November 7, 2025

Land Conservation and Development Commission
Oregon Department of Land Conservation and Development
550 Capitol St. NE, Suite 505
Salem, OR 97301

Via email

RE: Comments on Oregon Housing Needs Analysis Rulemaking and Model Code

Dear Members of the Land Conservation and Development Commission:

Thank you for the opportunity to comment on the proposed amendments to OAR chapter 660, division 008. This letter serves to follow up on the City of Wilsonville's preliminary comment letter dated October 17. The draft rules represent a significant effort to streamline Goal 10 "Housing" compliance, but several provisions raise practical, legal, and technical concerns. We respectfully submit the following comments to address additional areas where the rules would benefit from clarification, reduced burdens, legal certainty, and strengthened alignment with housing choice principles. Please enter this letter into the public record.

The City of Wilsonville reiterates and incorporates by reference our October 17 letter, including concerns raised regarding:

- The lack of alignment with legislative intent
- The absence of safe harbors and clear and objective standards
- No viable alternative to the Model Code
- Divergent development standards
- Administrative and legal risk to cities

Adoption of the Model Code

Our greatest concern is that the draft rules effectively force adoption of a model code on every city's buildable or development-ready land unless a jurisdiction can prove its own code is 'as good or better.' Yet nowhere do the rules explain what evidence is sufficient to "rebut" or "exceed" the presumption that the Model Code is superior. Is an analysis from a "qualified consultant" enough? Or will DLCD apply a subjective review that changes over time? The Department has provided no outcome-based data, performance benchmarks, or streamlined path for cities to demonstrate their own track records. Model code is meant to serve as a possible solution for jurisdictions to utilize when developing and adopting code

language unique to that jurisdiction is unfeasible, not to replace a city's authority and autonomy.

Moreover, DLCD has not proven that the Model Code is successful or will even result in more housing production. Without clear vetting criteria or any published data showing that the State's Model Code actually produces more housing, better affordability, or stronger fair-housing outcomes than existing local regulations, this is deeply concerning. Cities are left with either adopting the Model Code wholesale—despite its untested status—or risking a costly, subjective analysis that may never satisfy DLCD or HAPO and resulting in a compliance process.

The Intent of Safe Harbors

A **safe harbor** is a provision in a law or regulation that offers protection from liability or penalties if certain conditions are met. A **rebuttable presumption** is a legal assumption that a court accepts as true until the opposing party presents evidence to prove it's false. Placing the full burden of proof on a city is therefore the opposite of a safe harbor. No longer is there any protection from liability for good-faith actors.

Staff from the Housing Accountability and Production Office (HAPO) stated that the Model Code provisions serve as "a benchmark," and cities can do work to show their codes are comparable to the benchmark. However, that is not what the rules state and not what a rebuttable presumption means. A city has to prove that the Model Code being better is false in order for a city to use its own code. That is an extremely high burden. Additionally, clear and objective explanation of how a city could meet that burden is not set forth in the Draft Rules, meaning the goal posts could constantly change and potentially be impossible to prove.

660-008-0200(4) clearly states, "Rebuttal of this requirement must demonstrate through analysis that alternative zoning or development standards are comparable or no more restrictive than the model ordinance standards." A "city **must adopt** the model ordinances" for middle and multi-unit housing, to incentivize accessible housing, and adaptable housing (emphasis added). Excerpts from 660-008 show the lack of clarity:

- "Regulations facilitate comparable development outcomes"
- "Same or greater intensity"
- "Comparable proportional cost to development"
- "Do not create unreasonable cost or delay"
- "Provide comparable or improved economic and feasibility benefits to residential development…or increase projected revenue from development"

Those criteria are not clear and objective and place too heavy of a burden on cities with risk and legal exposure based on interpretation, which is inappropriate given these Rules were supposed to make compliance clear. To further illustrate the issue, there is zero collaboration from DLCD during cities' Housing Production Strategy (HPS) processes. This means cities would do a comparative analysis, choose not to include the Model Code as an HPS action, adopt the HPS, and then on the 120th day after submission of the decision to DLCD find out whether or not their comparative analysis is sufficient or whether their HPS is remanded (after the DLCD grant funded consultants are no longer contracted).

The intent of safe harbors was for cities to not have to do lengthy and costly analyses and instead have some certainty in the actions they choose in their HPS. The Model Code should be a safe harbor first and foremost. If it is not changed, then a comparable analysis conducted by a land use or planning professional should be a safe harbor (meet the burden of proof).

Timeline and Application of Multiple Codes

The Model Code presents development review timelines that differ from the 120-day development shot clock established in statute. When cities are understaffed and reviewing several development applications, especially larger subdivisions or complicated projects, 120 days is necessary to ensure accurate reviews. Having different timelines for different types of projects can become difficult to track and present serious legal risks if a city makes a mistake in applying the wrong timeline to a project. The shorter review period also inherently prioritizes a certain type of housing above others, even if the project has less impact on affordability, accessibility, or overall production. For example, staff would have to put aside a large subdivision review, or a multi-family affordable housing project, in order to process a four-unit infill middle housing project on a faster timeline. In reviewing the updated draft, there are **3 different review timelines proposed in Section 9 of the Model Code**, and by defining what types of land use decisions and what timelines apply to different developments, the Model Code overwrites existing state processes without engaging local authorities or being transparent. Not only was this never discussed during rulemaking, but it **appears to be inconsistent with SB 974**.

The draft Rules also impose two different "flavors" of code in a single jurisdiction—existing local regulations for some parcels and Model Code modules for others—based on whether land is merely "buildable" (OAR 660-008-0005(6)) or "development-ready" (660-008-0005(45)). In practice, almost all buildable lands will qualify as development-ready under these broad definitions, rendering the distinction trivial and forcing the Model Code citywide anyway. If the Middle Housing–required Model Code standards are more difficult to interpret and implement than the rest of city code, it will push developers to build single-family detached units. Applying different codes and standards for different types of housing is inherently confusing and is not good customer service. In this scenario, a developer proposing a single subdivision plan would have to navigate and apply two separate codes and sets of standards. How are staff or developers supposed to explain why a corner lot follows the state Model Code while its neighbor follows the local code? This patchwork approach undermines transparency and the Legislature's goal of streamlining development.

Further, the Floor-to-Area Ratio (FAR) minimums and maximums included in the Model Code are not conducive to every context. For example, the City's award-winning TOD project, Vuela, a 100% affordable housing project, would be able to be constructed through the bonus structure, but this same project if market-rate would not be allowed based on the restrictive FAR and other draft standards in the Model Code.

The concept of the density bonuses are far more convoluted than is necessary, leading to many unanswered questions. It would be clearer and more effective to simply exempt certain housing types from density requirements, similar to the original HB 2001 approach.

As is often the case with state-level guidance, the code seems to assume lot-level or infill development, rather than larger subdivision, master-planned, or greenfield areas (e.g. not allowing required open space). This limits flexibility and could hinder better fair housing outcomes. But it will be impossible for cities to prove our code is better when no criteria are established. The Rules echo the CFEC parking standards—whereby cities just stripped parking minimums rather than untangle the convoluted, overlapping standards. And as a result, cities will have fewer tools and less ability to address our contextualized housing needs. It is hard to even understand the point of doing a contextualized housing need anymore when all targets and codes are being mandated uniformly across the state.

Legal Risk and Cost of Defense

In Oregon, the Land Use Board of Appeals (LUBA) has developed well-established legal precedent regarding how much deference is given to a city's interpretation of its own land use codes, unless the interpretation is inconsistent with the express language of the code, or it is not plausible. **No such deference is owed when a city is interpreting statewide statutes, rules, or goals; or implementing state-mandated requirements.** In those cases, LUBA applies its own judgment to determine whether the local government's interpretation is correct — not merely "plausible." **Clearly, this puts a city at significant legal and financial risk to be implementing State code on a site development basis, especially when the intent of the draft code is not documented nor clear.**

These are all serious concerns as local jurisdictions now bear the legal costs. If an applicant appeals to LUBA, cities can face significant legal costs — both direct and indirect. Those legal costs include: Attorney Fees (City's Own Counsel), Staff Time / Administrative Costs, Potential Attorney Fees Awarded to Petitioner, Remand / Reconsideration Costs, Appeal to Court of Appeals or Supreme Court (if pursued). As a reminder, this current Rulemaking process included a directive from the legislature to provide cities with certainty and lower legal risks—forcing cities to implement a State model code for housing development of any type does the opposite, it only creates more uncertainty and higher legal (and financial) risks. The alternative is that cities will just approve applications even if they conflict with code and are not implementing needed housing, simply in order to avoid costly legal processes.

The Rules also do not clarify what happens if the implementation of the Model Code directly contradicts a city's other adopted plans and policies, including prior and existing actions from a housing production strategy, comprehensive plan, or master plan, directly related to providing needed housing in the city. In these situations, a city has no direction to "prove sufficiently" to DLCD and HAPO; it does not appear that is even an option in this kind of situation.

Proposed Revised Language

The City of Wilsonville submits the below revised language to address the concerns addressed in our written and verbal public comments:

> ***660-008-0200(3)(B):*** A large city [*must*] **may** adopt the model ordinances for large cities for middle housing development types **as a safe harbor**, or **adopt** zoning or development standards that are [*demonstrably comparable or*] no more restrictive than the model ordinance standards **as shown through a written comparative**

analysis by a professional planner. DLCD must, upon the request of a city, collaborate, review, and approve or deny whether the comparable analysis sufficiently shows the city's alternative code provisions sufficiently compares to the Model Code/Ordinances during the city's Housing Production Strategy development process and prior to local adoption.

660-008-0200(4): A city must satisfy the requirement to respond to the following needed housing characteristics with land use efficiency measures in its housing production strategy under section (2) in compliance with the following subsections [*or rebut this requirement. Rebuttal of this requirement must*]**. Cities may** demonstrate through analysis **by a certified planner or land use professional** that alternative zoning or development standards are [*comparable or*] no more restrictive than the model ordinance standards **as shown through a written comparative analysis by a professional planner**. **DLCD must, upon the request of a city, collaborate, review, and approve or deny whether the comparable analysis sufficiently shows the city's alternative code provisions sufficiently compares to the Model Code/Ordinances during the city's Housing Production Strategy development process and prior to local adoption.** This section of rule does not apply if the city already taken (*sic.*) or exceeded the equivalence of these actions.

(a) To plan for affordable housing need with land use efficiency measures a city [*must*] **may** adopt the model ordinances appropriate for the city size to incentivize affordable middle and multi-unit housing under OAR 660-008-0425 **as a safe harbor, or adopt zoning or development standards that are demonstrably comparable or no more restrictive than the model ordinance standards**.

(b) To plan for accessible housing need with land use efficiency measures a city [*must*] **may** adopt the model ordinances appropriate for the city size to incentivize accessible housing for all housing types available under OAR 660-008-0425 **as a safe harbor, or adopt zoning or development standards that are demonstrably comparable or no more restrictive than the model ordinance standards**.

(c) To plan for adaptable housing need with land use efficiency measures a city [*must*] **may** adopt the model ordinances appropriate for the city size to incentivize adaptable housing for all housing types available under OAR 660-008-0425 **as a safe harbor, or adopt zoning or development standards that are demonstrably comparable or no more restrictive than the model ordinance standards**.

Conclusion

There has not even been time for a public review, and no evidence of a peer review during this drafting process. When asked about what the vetting process was for the Model Code, DLCD responded: "we heard interest in DLCD providing more support and clarity on how local governments can grapple with Model Code standards, and can provide [that] during rollout and implementation." Any experienced code-writing practitioner knows it takes months of work sessions to refine code to a workable standard. Creating a statewide code in a backroom without input from practitioners statewide lacks transparency and ethical integrity. The Rules also do not outline how updates to the Model Code will occur and what

type of noticing or public involvement will occur. Both staff and the Rules allude to the model ordinances being amended in the future, but it is not clear when, how, and what type of vetting will occur.

It is important to remind LCDC that HB 2001 (2023) did not direct the Department to adopt a statewide zoning ordinance or planning code. **There is no statutory language in HB 2001, SB 1564, ORS 197A.130, or HB 2138 that expressly compels DLCD to create a mandatory housing code.** On the contrary, the Legislature expressly directed DLCD to **provide technical assistance to be utilized voluntarily** by those cities seeking support with a deadline of January 1, 2026. It also directed DLCD to create safe harbors to provide cities with certainty and lower legal risks with a deadline of January 1, 2025. These were two separate directives with safe harbors adopted long before DLCD drafted a Model Code.

These Model Codes are part of a cooperative planning approach under ORS 197.291 and 197.293. ORS 197.335(6)(c) allows the Land Conservation and Development Commission (LCDC) to impose appropriate models developed by DLCD **only on cities that fail to comply with housing acceleration agreements**. **We encourage LCDC to reevaluate whether the Model Code, as currently written, is in compliance with state statute**.

We appreciate your consideration of these additional points. Addressing them will enhance legal certainty, reduce undue technical burdens, and better align the rules with the principles of housing choice and fair housing.

We appreciate DLCD's commitment to collaboration and stand ready to discuss these recommendations further.

Sincerely,

Miranda Bateschell
Planning Director
City of Wilsonville