

**To: Bend City Council**

**From: Allen L. Johnson, 2522 NW Crossing Drive, Bend, OR 97701**  
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**Re: Submittals for records of March 30, 2015 public hearings**

**1. PZ14-1127 - Proposed Vacation Rental Housing Land Use Code Amendments**

**2. Proposed Chapter 7.16 - Short-term rental operating license**

**Date: March 30, 2015**

This memo and attachments are submitted on my own behalf as a citizen and full-time Bend resident and homeowner. I am a member of the UGB Residential Lands Technical Advisory Committee and a retired Oregon land use attorney, and my testimony reflects that experience, but the views expressed here are strictly my own.

### **Affordable Housing**

My main concern is Bend's increasingly intractable problem in meeting current and future affordable housing needs in the face of changing circumstances. These changes include rapidly-rising rental and purchase prices, microscopic vacancy rates, growing income disparities, regressive systems development charges, and submarginal transportation alternatives. Coverage of these issues by the Bulletin is attached.

Of most concern in this context is the increasing erosion of existing, affordable, centrally-located housing stock by (1) conversion of existing homes to commercial overnight lodging and (2) ripple effects on vacancy rates, rental rates, and home prices created by the loss of such housing and by the increased value of existing housing stock for nonresidential commercial use.

The result is the increasing segmentation of the region by class, with the personal, social, and economic hardships that go with it. People who work in Bend's service jobs or go to Central Oregon Community College increasingly have to commute to Bend from Redmond, La Pine, Prineville, and remote rural areas, with the attendant personal costs and hardships--lost family time, transportation costs, and stress--along with the many public costs of long commutes.

### **Issues under state housing, economic development, and urbanization goals, rules, and statutes.**

Bend's vacation rental problem creates challenges for compliance with state housing statutes, goals, and rules. In its current form, the proposed ordinance violates those goals, statutes, and rules in several ways. Among them:

1. It fails to provide a reliable, efficient, and prompt means of eliminating the large cluster of commercial lodging permits that has recently emerged in centrally-located, relatively affordable residential districts. This violates state housing goals requiring the city to assure with solid evidence and analysis that it will correct existing deficiencies and won't further degrade its already inadequate supply of affordable housing and buildable residential land.

At the very least, this means that existing permits should be made personal and nontransferable upon adoption of these ordinances.

It also means that amortization belongs back on the table, to be considered by the Planning Commission and returned to you as part of a supplemental package in a few months. Termination of nonconforming uses after a reasonable period of time is a well-established method of treating current permittees fairly and without any material risk of liability under federal or state constitutions. *Cope v. City of Cannon Beach*, 855 P.2d 1083, 317 Or. 339 (Or., 1993). I see no risk to the city under Oregon's very limited compensation statute. ORS 195.305, by its terms, does not apply to commercial uses such as short-term vacation rentals. It expressly applies only to farm, forest, and residential uses, and there is no way that "residential" would be construed to include commercial uses such as short-term vacation rentals. Even where it does apply, the statute allows for government waivers. It has never, as far as I know, resulted in a compensation award.

2. It fails to provide a reliable and effective mechanism for enforcement, such as a requirement that permittees record restrictive covenants enforceable not only by the city but also by neighbors and affordable housing agencies (A similar covenant requirement enforcing minimum stays should be included when you update the city's Accessory Dwelling Unit ordinances). These restrictions can be developed by city staff working with your planning commission, modeled on deed restrictions already authorized or required by state statutes concerning affordable housing, nonfarm uses, and open space. See, e.g. ORS 456.275-280.

3. It changes the purpose of Bend's residential districts by adding a major nonresidential commercial tourism use to the statement of purpose, greasing the skids for further erosion of the city's already-endangered inventory of existing affordable housing.

4. It undermines Bend's efforts to comply with state housing statutes and goals in its current UGB remand process. In particular, it threatens to cancel out the effect of any "efficiency measures" that the city might adopt to demonstrate that it can meet part of its projected needs for suitably-located lands for affordable housing within the current UGB within its truncated post-remand planning period, ending in 2028. Failure to make this statutorily-required factual demonstration will require the city to add more land to the boundary than otherwise. See ORS 197.296(2)-(9). It also reinforces opposition to an important efficiency measure and needed housing type, accessory dwelling units. Nothing in the findings acknowledges or accounts for those very likely impacts of grandfathering existing vacation rentals and continuing to authorize new ones.

5. Allowing vacation rentals in residential zones also undermines the city's efforts to demonstrate compliance with the statewide Urbanization Goal (Goal 14) and related statutes governing establishment and change of urban growth boundaries. The Oregon Court of Appeals has observed that amendments which compromise urban lands inventories inside existing UGBs raise Goal 14 UGB issues because they accelerate the need to convert rural resource lands to urban uses through boundary expansions. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 694-95 (1995) and 141 Or App 253 (Court of Appeals 1996) .

These challenges are akin to but more serious than the “Costco” problems created years ago when retailers called themselves wholesalers and lumberyards as a ploy to locate on cheaper lands inventoried for industrial use. Similarly, some cities naively diluted their medium-density residential zones to allow office uses. As expected, the “invasive species” often outcompeted the “native” uses.

A classic example is centrally-located land originally designated for multifamily housing on Country Club Road near Oakway Mall in Eugene. After the city authorized “office-professional” in the MF zones, it rapidly built out with office buildings. The city had to redesignate the entire area commercial and find replacement multi-family land during periodic review. See attached graphic.

Here in Bend, we already have commercial plan and zone designations allowing short-term tourist lodging. If we are going to meet tourism needs on residential lands, then maybe we don't need as much commercial land. We might even have to use some of it to replace lost or compromised residential inventories. Or find more outside our current UGB.

### **Evidentiary and Findings Requirements**

These issues cannot be glossed over by casual, nonquantitative findings. Oregon's Land Use Board of Appeals (LUBA) and the Oregon Court of Appeals have interpreted Goals 9 and 10 to require at least a meaningful accounting quantifying the likely impact of converting lands inventoried for needed housing or employment types to other uses, whether by outright rezoning to other uses, by creation of natural resource buffers, or de-facto changes of single-purpose zones to mixed use zones. When that happens, general “not-a-problem” findings such as those proposed in your hearing materials don't suffice. As LUBA said in rejecting generalized findings in Eugene's 2000 Land Use Code Update (LUCU).

“Petitioners have made a facially plausible showing that the disputed provisions are likely to reduce the supply of buildable lands. Under such circumstances, the city has an obligation to demonstrate that despite any such reductions in development potential for industrial, commercial and residential lands the city's inventories continue to comply with Goal 9 and 10. . . . “ LUCU decision at page 76 (full citation below)

Postacknowledgment amendments to plans and land use regulations that trigger Goals 9 and Goal 10 and related statutes and rules must be supported by records and findings demonstrating that inventories will still be adequate to meet projected needs after the changes. *Home Builders Assoc. of Lane County v. City of Eugene*, 41 Or LUBA 370, 447 (2002)(new tree buffers and other buffer areas require accounting for losses to inventory of buildable land for needed housing).

These obligations apply where, as here, the threat is erosion of existing inventory as well as where the threat is improper use of undeveloped lands in housing and employment land inventories. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670, 694-95 (1995) and 141 Or App 253 (Court of Appeals 1996) (Goal 9 and 10 accounting insufficient to support refinement plan amendments that impair the viability and redevelopment potential of existing built inventories by allowing or favoring competing uses).

Mixed use zoning is not inherently a bad thing, but it has to be carefully managed and to protect the integrity of urban land inventories as required by Goals 9, 10, and 14 and related rules and statutes. The means that allowing or perpetuating mixed use has to be supported by evidence, analysis, and, where necessary, replacement of diminished capacity for primary uses. That hasn't been done yet.

### **What to do now and over the next few months**

I urge you to do as much as you can as soon as you can to stem the flow and stop the ongoing erosion, and that you supplement this measure within the year with additional steps to restore the integrity of your residential neighborhoods and land use inventories.

If you choose to adopt the current version of the proposed ordinance and findings, please make at least these changes to stem the flood and to reduce, if not eliminate, conflicts with the current comprehensive plan and applicable state housing and urbanization goals, rules, and statutes:

1. Make existing vacation rental permits personal and nontransferable upon sale or otherwise.
2. Remove any reference to meeting tourism needs as part of the purpose of your residential zones as well as from any balancing language and replace it with a commitment to maintaining the integrity of your residential neighborhoods and land supplies.
3. Change the reference to “property rights” to “commercial interests” in the balancing language.

4. Explicitly affirm the vital interests of Bend's current and future low-and-moderate income residents and employees as key interests to be addressed in considering changes to zoning on Bend's residential lands.
5. Make it clear that you are taking a first step and will follow up with supplemental legislation within the year.
6. Direct the Bend City Planning Commission to return to you with a supplemental ordinance addressing enforcement, amortization, impacts on efficiency measures, and impacts on Goal 9 and 10 inventories within six months.

I strongly support the city's use of task forces made up of stakeholders, experts, and advocates. The Vacation Rental Task Force has worked hard and long on this issue and has provided much of what the Council will need to reach and support the right result. It deserves our thanks.

However, the Planning Commission is the city's designated advisory body on land use planning. The Planning Commission is the place to complete the job.

Respectfully submitted,

Al Johnson

Attachments:

Bend Bulletin: Bend rental market tightens, March 27, 2014  
Vacation rentals continue to skyrocket, March 6,  
Big crowd discusses Bend vacation rentals, February 24, 2015  
Vacation rentals headed to Planning Commission, February 16, 2015  
Vacation rental task force works on strict permitting, February 4, 2015  
Central Oregon rental market grows tighter, April 9, 2014

OPB: An Endless Search for Housing for Oregon's Working Poor,  
Sept. 18, 2014

Graphic: Aerial photo of Eugene office building district on land previously planned and zoned for multifamily use, with prior Medium and High Density Residential comprehensive plan designations.

