



# Oregon

Tina Kotek, Governor

Department of Land Conservation and Development

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September 12, 2024

To: Land Conservation and Development Commission

From: Brenda Ortigoza Bateman, Ph.D., Director  
Kirstin Greene, Deputy Director and Tribal Liaison  
Josh Hardage, Assistant Director and Chief Operating Officer  
Sean Carpenter, Senior Editor

Subject: **Agenda Item #4, September 26-27, 2024, LCDC Meeting**



## Director's Report

### I. Introduction

This report summarizes significant events at the Department of Land Conservation and Development (DLCD or the department) for members of the Land Conservation and Development Commission (LCDC or the commission), including staffing, legal, legislative, and budget updates, and division reports. The Director's Report is informational with no commission action needed.

#### a. Summary of Recruitment, Hiring, Promotions, Placements

DLCD continues its rapid growth. Specific employees and positions are described in the individual division updates.

#### b. New Hires

- Madeline Judokusumo, GIS Intern - August 2024

#### c. Promotions

- Cynthia Smidt, Offshore Wind Energy Enforceable Policies Specialist - September 15, 2024
- Jeff Burrigh, Offshore Wind Energy Roadmap Coordinator - August 2024

#### d. Governor's Expectations

On January 11, 2023, Governor Kotek sent each agency director a set of expectations. This agenda item provides a brief status update on the 11 required reports. Additional information is posted on the Department of Administrative Services [Strategic Initiatives and Enterprise Accountability](#) website.

Item	Requirement / Status
DEI Plan	Completed initial plan by June 1, 2024  <b>Complete. Embedded in the Strategic Plan. Implementation is underway.</b>
Agency Hiring Process	Average time to fill recruitments < 50 days from announcement.  <b>Ongoing. Meeting this expectation.</b>
Audit Accountability	Resolve Secretary of State findings within 12 months of audit report  <b>(N/A)</b>
Developing New Employees & Managers	Demonstrate that 100% of employees participate in onboarding within 60 days of hire.  <b>Ongoing. All 15 of DLCD's 2024 new hires have taken part in onboarding within 60 days of hire.</b>
Performance Feedback for Employees	Quarterly.  <b>Ongoing, 97% of staff received feedback from their manager during Q2 of 2024.</b>
Continuity of Operations Plan	Completed initial plan by Sept. 30, 2023.  <b>Update underway due Sept. 30, 2024.</b>
Measuring Employee Satisfaction	Complete first survey by Dec. 31, 2023.  <b>Completed. The survey will occur annually, with the next survey scheduled for May 2025.</b>
Strategic Plan	Completed and posted online June 1, 2024.  <b>Completed.</b>
IT Strategic Plan	Completed and submitted to the Department of Administrative Services (DAS) by Dec. 31, 2023.  <b>Completed. Update due June 1, 2025.</b>
Succession Planning	Completed and submitted to DAS by Dec. 31, 2023.  <b>Completed. Update due December 31, 2024.</b>
360° Performance Review for Agency Director	Due August 2025 (differs by agency)  <b>DLCD plans to conduct its 360° review with assistance from Gallup, the state's contractor.</b>

## **II. Division Reports**

### **a. Policy Office**

The following section describes recent work of the DLCD Policy Office. It includes general legislative activities in addition to an update of the 2023-25 Policy Agenda.

#### **1. Recruitments / Staffing Changes**

The Policy and Communications Office is recruiting for a Legislative and Policy Analyst.

#### **2. Legislative Update**

The Policy Office will participate in Legislative Days during September 23-25, 2024. DLCD staff will meet with key legislators and their staff and testify at the invitation of two legislative committee meetings. DLCD will take a funding request to the Emergency Board requesting limitation for a federal grant.

#### **3. Communications**

The Communications team is drafting a communications plan in partnership with the entire agency.

#### **4. Policy Agenda and Rulemaking Updates**

DLCD staff updated the 2023-25 Policy Agenda (Attachment A) to show the progress of policy agenda items and to include new responsibilities assigned by the legislature during the 2024 session. New responsibilities include:

- SB 1537 - Implementation of the Housing Accountability and Production Office (HAPO)
- SB 1564 - Creation of adoption-ready housing model ordinances
- HB 4080 - Coordination of an Offshore Wind Policy Roadmap

### **b. Program Services: Planning Services Division**

#### **1. Recruitments**

DLCD is currently recruiting for two positions in the natural hazards mitigation program. These will fill vacancies created as Cynthia Smidt moves to the offshore wind energy position, and as Katherine Daniel retires at the end of October 2024.

## 2. Natural Hazards

### i. National Flood Insurance Program

On July 15, 2024, the Federal Emergency Management Agency (FEMA) sent letters to Oregon cities and counties that participate in the National Flood Insurance Program (NFIP). The letters directed jurisdictions to make immediate changes to development regulations in their flood hazard areas.

In 2016 the National Marine Fisheries Service issued a biological opinion saying that the NFIP jeopardizes several threatened species.

In 2023 several organizations sued FEMA alleging that FEMA has been too slow to respond to the biological opinion. FEMA's letters sent in July 2024 would force cities and counties to make immediate changes — as Pre-Implementation Compliance Measures — while FEMA develops an implementation plan and reviews it under the National Environmental Policy Act (NEPA).

Many cities and counties are frustrated with FEMA's attempt to force immediate action while the implementation plan is still under development. More information is available online from [FEMA](#) and [DLCD](#).

### ii. Oregon Natural Hazards Mitigation Plan

Staff are updating the [Oregon Natural Hazards Mitigation Plan](#), which expires in September 2025. The first step has been to [upgrade the statewide natural hazards risk assessment](#). The initial risk assessment is almost completed, and the results will be presented on October 1, 2024 to an [Inter-agency Hazard Mitigation Team](#).

## 3. Transportation

The Oregon Supreme Court declined to hear an appeal in the legal challenge to the 2022 amendments to the Transportation Planning Rules under the Climate-Friendly and Equitable Communities program. More information is in the legal section on page 13 of this report.

The Transportation and Growth Management program received 30 applications for [planning grants](#). These grants will help communities give Oregonians a better range of transportation options. DLCD and Oregon Department of Transportation staff are scoring the applications and will announce awards in late September 2024.

## 4. Community Green Infrastructure

Applications for the new [Community Green Infrastructure](#) grant program will begin on September 30, 2024, and run through November 25, 2024, providing up to \$6,500,000 in grants. Green infrastructure is infrastructure that mimics natural systems, such as urban green space and parks. Green infrastructure offers a wide array of social, environmental, and economic benefits. DLCD's [Advisory Committee on Community Green Infrastructure Investment](#) has met four times to help design the new program.

## **c. Program Services: Ocean and Coastal Services Division/ Oregon Coastal Management Program**

### **1. Recruitments/Staffing Changes**

Jeff Burrigh was promoted to the Offshore Wind Energy Roadmap Project Coordinator. He started his new position on September 3, 2024, and will lead the state's efforts to develop a roadmap ensuring the interests of the state and coastal communities are addressed during the application process for the construction of floating offshore wind energy facilities. DLCD began the recruitment process for Jeff's previous position, State-Federal Relations Coordinator, on August 28, 2024.

Cynthia Smidt, DLCD's Natural Hazards Planner, will move into the brand-new position of the Offshore Wind Energy Enforceable Policies Specialist starting September 15, 2024. This position is critical to ensure that state and local government enforceable policies are in place to prepare for potential floating offshore wind energy development. Cynthia has spent the last two and a half years with the Planning Services Division as the Natural Hazards Planner.

### **2. Program Updates**

Oregon Coastal Management Program (OCMP) staff issued a federal consistency determination of "Concurrence with Conditions" to the Bureau of Ocean Energy Management for the leasing of their proposed wind energy areas off Oregon's south coast. The conditions reflected concerns raised by the four federally recognized coastal tribes, significant public comments, and industry. [The decision can be found on DLCD's website.](#)

In response to the call for letters of intent released on June 17, 2024, OCMP staff submitted three projects to a NOAA grant program. The submittals included two projects for acquisition and one project for restoration and were distributed along Oregon's north, central, and south coasts. NOAA will issue a call for full proposals in fall of 2024.

OCMP staff will lead a series of workshops along the coast to develop rocky habitat site management plans for the eight newly designated rocky habitat protected areas. These meetings are an opportunity to listen to professionals and volunteers who work in rocky habitats and to share feedback with OCMP staff. [A schedule of the workshops can be found online.](#)

## **d. Program Services: Housing Services Division**

### **1. Recruitments/Staffing Changes**

The Department is currently conducting interviews to fill the role of Housing Accountability and Production Office (HAPO) Manager. HAPO will be its own division in the Director's Office, separate from the existing Housing Division.

## **2. Program Updates**

### **i. Oregon Housing Needs Analysis Rulemaking**

The Housing Division has been sprinting towards completion of the second version of Oregon Administrative Rules implementing the OHNA program and HB 2001 (2023). The second draft of rules related to the Housing Production Strategy and Housing Acceleration programs was published on August 29, 2024 and is available on [DLCD's website](#).

The next phase of rulemaking is to further refine rules for an LCDC public hearing in October 2024 and to focus efforts on plain language. Staff plans to present rules to the commission for review and adoption in December 2024.

### **ii. Legislative Concepts for 2025**

The department is developing two legislative concepts for 2025. One is related to further removing barriers to the production of middle housing. The other is to clean up any technical items necessary to implement the OHNA program. These legislative concepts will move from concepts to discussions with interested parties before heading to legislative counsel for bill drafting in the fall of 2024.

### **iii. HAPO**

The Housing Division continues to serve as an interim Housing Accountability and Production Office as HAPO staff are onboarded. The recruitment for the HAPO Manager closed on August 25, 2024, and the department held round one of interviews the first week of September 2024.

## **e. Program Services: Community Services Division**

### **1. Recruitments/Staffing Changes**

Madeline Judokusumo joined the department on September 3, 2024, as DLCD's new Geographic Information Systems (GIS) intern. She will be updating the department's mapped data layers for urban growth boundaries and local government zoning.

## **2. Program Updates**

### **i. North Plains**

The department continues to provide technical assistance to the city of North Plains as it undertakes the next phase of its urban growth boundary (UGB) expansion planning. In fall of 2023, the city roughly doubled its size after adopting a UGB expansion of 855 acres for both residential and employment lands. However, before it could be approved by the county and submitted to the department for review, the city's decision was referred to the May 2024 ballot, where it was overturned by North Plains residents. Since the May 24, the city began a process to reengage with the community and "relook" at its expansion plans. The department remains engaged with the city through this effort, including staff participation on the project's technical advisory committee.

To further complicate the situation, the 2024 Legislature enacted HB 4026 amending ORS 197.626 prohibiting voter referendums on UGB expansions. Subsequent action to remove the North Plains UGB referendum from the ballot by the City of North Plains was voided by Washington County Circuit Court on Sept. 6, 2024. That decision was based on the constitutionality of the action to remove a certified municipal referendum from the ballot. The court did not determine the constitutionality of HB 4026 itself. The Sept. 6, 2024, decision by the Washington County Circuit Court could still be appealed.

## **ii. Child Care Facilities Study and Report**

Since presenting an update to the commission in June 2024, DLCD staff and work group members have made considerable progress. The work group met July 26, 2024, to finalize a memorandum summarizing identified regulatory and permitting barriers. The department has also participated in additional outreach and engagement with regulatory partners, childcare providers, and state agencies to ensure a coordinated body of work. The work group met again on September 13, 2024, to review the final strategies and recommendations and a draft of the final report. The final meeting of the work group is scheduled for November 1, 2024, and the final report is due to the legislature by December 31, 2024.

## **iii. Data Centers in Eastern Oregon**

DLCD is responding to a high volume of inquiries from cities in Morrow, Umatilla, and Gilliam Counties about growing demand for large industrial sites to accommodate new data centers. This industry is growing and hoping to find places in Eastern Oregon counties that have robust energy infrastructure, abundant water, and inexpensive land.

Cities that lack sufficient sites to accommodate data centers or other large scale industrial development are required to conduct an economic opportunities analysis (EOA) to justify a UGB expansion. Department staff are tracking EOAs in several cities, including Hermiston, which has identified a 20-year industrial land need of 1,200 acres for data centers, much of which would need to be satisfied through UGB expansion.

## **f. Administrative Services Division/Operations Updates**

### **1. Recruitments/Staffing Changes**

- ASD Executive Support Specialist - Completed first round of interviews. Moving to a second round of interviews.
- Chief Data and Innovation Officer - Currently conducting first round interviews.
- Business Analyst - Recruitment posted.
- Project Manager - Planning to post in September 2024
- Grants Accountant - Planning to post in September 2024
- Fiscal Analyst - Planning to post in September 2024

### **2. Contracts and Procurement Services**

Over the past several weeks nearly 30 contracts and amendments were completed, and two solicitations for goods and services were conducted.

### **3. Fiscal and Budget Services**

DLCD submitted its 2025-27 Agency Request Budget (ARB) to the Governor's Office on August 8, 2024. The budget request continues and strengthens DLCD's technological and staff capacity to achieve its core functions and responsibly manage Oregon's land use planning program.

The ARB contains 11 Policy Option Packages, for a total amount of \$19,133,244 General Fund, including \$12,675,000 in grants, \$4,058,244 in position requests, and \$2,400,000 for contracted services and rulemaking. The bulk of these requests are in support of the Governor's Housing Production Priorities.

Next, the Governor's Office works with agencies to compile budget requests and develop the Governor's Recommended Budget (GRB), which will be released December 1, 2024. DLCD will present the department's budget from the GRB to the Legislature for further development during the 2025 legislative session. DLCD's 2025-27 biennium budget will be finalized with the conclusion of the 2025 Session.

Fiscal and Budget Services also successfully completed accounting entries for the 2024 state fiscal year-end process.

### **4. Information Technology Services**

The new A/V equipment for the commission will go live for the December 2024 meeting.

DLCD is finalizing the details of the IT Disaster Recovery Plan, with an estimated completion of November 2024. The goal of the project is to move the on-premises backup systems to the cloud.

DLCD completed the Acknowledgement Room digitization project the week of September 9, 2024, three months ahead of schedule. As per the IT Strategic Plan, the next phase of the project is the implementation of a record management system.

The department is also developing an artificial intelligence (AI) policy.

### **5. Human Resources Services**

Since July 1, 2024, the department has:

- Posted 11 Jobs
- Hired two external employees
- Promoted two internal employees

DLCD continues to work on hiring all the positions approved in the 2024 legislative session.

Thirteen position descriptions still need approval from DAS before posting. DLCD will continue working with DAS to get them approved, and then fill them through the beginning of 2025.



### **III. Participation in Appeals, Recent Land Use Board of Appeals (LUBA), and Appellate Court opinions**

#### **a. Department Participation in Appeals**

LUBA decided two cases in which the department participated. In DLCD v. Clackamas County, LUBA remanded the county's decision as requested by the department. In Oregon Department of Fish and Wildlife v. Jackson County the department provided an agency brief regarding interpretation of administrative rules adopted by the commission. LUBA agreed with the agency's interpretation. Both cases are detailed in subsection b below.

#### **b. LUBA Opinions**

From May 1, 2024, to July 31, 2024, six opinions issued by LUBA implicated a statewide planning goal, LCDC-adopted administrative rule, or land use planning-related state statute.

##### **1. Goal 3, ORS 215.448, Home Occupations on Agricultural Land, Friends of Marion County v. Marion County, LUBA 2023-072, issued May 16, 2024.**

LUBA affirmed a decision by Marion County adopting amendments to the Marion County Code that allow and regulate event businesses as conditional use home occupations in the county's farming and forestry zoning districts. LUBA had remanded an earlier county code adoption that set a maximum limit of 750 guests at an event hosted by an approved home occupation. LUBA determined the county had not made findings regarding how an event venue could serve 750 guests with only five employees, the maximum allowed for a home occupation on farmland as provided in ORS 215.448. In response, the county amended the code provisions to remove the 750-guest limit and instead require an applicant to demonstrate that five employees on the site could handle any permitted events.

LUBA noted that a challenge to a new land use regulation asserting inconsistency with a state statute must demonstrate that the new regulation is categorically incapable of being applied consistently with the statute. The petitioner asserted that the county's language, limiting the number of employees of the property owner to five, allowed the home occupation to hire contractors and vendors in addition to these five employees for specific events. LUBA agreed with the county that ORS 215.448 and case law did not allow such contractors and vendors in addition to the five-employee limit. LUBA stated that it does "not review the challenged regulations for whether they could be applied inconsistently with applicable state law. Instead, we will affirm the amendments if they possibly can be applied consistently with state law." Thus, any future county actions under this code provisions could be challenged as applied to an individual situation, but the code language allows the county to proceed in compliance with ORS 215.448 standards for home occupations on farmland.

##### **2. Goal 3, ORS 215.448, Home Occupations on Agricultural Land, North Hideaway Hills Neighbors v. Lane County, LUBA 2023-081, and Burch v. Lane County, and LUBA 2023-083, decided May 20, 2024.**

LUBA affirmed a Lane County decision approving a home occupation permit for dog boarding, training, and breeding against challenges to the decision from opponents of the kennel and also from the applicant regarding one of the conditions of approval associated with the decision. Opponents asserted that ORS 215.448(1)(c), limiting where the operator could conduct the home occupation, did not allow off-site business activities related to the home occupation. The kennel operation relied on off-site puppy breeders as part of its business plan. LUBA found no basis for the appellant's argument that the home occupation criteria require the county to consider the overall business operation, including offsite activities, in determining whether the home occupation will be operated substantially within the dwelling or other buildings normally associated with permitted uses in the zone.

LUBA also affirmed the county's decision to reduce the size of the allowed accessory building and not allow additional accessory buildings associated with the facility. LUBA found the county's decision included sufficient factual basis for the condition, intended to implement the requirement in ORA 215.448(1)(c) that the home occupation be located in "other buildings normally associated with uses permitted in the zone in which the property is located," limiting the size of the applicant's proposed accessory buildings.

**3. Goal 14 OAR 660-004-0040(7) Goal 14 exceptions for residential development outside of urban growth boundaries, DLCD v. Clackamas County, LUBA 2023-078, decided May 31, 2024.**

LUBA remanded a decision by Clackamas County approving a zoning map change from Farm-Forest 10-acre minimum parcel size to Rural Area Residential 2-acre minimum parcel size. As the petitioner, the Department of Land Conservation and Development asserted that OAR 660-004-0040(7), originally adopted in 2000, requires any rezone of land within an existing rural residential zoning district to a higher residential density (or lower minimum residential lot size) requires approval of an exception to Statewide Planning Goal 14. In contrast, the county asserted that, since both the existing and proposed zoning districts had been found in compliance with Goal 14 as part of periodic review approvals from the 1990s, no exception to Goal 14 was necessary.

LUBA first disputed the petitioner's assertion that interpretation of OAR 660-004-0040(7) was "straightforward," noting that there existed several instances of ambiguous and confusing language within both this subsection and related subsections of this rule.

Then LUBA waded into the administrative rule history behind LCDC's adoption of the rule in 2000. Despite that fact that neither party had provided this history in its arguments, LUBA quoted from *Gunderson LLC v. City of Portland*, 352 Or 648, 662 (2012), and stated "in construing statutes and administrative rules, we are obliged to determine the correct interpretation, regardless of the nature of the parties' arguments or the quality of the information that they supply to the court." After a detailed analysis of the administrative rule history, LUBA determined it "is clear that all upzoning requires an exception to Goal 14 and that petitioner's construction of the rule is the correct one because it comports with LCDC's Intent, as illuminated by the rulemaking history." Therefore, LUBA remanded the county's decision. The county and the project applicant have appealed LUBA's decision to the Oregon Court of Appeals, where the case is pending.

**4. Goal 10, ORS 197A.420, OAR 660-046, Middle Housing, Goal 11, Public Facilities, Conte v. City of Eugene, LUBA 2024-023, decided July 10, 2024.**

LUBA remanded a decision by the City of Eugene adopting legislative amendments to the Eugene-Springfield Metropolitan Area General Plan and Eugene Code that allow for the development of middle housing types on residentially zoned properties where development of detached single-family housing is allowed. This was the second time LUBA had considered this dispute — a previous decision by LUBA affirming Eugene’s adoption of a “middle housing” code to implement state law and rule requirements in ORS 197A.420 and OAR 660-046 had been reversed by the Court of Appeals. The dispute centered around the city’s findings that the middle housing code complied with Goal 11, Public Facilities, by sufficiently mitigating increased impacts on public facilities from increased densities of housing in parts of the city.

In its review, LUBA agreed with the petitioner that there is not an adequate factual base for the city’s conclusion that its adopted public facilities and services plan ensures adequate infrastructure for the increased density that the city’s middle housing amendments allow. The city made no estimate of residential density from which to measure whether the public facilities and services plan and planned infrastructure projects therein are sufficient. The city also did not provide sufficient evidence for its finding that it would not approve a project that could not be served by the city’s existing public facilities infrastructure. LUBA’s remand directed the city to provide an estimate of potential additional development resulting from the code amendments, and better explain how the city manages and monitors its public facilities and responds to increased needs through project development.

As a result of this remand, the City of Eugene will once again be directly implementing the model code for middle housing found in OAR 660-046 on all lands zoned to allow single-unit residential dwellings.

**5. Goal 3, ORS 215.448, ORS 215.760, ORS 455.315, Home Occupations on Land Zoned Mixed Farm-Forest, Kupillas v. Clackamas County, LUBA 2024-015, decided July 19, 2024.**

LUBA remanded a decision by Clackamas County approving a conditional use permit for a home occupation event business on land zoned for mixed farm and forest use. The county approved use of an existing agricultural building (a barn) on the property for the event venue, as well as a new accessory building for event-related activities. LUBA determined that ORS 215.760(2) explicitly prohibits conversion of an existing agricultural building to a non-agricultural use on land zoned for forestry or mixed farm-forest use. This even though ORS 215.448, which governs home occupations more generally on rural lands, including land zoned for forest or mixed farm-forest use, allows such conversion of “other buildings normally associated with uses permitted in the zone in which the property is located.” LUBA reviewed the legislative history around the adoption of ORS 455.315 in 2013, which first allowed construction of agricultural buildings exempt from standard building codes on areas zoned for forest or mixed farm-forest uses and found explicit references to a prohibition on conversion of such buildings to a non-farm use. While LUBA acknowledged that ORS 215.448 and ORS 215.760 are inconsistent regarding use of agricultural structures for a home occupation on lands zoned for forest or

mixed farm-forest uses, LUBA used a canon of statutory construction (“the specific takes precedence over the general”) to come to this conclusion.

LUBA also remanded the decision regarding the new accessory building proposed. Note that since the ORS 215.760 prohibition applies only to existing agricultural building, an applicant can propose construction of a new building under ORS 215.448 that, if normally associated with uses permitted in the zone in which the property is located, can also be used for a home occupation. LUBA found the applicant’s submittal and county’s findings were not sufficient to prove that the proposed new building was “normally associated with uses permitted” as required by ORS 215.448(1)(c)(B). LUBA also affirmed the decision against challenges from the petitioner related to local code provisions not related to state law requirements.

**6. Goal 5, OAR 660-023-0180, Mineral and Aggregate Resources, Oregon Department of Fish and Wildlife v. Jackson County, LUBA 2024-002, decided July 24, 2024.**

LUBA remanded a decision by Jackson County changing the comprehensive plan designation from Agriculture to Aggregate Resource, changing the zoning map designation from Exclusive Farm Use to Aggregate Removal for 435 acres, and adding 324 acres to the county’s inventory of significant aggregate resources. The department filed an agency brief in this case setting forth the department’s interpretation of LCDC’s adopted rules in OAR 660-023-0180 in support of the position of the Oregon Department of Fish and Wildlife.

LUBA agreed with the petitioner and DLCD that the county had not conducted the required Goal 5 process for mineral and aggregate resources as outlined in OAR 660-023-0180(5). The county found significant conflicts between the Deer and Elk Habitat Overlay area identified in its comprehensive plan and the aggregate expansion. The county then went straight to mitigation measures as conditions of approval. However, by doing so, the county skipped several required steps in the process for working through the conflicts between the mineral and aggregate resource and other uses. The county did not specify the predicted conflicts, and did not explain how, where, when, and to what extent aggregate removal activities impact deer and elk habitat. The county also did not explain how the mitigation measures will minimize wildlife habitat conflicts. Thus, the findings are inadequate to satisfy OAR 660-023-0180(5)(b) and (c).

LUBA rejected another of the petitioner’s grounds because the petitioner had not raised the issue with sufficient specificity in Jackson County’s local proceedings. And LUBA rejected two cross-petitions from the applicant regarding the location of the significant wildlife habitat area and whether the mineral and aggregate and wildlife habitat resources were even conflicting at all.

**c. Appellate Court Opinions**

**1. Central Oregon Landwatch v. Deschutes County, 333 Or 263, issued April 30, 2024.**

In a nonprecedential opinion (meaning it cannot be cited to justify a legal argument in a future case before an Oregon court), the Court of Appeals affirmed LUBA's decision, which in turn affirmed Deschutes County's approval of a rezone for 59 acres from Exclusive Farm Use to Rural Residential. The court agreed with LUBA that the petitioner had failed to raise some arguments at the local level with sufficient specificity to allow an appeal. The court also agreed with LUBA's rejection of the petitioner's arguments regarding the county's findings as to whether the property was agricultural land, and the county's findings that the rezone did not allow for urban use of the property in violation of Goal 14, Urbanization.

## **2. Central Oregon Landwatch v. Jefferson County, 332 Or App 302 (2024), issued May 1, 2024.**

The Court of Appeals reversed a portion of LUBA's decision remanding a decision by Jefferson County to rezone 142 acres of land surrounded by the existing Crooked River Ranch unincorporated community from Range Land (an agricultural zoning district) to Rural Residential 2-acre minimum parcel size. LUBA had determined that, to approve the rezone, Jefferson County had to approve an amendment to expand the Crooked River Ranch unincorporated community boundary and address requirements for a goal exception set forth in OAR 660-004-0020(4) and OAR 660-004-0022(4). The majority found LUBA had erred, finding no requirement in state law or LCDC-adopted administrative rules that a property adjacent to an existing unincorporated community proposing a rezone to a higher intensity of use must concurrently be added to that unincorporated community.

One judge dissented from the majority opinion, finding that, in this situation, approving an application for a goal exception and higher intensity development adjacent to (or in this situation, surrounded by) an unincorporated community without amending the community's boundaries would frustrate the intent of state law set forth in OAR 660-022, Unincorporated Communities. LCDC adopted these rules in 1994 to address an anomaly in the statewide planning program - existing urban or almost-urban communities outside of incorporated city boundaries - and the majority's opinion finding no requirement in state law to amend the unincorporated community boundary when approving a goal exception to allow an urban use adjacent to that community elevates form over substance and frustrates the intent of LCDC's rules on this subject.

## **d. Other Opinions of Interest**

### **1. City of Cornelius v. Land Conservation and Development Commission**

In 2022 the commission adopted significant rule amendments within the Transportation Planning Rules (OAR chapter 660, division 012), the Metropolitan Greenhouse Gas Reduction Targets (OAR chapter 660, division 044), and the Goal 10 Housing rules (OAR chapter 660, division 008) as part of the Climate-Friendly and Equitable Communities program. Twelve cities and one county filed a legal challenge in the Oregon Court of Appeals. Several industry advocacy organizations filed a separate but similar legal challenge. On March 6, 2024, the Oregon Court of Appeals issued a decision affirming the overall validity of the commission action. The court ruled the commission has the authority to adopt these rules, except for one subsection within one rule. The court also affirmed the commission followed the correct

procedures to adopt the rules, except for one subsection within one rule. The challengers asked the Oregon Supreme Court to review the case. On August 8, 2024, the Supreme Court declined. This upholds the decision by the Court of Appeals and ends the legal challenge.

#### **IV. Attachments**

- A. Updated 2023-25 DLCDC Policy Agenda
- B. Updated DLCDC Organizational Chart



**DATE:** August 7, 2024

**FROM:** Brenda Ortigoza Bateman, Ph.D., DLCD Director  
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**SUBJECT: 2023-2025 DLCD Policy Agenda Update**

## Introduction

The Department of Land Conservation and Development (DLCD, agency, or department) Policy Agenda contains projects as directed by statute or recent legislation, Land Conservation and Development Commission (LCDC or commission) charge, or department initiative.

DLCD publishes the policy agenda biennially after a long legislative session — on odd-numbered years — to establish its priority initiatives for the new biennium. In the summer of 2023, DLCD developed the original 2023–2025 Policy Agenda, opening a public comment period from August 28, 2023, to September 18, 2023. LCDC adopted the 2023-2025 Policy Agenda at its meeting on November 3, 2023.

This update to the Policy Agenda reflects statutory changes from the 2024 Legislative Session and provides an update on existing policy projects halfway through the 2023–2025 biennium.

DLCD updated this document on August 7 and will brief the commission on the update at its September 25–26, 2024 meeting.

## Rulemaking Background

Rulemaking is a specific process performed by state agencies that creates Oregon Administrative Rules (OARs), which govern the administration of government programs. DLCD writes, and LCDC adopts, rules to add to or amend OAR Chapter 660 at the direction of the Oregon Legislature or LCDC itself. OAR Chapter 660 refers to the rules that define implementation of the land use planning program at the state, county, and city level.

Rulemaking requires public hearings and filing with the Oregon Secretary of State's office. It can take two forms:

- Conforming rulemaking, which does not require statutory interpretation by the department.
- Complex rulemaking, which requires statutory interpretation and involvement of external partners through a rulemaking advisory committee (RAC).

This policy agenda presents only complex rulemaking.

## Legislatively Directed Policy Work

This section includes policy work directed by the legislature.

### *HB 2001 (2023) – Oregon Housing Needs Analysis (OHNA)*

HB 2001 was passed in the 2023 Legislative Session. It created the Oregon Housing Needs Analysis (OHNA) policy, the result of recommendations from the Regional Housing Needs Analysis pilot (HB 2003 (2019)). The OHNA seeks to reframe how housing planning is performed at the state and local level, reflecting a paradigm shift from planning based on past housing development trends to planning for the housing that is needed in a community based on factors of location, typology, affordability, and tenure.

The OHNA's goals align with Governor Kotek's Executive Order 23-04. The order set a goal to produce 36,000 housing units statewide to address the housing shortage and ensure housing options for populations that were previously not planned for, such as our unhoused neighbors.

DLCD is the primary executor of OHNA, in collaboration with the Department of Administrative Services (DAS) Office of Economic Analysis (EOA) and Oregon Housing and Community Services (OHCS). The EOA is responsible for the housing production targets that will be allocated to individual jurisdictions. OHCS will provide a housing production dashboard to monitor equity indicators, to help cities meet OHNA requirements for utilizing strategies that support development of safe and affordable housing.

Cities over 10,000 in population and Metro unincorporated lands (urban areas which are within the jurisdiction of Clackamas, Washington, or Multnomah county) are included in these requirements. SB 406 (2023) added cities and some unincorporated urban lands within Tillamook County to the list of communities required to adhere to OHNA, regardless of city size.

The legislature directed DLCD to develop the administrative rules to govern this policy, including three key aspects:

- Housing needs and production
- Housing accountability
- Housing capacity and urbanization

At the time of this update, the department has conducted meetings with three technical advisory committees spanning these topics, in addition to a broader rulemaking advisory committee to inform the rules that staff will present to LCDC for adoption. The department also received \$3.5 million to allocate to local governments for various housing related planning projects throughout the 2023–2025 biennium.

Department staff are also working closely with OHCS to align the housing production dashboard with polices established through administrative rule.



### *HB 2727 (2023) – Early Childhood Education Facility Siting Study*

HB 2727 was passed in the 2023 Legislative Session. The bill directed DLCD to produce a report for the Oregon legislature with recommendations to improve state and local policies for early learning and care facility siting. The report is due by December 31, 2024. The scope of this work extends to land use decisions, such as zoning, in addition to building code requirements and permitting processes that may create barriers to siting these facilities.

The department convened a workgroup with the statutorily required representatives to gather information on the zoning, permitting, and code applications of various local jurisdictions, in addition to state policy around land use and building codes in conjunction with state partners.

DLCD contracted ECONorthwest to help facilitate this workgroup, incorporate input from workgroup participants, and define recommendations under three categories:

- Reducing barriers to expanding early learning and care facilities.
- Supporting the expansion of early learning and care facilities.
- Reducing unequal access to early learning and care facilities for different racial and regional groups.

The department is combining feedback and gathering final comments on the report before publishing it in December 2024.

### *HB 3409 (2023) – Reduced Conflict Photovoltaic Siting Rulemaking*

HB 3409 was passed in the 2023 Legislative Session. It directed LCDC to adopt rules that counties in Eastern Oregon could use to prioritize projects for photovoltaic solar siting.

DLCD is working with a rulemaking advisory committee to identify areas with the least amount of conflict. These areas have limited wildlife, natural and cultural resource, natural hazard, agricultural, and forest concerns. The identified areas will streamline the solar siting process.

The department is midway through conducting rulemaking and has been holding meetings in cities throughout Eastern Oregon as directed by HB 3409. LCDC will adopt rules in January 2025 to meet the July 1, 2025, deadline.

### *HB 3409 (2023) – Community Green Infrastructure*

The legislature passed HB 3409 in the 2023 session. The bill directed DLCD to create a Community Green Infrastructure Grant Program to administer grants to schools, community-based organizations, and other eligible recipients for the planning or development of community green infrastructure, which includes projects such as urban tree canopies and stormwater management.

DLCD is coordinating with the Oregon Department of Forestry and the Oregon Department of Transportation to administer the program.

DLCD convened a statutorily required advisory committee to advise staff on grant allocations. As this is a new program, this advisory committee will advise on implementation strategies and criteria.

DLCD received \$6.5 million in grant funds to allocate throughout the 2023–2025 biennium. The department expects opening the first round of grant applications in the fall of 2024.

#### *SB 1564 (2024) – Housing Model Ordinances*

The legislature passed SB 1564 in the 2024 session. The bill directed LCDC to adopt model ordinances for housing types delineated by city size. The three ranges of city sizes are: populations under 2,500, populations between 2,500 and 25,000, and populations above 25,000.

These model ordinances are presumed to be clear and objective to the requirements of ORS 197.307(4). Cities have the option to adopt these ordinances either in whole or in part and may do so by reference, which is intended to encourage the participation of smaller jurisdictions.

DLCD staff will develop drafts of these model ordinances during the second half of the 2023–2025 biennium, using the existing Housing Capacity and Urbanization Technical Advisory Committee capacity to offer suggestions and feedback. LCDC must adopt them by January 1, 2026.

#### *SB 1537 (2024) – Housing Accountability and Production Office (HAPO)*

The legislature passed SB 1537 in the 2024 session. It established the joint Housing Accountability and Production Office (HAPO) between DLCD and the Department of Consumer and Business Services Building Codes Division. It requires the departments to enter into an interagency agreement and begin creation of the office prior to an operative date of July 1, 2025.

HAPO will support local governments through education, guidance, and technical assistance. It will also investigate and enforce violations of state housing laws. This office will act as a coordinating body for housing production throughout the state working with other state agencies to facilitate funding, remove housing production roadblocks, and mediate between local governments and housing developers. DLCD will hire the 28 positions received in SB 1537 (2024) and implementing HAPO throughout the remainder of the 2023-2025 biennium. SB 1537 also provided DLCD \$4 million for the provision of grants to local governments.

#### *HB 4080 (2024) – Offshore Wind Policy Roadmap*

The legislature passed HB 4080 in the 2024 session. It directed DLCD to lead an offshore wind policy development roadmap. This involves engaging Tribal governments, state agencies, local governments, organizations, and community members about their priorities. The roadmap process will begin in the fall of 2024.

DLCD staff and contract facilitators will begin an engagement process to create recommendations for the development of state and local enforceable policies that can be upheld as the Bureau of Ocean Energy Management continues the process of leasing for exploration of offshore wind opportunities and development in the coming years. This will provide the state with leverage to maintain Oregonians' priorities in the

A report on the roadmap process is due to the legislature by September 1, 2025.

### **Ongoing Policy Work**

This section includes policy work carried over from the previous biennium.

#### *Climate-Friendly and Equitable Communities*

LCDC adopted the Climate-Friendly and Equitable Communities (CFEC) rules in July 2022 and amended them in November 2023. The rules aim to address the state's climate change reduction and housing production and affordability goals. They require that Oregon's metropolitan regions create policies supporting the development of new housing within existing urban areas, and mass transportation to reduce reliance on cars.

Eight metropolitan areas across the state are required to designate climate-friendly areas. These areas will maintain zoned capacity for 30% of existing and future housing needs of the jurisdiction's total housing need.

Additionally, it requires removal of certain parking requirements and updating transportation system plans to plan for more transportation options. The department received \$3 million for grants related to CFEC implementation in the 2023–2025 biennium.

### **Agency-Directed Policy Work**

This section includes policy work that has been recommended by agency staff and directed by the commission in instances of rulemaking.

#### *Statewide Land Use Planning Goal 5 Rule Update for Cultural Resources*

LCDC originally adopted rules for Statewide Land Use Planning Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces into Chapter 660 Division 16 in 1981. However, cultural resources were not included in this rulemaking until better government-to-government relationships were established.

At the request of Tribal governments, DLCD has convened a rulemaking advisory committee and is creating rules in 2024 to define cultural areas and outline specific actions to ensure protection and access for native Oregonians and other culturally identified groups.

LCDC will hold a hearing on these rules in September, with a six week comment period September 1 – October 16.

### *Statewide Land Use Planning Goal 9 Updating Guidance/Rules on Economic Analyses*

The department is updating Statewide Land Use Planning Goal 9: Economic Development rules, relating to industrial lands and the Target Industry Approach. The Target Industry Approach will allow local governments to identify a particular industry's workforce population and land needs for consideration of an urban growth boundary expansion. However, the approach has been inappropriately used to estimate lands need for broad employment in a region, overstating the land need. This rulemaking intends to clarify execution of this approach through amendments to OAR 660-009.

LCDC will hold a hearing on these rules in September, with a six week comment period September 1 – October 16.

### *Public Records Request: Fees Update*

The department does not require fees for public records requests, which does not reflect the time and cost investment in staff resources needed to compile these requests. Updating these requirements to reflect the cost for the department was included in the 2023–2025 Policy Agenda but has been postponed to the following biennium due to department capacity and the need for DAS involvement in the process.

### *Farm and Forest Protection Updates*

Farm and forest protections (Statewide Land Use Planning Goals 3: Agricultural Lands and 4: Forest Lands) are core parts of Oregon's land use planning system. This program has been modified throughout the years by the Oregon State Legislature and LCDC to reflect additional nuance and changes to agricultural practices and needs.

During the end of 2023, the department produced a scoping report on how the program could be clarified and improved. The report was created with input from a working group comprised of county planners and members of the agricultural community. This report produced a list of recommendations which were presented to the commission in January of 2024.

In January 2024, LCDC directed the department to undertake rulemaking to codify existing case law and improve areas of uncertainty where there are circular definitions or a lack of guidelines for administration. The original charge included the following topics:

- ORS 215.296 (the "Farm Impacts Test").
- Commercial activities in conjunction with farm use.
- The agri-tourism and other commercial events "incidental and subordinate" and "necessary to support" standards.
- Transportation facilities on rural lands.

In April 2024, LCDC adopted an updated rulemaking charge that added the following topics:

- Repair the circular definition in OAR 660-033-0020(7)(b). Add a definition for "processing" to OAR 660-033-0020 with the intent of clarifying what is appropriately considered a preparation arm use and what is processing.

- Establish an evidentiary standard for verification of income to demonstrate compliance with the standards for farm stands, agri-tourism events, and primary and accessory farm dwellings.
- Rulemaking to define in OAR 660-006-0027 a replicable methodology to align a template rectangle with stream or road. Clarify what constitutes a “road” for purposes of the review and the term “maximum extent possible”.
- Rulemaking to clarify that focal events are not “recreational uses”. This is proposed as a codification of the opinion in *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 61 (2015).
- Clarify whether uses otherwise listed in chapter 215 of statute or in OAR 660-006-0025 may or may not alternatively be reviewed as Home Occupations under ORS 215.213(2), 215.283(2) or OAR 660-006-0025(4)(s).
- Clarify whether uses otherwise allowed in chapter 215 of statute may or may not alternatively be reviewed as Commercial Activities in Conjunction with Farm Use (CACFU) under ORS 215.213(2)(n) or 215.283(2)(i) unless otherwise allowed in statute.
- Discuss an approach to recommending any updates to replacement dwelling rule.

LCDC will hold a hearing on these rules in September, with a six-week comment period September 1 – October 16.

### *Coastal Access Rulemaking*

Statewide Land Use Planning Goal 17: Coastal Shorelands has a provision for coastal access. The department convened the Coastal Access Advisory Team throughout 2022 and 2023 — composed of Tribal governments and interested parties — to explore how to strengthen coastal access for Tribal members and the Oregon public.

This project is postponed to the 2025-2027 biennium due to agency capacity.

### *Territorial Sea Plan*

The Ocean Policy Advisory Council (OPAC) and LCDC coordinate to update the Oregon Territorial Sea Plan (TSP). They update the TSP in response to current events, changes in statute, and federal actions. The OPAC will take up this topic in the second half of the biennium and recommend updates to the commission for adoption.

This project is now expected to continue into the 2025-2027 biennium.

### *State Agency Coordination Program – Pilot*

ORS 197.180 requires all state agencies to enter into a State Agency Agreement (SAC) to ensure that its administrative rules and practices align with applicable land use laws and rules.

Adopted in the late 1990s, these agreements have only recently been digitized into a searchable record for the agency. Most SACs have also not been updated to reflect

recent changes in statutes or administrative rules. The department is working to review these records and begin the process of updating agreements.

