation?

No.

Subissue 5.8: Is inclusion of 119 acres of residential land for employment uses justified?

Yes, should be included in the residential land need analysis.

Subissue 5.9: 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?

No. City must address these policies on remand.

Issue Area 6: Goals 5 and 7 - Natural Resources and Hazards

Subissue 6.1: 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?

Under OAR 660-023-0250(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: * * * [t]he PAPA amends an acknowledged UGB *and factual information is submitted demonstrating that a resource site, or the impact areas of such a site, is included in the amended UGB area.*"

The department and the city have resolved Goal 5 issues as follows, and ask for confirmation that the commission agrees:

- State scenic waterway – To the extent that the waterway is located within the revised UGB expansion area, the city will adopt local requirements to implement the state plan for protecting the middle Deschutes scenic waterway, including a setback from the canyon rim for structures.
- Riparian protection – To the extent that the Deschutes River and/or Tumalo Creek are included in the revised UGB expansion area, for an inventory of the significant riparian area the city will either: 1) find that the topography along the river does not restrict the use of the safe harbor inventory [660-23-0090(5)(d)] and apply the 75' from top of bank safe harbor width; or 2) apply the standard inventory methodology, used within the current UGB, to the expansion area. In either case the commission understands that the significant riparian area will fall within the canyon walls. For a protection program the city will adopt the county measures that serve to protect the scenic waterway and add restrictions for vegetation removal within the significant riparian area. This will be developed to meet the safe harbor protection measure standards.

- Wildlife habitat – To the extent that the Deschutes River and/or Tumalo Creek are included in a revised UGB expansion area, the city will apply the Goal 5 habitat rule by conducting a safe harbor inventory. The safe harbor allows the city to limit consideration of significant habitat to 5 habitat categories [660-23—110(4)(a-e)]. ODFW does not have information on any of these five habitat categories being present within the portion of the Deschutes River or Tumalo corridors that pass through the expansion area and will provide letter stating this.
- Tumalo Creek –We understand that the city sees that it is unlikely that Tumalo Creek will be included in the final expansion area, but if it is the city will apply the Goal 5 safe harbor inventory and protection measures for riparian areas along the creek.

Finally, the commission also agreed that lands identified by the city as areas of special interest (ASIs – mainly areas of rock outcropping) are *not* inventoried as Goal 5 resources and, therefore, may not be excluded from the city's BLI (if they are already inside the prior UGB), or excluded from inclusion in the expansion area (299-acre adjustment to expansion area).

Subissue 6.2: 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?

No. The city is not required to address wildfire risk (although it should explain how it has done so) under Goal 7. However, relative risk of wildfire in alternate UGB expansion candidate areas may be a locational factor considered by the city under Goal 14.

Subissue 6.3: What area of the Shevlin property must be planned for Surface Mining on the plan map?

If the property is included in the revised UGB expansion area, only that portion of the property in question within the DOGAMI permit area (Shevlin) should be planned for surface mining, as the site is not on the county's acknowledged surface mining inventory.

Issue Area 7: Public Facilities Planning – Goal 11

Subissue 7.1: 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? May the city do a serial adoption of PFPs on remand (if it elects to do so), first for the prior UGB and then for the revised expansion area?

The city may adopt a PFP(s) for its prior UGB on remand. If the city does so, however, the PFPs must address build-out assumptions, including potential UGB expansion(s). The city may then, serially, adopt revisions to its PFPs for the revised expansion area.

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

Yes. In fact the PFPs should address expected future development, including projected development in UGB expansion areas. PFPs must be clear that such areas will not be served until ready to be urbanized and that no connections outside of the UGB are planned.

Subissue 7.3: Were the city's public facilities plans improperly used to determine the location of the UGB expansion?

The role of public facilities costs and feasibility in determining the location of a UGB expansion is addressed in connection with issue area 9. In general, this issue is no longer relevant as the city has agreed to revise both its UGB expansion area and its PFPs on remand.

Subissue 7.4: To what extent must a PFP be consistent with proposed land uses, including any measures intended to meet needed housing?

The city may adopt a PFP for its prior UGB, but that PFP must consider potential future land uses over the planning period.

Subissue 7.5: Under OAR 660-011-0010(2), what are the city's obligations, if any, to have service agreements with private water districts?

ORS 195.065 (requiring agreements with urban service providers for future urban service areas) does not apply to private water *utilities/companies* (Avion). Goal 2 coordination (and ORS 197.015(5) coordination) is required, however.

Subissue 7.6: 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?

The city has agreed to provide new 45-day and adoption notices of its PFPs on remand. As a result, this issue is no longer relevant.

Subissue 7.7: Must the city's wastewater system collection master plan PFP cover all areas in the UGB expansion area?

PFPs must address entire expansion area.

Subissue 7.8: Do Goal 2 and its coordination requirement (and ORS 197.015(5)) apply to private water utilities when those utilities will provide an urban service to areas within the UGB?

Yes.

Subissue 7.9: Does the water system plan provide sufficient information about private utility water purveyors who provide an urban service?

The city will provide existing plans of private water utilities/companies, and consider those plans in developing its revised master plan(s).

Subissue 7.10: 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.

City is not required to coordinate with Swalley as a service provider. However, the city has agreed to coordinate further with Swalley generally. City is required to compare alternate expansion areas in terms of service costs.

Subissue 7.11: 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.

This issue is no longer relevant, as the city is revising both its UGB expansion area and PFPs on remand. Under both Goal 11 and Goal 14, the city will need to evaluate the

relative public facility costs of alternative UGB expansion areas, including consideration of likely development types and intensities based on its needs analyses.

Issue Area 8: Transportation Planning

Subissue 1: Do the city's findings adequately explain the relative costs of providing transportation improvements to serve individual UGB expansion areas?

The city generally should not mix lands in different priority classes under ORS 197.298 (except when lower priority lands are included as necessary to serve higher priority lands under 298(3)(b)). Analysis of relative costs should generally be between lands in the same priority category.

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?

Yes. City will strengthen findings where it is relying on costs of transportation facilities to exclude lands as unsuitable (under 298(3)(c) or as unsuitable under Goal 10 or Goal 9).

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?

The city did not properly allocate the cost of major highway improvements in the north area (including the proposed improvements to Highways 20 and 97) Additional analysis is required. While no specific method or outcome is required, the city must explain its basis(es) for assigning the costs of extraordinary improvements to expansion areas and consider whether changes in the extent or location of the UGB expansion would reduce the need for major improvements in this 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.

The city has agreed to strengthen its findings in this area to the extent that lands on the west of the city are included in the UGB expansion area on remand.

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)?

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

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?

The city's findings are adequate.

***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?**

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

(a) of a decline of 5% or more, then the city is in compliance with this aspect of the TPR;

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

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

Subissue 8.8: May the City of Bend rely on its partially acknowledged transportation systems plan (TSP)?

Yes (Swalley appeal denied).

Issue Area 9: UGB Location

Subissue 9.1 (GG): 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?

To be determined.

Subissue 9.2 (RW): 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?

To be determined.

Subissue 9.3 (RW): 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?

To be determined.

Subissue 9.4 (RW): ^{GG} 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)?

To be determined.

Subissue 9.5 (RW): ^{GG} 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?

To be determined.

Subissue 9.6 (GG): 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?

To be determined.

Subissue 9.7 (GG): 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)?

To be determined.

Subissue 9.8 (RW): ^{GG} Must the city and county apply Deschutes County Code section 23.48.030 as standards for this UGB expansion decision?

To be determined.

Subissue 9.9 (RW): ^{GG} Should the commission specifically remand the city and county decisions with respect to inclusion of the exception areas in the northwest?

To be determined.

Subissue 9.10 (RW/MR): 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?

To be determined.

Issue Area 10: 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?

City has agreed not to contest.

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

There are several parts to this subissue:

OAR 660-024

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?

The city has agreed to re-notice its hearing(s) on the proposed amendments to its General Plan. As a result, this subissue is no longer relevant to the commission's decision.

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

The city has agreed to re-notice its hearing(s) on the urban growth boundary expansion, and to allow new evidence to be introduced into the record. As a result, this subissue is no longer relevant to the commission's decision.

Subissue 5: Should the commission more clearly define the scope of the remand?

To be determined.

