



# Oregon

Kate Brown, Governor

Department of Land Conservation and Development

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[www.oregon.gov/LCD](http://www.oregon.gov/LCD)



## NOTICE OF ADOPTED CHANGE TO A COMPREHENSIVE PLAN OR LAND USE REGULATION

Date: June 09, 2016

Jurisdiction: City of Bend

Local file no.: PZ 15-0391

DLCD file no.: 003-15

The Department of Land Conservation and Development (DLCD) received the attached notice of adopted amendment to a comprehensive plan or land use regulation on 03/10/2016. A copy of the adopted amendment is available for review at the DLCD office in Salem and the local government office.

Notice of the proposed amendment was submitted to DLCD 36 days prior to the first evidentiary hearing.

### Appeal Procedures

Eligibility to appeal this amendment is governed by ORS 197.612, ORS 197.620, and ORS 197.830. Under ORS 197.830(9), a notice of intent to appeal a land use decision to LUBA must be filed no later than 21 days after the date the decision sought to be reviewed became final. If you have questions about the date the decision became final, please contact the jurisdiction that adopted the amendment.

A notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR chapter 661, division 10).

If the amendment is not appealed, it will be deemed acknowledged as set forth in ORS 197.625(1)(a). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

### DLCD Contact

If you have questions about this notice, please contact DLCD's Plan Amendment Specialist at 503-934-0017 or [plan.amendments@state.or.us](mailto:plan.amendments@state.or.us)



## NOTICE OF ADOPTED CHANGE TO A COMPREHENSIVE PLAN OR LAND USE REGULATION

FOR DLCD USE

File No.: 003-15 {23756}

Received: 6/7/2016

Local governments are required to send notice of an adopted change to a comprehensive plan or land use regulation **no more than 20 days after the adoption.** (See [OAR 660-018-0040](#)). The rules require that the notice include a completed copy of this form. **This notice form is not for submittal of a completed periodic review task or a plan amendment reviewed in the manner of periodic review.** Use [Form 4](#) for an adopted urban growth boundary including over 50 acres by a city with a population greater than 2,500 within the UGB or an urban growth boundary amendment over 100 acres adopted by a metropolitan service district. Use [Form 5](#) for an adopted urban reserve designation, or amendment to add over 50 acres, by a city with a population greater than 2,500 within the UGB. Use [Form 6](#) with submittal of an adopted periodic review task.

Jurisdiction: City of Bend

Local file no.: **PZ 15-0391**

Date of adoption: 06/01/2016

Date sent: 6/7/2016

Was Notice of a Proposed Change (Form 1) submitted to DLCD?

Yes: Date (use the date of last revision if a revised Form 1 was submitted): 03/10/2016

No

Is the adopted change different from what was described in the Notice of Proposed Change? Yes No

If yes, describe how the adoption differs from the proposal:

**Revised Ordinance adopted with additional findings to address LUBA remand.**

Local contact (name and title): Amy Barry, Senior Planner

Phone: 541-693-2114

E-mail: [abarry@bendoregon.gov](mailto:abarry@bendoregon.gov)

Street address: 710 NW Wall St

City: Bend

Zip: 97701-

**PLEASE COMPLETE ALL OF THE FOLLOWING SECTIONS THAT APPLY****For a change to comprehensive plan text:**

Identify the sections of the plan that were added or amended and which statewide planning goals those sections implement, if any:

N/A

**For a change to a comprehensive plan map:**

Identify the former and new map designations and the area affected:

Change from PF	to RM	5.36 acres.	A goal exception was required for this change.
Change from	to	acres.	A goal exception was required for this change.
Change from	to	acres.	A goal exception was required for this change.
Change from	to	acres.	A goal exception was required for this change.

Location of affected property (T, R, Sec., TL and address): 17-12-22DA-00101

The subject property is entirely within an urban growth boundary

The subject property is partially within an urban growth boundary

**If the comprehensive plan map change is a UGB amendment** including less than 50 acres and/or by a city with a population less than 2,500 in the urban area, indicate the number of acres of the former rural plan designation, by type, included in the boundary.

Exclusive Farm Use – Acres:	Non-resource – Acres:
Forest – Acres:	Marginal Lands – Acres:
Rural Residential – Acres:	Natural Resource/Coastal/Open Space – Acres:
Rural Commercial or Industrial – Acres:	Other: – Acres:

**If the comprehensive plan map change is an urban reserve** amendment including less than 50 acres, or establishment or amendment of an urban reserve by a city with a population less than 2,500 in the urban area, indicate the number of acres, by plan designation, included in the boundary.

Exclusive Farm Use – Acres:	Non-resource – Acres:
Forest – Acres:	Marginal Lands – Acres:
Rural Residential – Acres:	Natural Resource/Coastal/Open Space – Acres:
Rural Commercial or Industrial – Acres:	Other: – Acres:

**For a change to the text of an ordinance or code:**

Identify the sections of the ordinance or code that were added or amended by title and number:

**For a change to a zoning map:**

Identify the former and new base zone designations and the area affected:

Change from RS	to RM	Acres: 5.36
Change from	to	Acres:
Change from	to	Acres:
Change from	to	Acres:

Identify additions to or removal from an overlay zone designation and the area affected:

Overlay zone designation:	Acres added:	Acres removed:
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Location of affected property (T, R, Sec., TL and address): 17-12-22DA-00101

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List affected state or federal agencies, local governments and special districts: N/A

Identify supplemental information that is included because it may be useful to inform DLCD or members of the public of the effect of the actual change that has been submitted with this Notice of Adopted Change, if any. If the submittal, including supplementary materials, exceeds 100 pages, include a summary of the amendment briefly describing its purpose and requirements.

A notice of adoption for Ord. NS-2249 was sent on September 3, 2015. On September 21, 2015, an appeal was filed with LUBA (LUBA 2015-068) on behalf of Larry Kine. On December 24, 2015, LUBA remanded the decision based on its determination that certain findings were insufficient. On June 1, 2016, the Bend City Council adopted Ordinance NS-2267 (replacing NS-2261), which included supplemental findings in addition to the findings adopted in Ord. NS-2249.

## ORDINANCE NO. NS-2267

AN ORDINANCE AMENDING THE BEND AREA GENERAL PLAN MAP TO CHANGE THE DESIGNATION OF 5.36 ACRES OF PROPERTY FROM PUBLIC FACILITIES (PF) TO RESIDENTIAL MEDIUM DENSITY (RM) ALONG WITH A ZONING MAP AMENDMENT FROM RESIDENTIAL STANDARD DENSITY (RS) TO RM. THE PROPERTY IS LOCATED ON THE EAST SIDE OF THE FUTURE EXTENSION OF EMPIRE AVENUE/27<sup>TH</sup> STREET, NORTH OF BUTLER MARKET ROAD.

### Findings

- A. On April 21, 2015, the City of Bend submitted a Type III Quasi-judicial application to change the designation of 5.36 acres of city-owned property from Public Facilities (PF) to Residential Medium Density (RM) along with a Zoning Map Amendment from Residential Standard Density (RS) to RM for consistency with the proposed General Plan designation.
- D. The Bend City Council held a public hearing on August 19, 2015, to consider the Hearings Officer recommendation and conduct a first reading. On September 2, 2015 the Council adopted Ordinance No. NS-2249 approving the application.
- E. The decision was appealed to the Land Use Board of Appeals, which through its December 24, 2015 Final Opinion and Order found several of the findings to be insufficient and remanded the decision to the City for further consideration of those particular issues,
- F. The Council held a public hearing on May 18, 2016 to consider the issues on remand and conduct a first reading of this ordinance. On June 1, 2016 the Council adopted Ordinance No. NS-2267 approving the application, including the incorporation and adoption of the supplemental findings attached to this ordinance as Exhibit C, as well as the additional supplemental findings attached in Exhibit D. This ordinance also adopts and incorporates the findings adopted by Ordinance No. NS-2249.
- E. The amendments to the Bend Area General Plan Map and Zoning Map approved by this Ordinance meet all applicable Development Code criteria, policies of the Bend Area General Plan, Oregon Statewide Planning Goals, and the Transportation Planning Rule.

### THE CITY OF BEND ORDAINS AS FOLLOWS:

- Section 1. The Bend Area General Plan Map is amended to change and Zoning Map are amended to change the designation of 5.36 acres of property from PF to RM as contained in Exhibit A.
- Section 2. The Bend Zoning Map is amended to change the zoning of 5.36 acres of property from RS to RM for consistency with the proposed General Plan designation as contained in Exhibit B.
- Section 3. The City Council adopts the supplemental findings in support of this ordinance as contained in Exhibit C, the additional supplemental findings in Exhibit D, as well as the findings adopted by Ordinance No. NS-2249.

Section 4. This Ordinance replaces Ordinance No. NS-2261, adopted by the Council on March 2, 2016.

First reading: May 18, 2016.

Second reading and adoption by roll call vote: June 1, 2016.

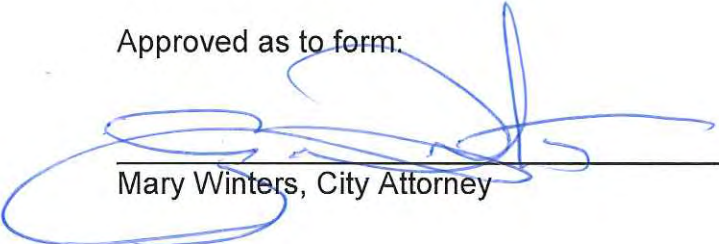
YES:	Jim Clinton, Mayor	No: None
	Doug Knight	
	Victor Chudowsky	
	Sally Russell	
	Nathan Boddie	
	Casey Roats	
	Barb Campbell	

  
\_\_\_\_\_  
Jim Clinton, Mayor

Attest:

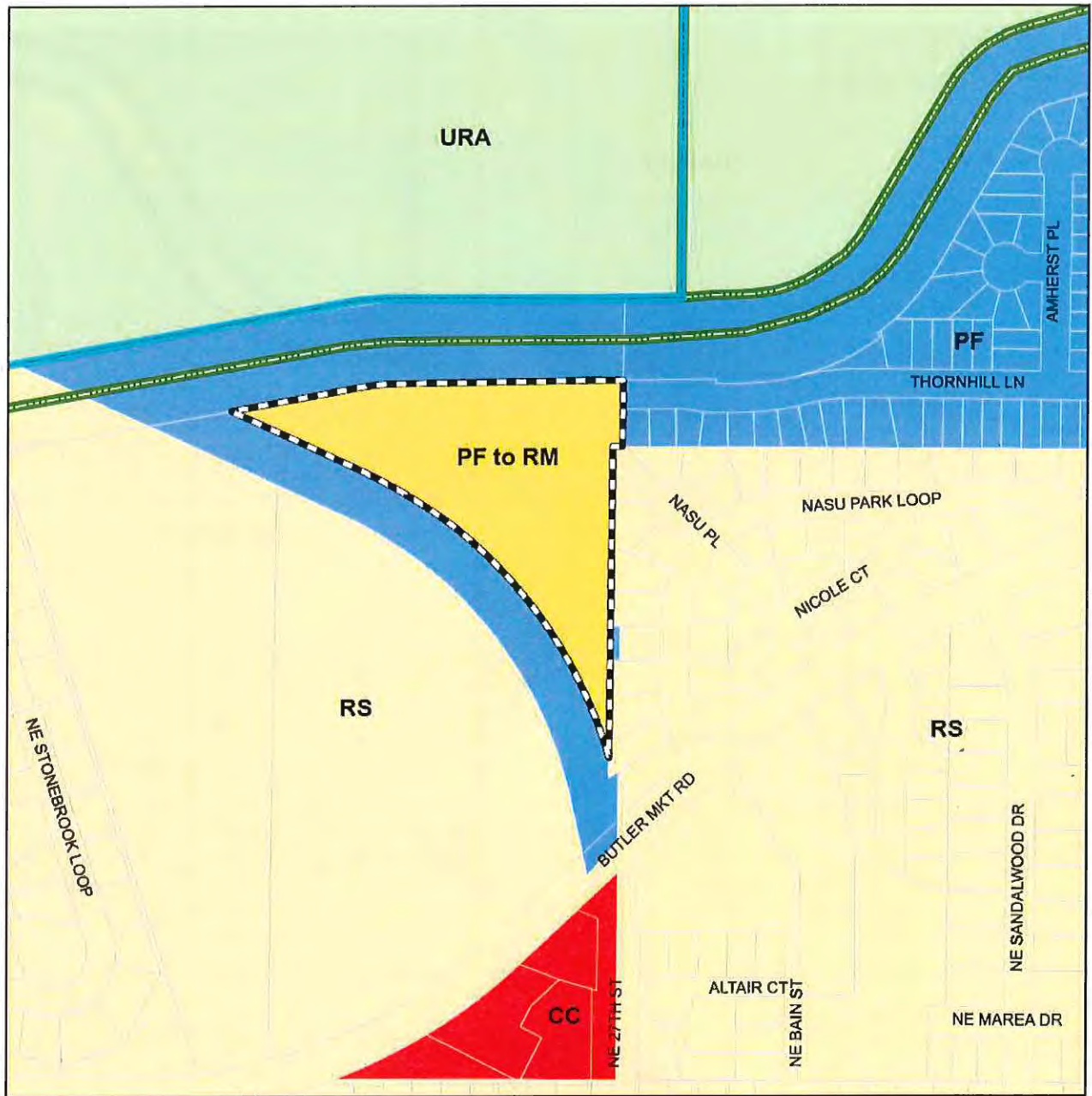
  
\_\_\_\_\_  
Robyn Christie, City of Bend Recorder

Approved as to form:

  
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Mary Winters, City Attorney

# Exhibit A. General Plan Map Amendments

PZ-15-0391 Empire and Thornhill Plan Amendment and Zone Change



**Legend**

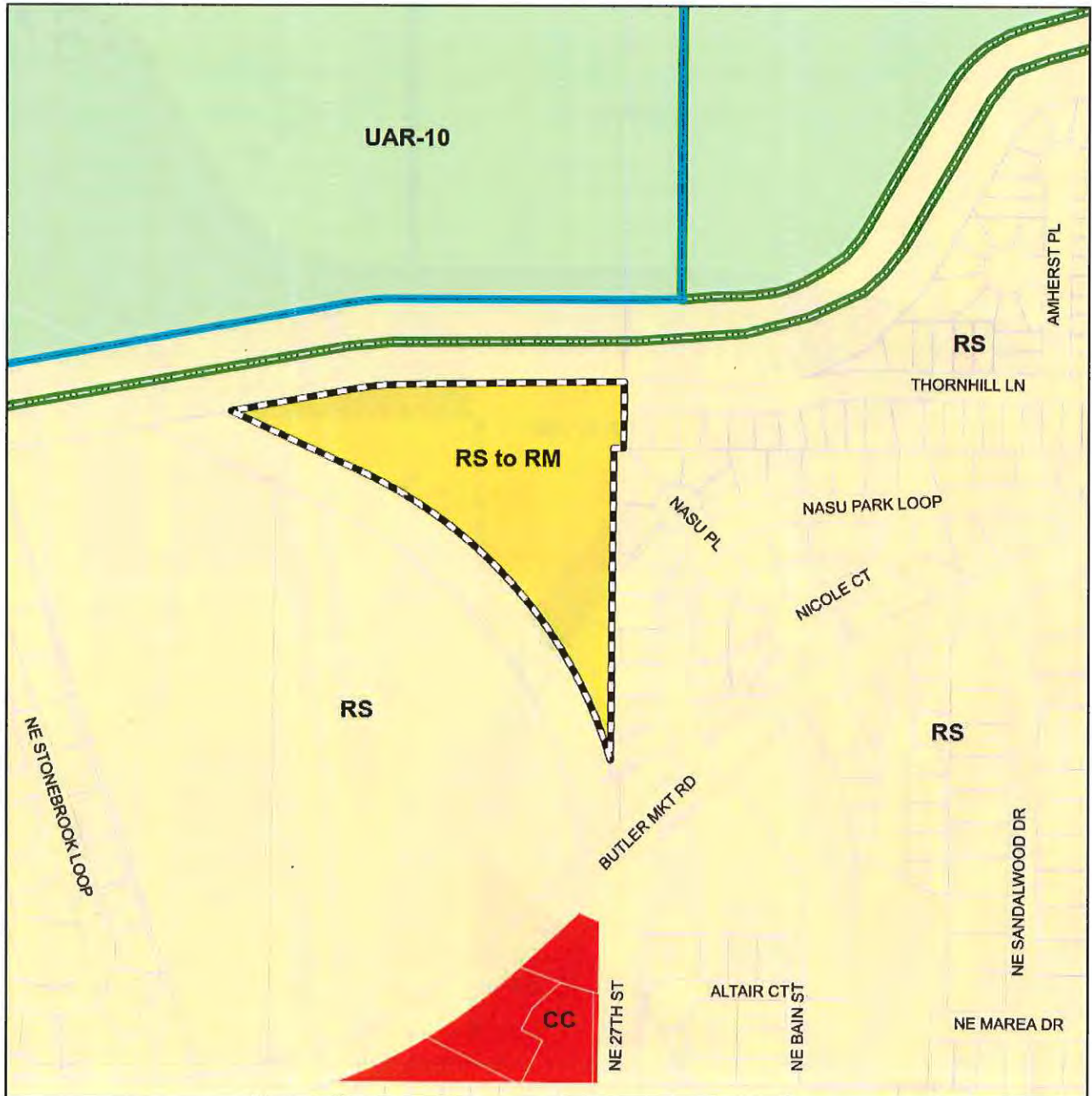
	Proposed Area for Amendment		Convenience Commercial
	City Limits		Public Facilities
	Urban Growth Boundary		Residential Medium Density
			Residential Standard Density
			Urban Reserve Area

0 150 300 450 600 Feet




Map of Proposed General Plan Map Amendments  
Prepared Aug. 4, 2015 by R. Ruppel, City of Bend  
Planning Division, Community Development Dept.

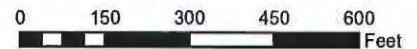
# Exhibit B. Zoning Map Amendments

PZ-15-0391 Empire and Thornhill Plan Amendment and Zone Change



### Legend

-  Proposed Area for Amendment
-  City Limits
-  Urban Growth Boundary
-  Convenience Commercial
-  Medium Density Residential
-  Standard Density Residential
-  Urban Area Reserve 10-Ac Min.



Map of Proposed Zoning Map Amendments  
 Prepared Aug. 4, 2015 by R. Ruppel, City of Bend  
 Planning Division, Community Development Dept.

**EXHIBIT C**  
**SUPPLEMENTAL FINDINGS**  
**PZ 15-0391**

**APPLICABLE PROCEDURES AND CRITERIA ON REMAND**

**Applicable Criteria**

Bend Development Code (BDC)

Chapter 4.6, Land Use District Map and Text Amendments

Bend Area General Plan

**Applicable Procedures**

BDC Chapter 4.1, Land Use Review and Procedures

**Chapter 1, Policy 5**

*The city and county will encourage compact development and the integration of land uses within the Urban Growth Boundary to reduce trips, vehicle miles traveled and facilitate non-automobile travel.*

The Council finds that this policy is intended to encourage and facilitate a mix of uses, where appropriate, and that the Residential Medium (RM) designation is especially appropriate for this site precisely because it promotes that diversity in an area of the city where a greater integration of land uses is needed. Having such a mix can generally help to reduce trips, vehicle miles traveled, and facilitate non-automobile travel, because compact development helps limit sprawl and provides options for uses and activities within a particular area. As the discussion for subsequent findings will show, this area has a variety of land uses, from Convenience Commercial (CC) directly to the south, to Industrial Light (IL) employment lands just over a ½ mile to the west, a large regional park abutting the site to the north, a church and private school directly across the street to the west, a public elementary school ½ mile to the north, a public high school ½ mile to the south, and the major medical district for the city less than 1 mile to the south. This area is otherwise dominated by neighborhoods developed with single-family detached dwellings. There is almost no multifamily development in the area. Therefore, changing the designations to RM for this site to allow for multifamily development will bring to the area an element it is currently lacking, something that is consistent with and achieves the goals in this policy of integrating land uses, where appropriate, to reduce reliance on automobile travel and provide people options that will reduce the distances and frequency of automobile trips. It will integrate the multi-family development with the other existing land uses, creating a mix of uses in closer proximity to each other consistent with and implementing this policy.

**Chapter 5, Policy 1**

*Future development and local development standards shall recognize and respect the character of the existing areas.*

Exhibit C – Supplemental Findings

PZ 15-0391

Page 1 of 9



The character of the area to the east and southeast of the subject site is residential, but there are commercial areas to the direct south and west (CC zone and Trinity Lutheran Church and School), and Pine Nursery Park to the north. The proposed development will also be residential, and as such will be more consistent with the character of the nearby residential areas than commercial development. The Council also notes that the proposed plan amendment will change the designation from PF, a designation which would allow a variety of public facility developments which would be more industrial or commercial in character. Thus, several of the other options, including leaving the designation unchanged, would be less consistent with the character of the existing area, and potentially less respectful of that character.

Although the proposed change to RM is higher density than the RS designation of the residential area nearby, the Council finds that having different residential densities in the same area does not equate to a conclusion that the character of an existing area is not being recognized or respected. Indeed, the Council notes that other policies, such as Chapter 1, Policy 5, by their nature encourage and result in a mix of uses and designations through integration of different land uses in order to accomplish important goals, such as the reduction of vehicle miles traveled. Here, considering the current nature of the subject site, its current plan designation, the lack of need for public facilities at the site, the potential compatibility of those public facility uses with the existing area, and other factors, the Council finds that changing the plan designation to RM is consistent with recognizing and respecting the character of the existing area, and finds that it will most likely enhance it. Finally, this policy connects itself to the creation and maintenance of the standards in the Bend Development Code, which regulates future development, including features such as building heights, lot coverage, permitted uses, transitional buffers, and others to ensure compatibility and respect for the character of existing areas.

### **Chapter 5, Policy 21**

*Densities recommended on the Plan shall be recognized in order to maintain proper relationships between proposed public facilities and services to the population distribution.*

The Council finds that the history of this site is instructive in demonstrating why the proposed change is consistent with and meets this policy. The subject site was acquired by the City from the Bend Parks and Recreation District in 2006, in part because the District had no need of the land for a park. The City has the land it needs for the planned 27<sup>th</sup> Street/Empire Avenue extension, and has no need of the land for other public facility uses. The decision to seek a change to the density recommended on the plan is due in part to a desire to increase the residential population component in this area. Put another way, while the policy may be intended to ensure that an area's population is not underserved by public facilities, this area is currently one where the relationship between population and public facilities is skewed in the *opposite* direction because there is insufficient population in the area to take advantage of the adequate public facilities, such as Pine Nursery Park to the north and the nearby schools. Therefore, there is no need for more of those facilities even with the anticipated increase in population that would come with higher density residential housing.

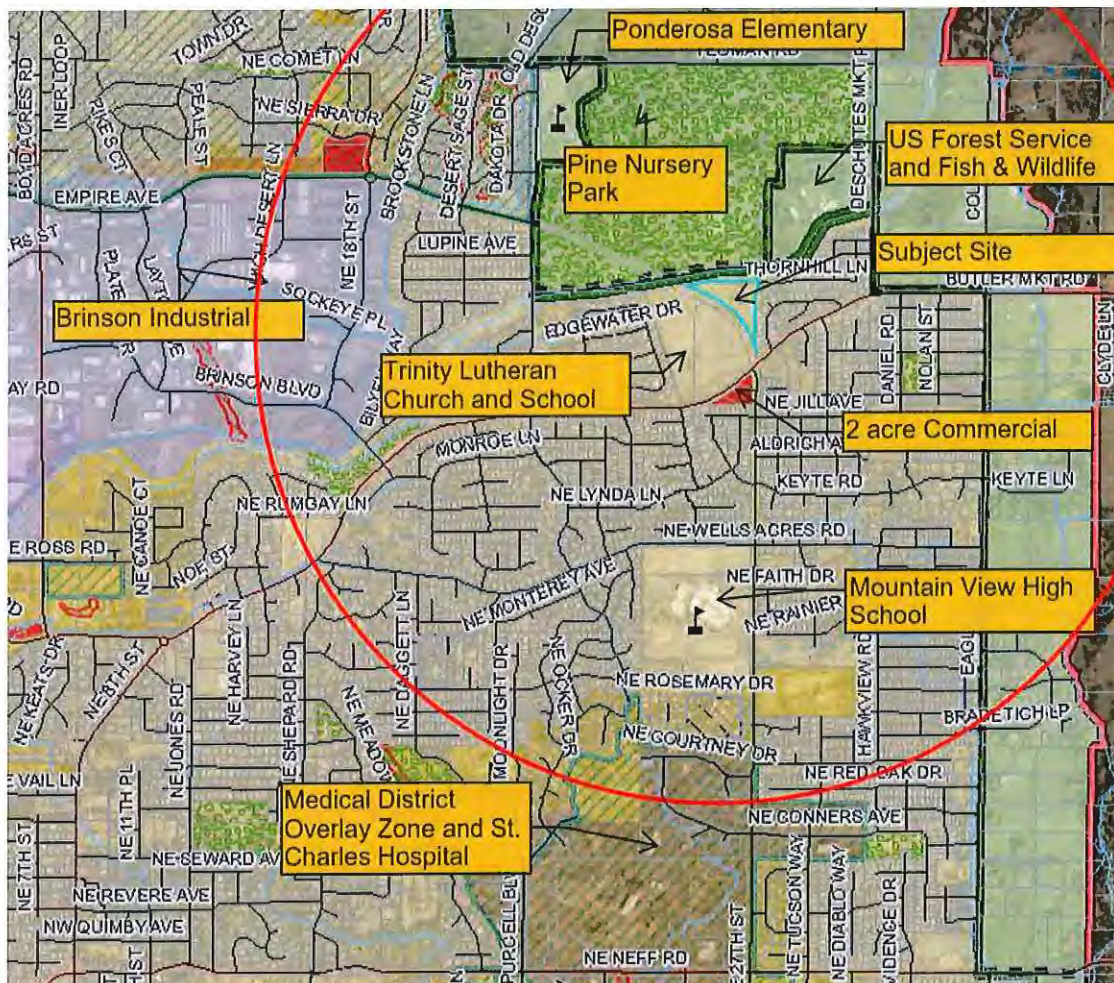
The Council therefore finds that the application is consistent with and will facilitate a better and more appropriate relationship between public facilities and services to the population distribution.

**Chapter 5, Policy 31 and Chapter 7, Policy 6.9.1**

*Medium and high density developments shall be located where they have good access to arterial streets and be near commercial services, employment and public open space to provide the maximum convenience to the highest concentrations of populations.*

The language in these plan policies is essentially identical with only minor variations which are not material to the meaning. The language from Chapter 5, Policy 31 is produced above.

The CC zone immediately to the south of the subject site is just over 2 acres and contains an array of commercial services, including a 3,196 square foot dentist office, two commercial/retail buildings (4,000 square foot and 2,400 square foot, respectively) with multiple tenants including a small market, two restaurants, a gun shop, a hair salon, a nearly 2,000 square foot gas/service station, and a drive-through coffee purveyor. An overview of the area around the subject site is helpful in understanding the location:



Approximately 1 mile radius —



Trinity Lutheran Church & School is also near, within walking distance. The school (elementary through high school) employs approximately 33 teachers and administrative staff.



Just to the northeast across the irrigation canal is the Bend Pine Nursery Administrative Site which contain administrative facilities for the USDA Forest Service and US Fish and Wildlife agencies.



Approximately  $\frac{1}{2}$  a mile to the north, separated from the site by the Pine Nursery Park, is Ponderosa Elementary School which employs approximately 51 staff including teachers, administration, and custodial, and has an enrollment of around 577 students.

Less than a  $\frac{1}{2}$  mile to the south on 27<sup>th</sup> Street is Mountain View High School which employs almost 100 staff including teachers, administration, and custodial.

Just south of the high school, less than 1 mile from the subject site, is the 220 acre Medical District Overlay zone, which includes St. Charles Hospital and a variety of medical offices and support services.

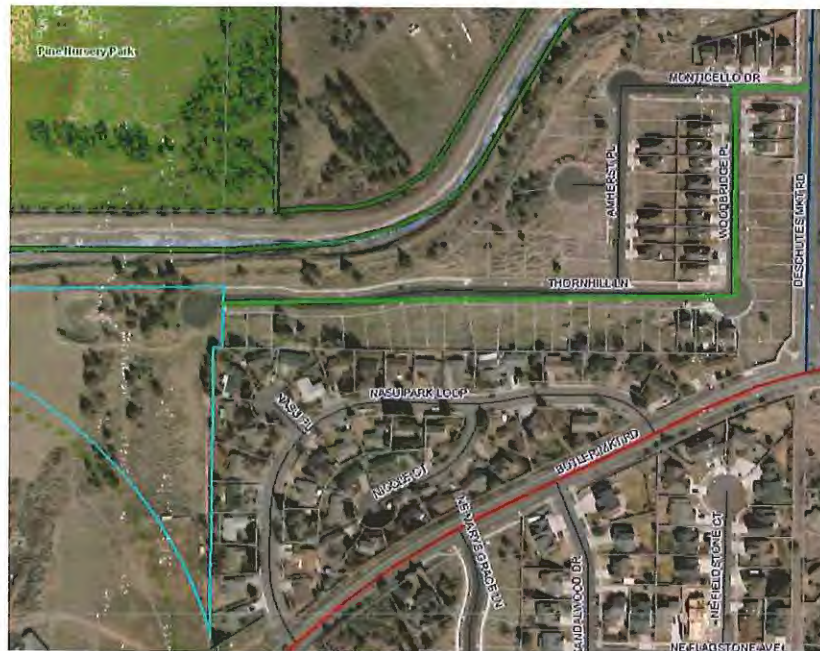
Also, just over ½ mile to the west, accessed both from Butler Market Road (existing arterial just south of site) and from the planned 27<sup>th</sup> Street/Empire Avenue arterial extension bounding the site on the west, is approximately 180 acres of industrial employment land with a variety of industrial and recreation uses and support services. While these economic lands are surrounded by residential lands, there is almost no multifamily development in this area. The only housing stock available within a ¾ mile radius of the subject property are single-family detached dwellings.

The Council finds that these various commercial services, employment and public open spaces are near the site and sufficient to satisfy this criterion.

This criterion also requires that the site have “good access to arterial streets.” The Council interprets “good access” to an arterial street as being met when the site is in reasonably close proximity and has access, whether direct or indirect, to the arterial. The policy language uses the term “good” to describe the requisite access, which is distinct from a requirement that the access be “direct”. Further, the policy language does not specify that it refers solely or even primarily to “vehicle” access.

In fact, both the plan and Development Code limit direct vehicle access to arterial and collector streets. Arterial and collector street standards require infrastructure for multi-modal transportation with sidewalks and bicycle lanes on both sides of the street, and often include existing or future planned transit routes and stops. The subject site will have direct pedestrian and bicycle system connections to this planned arterial, and potentially a direct vehicle access as well. Such bike and pedestrian connections will be required to be provided concurrently with development of the site, even if the larger City arterial street project is not yet constructed at the time of site development.

Even without considering the 27<sup>th</sup> Street/Empire Avenue extension, the south end of the site is less than 200 feet north of Butler Market Road (arterial street), and vehicle access from the site to Deschutes Market Road (collector street) is approximately 1/3 of a mile (green line below).



The subject site directly abuts the planned connection of two major arterial streets; 27<sup>th</sup> Street (south of Butler Market Road), and Empire Avenue (north of Butler Market). This arterial will connect Highway 97 at the Empire Avenue interchange to the Medical District which is less than a mile south of the subject site, and a major commercial area less than 2 miles south of the subject site (Costco, Forum Shopping Center, etc.) This is the major north/south corridor on the east side of town. The missing ½ mile section of this corridor adjacent to the subject site is a critical, high-priority infrastructure project that the City intends to undertake in the near future. The City acquired the subject site specifically for the purpose of creating the right of way needed for the project which was slated to be constructed just as the recession hit in 2007. However, due to the scope of this project, which will include a reconstruction of the intersection of 27<sup>th</sup> and Butler Market, likely with a roundabout, this project will be far too large for a developer to undertake and will likely be done as a City infrastructure project.

The applicant's TIA shows that the existing street infrastructure (not including the future 27<sup>th</sup> St/Empire Ave extension) is adequate to serve build out of the site with multifamily development at maximum RM zone density.

Accordingly, the Council determines that the current, existing access to arterial streets is sufficient to constitute good access, given the language of the plan policy. The high priority of the 27<sup>th</sup> Street/Empire Avenue extension is informative, but its future funding and construction is not a necessary basis for determining that the current access is sufficient.

#### **BDC 4.6.300.B.3**

*The property and affected area is presently provided with adequate public facilities, services and transportation networks to support the use, or such facilities, services and transportation networks are planned to be provided concurrently with the development of the property.*

The area's need for public facilities, and the adequacy of the area's services and public facilities, is addressed in the findings to the other relevant criteria. The Council finds that the property and the affected area is presently provided with adequate public facilities and services to support the use.

With regard to transportation networks, LUBA focused on an identified need for a second access point to the property for safety reasons, although the record establishes that the existing transportation system has adequate capacity to serve development of the site at maximum RM zone density, and there are sewer and water mains stubbed to the site that have adequate capacity as well.

No specific infrastructure needs (streets, sewer or water) were identified as needed to support the additional density. For instance, in some cases of plan amendments, the increase to the transportation system anticipated from the additional density triggers required mitigation at nearby intersections such as changes to signalization or additional turn lanes. The applicant's TIA did not identify any mitigation needed related to this proposed change, noting that:

- *The proposed rezone has the potential to increase the trip generation of the subject property by 29 weekday p.m. peak hour trips.*
- *The impact of the rezone will not meet significance thresholds at any of the area intersections.*
- *Thornhill Lane will continue to function as a local street with the rezone to RM.*

Additional findings and recommendations in the TIA are related to items that may need to be addressed with future development or future construction of the 27<sup>th</sup> Street/Empire Avenue extension:

- A new public street connection through the property of Thornhill Lane to the future Empire Avenue extension will be required to meet City block length and perimeter requirements. This connection was identified within the 2006 Empire Avenue plan and should be accommodated within future Empire Avenue extension designs.
- Consistent with the Empire Avenue Extension study, the connection to Empire Avenue will need to be located and designed to provide adequate sight lines north toward the vertical curve of the future bridge and south along the horizontal curve.

The Council finds that there are adequate public facilities, services and transportation networks to support the use that would be enabled under the RM designation. However, looking forward, any subsequent development of the site will be required to go through a Type II land use approval, either a Subdivision and/or Site Plan Review. The standards required for either subdivision or Site Plan Review ensure that adequate public facilities, services and transportation networks to support the use are provided concurrently with the development of the property.

It is likely that fire codes will require a second point of access with development of the site. However, where the access will be located and how it is provided will depend on the specific development proposal. It is premature and impracticable to require a specific condition of approval without a development plan. Further, as discussed below, a condition of approval is not needed as the review procedures and the applicable criteria and standards of the Development Code will ensure that adequate transportation networks are present.

Nevertheless, the Council observes that the 100 feet of public right-of-way for the future extension of 27<sup>th</sup> Street/Empire Avenue exists adjacent to the site and could easily accommodate a secondary emergency vehicle access and/or pedestrian and bicycle connections in the interim period before the full arterial street build-out. Because there is no proposal for development at this time, it is premature to speculate on what specific levels of infrastructure might be required with development, thus making it impossible to accurately craft specific conditions of approval on a plan amendment and zone change. These requirements *are planned to be provided concurrently with the development of the property* as required under BDC Chapter 3.4 which must be addressed and met with development of the site through the Type II Site Plan Review and/or Subdivision application processes which are *required* prior to development.

The Council finds that BDC 3.4.100 establishes that, even if the facilities, services, and transportation networks are not presently provided, they will be planned, provided, and required concurrently with the development of the property. BDC 3.4.100.B provides that development shall not occur unless the public improvements serving the development comply with the public facility requirements of Chapter 3.4. In addition, BDC 3.4.100.D mandates that no development shall occur unless required public facilities are in place or guaranteed.

Based on reading these Development Code provisions along with BDC 4.6.300.B.3, the Council finds that the provisions in BDC 3.4.100 effectively condition any development of the subject site on the presence of adequate public facilities, services, and transportation networks

concurrent with the development of the property, and that the application thus satisfies the requirements of BDC 4.6.300.B.3.

The Council also finds that BDC 4.6.300.B.3 may and should be read in light of the Application and Review Procedures in BDC 4.2, and that these aspects of the development code may be harmonized. Based on the anticipated use in this circumstance and the application and review procedures that would be concurrent with and applied to any future development proposal, the Council finds that those application and review procedures and the attendant requirements and standards for future development are tantamount to a condition that all public facilities, services and transportation networks will need to be provided at an adequate level concurrent with the future development of the property.



## EXHIBIT D to ORDINANCE

### ADDITIONAL SUPPLEMENTAL FINDINGS

#### IN RESPONSE TO COMMENTS RECEIVED MAY 17, 2016

These supplemental findings address comments made in the letter of Larry Kine dated May 16, 2016 and the letter of Christopher P. Koback dated May 17, 2016. Both letters were received on May 17, 2016.

The original findings and the supplemental findings demonstrate compliance with Plan Policies and Code provisions mentioned by Mr. Kine and Mr. Koback. These Additional Supplemental Findings are provided as further support for the decision.

#### Bend General Plan Chapter 1, Policy 5

*The city and county will encourage compact development and the integration of land uses within the Urban Growth Boundary to reduce trips, vehicle miles traveled and facilitate non-automobile travel.*

Mr. Kine and Mr. Koback argue that the “site does not reduce trips, vehicle miles, or non-automobile travel.” The change from Public Facilities plan designation and zoning allows medium density residential development to occur on the site. The site is across from a developed convenience commercial area. Allowing medium residential development close to commercial will allow pedestrian and bike trips to the commercial area from the residential area. The proximity to other uses, including nearby commercial and employment areas, will also reduce overall vehicle miles traveled by bringing additional residential capacity closer to those areas and minimizing the current need for residents to travel from longer distances. By having a mix of residential, higher density residential, and other commercial and employment uses, uses become closer to together which creates opportunities for people to make choices that inherently reduce vehicle miles traveled.

If the area remains designated and zoned Public Facilities, the residential units that could be built on the site would have to be built elsewhere, probably in a lower-density area or not adjacent to commercial development, which would substantially reduce pedestrian and bicycle trips and would increase vehicle trips and vehicle miles. The re-designation and rezoning will reduce vehicle trips, reduce vehicle miles, and facilitate non-automobile travel.

Mr. Kine argues that some routes do not have pedestrian access. The fact is that there are safe pedestrian routes, and improved pedestrian and bicycle access will occur over all routes in time, spurred in part by the presence of additional residents and demand for more routes and options. The prospective aspect of transportation is reflected in the

City's Development Code at 2.1.1000, which specified that medium and high density residential districts are intended, in part, to provide opportunities for future transit opportunities.

Mr. Kine also makes an argument related to snow removal. The fact is that snow prevents pedestrian or bicycle access only on a few days or weeks per year, and does so everywhere in the City. The ability for pedestrian and bicycle travel for the majority of the year will be increased.

Mr. Kine argues that sidewalks need to be installed or planned now. Sidewalks are installed at the time of development. They will be in place in developed areas when development occurs.

Mr. Kine also argues that existing homes meet the goal. Those existing homes are occupied, so do not meet the need for housing. Many are developed at low density, which increases the length of vehicle trips and makes vehicle use more likely. This argument is irrelevant to the issue whether this property should be re-designated and rezoned.

Mr. Kine argues that the lack of multifamily development for 40 years is evidence that the City has not found a need for multifamily in the area. Past planning actions have created a need for a greater amount of multifamily housing, not just in this area, but throughout the City. Multifamily housing can provide more needed affordable housing, which this re-designation and rezoning will accomplish.

Mr. Koback argues that RM development will add people and vehicles, thereby increasing vehicle trips. While the re-designation may increase vehicle trips in the immediate area, those trips would be added somewhere as the City adds residential capacity and sees additional growth. This site is close enough to some commercial and employment areas to allow some pedestrian and bicycle travel, and it is closer to commercial development than many other developable parts of the City, such as the area along 15<sup>th</sup> at the south end of the City. Further, both 27<sup>th</sup> and Butler Market are presently equipped with bicycle lanes, making trips by bike to employment and services not just feasible by proximity, but also in terms of facilities. Bicycle trips between the site and nearby industrial and employment lands can be accomplished in less than ten minutes, by existing bicycle lanes. This will both facilitate non-automobile travel and reduce vehicle miles traveled.

It has been established that compact development, including concentrating population and mix of uses, can be built anywhere, can be adapted to different settings, and can reduce congestion and support transportation alternatives and a reduction in vehicle miles traveled. *See Land Use and Driving: The Role Compact Development Can Play in Reducing Greenhouse Gas Emissions*, Urban Land Institute, pages 3-4 (2010).

Other Oregon communities have recognized that compact development and the integration of land uses can help reduce vehicle miles traveled, and implemented land use planning measures to do so. *Bend Integrated Land Use and Transportation Plan (April 14, 2016 Working Draft)*, page 21.

Finally, the plan and zone change for this site is consistent with the City's extensive planning efforts around housing, which are reflected in the Bend Housing Needs Analysis of April 14, 2016, also included in the record. This project identifies a need to take action to shift from the previous trend of building approximately 75% single family detached units in the period from 1998-2015, toward a rate that includes 55% single family detached, 10% single family attached, and 35% multifamily units.

The record as supplemented for the May 18, 2016 hearing contains extensive material from the ongoing Urban Growth Boundary expansion process, as well as other studies on development policies, vehicle miles traveled, and strategies for increasing housing and transportation efficiencies and economy. The City Council incorporates all of these materials in to the record and as part of this decision, including those referenced in these findings as well as those submitted to the record and not referenced. The Council finds that these materials are relevant and persuasive to this policy, as well as to the other policies and criteria at issue.

The Council finds that this material is persuasive evidence that proposed plan and zone change for the site would be compatible with Chapter 1, Policy 5, including because it generally supports the need for increased densities and a mix of housing types, including in areas where housing, either single family or higher density, has not traditionally been located.

#### Chapter 5, Policy 1

*Future development and local development standards shall recognize and respect the character of existing areas.*

Mr. Kine argues in effect that creating an RM zone in an area otherwise dominated by RS zoning is inconsistent with this policy. Mr. Kine also cites to past use of the property for a baseball field. Past use of the property is not relevant to this policy, what is relevant is the character of the existing area. The Council interprets this section as not requiring uniformity or the exact same zoning. Placing some RM zoning near or adjacent to RS zoning does not demonstrate a lack of respect for character of the area. The City has buffering standards that implement this policy that apply at the time of subdivision or development.

## Chapter 5, Policy 21

*Densities recommended on the plan shall be recognized in order to maintain proper relationships between proposed public facilities and services and population distribution.”*

The City Council interprets this provision as requiring that public facilities be planned to accommodate the plan densities upon development. The long-term planning for public facilities considers full build-out under current general plan designations. With this proposed change, sewer, water, and transportation analyses were done which demonstrated that all facilities were adequate to serve the site at RM density. Therefore, the evidence establishes that the proper relationships to public facilities and population distribution will be maintained.

Mr. Kine argues that the area should be returned to park use. It has seen little or no park use over the last several years. Furthermore, the Park District has not indicated any desire to use or develop the property as a park. It is currently owned by the City, which does not provide park uses. The City still plans to continue 27<sup>th</sup> to connect to Empire. That extension will be adjacent to the property and will result in a bridge over the canal. The City plans for the long-term, not for immediate need. In the long term, there will be a transportation connection across the canal, which will allow residents of the property easy access to Pine Nursery Park. Chapter 5, Policy 21 requires planning but does not require that all facilities be in place at the present. Even so, the evidence in the record establishes that the current facilities are adequate to serve the proposed density.

Both Mr. Koback and Mr. Kine argues that the City ignored its own traffic expert's recommendation that a secondary access be required. That is not what the traffic expert concluded. The requirement is for a second emergency access, which can be provided to the site. This is not an issue of transportation connectivity or facilities, but one of compliance with the fire code upon development. Emergency access can be achieved in numerous ways, including, for example, a gated access along gravel.

## Chapter 5, Policy 31, Chapter 7, Policy 6.9.1

These policies require medium density residential developments to be located with good access to arterial streets and near commercial services and open space. This property will have very good pedestrian and bicycle access to both Butler Market and 27<sup>th</sup>, both of which are arterials less than 200 feet from the site. When the 27<sup>th</sup> extension is built, the property will have direct access to 27<sup>th</sup>. Even under current conditions, the property is less than 2000 feet from Deschutes Market Road, a collector, which is good access.

As to access to employment, the property is about one to one and a half mile from a major industrial area north of Butler Market Road to the east. The Council interprets this kind of proximity to employment as sufficiently close to be “near” for purposes of this policy.

Mr. Kine argues that the property is not close to any groceries. That is not what the policy requires. However, there is a small market directly to the south, easily accessible to pedestrians or by bicycle via the signaled, controlled crossing at Butler Market and 27<sup>th</sup>.

Mr. Kine also argues that two points of ingress and egress are required and this property could be approved for more than that. A standard that depends on the number of units applies at the time of development, not at the time of plan designation or zoning, and is not relevant to these policies.

Finally, the preferred scenario for the UGB expansion – although not yet adopted – shows that it is likely the area just east of the site will see development of a substantial commercial area, as well as medium and higher density residential housing. *Bend Urbanization Report (April 14, 2016 Draft)*, p. 6. This will provide increased access to commercial services and employment opportunities less than one mile from the site. While the Council finds that the current features around the site are sufficient to satisfy these policies, the UGB materials demonstrate that changing the plan and zone designations is consistent with the nearby areas that are expected to be brought within the expanded UGB.

#### BDC 4.6.300B.3

*The property and affected area is presently provided with adequate public facilities, services and transportation networks to support the use, or such facilities, services and transportation systems are planned to be provided concurrently with the development of the property.*

The property and affected area have water and sewer facilities that are adequate to serve all existing and planned development and potential development of the property. As to transportation, the system that Mr. Kine is most concerned with, the road system functions, including the three arterials or collectors in the area, Deschutes Market Road, Butler Market Road and 27<sup>th</sup> Street, all function adequately and have capacity to carry the traffic from any development of the property; the local streets over which traffic will travel to access Deschutes Market Road has capacity and is adequate to serve the development what will be allowed by the new plan designation and zoning.

Mr. Koback repeats the argument about secondary access, but BDC 4.6.300B.3 does not require secondary access, and the property will have an emergency access in addition to its main access, which is all that is required.

The TIA in the record shows the existing right of way and transportation systems are adequate to serve proposed development at RM density. The existing arterial streets are adequate to provide good access, even without relying on the future extension of Empire. However, in response to the arguments that the Empire extension is too speculative, the Council notes that the record contains a January 21, 2016 email from Russell Grayson, the current Community Development Director and former City Engineer, demonstrating that the Empire extension is an identified priority project. The email also shows that design work has been done, and that the City has placed the project on the City's Transportation System Development Charge (SDC) List and begun actually collecting fees for the project (approximately \$250,000 worth as of January 2016). While additional funding sources may be needed, it is inaccurate to say the record does not contain evidence regarding the Empire project. Not only has design work been done and rights-of-way acquired, the City has been actively collecting funds for the project.



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BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON

LARRY KINE,  
*Petitioner,*

vs.

CITY OF BEND,  
*Respondent.*

LUBA No. 2015-068

FINAL OPINION  
AND ORDER

Appeal from City of Bend.

Christopher P. Koback, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hathaway Koback Connors LLP.

Mary A. Winters, Gary Firestone, and Ian M. Leitheiser, Legal Counsel, Bend, filed the response brief. Ian M. Leitheiser argued on behalf of respondent.

BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board Member, participated in the decision.

REMANDED 12/24/2015

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.



1  
2 **NATURE OF THE DECISION**

3       Petitioner appeals an ordinance that approves comprehensive plan and  
4 zoning map amendments to allow medium-density residential development.

5 **MOTION TO FILE REPLY BRIEF**

6       Petitioner moves to file a reply brief to address waiver and scope of  
7 review issues raised in the response brief. The city opposes the motion,  
8 arguing that the reply brief was untimely filed. OAR 661-010-0039 provides  
9 that the reply brief must be filed within seven days of the date the response  
10 brief is filed. Here, the response brief was filed November 19, 2015, and the  
11 reply brief filed November 30, 2015, 11 days later. Oral argument was held  
12 December 3, 2015.

13       Petitioner responds that the reply brief was timely filed, if the seven day  
14 deadline is computed according to OAR 661-010-0075(8), which provides:

15       “Computation of Time: Time deadlines in these rules shall be  
16       computed by excluding the first day and including the last day. If  
17       the last day is Saturday, Sunday or other state or federal legal  
18       holiday, the act must be performed on the next working day.”

19       The last day of the seven-day deadline was Thursday, November 25,  
20 Thanksgiving. The following day, November 26, all state offices were closed,  
21 including LUBA’s. Petitioner contends that the “next working day” was

1 Monday, November 30, 2015, and therefore the reply brief was timely filed on  
2 that date. We agree with petitioner. In addition, OAR 661-010-0005 provides  
3 that “[t]echnical violations not affecting the substantial rights of parties shall  
4 not interfere with the review of a land use decision[.]” Even if the reply brief  
5 had been filed in violation of our rules, the city does not allege any prejudice to  
6 its substantial rights. The reply brief is allowed.

7 **FACTS**

8 The subject property is a vacant 5.36-acre triangle-shaped parcel zoned  
9 Residential Standard Density (RS) and designated Public Facilities (PF) on the  
10 city’s comprehensive plan. In 2006, the city acquired the property from the  
11 city parks department, as surplus land. In 2015 city staff filed an application to  
12 re-designate the property from PF to Residential Medium Density (RM), and to  
13 rezone the property from RS to the corresponding medium-density residential  
14 zone, also called RM.

15 The subject property is generally surrounded by RS-zoned land. Access  
16 to the property is to the east, via a stub at Thornhill Lane, a local street, through  
17 an adjoining residential subdivision with 80 lots, to Deschutes Market Road.  
18 North of the property, outside the urban growth boundary, are an irrigation  
19 canal and a public park. South of the property is land developed with a church,  
20 which adjoins Butler Market Road, a minor arterial. A small commercial area,

1 zoned Convenience Commercial, is located at the nearby intersection of Butler  
2 Market Road and 27<sup>th</sup> Street. The city has future, unfunded plans to extend 27<sup>th</sup>  
3 Street as a major arterial north and west along the western border of the subject  
4 property, which would potentially allow a second access point to the property.  
5 Further west are vacant RS zoned lands.

6 Petitioner appeared orally and in writing during the proceedings below.  
7 The hearings officer held a hearing, and recommended approval, based on  
8 findings addressing the applicable plan and zone change standards. On  
9 September 2, 2015, the city council voted to adopt the challenged ordinance  
10 approving the city application. The city council adopted without changes the  
11 hearings officer's findings as its decision on the application. This appeal  
12 followed.

### 13 **FIRST ASSIGNMENT OF ERROR**

14 Bend Development Code (BDC) 4.6.300.B sets out four standards for  
15 quasi-judicial comprehensive plan and zoning amendments. The second  
16 standard, BDC 4.6.300.B.2, requires a finding that “[a]pproval of the request is  
17 consistent with the relevant policies of the Comprehensive Plan that are  
18 designated by the Planning Director or designee.” The planning director  
19 identified a number of relevant comprehensive plan policies in the Bend  
20 General Plan (BGP), which are addressed in the findings adopted by the

1 hearings officer and board of commissioners. Under the first assignment of  
2 error, petitioner challenges the adequacy and evidentiary support for the  
3 findings adopted to address five comprehensive plan policies.

4 As a preliminary matter, the city responds that no party raised issues  
5 below regarding any of the five comprehensive plan policies with the  
6 specificity required by ORS 197.763(1), and therefore the right to challenge the  
7 adequacy of the city's findings regarding those plan policies has been waived.<sup>1</sup>  
8 We disagree with the city's waiver challenge.

9 In *Lucier v. City of Medford*, 26 Or LUBA 213, 216 (1993), we held:

10 "In order to preserve the right to challenge at LUBA the adequacy  
11 of the adopted findings to address a relevant criterion or the  
12 evidentiary support for such findings, a petitioner must challenge  
13 the proposal's compliance with that criterion during the local  
14 proceedings. Once that is done, the petitioner may challenge the  
15 adequacy of the findings and the supporting evidence to  
16 demonstrate the proposal complies with the criterion. The  
17 particular findings ultimately adopted or evidence ultimately relied

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<sup>1</sup> ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1 on by the decision maker need not be anticipated and specifically  
2 challenged during the local proceedings.”

3 Generally, to be adequate for review, findings must (1) address the  
4 applicable standards, (2) set out the facts relied upon, and (3) explain how  
5 those facts lead to the conclusion that the standards are met. *Heiller v.*  
6 *Josephine County*, 23 Or LUBA 551, 556 (1992). To preserve the ability to  
7 challenge the adequacy of findings to satisfy one or more of the above  
8 requirements, a petitioner need not anticipate and challenge such basic  
9 inadequacies in the findings ultimately adopted in the final decision. Instead, a  
10 petitioner must demonstrate only that the petitioner or another party challenged  
11 the proposal’s compliance with the relevant approval standard. If so, then  
12 before LUBA the petitioner may challenge the basic adequacy of the findings  
13 addressing that standard.

14 In the present case, petitioner testified with respect to BDC 4.6.300.B.2,  
15 which as noted requires consistency with comprehensive plan policies  
16 identified by the planning director:

17 “The proposal is not consistent with the General Plan. Typically  
18 RM is located in locations that are buffers to commercial lands.  
19 This property is located in a sea of RS property. The closest RM  
20 property is  $\frac{3}{4}$  of a mile away to the West, which already has vacant  
21 land for development that is closer to commerce and  
22 employment.” Record 43.

1 Although this general compliance challenge does not cite or discuss specific  
2 comprehensive plan policies, it argues that the RM designation/zone is  
3 inappropriate because the site is not close to commercial areas and  
4 employment, which are relevant considerations under several BGP policies that  
5 the planning director identified as applicable, and which are discussed below.  
6 Petitioner and others also raised compliance issues with reference to specific  
7 plan policies. E.g. Record 43, 69, 146. In our view, the foregoing is sufficient  
8 to allow petitioner, on appeal to LUBA, to challenge the adequacy of the  
9 findings the city ultimately adopted to demonstrate compliance with BDC  
10 4.6.300.B.2, at least with respect to plan policies that petitioner or others cited  
11 to or referenced or cited the operative language of the plan policies. With  
12 respect to such policies, petitioner may argue that the findings are inadequate  
13 because they fail to (1) address the applicable standards, (2) set out the facts  
14 relied upon, and (3) explain how those facts lead to the conclusion that the  
15 standards are met. We therefore turn to petitioner's challenges to the adequacy  
16 of the findings the city adopted regarding five applicable BGP policies.

17 **A. BGP Chapter 5, Policy 31, and Chapter 7, Policy 6.9.1**

18 BGP Chapter 5, Policy 31 is part of a plan section devoted to  
19 transportation connectivity, and provides:

1           “Medium and high density developments shall be located where  
2           they have good access to arterial streets and be near commercial  
3           services, employment and public open space to provide the  
4           maximum convenience to the highest concentrations of  
5           populations.”

6   Chapter 7, Policy 6.9.1 provides nearly identical language. The city’s findings  
7   addressing both policies are also almost identical. We quote the findings  
8   addressing Policy 31:

9           “The subject property is situated near a minor arterial and a  
10          planned princip[al] arterial, and is adjacent to a commercial node  
11          and a public park. Pursuant to this section, the property is  
12          therefore located in an area where RM zoned properties should be  
13          located. The proposed amendment will therefore be consistent  
14          with this policy.” Record 25.

15                           **1. Located Near Commercial Services and Employment**

16          Petitioner first argues that the above-quoted finding fails to adequately  
17          address whether the proposed site for medium density development is located  
18          near “commercial services” and “employment.” Petitioner contends that there  
19          are no findings whatsoever about proximity to employment. With respect to  
20          commercial services, petitioner argues that the reference to a “commercial  
21          node” is apparently a reference to the small site located south of Butler Market  
22          Road zoned convenience commercial, or CC. However, petitioner argues that  
23          the CC zoning allows only limited commercial uses, such as a convenience  
24          store, and the site is too small to provide either “commercial services” or

1 “employment” within the meaning of Policy 31. Petitioner argues that the  
2 finding that the site is “adjacent to a commercial node” is not supported by the  
3 record and fails to demonstrate that the subject property is located near  
4 “commercial services” and “employment.”

5 The city responds, initially, that the hearings officer’s findings adopted  
6 by the city council embody an implied interpretation of Policy 31, to the effect  
7 that “good access” is satisfied by mere physical proximity to an arterial,  
8 regardless of the ease of access, and further that the requirement to be “near”  
9 commercial services and employment is satisfied by physical proximity to any  
10 commercial areas or employment, regardless of the type or quantity of services  
11 and employment. The city contends that LUBA must defer to a governing  
12 body’s implied interpretation of a local plan or code provision pursuant to ORS  
13 197.829(1),<sup>2</sup> and that the hearings officer’s findings addressing Policy 31 are  
14 adequate under that implied interpretation.

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<sup>2</sup> ORS 197.829 provides, in relevant part:

“(1) [LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;



1           However, the city had not demonstrated that the hearings officer's  
2 findings adopted by the city council embody any express or implied  
3 interpretations of any code or plan language, at least any interpretation that is  
4 adequate for review. For an implied interpretation to be adequate for review  
5 under ORS 197.829(1), the findings embodying that interpretation must "carry  
6 with it only one possible meaning of the ordinance provision and an easily  
7 inferred explanation of that meaning." *Green v. Douglas County*, 245 Or App  
8 430, 439, 263 P3d 355 (2011). The city has not demonstrated that the above-  
9 quoted finding embodies an implicit interpretation that carries with it only one  
10 possible meaning and an easily inferred explanation of that meaning, or that it  
11 embodies any interpretation at all. We see no implied interpretation of the  
12 language of Policy 31 in the above-quoted finding or any other finding.

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“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]

“(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”

1           With respect to the lack of findings addressing proximity to employment,  
2 the city notes that in a separate finding addressing BGP chapter 1, Policy 5,  
3 which concerns compact development to reduce vehicle trips, the hearings  
4 officer responded to an argument that it is inconsistent with Policy 5 to locate  
5 medium density housing in a suburban area far away from services and  
6 employment, finding that “this property is not suburban in that it is near  
7 services and employment.” Record 22. The city argues that the finding under  
8 Policy 5 that the site is near “employment” is sufficient to overcome the failure  
9 to address proximity to employment in the finding addressing Policy 31.

10           In the abstract, the above-quoted finding under Policy 5 that the site is  
11 near “employment” might render the failure to address proximity to  
12 employment for purposes of Policy 31 harmless. However, the city identifies  
13 no evidence in the record indicating that the site is near any employment. If the  
14 city is relying entirely on the proximity to the small area zoned CC that is south  
15 of Butler Market Road to demonstrate that the site is “near \* \* \* employment”  
16 for purposes of Policy 31, we agree with petitioner that the findings are  
17 inadequate to explain why. There are no findings or evidence regarding how  
18 many or what kinds of jobs are provided in the CC-zoned area. As noted  
19 above, the decision includes no interpretations that would provide a basis to  
20 conclude that the number or type of jobs provided in the CC-zoned area are

1 irrelevant to consistency with Policy 31, and the findings identify no other  
2 employment areas in the vicinity. The city’s findings must give meaning to the  
3 requirement that medium density development be located near employment,  
4 and provide an explanation, supported by substantial evidence, for the  
5 conclusion that the subject property is located near employment within the  
6 meaning of Policy 31. The city’s findings regarding proximity to employment  
7 are, at best, conclusory and inadequate.

8 Similarly, with respect to proximity to “commercial services,” the  
9 findings appear to rely on the small area zoned CC to satisfy that element of  
10 Policy 31. However, the findings and the record do not include a description of  
11 what services that small CC-zoned area provides or is capable of providing.  
12 Again, the city’s finding regarding proximity to commercial services is  
13 conclusory, and fails to explain why proximity to a small convenience  
14 commercial area is sufficient to constitute the proximity to “commercial  
15 services” necessary to locate medium density development under Policy 31.  
16 Remand is necessary for more adequate findings.

## 17 **2. Good Access to Arterial Streets**

18 Policy 31 and Policy 6.9.1 also provide that “Medium and high density  
19 developments shall be located where they have good access to arterial  
20 streets[.]” Petitioner and others raised issues below regarding access from the

1 property to nearby existing and future arterials. Record 42, 137. The city found  
2 that the proposed RM zoning is consistent with this element of Policy 31 and  
3 Policy 6.9.1 because the subject property “is situated near a minor arterial and a  
4 planned princip[al] arterial[.]” Record 60-61.

5 The referenced “minor arterial” is Butler Market Road, the minor arterial  
6 south of the property. The subject property has no direct access to Butler  
7 Market Road. The only indirect access is via three local streets through the  
8 neighboring subdivision to Deschutes Market Road, then south to connect with  
9 Butler Market Road. Petitioner argues that finding that the property is “situated  
10 near a minor arterial” is not responsive to the language of Policy 31, which  
11 requires a finding that the property has “good” access to an arterial.

12 Petitioner also argues that the city’s findings fail to explain how the  
13 possibility of future access to a planned, but unfunded extension of 27<sup>th</sup> Street  
14 constitutes “good access” to an arterial. Petitioner notes that the city adopted  
15 no condition of approval requiring access to a future extension of 27<sup>th</sup> Street.  
16 Further, petitioner argues that it is not clear that access to such a future  
17 extension would be feasible, given the major arterial status of the extension,  
18 and in any case, the city adopted no findings addressing feasibility of access.

1           The city responds that the hearings officer and city council implicitly  
2 interpreted Policy 31 to the effect that “good access” is satisfied by physical  
3 proximity to an existing or planned arterial. However, again, we perceive no  
4 implied interpretation of the “good access” language, or at least any  
5 interpretation that adequate for review. To the extent the city argues in its brief  
6 that LUBA should exercise its discretion to interpret the Policy 31 “good  
7 access” standard to be satisfied by proximity measured as the crow flies from  
8 the property to the nearest arterial, whether or not there is in fact reasonably  
9 convenient access to that arterial, we reject that interpretation. ORS  
10 197.829(2).<sup>3</sup>

11           We agree with petitioner that the county’s findings regarding the “good  
12 access” language are inadequate. The findings make no evaluation and adopt  
13 no explanation whatsoever regarding whether the property has “good” access to  
14 Butler Market Road. Similarly, the findings fail to explain why the possibility  
15 of future access to a planned, but unfunded major arterial is sufficient to  
16 provide “good access.” Policy 31 is phrased in the present tense (“Medium and  
17 high density developments shall be located where they *have* good access to  
18 arterial streets”), suggesting that an arterial is a candidate for “good access”

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<sup>3</sup> See n 2.

1 only if the arterial presently exists or at least will exist contemporaneously with  
2 medium and high density development. If the 27<sup>th</sup> Street extension is never  
3 funded or built, then it cannot provide access. Even if the record is such that  
4 the city can reasonably assume that the arterial will be built someday, there is  
5 no condition or limitation that ensures it will be in place when medium density  
6 development is constructed, which Policy 31 appears to contemplate.

7 In sum, for the foregoing reasons, we agree with petitioner that the city's  
8 findings addressing consistency with Policy 31 are inadequate and not  
9 supported by substantial evidence.

10 The first sub-assignment of error is sustained.

11 **B. BGP Chapter 1, Policy 5**

12 BGP Chapter 1, Policy 5 provides that it is city policy to:

13 "[E]ncourage compact development and the integration of land  
14 uses within the Urban Growth Boundary to reduce trips, vehicle  
15 miles traveled and facilitate non-automobile travel."

16 Participants argued below that placing higher density residential uses in  
17 a low-density suburban area at the edge of the urban growth boundary would  
18 cause greater traffic than if the higher density uses were located closer to  
19 services, highways and employment. Record 69. The hearings officer rejected  
20 that argument:

1           “The hearings officer finds that this property is not suburban in  
2           that it is near services and employment. Moreover, with the  
3           extension of 27<sup>th</sup> Street, bus service may be available nearby in the  
4           future as well. The amendments are being proposed to entitle the  
5           land for future medium residential uses. Furthermore, the higher  
6           density residential development may enhance the vitality of the  
7           adjacent commercial node, making development of that site more  
8           economically vibrant. Based upon the foregoing reasons, the  
9           proposal will be consistent with [Policy 5].” Record 22.

10   Petitioner argues, and we agree, that this finding suffers from many of the same  
11   flaws as the finding addressing Policy 31. If the city is relying on proximity to  
12   the small CC-zoned area to provide “services and employment” for purposes of  
13   demonstrating that the proposed development is consistent with Policy 5,  
14   additional explanation is necessary, as described above. Moreover, the apparent  
15   purpose of Policy 5 is to promote development patterns that will “reduce trips,  
16   vehicle miles traveled and facilitate non-automobile travel.” The only finding  
17   that purports to address this language is the finding that if 27<sup>th</sup> Street is  
18   extended, “bus service may be available nearby in the future as well.” *Id.*  
19   However, as petitioner notes, even assuming the 27<sup>th</sup> Street extension is built  
20   someday, the findings can only speculate that bus service “may be” provided  
21   along that arterial. There is no apparently no evidence in the record that bus  
22   service is planned anywhere in the area in the foreseeable future. Similarly, the  
23   city speculates that medium density development of the subject property “may  
24   enhance the vitality of the adjacent commercial node,” presumably suggesting

1 that if this occurs it would reduce vehicular trips to more distant commercial  
2 areas. However, the city cites no evidence in the record supporting this  
3 speculation.

4 In sum, we agree with petitioner that the city's findings addressing  
5 Policy 5 are inadequate and not supported by substantial evidence. The second  
6 sub-assignment of error is sustained.

7 **C. BGP Chapter 5, Policy 21**

8 BGP Chapter 5, Policy 21 provides that the city:

9 "Densities recommended on the Plan in order to maintain proper  
10 relationships between proposed public facilities and services and  
11 population distribution."

12 The city's findings address Policy 21 as follows:

13 "The proposal will result in 5.36 additional acres of RM zoned  
14 property in the City of Bend. The RM zoning district has a density  
15 range of 7.3-21.7 units per acres. Future development will be  
16 required to meet the established density requirements, meeting the  
17 policy of this section and providing much needed housing in our  
18 community. BDC requirements applied to subsequent  
19 development will ensure consistency with this policy." Record 25.

20 Petitioner argues, and we agree, that the above finding does not attempt  
21 to address the actual language of Policy 21. The finding observes, correctly but  
22 rather obviously, that future medium density development will meet the density  
23 standards applicable in the RM zone. However, there is no explanation why re-  
24 zoning the subject property to RM is consistent with the obligation to



1 “[d]ensities recommended on the plan,” or to “maintain proper relationships  
2 between proposed public facilities and services and population distribution.”  
3 There is no discussion whatsoever regarding the relationship between proposed  
4 public facilities and services and population distributions.

5 The city’s only response to petitioner’s arguments regarding the  
6 adequacy of the findings addressing Policy 21 is to argue that the planning  
7 director did not identify Policy 21 as an applicable comprehensive plan policy  
8 for purposes of BDC 4.6.300.B.2, and therefore the city was not required to  
9 adopt findings of consistency with Policy 21. Response Brief 9. However, the  
10 planning director did identify Policy 21 as an applicable policy, and the city’s  
11 findings do address that policy. Record 157, 24-25. The city does not cite any  
12 other basis to conclude that an adequate findings challenge to the findings  
13 addressing Policy 21 were waived.

14 The third sub-assignment of error is sustained.

15 **D. BCP Chapter 5, Policy 1**

16 BCP Chapter 5, Policy 1 provides that “[f]uture development and local  
17 development standards shall recognize and respect the character of the existing  
18 areas.” Petitioner and others raised issues regarding compliance with Policy 1  
19 during the proceedings below. Record 43, 146. The city’s findings address  
20 Policy 1 as follows:

1 “These amendments are proposed in response to a growing need in  
2 our community for quality affordable housing. *The character of*  
3 *the area surrounding the property is generally residential.* Many  
4 of the concerns raised by the opponents argue that medium density  
5 residential development is not appropriate in this location. The  
6 neighbors in the single family residential neighborhood argue that  
7 RM density is not appropriate. Opponents also argued that there is  
8 not any higher density residential development along 27<sup>th</sup> or Butler  
9 Market.

10 “The hearings officer finds that this location is nearby single  
11 family development as well as commercial development across  
12 Butler Market and adjacent to a large church and school. The City  
13 typically follows a development pattern of higher density  
14 residential or commercial development along arterials and  
15 collectors, with lower density areas further away from the primary  
16 corridors. The subject property is just north of an existing arterial  
17 street and adjacent to a planned arterial street, thus is well suited  
18 for a more dense residential use. *The medium density use is*  
19 *compatible with the neighborhood as a whole now and as it will*  
20 *develop with the future extension of 27<sup>th</sup> [S]treet.* The proposed  
21 amendments will therefore address a need in our community, *while*  
22 *respecting the existing conditions in the surrounding area.*  
23 Conformance to Development Code compatibility standards will  
24 further ensure consistency with this policy.” Record 24 (emphasis  
25 added).

26 Petitioner argues that the foregoing finding is inadequate, because it does  
27 not attempt to describe the character of the existing area other than to state that  
28 it is “generally residential.” According to petitioner, that limited description  
29 fails to recognize that the subject property is surrounded by property zoned RS,  
30 and the current and likely future character of the area is standard density  
31 residential, *i.e.*, single family dwellings on relatively large lots. Petitioner

1 contends that the findings fail to explain why placing an island of medium  
2 density residential uses in the middle of an area planned and zoned for single-  
3 family residential recognizes and respects the character of the existing area.

4 Further, petitioner argues that the main support for the conclusion that  
5 RM zoning is “compatible” with the character of the area and respects the  
6 “existing conditions” of the area is not compatibility with the surrounding RS  
7 zoned lands, but rather the presence of the “commercial node” south of Butler  
8 Market Road, and the fact that the property is located near a minor arterial  
9 (Butler Market Road) and will be adjacent to a planned arterial street (27<sup>th</sup>  
10 Street), when and if that street is built. Petitioner notes that the finding states  
11 that the city’s typical development pattern is to locate higher density residential  
12 “along” arterials, but argues that the subject property is not located “along” the  
13 nearest arterial, Butler Market Road. Finally, petitioner repeats his arguments  
14 that the city cannot rely on the possibility that the unfunded 27<sup>th</sup> Street arterial  
15 will someday be constructed.

16 The city responds that the above-quoted finding embodies an implied  
17 interpretation, to the effect that (1) Policy 1 does not require new zoning to  
18 produce the exact same type of development as the zoning on surrounding  
19 lands, and that (2) Policy 1 is prospective, concerned not only with respect for  
20 the existing character of the area, but also with respect for the future character

1 of the area after future street extensions are constructed. Again, the city reads  
2 far too much into the finding. We see no express or implied interpretations of  
3 the language of Policy 1 in the above-quoted finding, at least any that are  
4 adequate for review. In the finding, the hearings officer simply recites facts  
5 and intermediate conclusions that she believes leads to the ultimate conclusion  
6 that the proposed rezoning is consistent with Policy 1. Such a finding does not  
7 “carry with it only one possible meaning of the ordinance provision and an  
8 easily inferred explanation of that meaning.” *Green*, 245 Or App at 439.

9 The city does not offer any other defense of the adequacy of the above-  
10 quoted finding. We generally agree with petitioner that the finding  
11 inadequately describes the “character” of the “existing area,” and that  
12 additional explanation is necessary for why placing medium density residential  
13 development in the middle of an area predominantly zoned and developed with  
14 low density residential development is consistent with recognition and respect  
15 for the “character of the existing area.” Further, if a relevant consideration  
16 under Policy 1 is the city’s typical development pattern to locate higher density  
17 development only “along” arterials and collectors, some explanation is  
18 necessary to justify locating higher density development on the subject  
19 property, which is not located along an arterial. Finally, because Policy 1  
20 expressly requires the city to evaluate respect for the character of the “existing”

1 area, the city will need to adopt some explanation or interpretation to justify  
2 giving weight to the *future* character of the area.

3 The first assignment of error is sustained.

#### 4 **SECOND ASSIGNMENT OF ERROR**

5 BDC 4.6.300.B.3 is a plan and zoning amendment standard requiring a  
6 finding that:

7 “The property and affected area is presently provided with  
8 adequate public facilities, services and transportation networks to  
9 support the use, or such facilities, services and transportation  
10 networks are planned to be provided concurrently with the  
11 development of the property[.]”

12 The record includes a traffic study concluding that development of the  
13 subject property with a medium density residential requirement will require a  
14 second access point for safety reasons, presumably via a connection with the  
15 future 27<sup>th</sup> Street extension. Record 195. However, the decision makes no  
16 finding that secondary access to the property will be “provided concurrently  
17 with the development of the property” and imposed no conditions regarding  
18 secondary access.

19 Instead, the city’s findings rely solely on application of future  
20 subdivision or site plan development approval standards to ensure compliance

1 with BDC 4.5.300.B.3.<sup>4</sup> Although the findings do not explain further, the city  
2 takes the position in its brief that any development of the subject property will  
3 involve application of either subdivision or site design review standards, both  
4 of which require a demonstration that public facilities have “adequate  
5 capacity.” See BDC 4.3.300.E.4 (subdivision standard requiring that “[a]ll  
6 required public facilities have adequate capacity”) and BDC 4.2.500.D.7 (site  
7 plan review standard requiring the same).

8 Petitioner argues that the city erred in relying solely on the possibility of  
9 applying subdivision or site design review standards to establish compliance  
10 with BDC 4.6.300.B. We agree with petitioner. Again, BDC 4.6.300.B  
11 requires that, where public facilities are not presently provided, the city must  
12 find that adequate public facilities are “planned to be provided concurrently  
13 with the development of the property.” The city made no such finding, and the

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<sup>4</sup> The city’s findings of compliance with BDC 4.6.300.B state:

“\* \* \* The BDC ensures conformance with this criterion by requiring land division and/or site development approval for any development on the site other than a single-family or two-family dwelling. The approval criteria in BDC Chapter 4.3, *Subdivisions, Partitions, Replats and Property Line Adjustments*, and BDC Chapter 4.2 *Site Plan and Design Review* require that adequate public facilities, services and transportation networks to support the use will be provided with development of the property.”  
Record 30.

1 findings and record do not identify any basis to conclude that secondary access  
2 is planned to be provided concurrently with development of the property.

3 With respect to BDC 4.3.300.E.4 and BDC 4.2.500.D.7, which the city's  
4 brief identifies as the specific standards the hearings officer relied upon to  
5 establish compliance with BDC 4.6.300.B, petitioner argues that it is possible  
6 that the subject property could be developed without application of either the  
7 subdivision standards at BDC 4.3.300.E.4 or the site design review standards at  
8 BDC 4.2.500.D.7. The city contends that one or both standards will apply to  
9 any development of the subject property, and ensure that public facilities will  
10 have "adequate capacity" to accommodate development of the subject property.  
11 We understand the city to argue that if adequate capacity is not available when  
12 development is proposed, the application will be denied for noncompliance  
13 with BDC 4.3.300.E.4 or BDC 4.2.500.D.7, whichever applies.

14 It is not clear to us whether the city or petitioner is correct regarding the  
15 applicability of BDC 4.3.300.E.4 or BDC 4.2.500.D.7 to all development of the  
16 property. But even if the city is correct on that point, we agree with petitioner  
17 that the findings fail to explain how reliance on future application of BDC  
18 4.3.300.E.4 or BDC 4.2.500.D.7 is sufficient to establish compliance with BDC  
19 4.6.300.B. A future evaluation of whether required public facilities have  
20 "adequate capacity" to support proposed development of the subject property,

1 and the possibility that such development will be denied if there is inadequate  
2 capacity, is not equivalent to a finding that adequate public facilities are  
3 “planned to be provided concurrently with the development of the property.”  
4 Further, BDC 4.3.300.E.4 or BDC 4.2.500.D.7 are both focused on “adequate  
5 capacity.” It is not clear that providing secondary access to the subject  
6 property, something which is apparently required for safety rather than  
7 capacity, would trigger evaluation under BDC 4.3.300.E.4 or BDC 4.2.500.D.7.  
8 Remand is necessary for more adequate findings of compliance with BDC  
9 4.6.300(B), and at a minimum the adoption of conditions necessary to ensure  
10 that secondary access is “planned to be provided concurrently with the  
11 development of the property.”

12 The second assignment of error is sustained.

13 **THIRD ASSIGNMENT OF ERROR**

14 BDC 4.6.300.B.4 is a plan and zoning amendment standard requiring a  
15 finding there is:

16 “Evidence of change in the neighborhood or community or a  
17 mistake or inconsistency in the Comprehensive Plan or Land Use  
18 District Map regarding the property that is the subject of the  
19 application[.]”

20 The city’s decision identifies two “change[s] in the neighborhood or  
21 community” as the basis for compliance with BDC 4.5.300.B.4, specifically a



1 change in the need for park land, and a change in the need for affordable  
2 housing.<sup>5</sup>

3 Petitioner argues that the findings regarding the community need for  
4 more affordable housing are misdirected and not supported by substantial  
5 evidence. According to petitioner, the pertinent question is not the general

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<sup>5</sup> The city's findings addressing BDC 4.6.300(B)(4) state, in full:

“The General Plan Map and Zoning Map amendments are proposed to address a change in the community, specifically the change in the need for a park or public use on the subject property, and the increased demand for affordable housing in our community.

“Prior to 2006, the subject property was owned by the Bend Park and Recreation District (BPRD) as a site for a potential future park. With the plans for development of the Pine Nursery Park in 2006, the Park District realized that they no longer needed the subject site for a park land. In May of 2006, the Park District conveyed the property to the City of Bend. Currently, the City of Bend does not have a need for the property and does not intend on using the property under the PF plan designation. Additionally, the City has a pressing need for affordable housing, and the Council has identified this property as one which would be suitable for providing this housing type.

“Given the need for housing at a variety of price points in the community, the City would like to entitle the property to address this current need and change in our community. Given that the City and other public entities do not need this property, and given its location adjacent to arterial streets, a commercial node, parks, churches, and other residential uses, it is well suited for residential development at RM district density.” Record 30.

1 need for more affordable housing in the city, but rather the need for more RM-  
2 zoned land in the city. Petitioner contends that the city’s comprehensive plan  
3 inventory of residential lands in fact shows a surplus of RM-zoned land.  
4 Further, petitioner argues that the findings fail to acknowledge that the subject  
5 property cannot meet any *immediate* need for more affordable housing, because  
6 unless and until the 27<sup>th</sup> Street extension is constructed, and secondary access  
7 to the property is provided, the subject property cannot be developed with  
8 medium density dwelling units.

9         The city responds, and we agree, that petitioner has not established error  
10 in the city’s findings addressing BDC 4.6.300.B.4. First, the city identified two  
11 “change[s] in the neighborhood or community,” (need for parks and need for  
12 affordable housing) and petitioner challenges only one (affordable housing),  
13 without attempting to establish that any inadequacy or lack of evidentiary  
14 support for one basis is more than harmless error, given the unchallenged  
15 second basis. Second, petitioner has not demonstrated that the cited need for  
16 additional affordable housing in the city must be reframed as a need for  
17 additional RM-zoned land, or that the amount of RM-zoned land in the city’s  
18 inventory of buildable lands undermines the identified need for additional  
19 affordable housing. Finally, petitioner has also not established that the subject  
20 property must be immediately available for development, in order to play some

1 role in meeting the identified need for more affordable housing, for purposes of  
2 justifying the plan and zoning change under BDC 4.6.300.B.4. The “change in  
3 the neighborhood or community” standard is a very subjective standard, and  
4 petitioner has not established that the city’s findings addressing that standard  
5 are inadequate or not supported by substantial evidence.

6 The third assignment of error is denied.

7 The city’s decision is remanded.