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Land Conservation and Development Commission
Oregon Department of Land Conservation and Development
635 Capitol Street NE, Ste. 150
Salem, OR 97301

Dear Land Conservation and Development Commission Members,

The City of Molalla thanks the Oregon Department of Land Conservation and Development (DLCD) for the opportunity to comment on recent Oregon Housing Needs Analysis rulemaking. The City is encouraged by efforts made by DLCD in this process to clarify some of the challenging points in the housing study. Providing a model code to incorporate recent middle housing regulations and clarifications on what constitutes and efficiency measure vs. housing policy for our Housing Production Strategies (HPS) documents are two steps taken that provide clarity, previously missing, for how to proceed. Additionally, City Staff appreciate that new rulings take consideration of financial constraints as a significant factor when prioritizing lands within urban reserves. These are steps in the right direction for providing clarity to housing policy and implementing it in a way that that is more conducive to successful development of cities and towns within the Oregon Land Use framework.

With that, the City has concerns about the new rules and concerns that persist through the housing policy process generally.

Ambiguity

Ambiguous rules lead to inconsistent application, unfairness, and uncertainty. Recent OHNA rules unfortunately have created ambiguity in several instances where cities are tasked with adopting prescribed standards or providing an alternate model.

- In OAR 660-008-0075 (6) cities are required to set prescribed minimum targets for middle housing and multi-family housing or present an alternate model but no criteria for that presentation are provided.
- Cities are required to either adopt the model code for middle housing land divisions or develop a comparative set of standards that allows for middle housing land divisions. Again, there are not clear targets for cities to show that these alternative standards meet objectives.

Without clear guidelines on how to proceed, cities run the risk of bringing forth their own existing or proposed standards and may receive a discretionary ruling by LCDC that could delay adoption and implementation of these standards. In small city environments where staff is often short, this time lost is a substantial drain on the city's resources.

Ambiguity in statute has been written into the housing standards too often and these discretionary rulings do happen. For rules governing DLCD review of cities' Housing Production Strategies, OAR 660-008-0055(6)(h) states that DLCD shall review the accuracy and sufficiency of the Housing Production Strategy Report based upon other attributes the commission considers relevant. Notably, DLCD has not provided any guidance document on what those "other attributes" might be. This standard has produced exactly those undesirable outcomes mentioned above. It places jurisdictions in a position that requires them to reach into the collective mind of LCDC in order to complete a compliant Housing Production Strategy that can be defended against DLCD staff overreach. What's more, it allows DLCD staff to exercise unfettered, unappealable discretion in the approval or denial of otherwise compliant reports based solely on what they determine, and which cannot be verified, are the "other attributes" LCDC deems relevant.

Finally, it produces a significant appearance of unfairness, and/or disdain for particular jurisdictions. There are multiple examples of DLCD staff finding that a criterion is not met based on a standard that cannot be found in the OAR. There are also several examples of DLCD staff second guessing a criterion they themselves have found met by including a slew of comments suggesting specific other measures that DLCD staff thinks should be taken, and/or the timing in which they should be addressed. This is illustrative of a lack of respect for the people, elected officials, and staff in a given community, and a lack of understanding of the big picture in which these strategies must fit.

Further, these concerns are compounded since in both cases these decisions are not subject to appeal, leaving the full weight of these critical decisions at a staff level of discretion. Placing the power to write law on the fly in the hands of DLCD staff members is totally inappropriate, produces unfair outcomes, inconsistent application, and anoints unqualified individuals to make decisions which they are not qualified nor informed enough to make. Cities deal with significant balancing of the interests with each and every decision made. To suggest that a DLCD staffer is better situated than the community, elected officials, and staff of a city to make those decisions defies the fundamental premise of a Democratic Republic. Administrative rules should be written to provide full notice of expectations and remove staff discretion.

Consistency Between Model Code And Statute

The City appreciates the effort from DCLD to provide model code for the middle housing land division process. Smaller cities face a lot of challenges keeping up with the rapid pace of recent statutes and provision of model code following the development of robust statutes is helpful to keep pace. With that, City Staff has identified some areas in the draft model code that are apparently incompatible with Senate Bill 458. Ensuring that the incongruities are appropriately addressed promptly will save heartache both for cities and towns down the line if projects are appealed and ultimately for DLCD to ensure this rulemaking process need not be repeated. Areas we identified are as follows:

Incorrect Automatic Review Process:

The Model Code incorrectly allocates the review process to the standard version unless the applicant requests otherwise. Senate Bill 458 states that it shall follow the expedited process unless the applicant requests otherwise.

Model Code	<i>Tentative Plan Procedure. 1. Standard Procedure. Unless the applicant requests to use the procedure for an expedited land division as provided in subsection (2), the city shall review an MHLd under the same procedure that applies to a standard land division. An application of one or more than one MHLd submitted at the same time as an application for a standard subdivision or partition will be consolidated into a single application subject to the procedural requirements for the standard subdivision or partition.</i>
Senate Bill 458 (Enrolled)	<i>197.365. Unless the applicant requests to use the procedure set forth in a comprehensive plan and land use regulations, a local government shall use the following procedure for an expedited land division, as described in ORS 197.360, or a middle housing land division under section 2 of this 2021 Act...</i>

Incorrect Appeal Limitations

The Model Code incorrectly states that only the applicant may appeal an MHLd. Senate Bill 458 states that the applicant or any commentor may issue an appeal.

Model Code	<i>Only the applicant may appeal a decision for an MHLd processed as an expedited land division made under this section.</i>
Senate Bill 458 (Enrolled)	<i>A decision may be appealed by: (A) The applicant; or (B) Any person or organization who files written comments in the time period established under ORS 197.365.</i>

Incorrect Comment Acceptance

The Model Code incorrectly asserts that the City does not accept public comment for an MHLD. Senate Bill 458 states that anyone who is provided notice may issue public comment.

Model Code	<i>The MHLD review process does not include a hearing and the city does not accept public comment from third parties.</i>
Senate Bill 458 (Enrolled)	<i>The local government shall provide written notice of the receipt of the completed application for [an expedited] a land division to any state agency, local government or special district responsible for providing public facilities or services to the development and to owners of property within 100 feet of the entire contiguous site for which the application is made. The notification list shall be compiled from the most recent property tax assessment roll. For purposes of appeal to the referee under ORS 197.375, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given. Notice shall also be provided to any neighborhood or community planning organization recognized by the governing body and whose boundaries include the site. (3) The notice required under subsection (2) of this section shall: (a) State: (A) The deadline for submitting written comments...</i>

These model code provisions ought to be more heavily vetted against the governing statutes before being deployed to cities for adoption.

Impracticability

Molalla was encouraged to see that the new rules provide some relief under OAR 660-021 to exclude lands from urban reserves that are not cost effective to serve due to existing or planned infrastructure investments. While this is not the scenario that Molalla faces, we encourage the Commission to examine its reasoning behind this change and extend that consideration more broadly to land prioritization under OAR 660-024. We pose the question, if lands are not suitable to bring into an urban reserve, why are they suitable to bring into an urban growth boundary where a city does not have an existing urban reserve? The current interpretation of impracticability to exclude first priority non-resource lands under OAR 660-024 is tantamount to an impossibility for development. In a time where housing costs are already the leading edge of a statewide crisis it may be time to revisit whether cost considerations that would prohibit all but the most luxurious of housing development ought to be considered more heavily when excluding lands from OAR 660-024 study areas. The Commission has recently, graciously funded work for our city to explore cost considerations in our own urban growth boundary study. This work to determine the burden of bringing in exception lands that are in large part highly fragmented and very

difficult to serve against lower priority lands that are substantially more easily served may provide outcomes of housing types and affordability targets more in line with Molalla's needs if we are able to proceed. We ask that this effort may serve as a benchmark to move forward with revisions that allow cities to make decision that make pragmatic sense for their urban development and affordability for residents.

Thank you once again for your time and consideration of Molalla's comments.

Sincerely,

A handwritten signature in black ink, appearing to be 'DZ' with a stylized flourish.

Dan Zinder
Planning Manager, City of Molalla