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January 29, 2010

Via Hand Delivery
Richard Whitman
Director DLCDC
635 Capitol St. NE STE 150
Salem, Or 97301-2540

Re: Appeal of Director's Decision to LCDC (City of Bend UGB Order No. 001775)

Dear Mr. Whitman:

This firm represents the Swalley Irrigation District (Swalley). Swalley hereby appeals the January 8, 2010 Director's Report (hereinafter Director's Decision) in the above captioned matter.

Swalley participated at the local level orally or in writing during the local process

Swalley Irrigation District participated in the local proceedings and objected to the UGB amendment proposals as shown on the record submitted to DLCDC (which, Swalley is advised, is the same record submitted to LUBA) at Rec. 2530, 2766, 2846, 4412/4416, 4916, 4972, 4984, 5164, 5612, 6840, 7068, 7096, 7276, 7788, 8692, 9071, 9470, 9748, 9802, 10,000 and 10,270. *See also* Director's Decision p 10.

Deficiency in the work task, the relevant section of the submitted task and the statute, goal, or administrative rule the local government is alleged to have violated.

Swalley addresses its appeal issues in the order in which they appear in the director's decision.

I. Director's Decision (p 44) erroneously determines that the city's revised HNA "should address and link needed housing types with its *existing* analysis of service costs." The city's *existing* analysis of service costs are an inadequate basis to provide such linkage. The Director's Decision also fails to require the proper linkage between the HNA and public facilities costs in its "Summary of Decision on Housing and Residential Land Needs" at p 45-46. In these regards, the Director's Decision is contrary to ORS 197.296(9) because basing the HNA on the *existing* city analysis of services costs, which *existing* analysis is known to significantly underestimate such service costs, does not establish that such needed housing will be in locations appropriate for the housing types identified in the HNA. *See also* ORS 197.752(1) which requires that land in a UGB is available for urban development consistent with the provision of urban facilities and

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services. If the city does not have an understanding and accurate assessment of the costs of urban public facilities and services, it cannot provide any assurance that newly added UGB land will be provided with urban facilities and services over the 20 year planning horizon. Relatedly, the Director's Decision in these regards is also contrary to ORS 197.296(6)(b) because the significantly underestimated public facilities cost estimate cannot as a matter of law "demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years without expansion of the [UGB]." As above, this also causes the city's UGB to fail to meet the terms of ORS 197.752(1).

Specific modification to the work task necessary to resolve the alleged deficiency: Require city's revised HNA to address and link needed housing type to a new and adequate analysis of service costs that addresses all service costs, so the city has an adequate foundation to (1) establish that needed housing will be in locations appropriate for the housing type, and (2) will demonstrably increase the likelihood of residential development occurring at densities sufficient to accommodate housing needs for the next 20 years without expansion of the UGB.

2. Swalley appreciates that the Director's Decision sustained its Goal 9 objections that the Director's Report outlines. However, the Director's Decision misses one of Swalley's key Goal 9 objections. Swalley points out that Goal 9(A)(4) requires: "Plans should strongly emphasize the expansion of an increased productivity from existing industries and firms as a means to strengthen local and regional economic development." Here, the proposed UGB amendment significantly adversely impacts an existing industry – the industry of providing irrigation water --an agricultural/utility type of industry. Further, the decision which significantly adversely affects the Swalley district's ability to supply irrigation in turn, significantly adversely impacts agriculture that relies on Swalley; and agriculture is also an industry. The findings do not even address this concern and neither does the Director's Decision. This is error.

Specific modification to the work task necessary to resolve the alleged deficiency: Remand the proposed UGB amendment requiring that it address impacts on Swalley's irrigation systems and its ability to supply irrigation to agriculture on the understanding that agriculture is an industry, Swalley is a part of the agricultural industry and that it is also a "firm"; and that Swalley must be protected and impacts on Swalley must be analyzed under Goal 9(A)(4).

3. The Director's Decision Part G, at pages 70-83 outlines a number of specific objections, including Swalley's and does a good job of analyzing several of those issues; but does not determine whether the objections are sustained. It is confusing what the objections here are sustained. For example, it appears at page 77 that the Director's Report sustains objections to the adequacy of the public involvement and notice used by the city to adopt the Public facility plans, but this is not clear. OAR 660-025-0150(1) requires the Director to remand or approve a work task based on objections received and the department's own concerns. Here, there are a number of objections to the Public Facilities Plans that the Department does not appear to address and the disposition of the same in the Director's Decision is not clear. While the Director's Decision at

page 11 states: “Objections not addressed in the analysis sections of this report are denied” the Director’s Decision narrative suggests some or all of the objections were in fact sustained. We are concerned that this disclarity might add confusion and undermine DLCD’s efforts to bring the city PFP’s into compliance with state law as well as the city’s efforts to comply with the applicable public facility planning standards outlined in the Director’s report.

Specific modification to the work task necessary to resolve the alleged deficiency: The Director’s Decision should be amended to clarify whether and which the objections listed at page 72-77 are sustained. Moreover, LCDC should sustain Swalley’s objections listed in the Director’s Report.

4. The Director’s Report correctly remands the Public Facility Plans to include required content (p 83). As a part of such remand, LCDC should require the city to follow the required Goal 1 processes for a Public Facilities Plan. The Goal 1 public involvement process for the adoption of the Public Facilities Plan (PFP) was inadequate. Specifically, Swalley objects to the local processes leading to the submitted PFP decisions because those processes were unreasonably confusing, subject to inadequate notice explaining the proposal or the applicable standards and afforded inadequate participatory opportunities that were not meaningful. Through September 29, 2008, the city’s preferred UGB amendment alternative was one of Alternative 1, 2, 3 or 3A. By the time the city got to the “Alternative 4A” submitted, now to LCDC, it nearly doubled the size of the UGB from the UGB first proposal described in the June 2007 DLCD notice . Alternative 4 simply appeared out of nowhere – it “poofed” onto the city website to the surprise of many, including Swalley. *See* Swalley’s DLCD Objection Attachment K and Rec. 4978 (including COID’s Objections). The UGB amendment Alternative 4 was set for its first hearing before the Joint City and County planning commissions on October 27, 2008. The only notice of this proceeding was a DLCD “45 day” notice the parts of which confusingly trickled into DLCD between October 8 and October 20. Rec. 4356-57.

On October 27, 2008 the county and city planning commissions heard testimony on Alternative 4A and other bundled decisions and on November 13, 2008, the Deschutes County planning commission was given just one meeting to deliberate on the city suite of proposals.

The Deschutes County planning commission expressed frustration that they lacked time to review and digest the latest city proposal and public testimony about it and suggested several changes. Among the suggested changes the county planning commission advised were appropriate, was to omit the northwestern UGB amendment area. Rec. 3910. In its deliberations, the county planning commission explained that bringing the northwest area into the UGB is unnecessary, extremely expensive to serve, and there were other less expensive options. *See* audio tape of county planning commission proceeding on November 13, 2008. The county planning commission further believed the proposed UGB decision overestimated the city’s “need” for residential and economic lands. *Id.*, *see also* Rec. 3944, 8540, 8656, 8694, 9410, 3544. *See also* Swalley’s DLCD Objection Attachment O.

However, instead of considering these county planning commission concerns, the city staff quickly, if not defensively, responded, in a November 21, 2008 memo claiming, among other things stated that the city could not reject the northwestern area on its extreme costs of service. Rec. 3502. This is in contrast to a previous memo of the city staff claiming “[S]tate law and the General Plan also allow for consideration of lower priority lands for inclusion, and allow for those lower-priority lands to be included over higher-priority lands under certain circumstances. Where justified under state law, lower-priority lands should be considered and may be justified for inclusion in an expanded UGB in preference over urban reserve or other exception lands” Attachment E, Rec. 3506.

For the October 27, 2009 joint planning commission hearing, the city provided commissioners with two binders of information to help it sort through the new UGB amendment recommendation. Given the confusing process used to develop the wholly new UGB amendment alternative speeding toward adoption, Swalley attempted to gain access to the two binders of material the city organized and prepared for the joint October 27, 2008 city/county planning commission in order to understand the proposal. There was no way to otherwise understand what the proposal was, why it was selected or on what basis. The county graciously gave Swalley an extra copy of Volume One of the two binders it had in its possession and offered to allow Swalley to come to county offices to make a copy of Volume Two. Given limited time and resources, Swalley offered to simply obtain the second volume from the city that produced it.

However, on Swalley’s inquiry, the city (1) claimed not to have an extra copy of Volume 2 to share with Swalley, (2) that it did not want Swalley to come to the city to review its copy or make a copy there, and (3) told Swalley it would put the information on a website for Swalley to download, print and bind itself. Swalley thought it could follow this procedure but discovered after it was too late that the information that the city put on the website was incomplete, and a disorganized mismatch of papers that was not helpful and did not establish what was planned for consideration on October 27, 2008. Swalley was left to piece together what it could, which was not enough material to make any sense of what was proposed for the final hearing, turned out was not the whole proposal anyway and was incomprehensible and confusing.

The UGB proposal scheduled for adoption on November 24, 2008, was different still and more confusing still. The November 24, 2008 UGB amendment proposal raised very different policy issues because of the size, impacts on another local government (Swalley), on irrigation infrastructure, among other things, and the fact that it was based on significant proposed amendments to the city’s new proposed EOA and other new documents. At the hearing before the City Council and County Commission on November 24, 2008 – the Monday before Thanksgiving – this new Alternative “4A” proposal was unveiled and the public had a mere three inadequate minutes to explain its concerns. Rec. 2530. It was nearly impossible to identify and comprehend the issues or the decisions that the city proposed to make on either October 27 or November 24, 2008. No city notice was provided on the city website or anywhere else to inform parties of the decisions at issue for the November 28, 2008 joint governing bodies’ final hearing on the UGB amendment proposal.

The city clearly understood its new alternative UGB amendment ideas (Alt 4 and 4A) were significantly different from the city's previous proposals. Evidence of this is that on October 8, 2008, the city sent a "Revised" 45 day notice to DLCD, including only *parts* of its significantly revised proposal. On October 20, 2008, the city forwarded what it *claimed* was *the rest* of its new proposal to DLCD. Regardless, the city insisted that the city council and county commission would make a decision on the October 20 proposal on November 24. This suddenly put the planning commissions into adoption overdrive and the public into a scramble to figure out what was to be adopted.

Swalley did eventually obtain (through great effort with DLCD) the October 20 DLCD, "45 day" notice (in reality it was much less than 45 days from the October 27, 2008 joint planning commission hearing as well as the November 24, 2008 governing body final hearing). This October 20 DLCD notice is a confusing pile of papers submitted to DLCD by the city over the two week period from October 8, 2008 to October 20, 2008. This city DLCD notice among other problems *suggested* the city planned to adopt a variety of public facility plans on November 24; yet those plans were not attached to the DLCD notice, making the notice fatally defective and useless. In fact, to this day, the elements that comprise the Public Facilities Plan are not possible to determine with any certainty. As it was, the DLCD "45 day" notice apparently represented more than 800 pages of disorganized and mismatched documents. There was no place to go to obtain all the information relevant to the new city proposal (Alternative 4 or 4A) or to understand why the city had selected it.

At the November 24, 2008 hearing, Swalley submitted evidence to support its objections to what it understood about the new UGB amendment proposal. However, the decision makers did not review Swalley's written evidence, as less than half of the decision makers took their binders with them instead leaving them on their tables or seats when they left to go home. See Swalley's DLCD Objection Attachment F p 2. It was clear they had either (or both) (1) inadequate time to read and understand or (2) interest in understanding, citizen concerns. *Id.*

These are significant Goal 1 problems for the submitted decisions. These problems deprived citizens, including Swalley, from having meaningful opportunity to prepare or provide input at the evidentiary hearings on either October 27 or November 24, 2008. Also, the timeframe for making any comments was too short from the October 20 "45 day" notice given the Joint Planning Commission hearing was on October 27, 2008. Compounding these problems is that the final hearing before the governing bodies was set for during the Thanksgiving holiday week when parties, their attorneys and even the city and county were closed on two of the five business days. This made it unreasonably difficult to prepare given the upcoming holiday. Also as is explained in greater detail below, on November 13, 2008 the county planning commission was asked to conduct a hearing on a yet new proposal the city wanted. This put Swalley into discovery overdrive to try to figure out what was going on and what was scheduled for adoption and on what basis.

The city process deprived the city and county decision makers of the chance for meaningful deliberation and debate as well as public input on important policy questions. As to the public facility plans, the city erroneously: (1) came up with public facility plans at the staff level with no citizen involvement before the UGB amendment process officially began, (2) conducted charettes and open houses about the public facility plans, but refused to make any changes to these plans and, (3) made all UGB amendment location decisions match the public facility plans city staff chose, but these plans were never the subject of a public notice, hearing and LCDC notice and never were adopted by the city until January 5, 2009. *See* (for example) Rec. 10390, 5072.

Goal 1 (Citizen Involvement) requires the decision makers to have a citizen involvement program that provides: “for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues.” The city and county failed to adhere to their own citizen involvement programs established in their comprehensive plans and failed to adhere to these requirements of Goal 1.

Goal 1 also requires: “Mechanisms shall be established which provide for effective communication between citizens and elected and appointed officials.” Effective communication requires the communicating parties have access to equivalent information. It also requires the public have more than a month to evaluate a proposal as complex and confusing as the one submitted. Swalley has not had access to the information it would need to understand and participate in the process. It was not provided with adequate time to prepare. And it was not afforded adequate time on November 24, 2008 to share its concerns. Finally, while the city and county decision makers encouraged written submittals, they did not review such information causing a failure of the communication required by Goal 1.

Goal 1 requires: “Information necessary to reach policy decisions shall be available in a simplified, understandable form. Assistance shall be provided to interpret and effectively use technical information. A copy of all technical information shall be available at a local public library or other location open to the public.” Information was either not available at all or was not been available in a simplified format. The city’s website was often out of date or not arranged in any way that would assist the public in understanding the proposal. While the effort of creating a website is appreciated, it was an inadequate substitute for notice and an explanation of the proposals pending before the city to enable citizens to understand and participate.

Goal 1 requires: “The general public through the local citizen involvement programs should have the opportunity to be involved in inventorying, recording, mapping, describing, analyzing and evaluating the elements necessary for the development of the plans.” This never occurred for the public facility plans of particular concern to Swalley, including the Combined Sewer Master Plan (CSMP). As noted elsewhere it is still impossible to know with certainty what documents comprise the city’s now adopted public facility plans.

Moreover, because the city’s proposed and unadopted public facility plans drove the location of the UGB, no one had had the opportunity to be involved in the “inventorying,

recording, mapping, describing, analyzing and evaluating the elements necessary for the development” of the plans, including UGB amendment locations in the manner Goal 1 contemplates.

Goal 1 further requires: “The general public, through the local citizen involvement programs, should have the opportunity to review and recommend changes to the proposed comprehensive land-use plans prior to the public hearing process to adopt comprehensive land-use plans.” This opportunity has never been available for the public facility plans. Because the unadopted public facility plans were improperly used as approval standards for the UGB amendment locations, the public had no meaningful opportunity to influence the outcome of those locations. The public had no meaningful opportunity to participate in the development of the final UGB amendment location adopted -- Alternative 4A – due to the process and participatory problems explained above.

As is noted briefly above, the city at the last minute asked the county to add to its November 13, 2008 planning commission agenda (already set for deliberation on the UGB amendments) for them to consider certain further plan and zoning code amendments two destination resorts zoned UAR. Swalley’s DLCD Objection Attachment G. The county obliged and scheduled a public hearing before the county planning commission on November 13, 2008 to change the zoning of two destination resorts from “UAR” to “exception. These further plan and zone amendments that the city wanted the county planning commission to consider on November 13, 2008 were designed to beef up older, attempted exceptions for particular UAR land, and this precise exception issue was well known to be of particular concern to Swalley (discussed in greater detail below). Swalley then was put in the unenviable position of trying to figure out what the new November 13, 2008 proposal was about and how it affected the UGB decision and the district, in addition to trying to understand the new UGB amendment proposal scheduled for decision by the city and county governing bodies on November 24, 2008. Swalley dedicated precious resources to that effort. However, just before the scheduled county hearing, the city changed its mind and decided it did not want the county to adopt the amendments after all. Only the county notified Swalley of this late breaking development. The county ended up withdrawing the proposal scheduled for the November 13, 2008 county planning commission. But this was only after Swalley needlessly wasted its time and resources preparing for the November 13, 2008 hearing, detracting from its ability to figure out what the UGB amendment proposal was that was scheduled for hearing and adoption on November 24, 2008.

Specific modification to the work task necessary to resolve the alleged deficiency: For these reasons, LCDC should remand the submittal, including the PFP with instructions to the city and county provide adequate notice of a proposed UGB amendment, of proposed TSP amendments, of proposed public facility plans, and of all city and county code amendments and specifically identify any other decisions, if any to be made by the city. This notice should be required to explain the relevant standards to be applied and the manner of submitting comments that will be read and digested by the decision makers and of presenting testimony. The instructions should require the city and county to provide “redlines” of proposed decisions that amend existing planning documents, so that the public can compare the proposals with existing provisions in

adopted codes and plans. The remand instructions should further advise the city and county of, and require the city to observe, relevant standards. The required notice should identify a date for public hearings that provide adequate time to allow meaningful opportunity for public input and meaningful opportunity for decision makers to decide on the basis of such public input. The instructions should further instruct the city and county that neither may prejudice these critically important decisions including the locations for UGB amendment, but rather must only select locations for UGB amendment based on the application of state and local standards and after coordination and consideration of public testimony.

5. OAR 660-024-0060 (8) requires: "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." The Director's Report at page 83 states: "*To the extent that the city is relying on relative costs of public facilities and services to justify inclusion of particular lands within the UGB expansion area, it must include the comparative analysis required by OAR 660-024-0060(8).*" Swalley objects to the suggestion ("*to the extent*") that the city could include land in the UGB without performing an "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." The Director's Report correctly points out at page 79: "Nor do the master plans contain an analysis of the relative costs, advantages and disadvantages of alternative UGB expansion areas as required by OAR 660-024-0060(8)."

Specific modification to the work task necessary to resolve the alleged deficiency: Require city to make its Goal 14 boundary location determination consistent with the Goal 14 rule including the requirement for an "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."

6. The Director's Report does a good job regarding Swalley's specific TSP objections (see page 91-94). Swalley has concern however about the Director's Report at page 90 which states the Bend TSP:

"was partially approved by the commission in periodic review. The commission's approval of the TSP itemized a number of relevant TPR requirements with which the city had not fully complied. However the department believes that, notwithstanding this remaining work, the existing TSP is partially acknowledged and the city may rely on it."

The Director's Report further asserts that Swalley "has not identified specific TPR provisions that require additional work by the city that affect the UGB decision, the department disagrees that the TPR requirement that the city have an adopted TSP has been violated." With all due respect, Swalley objects to these statements as incorrect and not based on the record.

As we understand it, the Director's Review is limited to the record. OAR 660-025-0130(4); 660-0025-0160(5). While official notice is possible, the documents relied on for such official notice must be specifically identified and available to the public. Respectfully, this is not the case here.

From what we know of the land use odyssey of the city's TSP (not in the record) the city's TSP was fairly thoroughly remanded by LCDC in 2001 with no hint that any part was acknowledged. We understand there were some 25 objections to the Bend TSP that LCDC sustained and remanded and many of those sustained objections and LCDC remand instructions were very broad identifying significant general and specific problems. The odyssey continues and, as far as we know, there is no "partial acknowledgement order" for the city's TSP.

Swalley's point in this part of its objection was, among other things, that the proposal seeks to amend and rely on a city TSP, but the city has no acknowledged TSP that is appropriate to rely on or that establishes the important policy objectives for long range UGB objectives in the first place. So, proposals about transportation infrastructure cannot be assumed as "givens". This problem sets up the mischief that the Director's Report identifies at page 91-94. In short, the city has no acknowledged TSP and the UGB amendment decision should not rely on the city's TSP for UGB amendment locations as if it were acknowledged. It would seem that Swalley's objections that are sustained by the Director's Report support Swalley's concern in this regard to establish that the city failed to comply with Goal 12 and the TPR.

Specific modification to the work task necessary to resolve the alleged deficiency: Sustain Swalley's objection that the city lacks an acknowledged TSP, that the TSP the city has is too inadequate to be relied upon for UGB amendment and remand the city's decision to adopt a Goal 12 and TPR compliant TSP before it selects UGB locations and expands the UGB.

7. The Director's Report at p 125 erroneously determines that the city/county were not required to consider the county code standards requiring the application of the previous version of and including seven Goal 14 locational factors and Goal 2 exceptions process. It appears the Director misunderstood Swalley's position. Swalley does not dispute that the city and county were required to comply with applicable state law. However, Swalley's objection is that the *county code and plan imposes more restrictive requirements and these more restrictive local requirements must be adhered to.*

County Ordinance 80-216 (County Recorder Vol 36 p 648 Rec 10645) required that the previous versions of the Goal 14 locational factors and Goal 2 exceptions process be applied before the UGB could be amended on UAR land. *See Jackson County Citizens League v. Jackson County*, 38 Or LUBA 489, 505 (2000) (even where state law does not require an exception for farm uses, the fact that local law requires an exception in such circumstances, means an exception must be taken.) These former versions of Goal 14 locational factors and

Goal 2 are at Swalley's DLCD Objections Attachment H (Rec. 6842-49).¹ These former Goal provisions mirror requirements in the current Deschutes County Comprehensive Plan 23.48.030. Moreover, the Director's Report at Attachment A reinforces that no UAR land was allowed to be urbanized unless these seven Goal 14 factors were applied. *See* Director's Report Exhibit A p 30 ("Any land use changes outside the IUGB will require an amendment pursuant to the seven factors of the Goal.")

To date none of these seven factors of Goal 14 or the former exceptions process standards, made mandatory by the local code, and thus made mandatory as a matter of *local law* (including as it was initially acknowledged), have been applied to the UGB amendment location decisions. As a matter of law these former Goal 14 and Goal 2 standards must be applied and cannot be ignored because they are local requirements. *Jackson County Citizens League, supra*. The Deschutes County Code clearly requires their application. While local law cannot be less restrictive than state law (it can be and is here) more restrictive.

Specific modification to the work task necessary to resolve the alleged deficiency: LCDC should remand the submittal with instructions that the city and county UGB amendment locations must be selected consistently not only *with state law* but also with local law (DCC 23.48.030) which local law requires the application of the former seven Goal 14 factors and the former exceptions criteria attached to Swalley's DLCD Objections as Attachment I, all as required in the county plan and code. If this is accomplished properly, the northwest UGB amendment area will be removed because it cannot meet both the state *and* these relevant *local* relevant approval standards.

8. The Director's Report at p 126 erroneously shifts the burden of establishing compliance with relevant standards to Swalley and in so doing fails to evaluate the proposal against relevant standards. Instead of sustaining an objection that points out the proposal fails to comply with

¹These seven Goal 14 factors are: "(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."

applicable law and lacks an adequate factual basis, the Director's Report determines these problems result in "denial" of the objection. This is wrong. Specifically, Swalley argued (in summary here, there is much more detail in Swalley's initial objection to DLCD of the city's decision which detail is incorporated herein by this reference) that the northwest UGB expansion area was selected by the city (and county) without properly applying the law and its selection lacks an adequate factual basis for inclusion in the UGB. The Director's Report said it could not tell whether the northwest met applicable standards or had an adequate factual base. But, where there is no showing that it is feasible for the northwest area to meet relevant standards its inclusion should be remanded.

Specifically, in response to Swalley's objection summarized by the Director as: "Exception areas in the northwest² should be removed from the amendment", the Director's Report determines: "The director cannot determine *based on the current record* whether these lands should or should not be included." (Emphasis supplied.) Respectfully, if the Director is unable to determine whether a particular area should or should not be included in the UGB based on the record, then the objection should be sustained and the northwest area should be remanded for inclusion (or not) based on the application of appropriate approval criteria and an adequate factual basis (*viz*, record) for inclusion (or it should be removed). Specifically, the Northwest area is contrary to Goal 14 Boundary location factor (4) and the Goal 14 rule "Compatibility of proposed urban uses with nearby agricultural * * * activities occurring on farm and forest land outside the UGB." There is no dispute that at a minimum the northwest area has "nearby" agricultural activities occurring on farm and forest land outside the UGB. Among those nearby lands are significant lands in exclusive farm use zoning in Swalley's district to the north which have important irrigation infrastructure (an agricultural activity) and well as other agricultural activities like farming. There are numerous alternative locations that do not have these significant deleterious effects on nearby agricultural activities. Moreover, as noted in the public facilities analyses, the northwest has the most expensive public infrastructure of any potential candidate UGB amendment location.

Further, there are important Goal 5 resources (Deschutes River Canyon) in the northwest and the scenic part of the Deschutes River that is protected as a designated a state Scenic Waterway corridor and the city has failed to apply required protections under Goal 5, state scenic protection programs, and the protections of the county comprehensive plan. *See* map Swalley DLCD Objections at Attachment N. This is recognized in the city findings for the UGB amendment at p 163-64:

"In 1988, the north Deschutes River canyon was designated by the State as an Oregon Scenic Waterway, qualifying the river canyon for Goal 5 scenic protection."

In sum, Swalley established that the city has an inadequate factual basis to establish the northwest is an appropriate area for inclusion in the UGB. As such, the appropriate remedy is to

² Swalley does not agree that there areas are subject to an acknowledged exception.

remand the decision to include the northwest, not deny the objection that the northwest fails to establish compliance with law and lacks an adequate factual basis.

Specific modification to the work task necessary to resolve the alleged deficiency: Remand the northwest UGB amendment area as not supported by an adequate factual basis that it complies with relevant standards or that it is feasible for it to comply with relevant standards.

9. The Director's Report at page 126, erroneously determines that the UGB analysis may under Goal 14 ignore the impacts of the proposed UGB amendment on Swalley as a "rural irrigation system." First, Swalley's infrastructure is an "agricultural activity" nearby to the northwest proposed UGB amendment location. So, impacts on Swalley and its "nearby" agricultural activities (think irrigation infrastructure like canals, gates, pipes, and conveyance systems) must be considered under Goal 14 locational factor 4. Second, OAR 660-024-0060(8) the Goal 14 boundary location determination is required to include an "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."

The director erroneously ignored factor (a) quoted above and replaced the term "water" used in Goal 14 with the definition of "water system" from Goal 11. There is no dispute that Swalley's water already serves some areas that are being farmed inside the UGB. Further there is no justification for failing to coordinate with Swalley as a "service provider". Clearly, it provides a "service" both inside and outside the UGB.

10. The Director's Report at page 131 erroneously determines that the UAR lands are an acknowledged exception area. This is incorrect.

This issue is fairly straightforward such that if the usual rules are applied, all UAR zoned lands are placed on a coequal playing field with any other land not subject to an acknowledged exception.

No Acknowledgment

The Director's Decision at p 131 states that the UAR area of the county was designated as an exception in Deschutes County Ordinance 80-216 in 1980 and acknowledged in 1981. This is impossible since the County did not receive its acknowledgement until 1986. The 1981 acknowledgement of the Ordinances the findings rely on, was denied, not approved. There was no such thing as "partial acknowledgement" in 1981. *Panner v. Deschutes County*, 76 Or App 59, 65 ("[T]here is a threshold question of whether LCDC had the authority to issue a limited or partial acknowledgement under the circumstances at the time it issued the continuance order. The answer is no. * * *") Rather, LCDC possessed authority to deny, approve or modify an acknowledgement proposal. *Marion County v. Federation for Sound Planning*, 64 Or.App. 226, 235 (1983). Deschutes County acknowledgement did not occur until 1986. In the final acknowledgement, there is no reference to the purported UAR land "exceptions" to Goal 3. IN truth, nothing in the 1986 acknowledgement approved Goal 3 exceptions.

There is No Such Thing as Generally Described Exceptions Areas, Rather, Exceptions Must be Specifically Described

There can be no general acknowledged exception for a category of land, such as all UAR planned and zoned lands, because there is no such thing in Oregon law. In this regard, the court of appeals has made clear where a disputed "plan provision" does not identify any territory specifically; [but] simply states that *all* territory fitting a categorical description is within the UGB" (Emphasis in original), that it is improper to assume that a textual provision equates to particular property. *Carlson v. City of Dunes City*, 139 Or App 343, 348 (1996). The court of appeals' view matters because whether an exception is adequate to be an acknowledged is a question of state law. *Id.* County Counsel reinforced the requirement of specificity for exceptions in an August 29, 2007 legal analysis, attached to Swalley's DLCD Objections as Attachment B at p 2-3. Specifically, after outlining the county's view of the county acknowledgement process between 1981 and 1985 county counsel stated:

"All this assumes, of course, that a *comprehensive plan map and a legal description* were also acknowledged in 1980. Thus the above opinion is assuming that the County did adopt a plan map that *showed exactly what properties are included in the UAR*. If the map was not adopted then the final designation of the UAR was never perfected."
(Emphasis supplied.)

The city record submitted to LUBA and DLCD fails to include this county counsel letter quoted above. Rather, both the LUBA and DLCD records erroneously include only a later county counsel letter (but that oddly bears the same date as that quoted above) that omits this important legal observation. See Swalley DLCD Objection at Attachment C.

The principle that exceptions must be specific to exist at all is also reinforced in OAR 660-0025-0020(2): "The UGB and amendments to the UGB must be shown on the city and county plan and zone maps at a scale sufficient to determine which particular lots or parcels are included in the UGB. Where a UGB does not follow lot or parcel lines, the map must provide sufficient information to determine the precise UGB location." Of course, this specifically is lacking in this case and always has been lacking.

Here, the Goal 3 exception for particular UAR lands must be (and is in the Director's Decision) inferred and then pieced together with hindsight. The city and Director does not even claim all UAR lands are exception lands if one drills into the details. Specifically, new Bend Area General Plan 1-5 correctly states that UAR zoned lands "Highlands at Broken Top" and "Tetherow" are not exception lands. This underscores that not all UAR lands are exception lands. So which UAR lands are exception lands and which ones are not?

Simply put, there is nothing specific to determine which specific parcels are subject to any claimed goal exceptions. The county "Bend Area Plan" map attached to county counsel's first memorandum (Attachment B to Swalley's DLCD Objection - a larger version of which Swalley placed into the record three times) showed some of the area now designated as UAR as "Agricultural" land, except a small part which was designated as Industrial. The Bend Area General Plan Zoning map shows generally where there is some land that was zoned UAR but here, much of this land is in the places that the county plan map shows as generally either designated as Agricultural or the small part noted above that is "Industrial" zoned.

The land now known as Tetherow and Highlands at Broken Top don't appear to be covered at all.

Surely, there cannot be a serious argument that this situation presents a specific map at an adequate scale to enable a person to say with certainty which lands are subject to a Goal exception and which are not.

In any case, it is not possible to say that all of the UAR land is specifically shown as "exception" land because they are not in fact and also the plan map shows much of the UAR land to be generally "Agricultural" land. In such circumstances, the law does not permit inferring any part of the UAR land is subject to a Goal 3 exception. It is impossible to be both "Agricultural" land and not "Agricultural" land.

Where There is an Issue of interpretation, it is Long Settled that the Zoning Map Must be Interpreted in a Way that is consistent with the Plan Map

The planning principle of *Baker v. City of Milwaukie*, 271 Or 500, 533 P 2d 772 (1975) makes clear that interpretive questions about the meaning of zoning must be resolved in a way that is consistent with the plan. Here there is no dispute that the plan map shows all the UAR lands as "Agricultural" except for one small part that is shown as "Industrial Park". See

Attachment B p 6. If some UAR is “Agricultural” then by definition those lands are not subject to a Goal 3 exception.³

Only the County had Authority to Designate Exceptions

And finally, at the end of the day, only the county had authority to take a goal exception to county Agricultural lands and it is clear from the above it did not do so. Unquestionably, the City had *no* authority to take any exception on County land. *Standard Ins. Co. v. City of Hillsboro*, 97 Or App 625, 628 (1989). Therefore, any 1981 “exceptions” that may have been attempted by the City would have no legal effect and be void.

Various participants in the process have argued that their UAR zoned property should come into the UGB ahead of other meritorious land because UAR land *should* be subject to a Goal exception given they have long assumed that was the case. However, such a presumption does not create an exception to Goal 3. It is well settled that expectations do not create a presumption or fact of an exception to a statewide planning goal. *Manning v. Marion County*, 42 Or LUBA 56, 70-71 (2002).

Specific modification to the work task necessary to resolve the alleged deficiency: For these reasons, LCDC should remand the submittal with instructions to the city and county to (1) remove the UGB amendment locations on UAR land, and (2) the city and county should determine appropriate UGB amendment locations without presuming that all UAR lands are subject to Goal exceptions. UAR land should only be brought into the UGB if they meet state law standards as not acknowledged exception land. While it may be that some UAR land is appropriately included in the UGB, such UAR lands should not be included in the UGB on the erroneous assumption that they are second priority exception lands, because they are not.

11. The Director’s Report at page 135 fails to recognize that even if the northwest were composed of exception lands, state law allows an exception area to be passed over for inclusion in the UGB on the basis of the high costs of serving it. *Hildenbrand v. City of Adair Village*, 54 Or LUBA 734 (2007) determines that there is no error in passing over “exception lands” because of the high cost of extending services to that exception land. There is no dispute that the northwest area to which Swalley objects has the highest public facilities costs by an order of magnitude. See Swalley DLCD Objection Exhibit M. Similarly, the Director’s Report errs at p 136, that environmental impacts and impacts to irrigation districts may be ignored if those impacts occur on so called “exception land”. There can be no reasonable dispute that exception land may be passed over based on significant sensitive environmental Goal 5 resources like the

³ One must infer that the written description of the UAR lands that were to be designated as exception lands (but were not in fact) to serve as a “buffer to the more rural and resource lands beyond the UGB” meant the particular lands the city ended up drawing as UAR. This is a little hard to infer though, given the lands the city picked were designed on the plan map as “Agricultural”. Which of those “resource lands” was to be a buffer to “resource lands?” If you have to infer, then as a matter of law there is no exception. *Carlson v. City of Dunes City*, 139 Or App 343 (1996).

designated scenic area of the Deschutes River canyon in the northwest. Moreover, there can be no serious dispute that so called exception land may be passed over under Goal 14 and Goal 9 as both (as explained in other parts of this appeal, clearly require protecting agricultural activities and agricultural industries of which Swalley has such activities and is such an industry. The Director's view is an incorrect reading of the law because it forces the city and county to ignore legal requirements. It also misreads ORS 197.298(1) which requires the statutory priorities to apply "in addition to other requirements established by rule" A proper interpretation of the law must give effect to the goals, administrative rules and the priorities – the priorities – however you interpret them, do not trump everything else.

Specific modification to the work task necessary to resolve the alleged deficiency: LCDC should remand the UGB amendment decision to with the clarification that the Director's Report misstated the law regarding the reasons why "exception" lands may be passed over. The LCDC instructions to the city/county should clarify that the northwest may be omitted (and should be) based on the high costs of serving that area. This is the case regardless of one's view of whether some or all of those lands in the northwest are subject to an acknowledged "exception." Similarly, LCDC should remand with instruction that so-called "exception" areas that are subject to significant Goal 5 resources (such as the Deschutes River Canyon and wild and scenic river area) may be passed over as well on that basis. Also, LCDC should determine that under the application of Goal 14 and Goal 9, and related administrative rules that the northwest may be passed over regardless of whether they are "exception" lands.

12. The Director's Report at page 131-132 erroneously determines ORS 197.298(2) may be interpreted contrary to its express terms. ORS 197.298(2) (statutory priority statute) requires the following:

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

Nothing in this statute says it is limited only to land where there is no exception. Also, in this regard, the Director's Report misreads the cited LUBA decisions. In none of those cited decisions is the issue Swalley raised here at issue – namely Swalley's position is that the express terms of the statute require prioritizing soils types regarding of whether those soils underlie so called exceptions.

Swalley's interpretation is consistent with the legislative history of this statute. That legislative history of ORS 197.298 is attached to Swalley's DLCD Objection as Attachment L, p 4. It is evident from the legislative history of ORS 197.298(2) that initially the soils priority requirement established in ORS 197.298(2), was proposed to be a part of the provision limited to agricultural land prioritization. That would give the statute the meaning the Director's Decision ascribes to it. However, the legislature *unbundled the soil priority requirement from the agricultural lands priority and established ORS 197.298(2) as an independent standard applicable to all ORS 197.298(1) priorities.*

Therefore the **only** correct interpretation of the ORS 197.298(2) requirement is the one that is consistent with its express terms and history -- that it requires prioritizing even within exception areas as well as all potential UGB amendment areas, and that the city take the worst soils classifications first. The measurement of the soils in terms of soil classification system soils class types is commonly referred to as the NRCS soil capability classification system. The maps at Swalley DLCD Objection Attachment A and J show soils types by the NRCS classification system.

The decisions the city submitted bring land into the UGB in the northwest, located within the Swalley District containing soils having the highest (best) soil classification, on larger parcels, as well making them more valuable by soils class than other lands available to the city.⁴ On the other hand, the city failed to study or include in the UGB the thousands of acres of undisputed exception land designated SR in the southwest that contain the worst soils classes. Swalley DLCD Objection Attachment A, p 2-5. This problem is particularly apparent where the city has ignored the 2600 exception acres in Deschutes River Woods and the thousands of exception acres including in River West and other southwestern areas for the proposed UGB amendment. See Swalley DLCD Objection Exhibit M p 29-30, 32, 40. The city failed to prioritize this or other land based on soils types and this error is fatal to the submittal. The proposal fails to comply with ORS 197.298(2).

Specific modification to the work task necessary to resolve the alleged deficiency

For these reasons, LCDC should remand the submittal with instructions to (a) apply the ORS 197.298(2) priorities based on NRCS soils capability classification to all candidate UGB amendment areas, and (b) select UGB amendment locations consistent with state and local law including by taking the worst classification of exception land soils first (these lands are predominately in the southwest) and the best soils last, and (c) remove any reference to UAR areas as “acknowledged exceptions” for purposes of applying the statutory priorities. The instructions should further require the city to include the exception lands in the southwest (including Deschutes River Woods and River West) in the candidate UGB amendment alternative areas considered.

13. The Director’s Report p 152 errs in determining that the city adequately coordinated with Swalley.

The submittals have not been coordinated with Swalley, notwithstanding that the city was advised that coordination with Swalley was required. See *D.S. Parklane v. Metro*, 165 Or 1 (2000). The facts and objections and remedies related in this Submittal Response above are incorporated herein by this reference.

While the findings state the city has met with “affected” districts nine times, there is a difference between showing up at a meeting and cooperatively exchanging information and

⁴ They also include key Swalley infrastructure which infrastructure is located both on good and poor quality soils.

accommodating Swalley's concerns as much as possible as Goal 2 requires. The latter is the essence of the coordination obligation and the latter is what has been neglected in this process. Swalley has objected strongly to the inclusion of the lands in the northwest in the UGB. Its concerns are backed by strong state public policy protecting the district. Specifically, ORS 545.249 provides that the use of all water and property "required in fully carrying out the Irrigation District Law is declared to be a public use more necessary, and more beneficial than any other use, either public or private * * *". It would be a simple thing for the city to remove the disputed northwestern lands because they contribute to the unjustifiably large UGB amendment and are the single most expensive area to urbanize of all. Clearly, it is "possible" to remove the northwest and a smart idea.

The city responded that it cannot accommodate Swalley request to remove this valuable irrigated land containing valuable irrigation infrastructure, suggesting wholly erroneously that Swalley's concerns are not "legitimate." Findings 163. The Director's Report makes clear that in fact Swalley's concerns are legitimate. Therefore the city/county failure to coordinate with Swalley is based on an incorrect view of the law and cannot therefore as a matter of law be an accommodation as "much as possible." The findings make clear the city made no effort to accommodate Swalley based on its wrong interpretation of the law.

Moreover, the city findings betray hostility to Swalley's concerns such that the hostility that impaired the city's ability to achieve required coordination. Swalley fears that in the absence of a directive from LCDC, the city will refuse to accommodate Swalley's concerns as much as is possible, as accommodation is evidently indeed possible, based on the Director's Report.

The city claim apparently bought by the Director's Report of evidence of coordination with Swalley (Findings 123) because the city "removed a 332 acre area at the north area [that is] entirely within [Swalley]" is unavailing and wrong. The 332 acre area was first added at the last minute in October 2008 for an "auto mall". It was removed at the last minute because there was no possible justification for it.

In fact DLCD, ODOT and citizens in the area strongly objected to its inclusion. The city findings claim that this area was removed as a reflection of these legal problems. The city admits this reason for removal in its Findings at p 135: "The area designated for a future auto mall and adjacent industrial uses at the north end of the city flanking both sides of N. Hwy. 97 was removed from the boundary. This action reduced the overall size of the proposed UGB expansion by 332 available acres. It was taken in response to concerns expressed by [ODOT] and [DLCD] and neighbors whose testimony in the Council's public hearing expressed concern about the proposed commercial and industrial uses with nearby rural residential neighborhoods." See also Findings p 123: "the city has determined that an auto mall is not

warranted as a special economic land need, therefore this proposed UGB amendment does not include a specially designated site for that purpose.”⁵

Clearly, its removal was no effort at accommodation to Swalley, as the district had been objecting to the northwest since the beginning – long before the last minute attempt to add the auto mall. The auto mall is nothing more than a straw man that was added at the last minute making matters much worse, and then removed as some concession.

The refusal to consider Swalley’s concerns at its core occurred from the city being married to an unadopted sewer and water plan which sewer plan included provision for an ambitious “north interceptor” to run through the northwest, across the deepest part of the Deschutes River Canyon or to blast/drill under the river to reach the western part of the city. This plan for the “north interceptor” was a part of the city’s desire to urbanize EFU zoned Juniper Ridge and as a way to facilitate the requests of the large developer in the northwest to build the “Riley Park” subdivision.

Swalley repeatedly stated its concern and objection to the northwestern UGB expansion proposal, objected to the CSMP, objected to the Water Public facilities Plan, objected that the city never factored in the particular and unique costs of the north interceptor including the needed bridge and blasting for arguably the deepest part of the Deschutes River Canyon for a sewer main, objected to the high costs and inefficiencies of public facilities and services in the northwest and that the city had failed to give any serious consideration to the southwest exception areas consisting of thousands of acres.

Swalley constructively suggested the city consider other UGB amendment and sewer routing options including the undisputed exception land in the southwest. *See* County July 18, 2007 memorandum at p 3 and Attachments A and M. The city never responded to Swalley’s requests and did not make an effort to accommodate Swalley as much as possible as Goal 2 requires. Instead, the city insisted in assuming Swalley would be urbanized. The city failed to consider other land for urbanization and simply (and unlawfully) made compliance with the north interceptor and other elements of the unadopted sewer plan and unadopted water plan a standard for “suitable” UGB amendment locations.

In fact, far from coordination, the record discloses a pattern characterized by a lack of information exchange, cooperation and accommodation.⁶

⁵ While the city’s lawyers say the auto mall was removed in the Findings, the city plan says otherwise. *See* BAGP 6-16-17: “The auto mall will be a statewide draw and make one of Bend’s most productive retail uses competitive into the future. The relocated auto sales sites in the core of Bend will likely be redeveloped to more intensive and vital mixed use centers in the future.” Bend Area General Plan 6-17. Also the “new auto mall along Highway 97 * * * will facilitate the gradual development of the Juniper Ridge Master Plan. BAGP, 6-17. **LCDC should require these provisions of the plan be removed.**

⁶ It is not true that COID did not object to the city proposal. COID did object “While the irrigation districts have been meeting with City staff this past year discussing all the issues mentioned above, the results of those conversations appears to be a discounting of irrigations district input and concerns.” Letter dated October 6, 2008.

While never allowed the insider type of participation of a “stakeholder”⁷, Swalley was invited in 2008 to participate in the citizen’s advisory committee (TAC) for the UGB amendment decision. This was a large group of people put together to discuss the UGB amendment proposal. Swalley made several suggestions as a part of that group but none of its suggestions were considered or followed by the city. Moreover, the TAC recommended to the city that a far less aggressive proposal be adopted which took much less of Swalley’s district. However, the city disbanded the TAC and did not adopt its recommendations, but instead came up with the Alternative 4 and eventually the so-called “4A” Option, and put it on the hearing docket for November 24, 2008. The TAC was not a way for Swalley to have meaningful input on the process and was not a Goal 2 compliant “coordination mechanism”.

Swalley requested opportunities to meet with city staff including public works staff on these critically important issues and to have a hand in the future sewer system routing decisions and water systems development and routing decisions and the UGB locations themselves. But the city refused, instead only being willing to meet with Swalley about the timing of installing the sewer infrastructure in the northwest and possible mitigation during construction and crossing district facilities. This fails to establish compliance in either letter or spirit with the coordination obligation for these critically important decisions.

Moreover, there has been no exchange of information whatsoever on the new city EOA, which Swalley saw for the first time on November 13, 2008 (while too late to have meaningful dialogue or input, this document was furnished through the courtesy of the county). The Director’s Report is simply wrong that the city was free to ignore Swalley’s concerns.

Nothing relieves the city from its Goal 2 coordination obligation for plan amendments which the proposed EOA clearly is. Since the new EOA is the document that justifies in part the new proposal to double the amount of land in the proposed UGB (the greatest single share of the UGB land is in Swalley’s district), the failure to coordinate the EOA is fatal to its adoption.

Specific modification to the work task necessary to resolve the alleged deficiency For these reasons, LCDC should remand the submittal with instructions to the city to (a) remove the northwestern area from the UGB amendment as being unnecessary or too expensive and inefficient based on the record or order the city to (b) submit the specific proposals, including UGB amendment location, transportation and infrastructure plans and EOA, HNA and BLI, to

Rec. 4979. *See also* Rec. 10270. However, the fact is the proposed UGB amendment location disproportionately harms Swalley.

⁷ All the developers except for Rose got at least a part of they wanted from the city and several were special “stakeholder” advisors to the city on what the city should do. *See* Attachment H. One of those “stakeholder” advisors, Brooks Resources wished at one point to develop Swalley’s district in the northwest and, as such, it is the largest single developer beneficiary of the UGB amendment proposal.

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Swalley for its comment, (c) consider Swalley's comments, (d) accommodate them as much as possible, and (e) remove the language in the plan noted in n 5.

The city should further be instructed that when it does consider UGB amendment locations in the context of legitimate public facilities issues, that it must coequally consider all costs and environmental issues, including the fact that the area in the northwest is a State of Oregon Scenic Waterway. While we believe the Director's Report requires the city to estimate the costs and feasibility as well as inventory and protect environmental values in order to determine suitability of the northwest, this should be clarified here as well.

Swalley appreciates this opportunity to comment and looks forward to an LCDC order that is reflective of the law and requires the city and county to consider, accommodate and protect Swalley in any future UGB amendment proposals. Thank you.

Very truly yours,

Wendie L. Kellington

Wendie L. Kellington

WLK:wlk

Enclosures

CC: Suzanne Butterfield, Manager, SID