To: **Senate Committee on Housing and Development**

Re: **HB 4035A and HB 4082A**

From: **Al Johnson, retired land use attorney**

Date: **February 24, 2026**

I am writing in support of both HB 4035A and HB 4082A. The people of Oregon desperately need housing. Every bit helps, and these bills will help a bit.

However, I remain deeply concerned that both measures are bandaids on a wounded Oregon state land use program that has failed profoundly in achieving the balance of land conservation and development that this legislature has envisioned from the beginning over half a century ago.[1] Above all, it has failed "all Oregonians" in encouraging the range and diversity of housing prices, rents, and locations that they so clearly, and so dearly, need.

My key concerns are these:

1. The department has never taken seriously the understanding the original members of the Land Conservation and Development Commission—the founding mothers and fathers of the statewide land use goals, that cities and counties would need to adopt and maintain realistic 20-year supplies of urban lands expanded regularly in accordance with sound planning principles embodied in the original Urbanization Goal factors.

2. The department, in its rulemaking, beginning with its original Housing Goal rulemaking, and up through the recent Climate and Equitable Communities and OHNA rulemakings, has ghosted the words "prices" and "locations" in favor of a bean-counter-friendly

[1] I have been a part of that journey from the time I was in law school until now, well into my retirement. I am proud of what I have accomplished in a series of decisions concerning state housing goals, rules, and statutes going back to LCDC's 1978 Seaman v. Durham decision, recognizing the Housing Goal's fair share, least cost, and realistic capacity requirements, among others. I have also worked to reinforce those requirements through extensive participation in rulemaking and legislative advocacy. I hope this memo will serve as a resource for other and younger advocates for fulfilment of the promise of Oregon's statewide housing goal: Adequate numbers of housing units at "price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type, and density."

"housing types" and "tenure-neutral" approach that prioritizes density, transit, and UGB-packing over realistic, affordable, and equitable housing for "all Oregonians."

3. The department has narrowly construed the requirement of the Urbanization Goal to consider "environmental social, economic, and energy" consequences in selecting where to expand UGBs to include consequences for agriculture and forestry, both inside and outside UGBs, but not to include such consequences for the Oregonians whose housing and other urban land needs are the reasons for the proposed expansions. I was told that, when asked why, a DLCD official said only that "We have never done it that way." When the City of Bend took those urban consequences into consideration in its 2016 UGB expansion, owners of several hundred acres of land that would otherwise have been excluded volunteered to record affordability restrictions. Rulemaking since then and, indeed, these bills, are narrowly prescriptive attempts to address those factors as required for the past half century by the goals themselves.

   My immediate concern is that DLCD and UGB expansion opponents will misuse your very limited and prescriptive bills to argue that they are all that the legislature wants done and to preclude cities from applying the social and economic factors more broadly as Bend has done.

4. The Department's assessments of what has gone wrong have, to my knowledge, never included its own role in allowing periodic review and other UGB update reviews to result in false "next-20-year" planning periods, needed housing analyses, capacity estimates, and population projections. This has resulted in Bend having, at present, a 2-year planning period ending in 2028. Eugene's is down to six years.

I have detailed these and other concerns in the testimony and memos excerpted below.

Please do not concern yourselves with maintaining the integrity of the UGB process. You are only being asked today to splint a broken process while you get it to the emergency room.

Next-20-year buildable land capacity

What the law requires

ALJ to OHNA RAC 7-22-25

This memo is respectfully submitted as a citizen, not as anyone's attorney.

There is a logical sequence of decisions to be made under state statutes and goals. That sequence is dictated in turn by a sequential methodology prescribed by the Oregon Supreme Court for interpreting statutes,

rules, and goals. Finally, Oregon's legislature has established a unique hierarchy for goalmaking and rulemaking by one particular state agency: the Oregon Land Conservation and Development Commission.

This rulemaking must conform to all of these requirements, substantive and procedural, if the resulting rules and the BLIs, HNAs, and UGB amendments adopted pursuant to those rules, are to (1) survive legal challenges and (2) avoid a huge waste of time, money, and institutional credibility.

The outcome, when it is done correctly, should be a residential lands supply that is realistically sufficient to demonstrate that local governments have appropriately planned and zoned lands within their urban growth boundaries in quantities, locations, and manners that are quantitatively and qualitatively sufficient to meet their projected housing needs for the next 20 years following completion of regular and timely HNA/BLI/UGB updates.

Those needs are defined by Oregon's statewide Housing Goal as "adequate numbers of housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type, and density."

For too long, DLCD has allowed and sometimes even required, Oregon cities to unrealistically ignore reductions in yield that are likely, even certain, to result from tightening legal, financial, and insurance constraints related to increasing awareness of risks associated with with flood zones and wildfire hazards, unstable hillsi

A key issue is that it unrealistically ignores reductions likely to result from probable tightening of legal, financial, and insurance constraints related to increasing awareness of risks associated with wildfire, earthquake, landslide, flooding, tsunamis, and air pollution. For example, FEMA is currently updating FIRM maps and related regulatory requirements, and the State of Oregon is adopting and implementing new wildfire risk maps and related regulations. DLCD has incorrectly advised L-COG that these probable new constraints cannot be taken into account until adopted. On the contrary, they must be taken into account when the issue is properly raised in the course of local updates, in order to meet existing statutory and goal requirements for fact-based planning.

State law requires that, if the city determines that it probably cannot accommodate all of its projected housing needs within its existing urban growth boundaries without making changes that would enable it to "reasonably accommodate" all or some of the unmet needs without expanding its UGB, then it must consider and adopt "efficiency measures" such as zoning code and map changes that address the unmet needs.

If the city adopts enough efficiency measures to demonstrate that it cannot reasonably accommodate all of the next-20-year identified in its HNA, the state law requires it to expand its UGB to meet those needs.

Any such expansions must be on lands that the record shows are likely to meet those needs, consistent with state Urbanization Goal factors concerning need, efficiency, resource protection, and environmental, energy and social consequences.

> These statutory requirements require far more than a paper exercise. They require the city's governing body to decide, after the requisite public hearings and intergovernmental coordination activities, what the evidence in the record before it demonstrates about a lot of different facts concerning everything from public services and facilities, zoning, wetland regulations, natural and human hazards, to rental and homeownership affordability, location and access, jobs-housing balance, and more.

With one exception, the city's projected 20-year population, state law assigns the role of initial factfinder to local planning jurisdictions. State law assigns responsibility for all other factual determinations to the city. State agencies and courts are required to accept the city's determinations as long as they are supported by "substantial evidence."

The city's job, as initial factfinder, is to apply a higher standard of probability, known as a "preponderance of the evidence." This is the standard than an initial factfinder uses to decide whether a particular fact **is** probably true, correct, or accurate. In contrast, "substantial evidence" is a reviewing standard that affords due respect to local governments as the initial factfindes. It requies LUBA, LCDC, and Oregon's courts to accept all local findings of fact unless they determine that the initial factfinder could not reasonably have made those findings based on the facts presented to it. They may not substitute their judgment for the City's just because they would have made a different choice.

This is an important difference in state and local responsibility. It reflects a considered legislative allocation of responsibility between state and local authorities.

That assignment of authority is too often ignored or misunderstood.

The ultimate factual update question to be answered in the first instance by local governments, not by state agencies or courts, are how much of a city's 20-year housing needs do the facts before it show that it is *probable* that their existing residential land supplies **will**, **in fact**, be able to accommodate when, where, and as needed consistent with the city's updated Housing Needs Analysis?

This question has to be answered in light not only of existing but also of probable future constraints, including additional regulations likely to be adopted in response to changing understandings of risks from earthquakes, wildfire, tsunamis, and climate change. It also has to be answered in ways that are consistent with the specific needs identified by Housing Needs Analysis, which must project 20-year needs consistent with the statewide Housing Goal. For example, if the HNA identifies an unmet need for homeownership or rental housing at particular price ranges, rent levels, types, or locations, there must be enough lands of the right kinds in the right locations with the right planning and zoning regulations in place to meet those specific needs.

This is a somewhat different determination than the one city must make at the next stage, which it reaches only if it determines that there are unmet needs that it can't reasonably accommodate within its existing UGB.

If the city finds there are unmet needs, then it must consider and adopt zone changes and other measures which**, in fact**, are likely to increase the capacity of the existing UGB to meet those needs. It must also decide how much that increase in capacity will be, and whether there are still remaining unmet needs to be addressed by expanding the City's UGB. Those projected increases in yield must also be supported by what Statewide Planning Goal Two calls an "adequate basis in fact," which Oregon's appellate courts have explained means the same thing as "substantial evidence."

Unlike existing and likely **capacity-reducing** constraints, these **capacity-increasing** measures cannot be considered in making the baseline determination. Nor should they. They are assigned by state law to a second stage precisely because they can't be considered "probable" until the Council has (1) selected them from broad and indeterminate range of possible measures, most of which must be chosen based on a complex set of legal and factual issues, and (2) adopted them to provide them with the same key adequate-basis-in-fact footing as the existing plan designations, zoning designations, and code provisions that each jurisdiction relies upon in determining the baseline capacity of its existing UGB.

And, as with the initial yield projections, the decision to be made by the local governing body as initial factfinder is what the preponderance of of the evidence in the record before them "demonstrates" to be the likely increases in yield over the applicable 20-year-planning period from each efficiency measure. That in turn will depend in part on whether the 20-year planning period will actually be 20 years after the efficiency measure takes effect. As with the baseline BLI capacity projections, the reasonably expected yield will be reduced if the efficiency measures in question won't take effect until several years into the planning period, or if part of the 20 years gets eaten up by delays in completing the update process because of appeals or for other reasons.

History and Purpose of the 20 Year Buildable Land Supply Requirement

*DLCD Report to November 18, 2009, joint meeting of The Senate Environment and Natural Resources Committee and the House Agriculture, Natural Resources and Rural Communities Committe***e**

Questions for the panel provided in advance by the committee administrator:

1. *What is the history of the 20-year UGB land supply policy; where did it come from?*
2. *What was its purpose – what was the state trying to accomplish?*
3. *Does this policy still make sense today?*

1. What is the history of the 20-year UGB land supply policy; where did it come from?

- The 20-year land supply requirement was derived primarily from Statewide planning Goal14, adopted by LCDC in 1974. Goal 14 requires each city to establish an urban growth boundary (UGB) "to identify and separate urbanizable land from rural land … [and to] accommodate **long range** urban population growth …" The term "long range" was not defined in the goal

- Goal 14 was, in part, a response to a preamble in 1973 Senate Bill 101 declaring that "the expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion. . ." [2]

- As cities began preparing land use plans to meet the goals in the late 1970's, LCDC was asked to better-define vague Goal 14 terms, including "long range", and "sufficient land to ensure choices in the market place." LCDC interpreted the goals through review of local land use plans. By 1979, after a number of plan and UGB reviews, LCDC had established that these Goal 14 terms meant "a 20-year supply."

[2] Now codified in ORS 215.243(3)

- Senate Bill 100 also required local governments to base land use plans on a "coordinated population forecast."[3] Counties are required to "establish and maintain a population forecast for the entire area within its boundary for use in maintaining and updating comprehensive plans, and shall coordinate the forecast with the local governments within its boundary". During the time the question of the 20-year planning period was under discussion, 20-year forecasts were regularly used for planning, and were provided by Portland State University or determined by various other methods.

- Other 1974 planning goals regarding land supply for housing (Goal 10), economic development (Goal 9), and transportation and public facility planning (Goals 11 and 12) also contributed to LCDC's determination of a standardized 20-year planning period.

- An adopted Goal 14 advisory "Guideline" recommending that "plans should designate sufficient amounts of urbanizable land to accommodate the need for future urban expansion, taking into account … population needs (by the year 2000)" is also cited in LCDC staff reports and orders issued around 1979 in support of the 20 year interpretation, especially an order regarding the proposed Eugene-Springfield UGB.

- A widely distributed 1979 LCDC document providing advice to local governments regarding Goal 14, "*Common Questions on Urban Development*," asserts that: *"The plan will include an approximate 20-year supply of buildable land within the urban growth boundary."*

- In a September 1979 City of Newberg UGB review, LCDC rejected the inclusion of "surplus land" beyond 20 years. In affirming that decision, the Court of Appeals cited key portions of the related LCDC report, which declared:

  > *"This Commission has not previously interpreted Goal 14 as allowing a vacant land 'surplus' of any kind, Rather, this Commission has interpreted Goal 14 as providing for an initial 20 year vacant land supply sufficient to accomplish all urban land requirements of the Goals – one of which is to avoid economically disruptive, artificial land scarcities and adverse escalation in urban and urbanizable land prices." (Williamson v. Yamhill Co, 3 LCDC 353, 359 (1980)).*

- In a 1982 compilation of LCDC precedent and case law, the Oregon State Bar's "*Continuing Legal Education*" series outlines additional history of the 20-year requirement, including LCDC interpretations beginning in1978 derived from Goals 9, 10 and 14 regarding long term housing, industrial and commercial needs, as well as consideration of needs for schools, transportation, parks and open space. That compilation also refers to the Goal 14 guideline reference of "the year 2000" as a basis for the "20-year" interpretation.

- The **amount** of land was not considered separately from critical policy issues regarding the **"efficient use of land"** (also required under Goal 14). Land supply cannot be evaluated without simultaneous consideration of efficient land use patterns, for housing, industrial and commercial uses, as well as for transportation and other infrastructure,

- By the time all land use plans and UGBs were approved ("acknowledged") in 1985, the "20-year supply" interpretation was well-established by LCDC precedent and had been affirmed by many court opinions issued in review of LCDC's interpretation.

[3] Amended and now codified under ORS 195.025 and 195.036.

- An administrative rule interpreting Goal 9 was adopted by LCDC in 1986, indicating that plans must provide "at least a 20 year supply" of land to accommodate industrial and commercial uses.

- Formal reference of the words "20-year supply" were not provided in statute until 1995, when ORS 197.296 was enacted with several references to a "20 year supply", including a provision declaring that

  "At periodic review … or at any other legislative review of the comprehensive plan or regional plan that concerns the urban growth boundary and requires the application of a statewide planning goal relating to buildable lands for residential use, a local government shall demonstrate that its comprehensive plan or regional plan provides sufficient buildable lands within the urban growth boundary established pursuant to statewide planning goals to accommodate estimated housing needs for 20 years."

- A related 1997 statute, ORS 197,299 specified deadlines for Metro "to accommodate a 20-year buildable land supply" in the regional UGB.

- In 2006, LCDC amended Goal 14 to specify that urban growth boundaries shall be based on "Demonstrated need to accommodate long range urban population, consistent with a 20-year population forecast coordinated with affected local governments."

- In 2006, LCDC also adopted a Goal 14 interpretive administrative rule, OAR 660, division 24, that clearly specified "the UGB must be based on the adopted 20-year population forecast for the urban area … and must provide for needed housing, employment and other urban uses such as public facilities, streets and roads, schools, parks and open space over the 20-year planning period …"

- In 2009, LCDC amended OAR 660, division 24, to clarify that "The 20-year need determinations are estimates which, although based on the best available information and methodologies, should not be held to an unreasonably high level of precision."

2. What was the purpose of this policy – what was the state trying to accomplish?

- It is clear by the documents referenced above (and others) that LCDC's establishment of a more precise "planning period", including a policy specifying the appropriate "land supply" for UGBs, was necessary in order for local governments to adopt local land use plans in response to Goal 14 and other land use Goals.

- LCDC's choice of "20 years" as the necessary planning period was based on consideration of several interrelated land use policy questions, including:

  1. The interpretation or policy choice made by various local governments in land use plans submitted to LCDC for acknowledgment review.
  2. Consideration of usual or standard planning practices at the time, in Oregon and elsewhere, including widespread use of 20-year population forecasts;
  3. Concern about the potential for **oversupply** of land in UGBs, which could increase urban sprawl, unnecessary loss of farm and forest resource land, and ineffective measures to achieve transportation and public facility efficiencies;
  4. Concern about having an **enough** land in order for the land markets to function inside UGBs without unreasonable increases in housing cost;

5. The need for an adequate supply of industrial and other "employment" land to ensure local job growth and economic development;
6. Standard accepted planning practices at the time regarding reasonable time horizons for population forecasting, including forecasts used for near-term and long-term transportation and public facility planning.

- Establishment of the 20-year UGB land supply was in response to concern about **"too much"** land supply **AND** simultaneous concern about the detrimental effects of **"not enough"** land supply. In the latter case, concern included the detrimental effects on housing affordability, as well as spillover effects on neighboring jurisdictions or nearby rural areas:

  1. Concern about the effects of an overly restrictive land supply is mentioned in a1978 Court of Appeals opinion regarding the City of Beaverton: *"A decision by one city to limit or prohibit growth within its boundaries can case a spillover effect of increased development in adjacent areas which may be unable to accommodate it."* [4]
  2. In a 1978 continuance order for the City of Aumsville, LCDC indicated that "growth not allowed in the city might result in added pressure for residential development in rural areas of the county."

- An important related policy discussion during the same time period concerned housing affordability and adequate land for "housing needs" under Goal 10. This ultimately led to a parallel determination that **sufficient** land supply was critical under Goal 10. In general, a 20 year supply was determined to be a reasonable standard. Drawing on LCDC Goal 10 interpretations beginning about 1979 regarding adequate land supply for various housing types, a 1981 state law established that

  "When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts with sufficient buildable land to satisfy that need." [5]

- At the same time LCDC was considering the land supply (and land efficiency) policy choices, closely related policies about coordinated population forecasts were also clarified. Over time, it became clear that by a county's "allocation" of the overall 20-year county population forecast among the various cities in the county can greatly affect the amount of land a city is allowed to provide as a 20-year supply. As such, individual cities could aspire to more or less growth through population coordination rather than by changing the UGB land amount.

3. Does this policy still make sense today?

- The positive effects of UGBs have been noted in a variety of articles and studies published over the 30+ years since Goal 14 was adopted by LCDC. In comparing the growth of Oregon cities with the growth of comparable cities in every other state, studies show much lower ratios of land consumed per household added; in fact, astonishingly lower ratios. This measure of sprawl alone indicates success for Oregon's UGB policy. Similar comparisons of farm and forest land preservation in Oregon compared to other states demonstrate the efficacy of UGB policy working in conjunction with farm and forest land policies established by the statewide goals.

[4] *See generally 1000 Friends v. Beaverton, 2 LCDC 41. 53-55 (1978)*
[5] ORS 197.307

- Nevertheless, it is impossible to compare these results with what *might have* been achieved under *different* UGB policies, such as more or less land supply.

- We again emphasize that the "land supply" policy is intertwined with polices regarding population forecasts, especially county "coordination" of those forecasts. This element of Oregon's land use planning system does not work well, and DLCD is increasingly reminded of problems with population coordination.

- Equally important, land supply policy cannot be separated from policies intended to improve land use efficiency inside UGBs. Urban sprawl can and does occur inside UGBs as well as outside. Transportation and public facility efficiency is not simply a function of land supply, and to the extent those efficiencies are more and more important, we should not be focusing on land supply alone as we continuously evaluate the effectiveness of Oregon land use policy. A fundamental requirement of Goal 14 is that local governments must demonstrate they have taken steps to increase the efficient use of land inside a UGB in before they are allowed to expand the UGB. Using land efficiently not only effectively increases land supply without UGB expansion, it also reduces costs for public facilities and transportation infrastructure.

- Finally, when considering UGB policy, we cannot ignore the spillover effects of UGBs established around large urban centers on nearby smaller cities occupying the same commute-shed. These effects are not limited to unanticipated growth rates for nearby cities, such as increased growth in smaller cities near Salem or Eugene. UGBs and related planning policies adopted by large cities also affect inter-city transportation systems. ODOT studies demonstrate a considerable percentage of automobile trips in various regions are to and from cities outside of major urban centers. As such, for example, targets for automobile greenhouse gas reduction cannot be achieved if we focus only on the land-supply policies of individual cities rather than land-supply policies of large urban centers AND the interconnected cities surrounding those centers.

To: LCDC Via E-mail for OHNA Rulemaking Record

From: Al Johnson

Re: OHNA Rulemaking -- Getting "areas of opportunity" right

Date: Nov. 7, 2025

You have a daunting task before you.

As you consider the proposed rules and the voluminous testimony about their complexity, their undue focus on packing more people into the places where they have been packed for too long already, and the risks of unintended or illegal consequences, please keep in mind the

fundamental charge you have been given by Oregon's land use statutes and goals, taken as a whole.

Those statutes and goals, since the adoption of SB 100 in 1973 and the goals in 1974, have consistently required that the all residential areas within Oregon's UGBs should become both "Areas of Opportunity" and "Climate-Friendly and Equitable Communities." Oregon's carefully balanced land use framework sets aside the vast majority of the state for nonurban uses, reserving only a tiny percentage on which the people of Oregon are expected to meet their needs for housing.

Let's not shrink that area further by disincentivizing equitable, affordable, climate-friendly housing throughout our urban araeas. Oregon's land use goals and statutes do not contemplate an inner archipelago of little UUGBs (Ultra Urban Growth Boundaries) inside our already tightly-constrained UGBs, and they do not contemplate a regulatory regime which denies affordable and equitable access to areas of opportunity and homeownership throughout our urban areas.

Properly implemented, they would be part of the solution, not part of the problem, described in books like Applebaum's Stuck (Random House, 2025, excerpts below), Bach's High Desert, Higher Costs: Bend and the Housing Crisis in the American West (OSU Press, 2025), Colburn's Homelessness is a Housing Problem (U of Cal Press, 2022), Gray's Arbitrary Lines (Island Press 2022), and Rothstein's Color of Law (Norton 2017).

Unfortunately, they have not been properly implemented, as I have detailed in earlier memos. Housing has always been second to other priorities, in particular the avoidance of "sprawl," which in Oregon has come to mean even the kind of incremental, contiguous, tree-ring, master-planned, climate-friendly complete community that would, if the Urbanization Goal were properly applied, result in creation of new areas of opportunity with housing supplies that matched with the needs of all Oregonians.

A few more words about "areas of opportunity" and "opportunity mapping." I worry that the proposed rules effectively invert the meaning of "areas of opportunity" and threaten to exacerbate the historical exclusion and concentration of Oregon's historically burdened populations near sources of harm—industrial areas, railroad tracks, dumps, noisy streets, etc.

Here, as elsewhere, "areas of opportunity" should include places from which unfavored populations have been excluded.

In Oregon, that means almost all of our urban areas except the areas to which we have historically relegated our less fortunate fellow citizens. They are not the places to which the excluded populations were confined or to which they were displaced, which have a history of separate and unequal treatment by public and private actors alike.

That should end. Those places and those who wish to live and work there need and deserve investment, protection against gentrification, and meaningful opportunities to remain and thrive. Those areas should be considered areas of protection, investment, restitution, repair, enhancement, and restoration.

But only when that has actually been done, not when it has been planned, proposed, or promised, can such areas be considered areas of opportunity. Any analysis or mapping which assumes otherwise will be misleading and highly damaging to those it purports to assist. Areas of opportunity should also not be confused with "opportunity zones" or "blighted areas" designated under state and federal statutes. Those terms and urban renewal and investment programs have become parodies of their dictionary meanings.

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Memo to Land Conservation and Development Commission
From Al Johnson
Re: Supplemental testimony on OHNA draft rules
October 12, 2025

This memo summarizes and supplements memos to the Housing Capacity Technical Advisory Committee, the OHNA RAC, and the Commission that I have previously placed in the record.

These are my main concerns. There are others. It may be time to think about giving everyone concerned time to get it right by adopting a temporary rule.

Risks and Unintended Consequences

The risks listed in the notice of rulemaking lay bare the misplaced priorities that have undermined this rulemaking from the beginning.

They say nothing about the risks of understating rather than overstating capacity. Are there no such risks or are they just not all that important? Or are those risks not unintended?

They speak patronisingly of the unintended consequence of "Households of color being pushed to perifory." [*Sic*]

They say nothing of the risks of failing to lower barriers to access to Oregon's real "areas of opportunity" generally at or near the edges of our urban areas, where government and the private sector have together located most of the newer schools, parks, libraries, recreation centers, ball fields, as well as home ownership and employment opportunities.

In so doing, the list perpetuates the inversion of the term "areas of opportunity" as it is generally understood. As Richard Rothstein and others make clear, "areas of opportunity" are those areas from which people of color and other disadvantaged populations have traditionally been excluded, through single-family zoning, redlining, transportation planning, and financing constraints. In his words:

> "Contemporary federal, state, and local programs have reinforced residential segregation rather than diminished it. . . Even half a century after government ceased to promote segregation explicitly, it continues to promote it implicitly. . ."
> **Color of Law**, p. 180.

> "Undoing the effects of *de jure* segregation will be incomparably difficult. To make a start, we will first have to contemplate what we have collectively done, and, on behalf of our government, accept responsibility." ***Id***., p. 217

The "Expected racial equity impacts" section includes "Increased housing choice in high-opportunity areas." That will not happen unless people of all ethnicities and colors have access to affordable ownership and rental choices throughout Oregon's tightly constrained urban areas, including areas at and near the edges, where we of the nonexcluded have created many if not most of Oregon's existing opportunities.

Getting thumbs off the scales in the Urbanization Goal's balancing process

The Urbanization Goal, since its adoption, has required the consideration of environmental, energy,economic, and social consequences of alternative candidates for inclusion in urban growth boundary expansions. That process is now deferred for application to the remnants of UGB expansion study areas left after agricultural and forest lands have been "tiered" out of consideration, absent limited special circumstances. Unfortunately, the Department and Commission have never provided any formal guidance concerning whether those consequences include goodness of fit with needs identified in Housing Needs analyses and Goal 10. Aren't the consequences of making access to areas of opportunity for good jobs, good schooling, safe neighborhoods, and housing ownership and rental affordability relevant ESEE consequences? If not, why not?

In practice, these consequences have simply been left off the scale, automatically outweighed by whatever else is on the scale. That selective reading of the ESEE factors corrupts the balancing process as described by Oregon's courts:

> ". . . The locational factors are not independent approval criteria. It is not necessary that a designated level of satisfaction of the objectives of each of the factors must always be met before a local government can justify a change in a UGB. Rather, the local government must show that the factors were "considered" and balanced by the local government in determining if a change in the UGB for a particular area is justified. It is within a local government's authority to evaluate the Goal 14 factors and exercise its judgment as to which areas should be made available for growth." *1000 Friends v Metro and Ryland Homes*, 170 Or App 406, 26 P3d 151 (2001).

The required balancing process is incomplete—unbalanced--unless needs addressed by Goal 10 and Oregon's Needed Housing statutes are not ESEE consequences. As noted in my earlier memos, Bend became the first jurisdiction I know of to correctly consider relative goodness of fit between the city's updated BLI and HNA when choosing lands to include in its 2016 UGB expansion. LCDC approved that expansion.

The OHNA rules should be explicit. This should not be left to "guidance." The rules must make it clear that every jurisdiction looking to expand its UGB to address unmet housing needs must include as relevant ESEE consequences the relative goodness of fit with needs identified in their HNAs, including access to areas of opportunity.

Getting real about "next-20-year" planning periods and "concurrency" in implementation.

As I have explained in an earlier memo, DLCD and LCDC are bound by "exact" and "inexact" legislative language in statutes and goals. In Oregon's needed housing statutes the word "next" means next," both as defined in dictionaries and as used in the governing statute, and the term "next 20 years" means the "next 20 years," not the 20 years beginning sometime in the past.

Likewise, the statutory term "are" means "are," and "are adopted" means "are adopted," not "will be adopted."

Current rules incorrectly interpret the statutory language, just as other LCDC rules have in the past.

The existing rules and the draft rules subtly eviscerate this unequivocal statutory text, along with its context in the needed housing statutes and statewide goals. They continue a long tradition of ghosting the genuine "next-20-year," regularly-updated, rolling 20-year planning periods contemplated by the LCDC in the guidelines adopted with the Urbanization and Housing Goals in 1974.

They do this in several ways, including:

(a) omitting the statutory terms "next" from all references to 20-year planning periods;

(b) making the beginning and "scheduled-completion" dates of 20-year planning periods byproducts of local adoption of phases of scheduled updates and work tasks rather than the actual "completion" (another nondelegative statutory term, meaning no longer subject to appeal) of all of the statutory tasks—HNA updates, BLI updates, LUEM updates, and, where necessary, UGB updates--assigned by the statutes; and

(c) making no provision for the establishment of a new "next-20-year" planning period, with a new year "initially scheduled for completion," following appeals, remand, or other delays resulting in failure to achieve actual "completion" by the date initially scheduled for completion.

These not-so-subtle evasions of legislative intent will perpetuate leaks in the bottoms of "next-20-year" housing capacity buckets throughout Oregon that have resulted in cities like Bend and Eugene ending up with foreshortened planning periods.

For example, Bend finished up in 2016 with a 12-year planning period that is now down to just 3 years, with no new "next-20-year" planning period in sight until it is several years in the hole.

Likewise, Eugene is sitting on the last 7 years of a planning period ending in 2032. If past is prologue, Eugene is unlikely to "complete," within the meaning of the needed housing statutes, its next HNA/BLI/LUEM/UGB update until its "next 20 years" is down to much more than half of that.

Smaller buckets mean shorter-term population projections, shorter-term housing needs projections, less capacity to enhance with land use efficiency measures and urban growth boundary expansions. They also mean shortchanging cities' housing production strategies and subverting the housing access, affordability, and equity goals established and reinforced by Oregon's elected legislators and governors in response to a housing crisis that land use cannot solve alone but that can't be solved at all as long as it is still part of the problem.

The holes in those buckets are not evidence of a flawed Oregon land use system. They are evidence of failed implementation. They are evidence of ongoing and endemic failures to give Oregon's housing statutes and goals the same respect and vigorous implementation that Oregon's farming and timber industries have so long enjoyed. Parity in implementation that the vast majority Oregonians whose housing choices are confined to the remaining 2-3 percent of the state so desperately need.

This is not a new problem. Oregon's courts have overturned LCDC rules involving urban reserves, incorporation of new cities, and the definition of "farm use." One example, showing how long it can take to correct an illegal interpretive rule, is ***Wetherell v. Douglas County***, 342 OR 666 (Or S Ct 2007), in which the Oregon Supreme Court invalidated a 25-year-old LCDC rule which ghosted the Oregon legislature's use of word "primary" in Oregon's Exclusive Farm Use statute. As the Court said:

> "We therefore hold that, because Goal 3 provides that "farm use" is defined by ORS 215.203, which includes a definition of "farm use" as "the current employment of land for the primary purpose of obtaining a profit in money[,]" LCDC may not preclude a local government making a land use decision from considering "profitability" or "gross farm income" in determining whether land is "agricultural land" because it is "suitable for farm use" under Goal 3. Because OAR 660-033-0030(5) precludes such consideration, it is invalid."

Notably, that invalid rule was applied by local governments, DLCD, LCDC, LUBA, and the Court of Appeals for over a quarter of a century before it was finally overturned by the Oregon Supreme Court. For lack of respect owed by DLCD and LCDC to a couple of key legislative inexact terms--"primary" and "profit," LCDC's rule distorted for almost 30 of its 50 years the process of categorizing lands as "agricultural" or nonresource. That unforced error has had the side effect of resulting in an indeterminate amount of land stranded in the wrong tier of Oregon statutes making agricultural lands essentially unavailable for urban growth boundary expansions.

This is not the result of flaws in statutes or goals. The system is not broken when a driver ignores a speed limit.

This, unfortunately, is not something that shows up in the agencies' performance standards.

This rulemaking is the time to prevent the agency's handling of "next 20 years" from meeting the same fate as its handling of "primary use."

Regulatory Concurrency

Again, "are adopted" means "are adopted" in the Needed Housing Statute, not "will be adopted."

Oregon Transportation and Urban Services and Facilities goals recognize the importance of concurrency. Oregon's Needed Housing statutes' "next-20-years" HNA/BLI/UGB and use methodology does for housing planning what those goals do for transportation, water, and sewers. The Oregon legislature requires regulatory concurrency when it comes to meeting Oregonians' housing needs.

BLI classification inclusion and exclusion

As detailed in my earlier memos, safe harbors cannot substitute for evidence need to meet Goal Two's "adequate basis in fact" requirement or the Needed Housing Statute's requirements that local governments "demonstrate" that they have the capacity necessary to meet their housing needs for "the next 20 years.'

Similarly, local governments may not ignore evidence concerning both existing and reasonably likely regulatory constraints, whether

Public, such as land use approval conditions, flood plain regulations, and wetland regulations;
Private such as deed, plat, and HOA restrictions, or such as agricultural, conservation, or open space easements:
physical, such as hills, rivers, rail yards, and interstates;
economic, such as zoned to allow competing uses like medical centers office buildings, etc.
Political, such as a history of strong neigborhood opposition.

BLI 20-year **yield**:

Adequate basis in fact must be based on genuine rolling "next-20-years" planning period.

Needed Housing Statutes place on local governments to "demonstrate" capacity. That burden cannot be removed or transferred by presumptions or safe harbors.

The concept of "discounts" is misplaced. Statutes and goals do not authorize a presumption of 20-year buildout capacity based on current plan or zoning designations. "Zoned to allow" a needed residential use does not mean zoned to allow only that use. Other uses may outcompete, limit feasibility, or conflict. See 2010 LCDC Bend remand decision on 20-year yield of residential land with medical facility overlay.

Factual determinations based on an "adequate basis in fact" and reasoned analysis that, taken together, "demonstrate" likely "next-20-year" yields addressing relevant HNA 20-year-need projections for housing types, locations, home prices, rental rates, etc., considering all relevant constraints identified in local records.

Land Use Efficiency Measures:

Rules are unclear on what 20-percent metric is measured against. Is it 20 percent overall, or 20 percent of the area to which each LUEM is applied? Or something else that we will find out about in "guidance."

LUEMs are part of the required "demonstration," which must be based on an "adequate basis in fact" (Bend) and reasoned analysis (Woodburn) that, taken together, "demonstrate" the likely "next-20-year" yield increases for each LUEM with respect to relevant HNA 20-year-need projections for housing types, locations, home prices, rental rates, etc., considering all relevant constraints identified in local records.

Thank you for your consideration of these rather critical comments. I am a fierce supporter of Oregon's land use program as I believe it was intended to work. This is not how I expected to spend so much time after my retirement. But if that is what it takes, so be it.

Testimony on SB 1537
Al Johnson

I urge you to adopt Senate Bill 1537. It is a strong bill, urgently needed, and deserves the bipartisan support it has in its current form.

My support for the bill includes provisions allowing one-time site additions to urban growth boundaries and alternative urban growth boundary land exchanges. If you do adopt them, however, please make it clear that they in now way alter existing 20-year urban land supply and needed housing capacity obligations that the Oregon Legislature and LCDC established a half-century ago.

And please, whether you adopt those provisions or not, include language or legislative history making it clear that you expect LCDC, DLCD, Metro, and Oregon's cities and counties to fully honor their longstanding obligations to provide, and to maintain, realistic "next-20-year" urban land supplies that, in the words of the Statewide Housing Goal, will

> ". . . encourage the availability of adequate numbers of housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type, and density."

The proposed one-time expansions will be less than a drop in the buckets of unmet needs and unfulfilled obligations under the half-century-old Statewide Housing Goal and the many reinforcing statutes you have adopted over the years. Those who tell you that it is time to move beyond Goal 10 are wrong. It is time to honor Goal 10, and to reinforce it with the kinds of housing production measures, enforcement tools, and unequivocal messaging that you have provided over the past few sessions.

When LCDC adopted the original statewide land use goals in December, 2024, it made clear that it expected local jurisdictions to establish urban growth boundaries with land supplies for at least 20 years ahead:

> "Plans should designate sufficient amounts of urbanizable land to accommodate the need for further urban expansion, taking into account . . . population needs (by the year 2000)." *LCDC Urbanization Goal Guidelines*

LCDC, DLCD, and Oregon's cities and counties honored the 20-year benchmark when the first set of urban growth boundaries established. That took about five years, giving Oregon's urban areas acknowledged urban growth areas for about 20 years, through the year 2000.

Since the beginning, local jurisdictions were expected to keep their plans up to date, including UGB expansions as needed to maintain genuine 20-year residential land supplies, topping them up regularly as they drew from their accounts.

> "Areas experiencing rapid growth and development should provide for a frequent review so needed revisions can be made to keep the plan up to date." *LCDC Planning Goal Guidelines*

As the initial round of acknowledgements neared completion, the Oregon Legislature reinforced LCDC's expectations with a statutory requirement for "periodic review."

That helped, but periodic review foundered because of design and implementation flaws.

As a result, by the 1990s, fast-growing urban areas often had urban land supplies that had dwindled to 10, 5, and even fewer years.

In 1995, the Legislature responded by putting the 20-year supply requirement into statute and prescribing standards and procedures for defining urban housing needs and proving up on urban land supplies.

Slippage continued, in part because DLCD was allowing jurisdictions to keep starting dates that had been rendered obsolete by local footdragging, appeals, and remands.

In response, the Legislature reinforced its 1995 mandate by defining the 20 years as "the **next** 20 years." Unfortunately, it also accepted a crippling amendment of unknown origin, specifying that "the next 20 years" would be calculated from "the date initially scheduled for completion" of a UGB update process.

No consequences were attached to missing the starting date, not even a requirement that the starting date be adjusted forward . Not surprisingly, that date turned out to be an unenforced non-deadline. As before, updated 20-year land supplies continued to be backdated checks, and accounts continued to be drawn on insufficient funds.

Bend, Eugene, and McMinnville are examples:

Bend began its urban area capacity update in 2004, with completion initially scheduled for 2008, and a 20-year planning period ending in 2028. After a remand in 2010, Bend got going again in 2013, and didn't get its UGB approved until 2016, leaving it with a 12-year UGB. Bend finally got a 12-year UGB in 2016.

It's now 2024. Bend's UGB is down to four years. Today, Bend theoretically has about one-fifth of what the original Land Conservation and Development Commission, repeated backed up by this Legislature, saw as necessary to maintain affordability, equity, and market functionality for renters and would-be homeowners. In reality, it almost certainly has less.

Today, in Bend, a townhouse that sold for $400k in 2014 has a Zillow estimate north of $900k. That works for retired professionals like me, but not for the many Oregonians who work in Bend and need to live there instead of burning up family time and fossil fuels commuting from Redmond, Prineville, and La Pine.

Eugene missed its initial completion date of 2012, finishing in 2017. As a result, its current planning period ends in 2032, less than half of the 20 years that state land use policy says is necessary.

McMinnville currently has a BLI and HNA for a 20-year planning period beginning in 2003 and ending in 2023. That's a UGB for the next zero years.

Those who tell you that the land supply piece of the housing affordability and access puzzle is unimportant are ignoring a history of underenforcement, misinterpretation, reluctant implementation, and sloppy bookkeeping
If I could trade the proposed one-time site expansion language for language that once again, and effectively, enforces the original understanding and meaning of Oregon's statewide housing and urbanization goals, I would gladly do so.

At a bare minimum, HB 1537 as adopted should require a reset of the beginning date of the "next 20 years" to one year following the year any BLI, HNA, or UGB update becomes final and no longer subject to appeal.

HB 1537 should also require a revision of DLCD/LCDC's KPMs (Key Performance Standards) to reflect the agency's success or failure in keeping Oregon's scarce urban residential land supplies at or near a genuine 20 years. The agency's current housing KPM conceals more than it reveals, in marked contrast to its ag and forest land KPMs.

I wish you the best with your housing legislation this session. HB 1537 is a great bill, and I am greatly encouraged by the level of bipartisan commitment and cooperation that the legislature has shown over the past few years. It feels like a reawakening of the spirit that led to the adoption of SB 100 and the original housing and urbanization goals over 50 years ago. Last year was the program's 50th year, and a time for looking back. I wish there had been less reliance on a rose-colored rear-view mirror. Thank you for offering us a vision of the future.

Lawmaking, Goalmaking, and Rulemaking
Memo to CAUTAC
From Al Johnson

This memo addresses the following issues, which are critical in assessing the limits of what can be done through rulemaking under existing statutes.

1. **What are the limits of standard administrative rulemaking?**
2. **What requires formal goal amendments?**
3. **What requires legislation?**
4. **Can rules substitute presumptions, suppositions, and "safe harbors" for factual demonstrations otherwise required by applicable statutes and goals?**
5. **Can rules require or allow local governments to disregard constraints and other factors affecting the reasonableness of "next-20-year" capacity projections?**

The current Housing Capacity rulemaking raises fundamental issues about how far LCDC can go in interpreting, without unlawful modification, statutory and statewide goal requirements such as those set forth in ORS 197A.270 for buildable lands inventories, in Goal Two for an "adequate basis in fact," in Goal 10 for housing, and in Goal 14 for urban growth boundary expansions.

The LCDC's obligation to make and interpret land use policy through formal goal-making and rule-making procedures is a key safeguard underlying the legislature's broad delegation of authority to an appointed body of volunteers to promulgate what this Court has aptly described as Oregon's "land use constitution." See Attorney General's Opinion re Constitutionality of Land Conservation and Development Act, 38 Op AG 1130 (Op No. 7492, 1977), p. 15ff; *Warren v. Marion County*, 222 Or 307, 314, 353 P2d 257 (1960). See also, *Warren v. Marion County*, 222 Or 307, 353 P2d 257 (1960) and *Meyer v. Lord*, 37 Or.App. 59, 65, 586 P.2d 367 (1978), rev. den. 286 Or. 303 (1979).

The adequacy as well as the existence of procedural safeguards such as judicial review and rulemaking determines the constitutional validity of a delegation under the home rule and separation of powers clauses of the Oregon Constitution. As the Court said in *Warren, supra*,

> "As pointed out in Davis on Administrative Law, the important consideration is not whether the statute delegating the power expresses standards, but whether the procedure established for the exercise of the power furnishes adequate safeguards to those who are affected by the action."

The Oregon legislature's special concern about the need to reinforce those safeguards in this context deserves respect by the agency charged with carrying out its broad delegation of policy making, policy interpreting, and policy enforcing authority. See *State v. Cloutier*, 351 Or. 68, 261 P.3d 1234 (Or., 2011).

These principles apply to interpreting the legislature's substantive language. They apply with equal force to the legislature's choice of special goalmaking and amending proccedures.

As the Oregon Supreme Court said in *Warren*,

> " . . . [T]he important consideration is not whether the statute delegating the power expresses standards, but whether the procedure established for the exercise of the power furnishes adequate safeguards to those who are affected by the administrative action . . ."
>
> "In testing the statute for the adequacy of such safeguards it is important to consider the character of administrative action which the statute authorizes."

Under SB 100, perhaps the most expansive delegation of authority ever made by Oregon's legislature, the same legislature imposed comparably rigorous safeguards. These safeguards included the considered and deliberate requirements that (a) the newly-created state land use agency, the Land Conservation and Development Commission, must make and amend its statewide land use standards in the form of goals, not ordinary rules, and (b) that it must do so using enhanced formal goalmaking and goal-amending procedures in addition to standard APA rulemaking requirements.

Broad public participation in making state land use policy has been at the heart of Oregon's state land use statutes since the adoption of Senate Bill 100 in 1973. The founding mothers and fathers of Oregon's land use constitution knew that they were embarking on a controversial program that would significantly affect the people, the environment, and the economy of the state for decades to come.

These procedural requirements are at the heart of a complex and comprehensive scheme for promulgating, amending, implementing, and enforcing state land use policy. The Oregon Supreme Court recently described it as follows:

> "Since 1973, with the passage of Senate Bill (SB) 100, the system of land use planning and development in Oregon has been governed by a comprehensive statutory scheme. See generally Edward Sullivan, *Remarks to University of Oregon Symposium Marking the Twenty–Fifth Anniversary of S.B. 100* , 77 Or. L. Rev. 813, 817–21 (1998) (describing development of Oregon's land use planning system under framework established by SB 100); see also Jennifer Johnson and Laurie Bennett, *Introduction: Oregon Land Use Symposium* , 14 Envtl. L. v., v-vi (1984) (describing SB 100 and its goal of replacing ad hoc local planning with "a unified statewide system"). Pursuant to that scheme, codified in ORS chapter 197, individual cities and counties across the state are responsible for adopting local comprehensive plans, zoning land, administering land use regulations, and handling land use permits, all in accordance with mandatory Statewide Planning Goals and Guidelines set by the Oregon Land Conservation and Development Commission (LCDC). See ORS 197.030 –197.798 (setting out framework for development of Statewide Planning Goals and Guidelines, and obligations of local governments for implementation of those goals)."

Lake Oswego Pres. Soc'y v. City of Lake Oswego, 360 Or 115, 118, 379 P3d 462 (2016).

Senate Bill 100 made it the law of the state that LCDC was to promulgate state land use policy in the form of rules adopted as "Goals," through an enhanced rulemaking process involving, among other things, enhanced notice, wide dissemination of proposed goals, and guidelines, and multiple hearings at dispersed locations around the state. It separately authorized the Commission to adopt "rules that it considers necessary to carry out this mandate." Or Laws 1973 Ch. 80, Secs. 35-38 (ORS 197.225-245, 1973 ed.)

The legislature reinforced that requirement in 1981, directing LCDC to use formal rulemaking and goalmaking whenever it was making policy. 1981 Or Laws ch 748, sec 22, codified as ORS 197.040(1)(c)), adopted in response to the agency's failure to heed the 1973 mandate and the advice of Paulus and Macpherson quoted above, provides that the Commission "shall"

> ". . . Adopt by rule in accordance with ORS 183.310 to 183.500 or by goal under ORS 197.005 to 197.430 any state-wide land use policies that it considers necessary to carry out ORS 197.005 to 197.430."

The 1981 law adds a new paragraph to ORS 197.040, which already directed LCDC to "adopt rules that it considers necessary to carry out ORS 197.005 to 197.430."

The 1981 legislation was adopted to put a stop to informal "policy papers," adopted without compliance with APA rulemaking. It was not adopted to water down existing goalmaking requirements.

As 1000 Friends attorney Robert Stacey explained to Senator L.B. Day's Senate Land Use Committee in hearings on the 1981 bill,

> "I think that the right buzz word is they're interpretive rules. Any rules that have been authorized by 040 are going to be interpreting goal provisions, not establishing new goal provisions."
> SELU Subcommittee Work Session on S.B. 419, as amended, May 29, 1981, Tape 96.

The 1981 mandate does not upset the hierarchy of statutes, goals, and rule. It does not give LCDC discretion to bypass the more rigorous and broad-based goal-making and goal-amending process with ordinary rulemaking.

On the contrary, it reinforces that hierarchy and the goalmaking safeguards relied upon in the Attorney General's 1977 opinion.

> "The goal-making process . . . involves statewide public involvement. . . . In addition to the protections afforded by citizen involvement the courts have substantial supervisory authority over the commission's actions." AG Op 7492, supra.

As codified and amended since the adoption of SB 100 over half a century ago, ORS 197.245 continues to require that "The adoption of or amendments to new goals shall be done in the manner provided in ORS 197.235 and 197.240 . . .," which require DLCD to conduct an extensive round of public hearings "throughout the state," with "notice of the time, place, and purpose of each hearing" published "in a newspaper of general circulation within the area where the hearing is to be conducted not later than 30 days prior to the hearing." See 1973 Or Laws Ch. 80, § 37. The legislature has since added the requirement that there be "at least two public hearings in each congressional district." 1981 Or Laws Ch 748, §28.

Since 1981, the legislature has occasionally authorized LCDC to use standard rulemaking procedures to adopt rules that implement new or amended statutes. Rulemaking under the recent "Middle Housing" statutes is a recent example. But it has never authorized LCDC to use standard rulemaking to bypass the goal-amending process.

Absent specific legislative authorization, LCDC cannot use standard rulemaking to enact definitions, requirements, prohibitions, deadlines, or applicability schedules that (1) evade or weaken statutory and goal requirements, (2) are not clearly grounded in existing goal language, or (3) exceed the scope of "interpretive rules." *1000 Friends of Oregon v. Wasco County Court*, 299 Or 344, 703 P2d 207 (1985); *1000 Friends v. LCDC*, 292 Or 735, 745, 642 P2d 1158, 1164 (1982); *Willamette University v. LCDC*, 45 Or App 355, 369, 608 P.2d 1178, 1186 (1980); *Marion County v. Federation for Sound Planning,* 64 Or App 226, 668 P2d 406 (1983).

Only the legislature can change the limits it has placed on LCDC's substantive and procedural authority. These statutory limits cannot be modified, relaxed, or bypassed by executive orders, ordinary rulemaking, informal guidance, ODOT strategic plans, or local land use regulations.

In short, this rulemaking, like all LCDC rulemaking, must stay within the bounds of what state land use laws and goals actually require, forbid, and allow, as opposed to what participants think they should require, forbid, and allow.

Deference and delegation: Oregon's Interpretive Methodology:

Since 1980, the Oregon Supreme Court has identified three categories of terms in statutes conferring regulatory and executive authority on state agencies. *Springfield Education Assn. v. School Dist.* , 290 Or. 217, 224-26, 228, 621 P.2d 547 (1980). Different kinds of terms confer different degrees of discretion on agencies and receive correspondingly different degrees of deference by courts on appeals of agency decisions, including rulemaking.

The three categories are "delegative" terms, "inexact" terms, and "exact" terms. A complex statute such as ORS 197A.270 will often include terms and phrases in all three categories.

The Oregon Supreme Court recently summarized its classification in *NW Metal Recycling, Inc. v. Or. Dep't of Envtl. Quality***,** 371 Or. 673, 695, 540 P.3d 523 (Or. 2023):

> "We have referred to statutory terms calling for interpretation and application as either '**exact**' or **'inexact**' terms, both of which charge an agency with carrying out the legislature's complete expression of policy, as compared to '**delegative** terms,' which 'delegate' some level of policymaking authority to an agency. *Springfield Education Assn. v. School Dist.* , 290 Or. 217, 224-26, 228, 621 P.2d 547 (1980). Exact terms 'impart relatively precise meaning' and involve agency factfinding. *See id.* at 223-24, 621 P.2d 547 (giving examples of exact terms as '21 years of age, male, 30 days, Class II farmland, rodent, Marion County')."
>
> "'Inexact terms,' on the other hand, are still a 'complete' expression of policy, but are less precise. *Id.* at 224, 621 P.2d 547. An inexact term often requires an agency to determine what the legislature intended by the term, and that determination is a question of law. *Id.*"'

As the Court of Appeals has explained in reviewing a Water Resources Department decision:

> Because the disputed statutory phrase is part of a regulatory scheme administered by the department, our standard of review depends on whether the disputed phrase is an exact term, an inexact term, or a delegative term. .*" Waterwatch of Or., Inc. v. Water Res. Dep't*, 268 Or.App. 187, 342 P.3d 712 (Or. App. 2014)

The Court went on to apply the prescribed methodology as follows:

> "Petitioner and the department agree that the phrase—'maintain * * * the persistence of [listed] fish species'—is an inexact term under Springfield. The municipal parties, however, argue that it is a delegative term. We agree with petitioner and the department that the phrase is an inexact term. It is a phrase that expresses a complete legislative policy to ensure that further development of municipal permits will maintain fish persistence, but it is not so precise that it is an "exact term." We reject the municipal parties' contention that the phrase must be delegative merely because the legislature did not set forth factors for the department to consider in setting conditions. The absence of factors does not negate that the legislature expressed a complete policy for the department to implement. That the agency must use judgment to determine what conditions it will need to impose on individual applications for extensions of time to effect that complete policy statement is what makes the term inexact. Thus, we must determine whether the department's interpretation and application of ORS 537.230(2)(c), as embodied in its final orders, is consistent with the legislature's intent in using the words that it did."

Springfield term classes and ORS 197A.270 (formerly ORS 197.296)

Oregon's Needed Housing Statute, not surprisingly, includes all three kinds of **Springfield** terms. It is critical, therefore, that DLCD and LCDC do the close reading of those statutes that our state's highest court requires.

Here is some key statutory text for the current housing capacity rulemaking:

> (2) A local government shall determine its needed housing under ORS 197A.018 and inventory its buildable lands and determine the lands' housing capacity under this section:
> (a) At periodic review under ORS 197.628 to 197.651;
> (b) As scheduled by the commission at least once each eight years; or
> (c) At any other legislative review of the comprehensive plan that concerns the urban growth boundary and requires the application of a statewide planning goal related to buildable lands for residential use.

(3) For the purpose of determining housing capacity and inventory of buildable lands under subsection (2) of this section:

(a) "Buildable lands" includes:

(A) Vacant lands planned or zoned for residential use;

(B) Partially vacant lands planned or zoned for residential use;

(C) Lands that may be used for a mix of residential and employment uses under the existing planning or zoning; and

(D) Lands that may be used for residential infill or redevelopment.

(b) The local government shall consider:

(A) The extent that residential development is prohibited or restricted by local regulation and ordinance, state law and rule or federal statute and regulation;

(B) A written long term contract or easement for radio, telecommunications or electrical facilities, if the written contract or easement is provided to the local government; and

(C) The presence of a single family dwelling or other structure on a lot or parcel.

(c) Except for land that may be used for residential infill or redevelopment, the local government shall create a map or document that may be used to verify and identify specific lots or parcels that have been determined to be buildable lands.

(4)(a) Except as provided in paragraphs (b) and (c) of this subsection, the determination of housing capacity must be based on data related to land within the urban growth boundary that has been collected since the last review under subsection (2)(b) of this section. The data must include:

(A) The number, density and average mix of housing types of urban residential development that have actually been developed;

(B) Trends in density and average mix of housing types of urban residential development;

(C) Market factors that may substantially impact future urban residential development;

(D) The number, density and average mix of housing types that have been developed on buildable lands;

(E) Consideration of the effects of the adopted housing production strategy and measures taken and reasonably anticipated to be taken to implement the strategy; and

(F) Consideration of factors that influence available housing supply, including short-term rentals, second homes and vacation homes.

(b) A local government shall make the determination described in paragraph (a) of this subsection using data from a shorter time period than the time period described in paragraph (a) of this subsection if the local government finds that the shorter time period will provide more accurate and reliable data related to housing capacity. The shorter time period may not be less than three years.

(c) A local government shall use data from a wider geographic area or use a time period longer than the time period described in paragraph (a) of this subsection if the analysis of a wider geographic area or the use of data from a longer time period will provide more accurate, complete and reliable data related to trends affecting housing need than an analysis performed pursuant to paragraph (a) of this subsection. The local government must clearly describe the geographic area, time frame and source of data used in a determination performed under this paragraph.

(5) If the needed housing is greater than the housing capacity, the local government shall take one or both of the following actions to accommodate allocated housing need for which there is insufficient housing capacity to accommodate over the next 20 years:

(a) Amend its urban growth boundary to include sufficient buildable lands to accommodate allocated housing need for the next 20 years consistent with the requirements of ORS 197A.285 and statewide planning goals. As part of this process, the local government shall consider the effects of actions taken pursuant to paragraph (b) of this subsection. The amendment must include sufficient land reasonably necessary to accommodate the siting of new public school facilities. The need and inclusion of lands for

new public school facilities must be a coordinated process between the affected public school districts and the local government that has the authority to approve the urban growth boundary.

(b) Take any action under ORS 197A.100 (3), whether or not the action was described in an approved housing production strategy, that demonstrably increases housing capacity or produces additional needed housing. Actions under this paragraph may include amending a comprehensive plan or land use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate needed housing for the next 20 years without expansion of the urban growth boundary.

(6) A local government that takes any actions under subsection (5) of this section shall:

(a) Demonstrate that the comprehensive plan and land use regulations comply with goals and rules adopted by the commission.

(b) Adopt findings regarding the changes in housing capacity assumed to result from actions adopted based on data collected under subsection (4)(a) of this section. The density expectations may not project an increase in residential capacity above achieved density by more than three percent without quantifiable validation of such departures. A quantifiable validation must demonstrate that the assumed housing capacity has been achieved in areas that are zoned to allow no greater than the same authorized density level, as defined in ORS 227.175, within the local government's jurisdiction or a jurisdiction in the same region.

(c) In establishing that actions adopted under subsection (5) of this section demonstrably increase housing capacity, ensure that buildable lands are in locations appropriate for needed housing, are zoned at density ranges that are likely to be achieved by the housing market and are in areas where sufficient urban services are planned to enable the higher density development to occur over the 20-year period. [2023 c.13 §22; 2023 c.326 §12]

Here are some important questions that raise issues under the Oregon Supreme Court's classification of statutory terms:

What does it mean to "determine?"

Who makes that determination?

What does it mean to "demonstrate"?

Who has the burden of demonstrating?

What must the record show to support a "determination?

What must the record show to support a "demonstration?"

What is DLCD's authority and what is its responsibility with respect to the required determinations and demonstrations?

Can that authority and responsibility be expanded or limited by rulemaking?

What is the required timing of efficiency measures "taken" or "adopted" to support determinations and demonstrations of baseline and enhanced capacity?

It seems clear to me that the terms "taken" and "adopted" mean just that: Efficiency measures can't be counted toward capacity projections unto; they have actually been "taken" and "adopted" with effective dates

that make them as effective and reliable as evidence of next-20-year capacity as the existing regulations relied upon in establishing the baseline BLI.

What is the effect of the list of mandatory considerations? Is it exclusive? Does it exclude unlisted constraints identified in the course of legislative updates? Can the list be broadened or narrowed through rulemaking?

Again, I am confident that the statutory terms "determine" and "demonstrate," are exact terms. As such, they require local jurisdictions to serve as initial factfinders making factual decisions about supplies, needs yields, capacities, constraints, affordability of prices and rents, etc., based on what the preponderance of the evidence properly placed before them in the course of local HNA/BLI/UGB legislative updates. The statutory list prescribes only what local governments must consider. It does not forbid them to consider, nor does it allow them to disregard, evidence of other constraints and barriers that is also placed before them.

As the attached excerpts from LCDC's 2010 decision on Bend's HNA/BLI/UGB update and from LUBA's 2002 decision on Eugene's Land Use Code Update show, both agencies have recognized that unlisted constraints such as deed restrictions and floating tree buffers can affect the validity of projected next-20-year yields.

Factual bases and burdens of proof

Oregon's Needed Housing statute and LCDC's Planning, Housing, and Urbanization Goals all require key determinations to be based upon facts, bringing into question the adequacy and availability of suppositions and safe harbors.

The "adequate basis in fact" requirement of the Planning Goal, the "demonstration" requirements of the Needed Housing Statutes, the inventory and needed housing projection requirements of ORS 197.296 and Goal 10 all remain fully in force, and all maintain the standard allocation of local and state factfinding responsibility under Oregon's land use laws and goals.

Those laws and goals allocate to local and regional governing bodies the role of initial finders of fact. They have the responsibility of determining what the evidence before them shows or fails to show. Cities, counties, and, in some cases, Portland Metro, are charged with developing the evidentiary records and determining what that evidence shows the relevant facts to be.

In so doing, local governments must decide what the record before them shows on factual issues.

This means they must determine that whatever facts they find to be true are supported by at least a preponderance of the evidence. This is not to be confused with the "substantial evidence," test, which is a standard of review, not a standard of proof or demonstration. To apply a lesser standard, such as the "substantial evidence" standard, is to determine what someone else could reasonably decide, not to make the decision itself.

Oregon's courts have addressed this issue in other contexts, but the principle applies to any entity to whom the basic factfinding function has been allocated.[6]

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[6] See, for example, *Friends of Yamhill County Inc. v. Bd. of Commissioners of Yamhill County*, 351 Or. 219, 264 P.3d 1265 (2011), a vested rights case, where the Oregon Supreme Court put it this way: " * * * [T]he county found only that there was "substantial evidence" to support a range of ratios. Substantial evidence, however, is the standard by which a court reviews a county's factual findings on a writ of review. *See* ORS 34.040(1)(c) (stating the standard of review for factual findings on a writ of review). It is not the standard by which the trier of fact makes a factual finding in the first place. The county's job as the trier of fact was to decide by a preponderance of the evidence what the estimated cost of constructing the planned homes was. The county did not do that."

The "substantial evidence" standard enables a reviewing body to do its job of assuring that the local government did its job without doing the local government's job for it. As the designated reviewing bodies, the Land Conservation and Development Commission and the Land Use Board of Appeals have a different role. Their job is to see that local governments have done their job as factfinders, not to find those facts themselves.

These principles apply to predictions, forecasts, and projections as well as to other factual issues. Two recent Oregon Court of Appeals decisions are especially helpful because they involve the probability or likelihood of a future condition or trend.

The first case is *Barkers Five, LLC v. Land Conservation and Development Com 'n*, 323 P3d 368, 419, 261 Or App 259, 348 (2014). In *Barkers Five*, The court did not reach the question of whether the initial decisionmaker had correctly understood and applied the preponderance of the evidence standard. Instead, the court found that DLCD had been overly deferential and had misunderstood and applied the lesser "substantial evidence" standard for reviewing the factfinding of initial decisionmakers.

In *Barkers Five*, the initial decisionmaker was the Portland Area's regional planning authority, Metro. Acting pursuant to Oregon's Urban Reserves statutes, ORS 197.626 et seq., Metro had designated an area known as the Stafford Area as "urban reserve." That designation gives such areas priority in future urban growth boundary expansions. It must be based on evidence and reasoning demonstrating, among other thangs, that the subject area will be capable of helping to meet future urban needs over a statutory 40-year planning period.

Noting that " the provision of adequate transportation facilities is critical to the development of urban areas," the Court of Appeals found that LCDC had accepted Metro's mere "speculative reasoning" that such facilities would become available to the Stafford Area during the planning period even though Metro's own Regional Transportation Plan projected that "almost all of the transportation system that would provide access to the Stafford Area will be functioning at service level F (for 'failing') by 2035."

The court found this "weighty, countervailing evidence" to be "squarely at odds with LCDC's determination that the designation of Stafford as urban reserve is supported by substantial evidence." 323 P3d 427-28.

The second case is *Columbia Pac. Bldg. Trades Council v. City of Portland***,** 289 Or 739, ___ P3d___(1918). The case involved Portland zoning code amendments designed to stop the expansion of existing fossil-fuel terminals and limit the size of some new terminals within the city. LUBA found that the amendments were unsupported by substantial evidence to support the city's finding that future fossil needs in the area "may plateau and decline with a continued shift to other modes of transportation, more fuel efficient vehicles, electric vehicles, and other carbon reduction strategies." Citing Barkers Five, the Court upheld LUBA's determination that the city's finding was speculative and failed to address countervailing evidence.

The Court's analysis in *Columbia Pac.* elaborates on its analysis in *Barkers Five.* In so doing, it provides useful guidance on how Oregon's appellate courts expect LUBA, DLCD, and LCDC to review local determinations of buildable land capacity over the statutory "next 20 years" under ORS 197.296.

To the same effect, see *Sobel v. Board of Pharmacy*, 130 Or App. 374, 379, 882 P.2d 606 (1994), rev. den., 320 Or. 588, 890 P.2d 994 (1995) (although Oregon's Administrative Procedures Act does not expressly prescribe a standard of proof applicable to administrative proceedings, a preponderance of evidence standard generally is applicable to contested cases under the Act.); 3 Davis, Administrative Law Treatise § 16.9 (2d ed 1980)("One can never prove a fact by something less than a preponderance of the evidence."); and *Charlton v. FTC*, 543 F2d 903, 907 (D.C. Cir. 1976)("* * *[I]n American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation. 31 Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating "something less than the weight of the evidence.")

Specifically:

> (1) key factual findings, including predictions and expectations relied upon to demonstrate compliance with planning statutes, goals, and rules, must be based upon evidence and cannot be based on speculation;
>
> (2) countervailing evidence must be addressed in the findings of the initial decisionmaker; and
>
> (3) the failure of one key finding can bring down a whole decision.

In the words of the Court:

> "If a locality recognizes that evidence contradicting its decision exists and disregards it based upon 'speculative reasoning,' that decision lacks substantial evidence. *Id*.
>
> "That is exactly what happened in this case. The city recognized the "trend-based forecasts" in the record that projected a moderate increase in fossil-fuel demand. However, it disregarded that evidence, concluding instead that demand for fossil fuels may plateau or decrease over time based on a shift to other transportation methods and away from fossil-fuel usage. While the city may, in fact, be correct that demand for fossil fuels may plateau or decline in the region based on a shift to other transportation and away from fossil fuel usage, the city fails to point to anything in the record that indicates that that may actually be the case.
>
> "Other factors besides technological advances, such as population growth and changes in the import and export of goods in a region, affect fossil-fuel demand. Further, as Columbia Pacific correctly points out, the city made no effort to address whether the trend-based forecasts in the record already accounted for shifts in technology. Without any evidence in the record indicating how technological changes interact with those other factors to affect fossil-fuel demand, the city's conclusion is merely speculative, and no "reasonable person could make" that factual finding. *Stevens*, 260 Or App at 772.
>
> "As a result, given that recognizing countervailing evidence alone does not bring a decision within the auspices of "substantial evidence," we cannot conclude that LUBA's decision was "unlawful in substance" when LUBA determined that, despite that recognition, the city's finding was not supported by substantial evidence." 289 Or App 758-59
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> "* * * *
>
> " * * * [W]here a local government made a decision that is based on a critical finding that was not supported by substantial evidence, regardless of whether other adequately supported findings were also relied upon in making that decision, LUBA is required to reverse and remand that decision. *See Barkers Five*, *LLC*, 261 Or App at 362." 289 Or App 760

From Al Johnson
Re: OHNA Rulemaking: Urban Reserve and UGB Tiering Issues
November 3, 2025

This memo raises questions about how the proposed rules interact with applicable statutes defining agricultural lands and establishing priorities for establishing urban reserves and expanding urban growth boundaries. Please place it in the rulemaking record.

Questions:

1. Do the rules continue, and in fact entrench, longstanding illegal urban land supply constraints resulting from unlawful and overinclusive classification of land as agricultural contrary to definitions in LCDC's Agricultural Lands Goal and Oregon's Exclusive Farm Use statutes?

2. How will future reclassifications of misclassified lands to nonresource affect existing and future tiering analyses for urban reserves and ugb?.

3. Will such reclasssifications have different effects on ugb expansions where there are urban reserves than on ugb expansions where there are no urban reserves?

4. Any idea of how many acres within two miles of existing UGBs have been misclassified and have been or will be placed in the wrong UGB or UR tiers?

5. Should the rules create a path for cities and counties to easily, efficiently, and correctly tier their study areas so that they plan for "next-20-year" urban land needs on nearby nonresource lands based on sound principles of urban planning as reflected in the balancing factors of the Urbanization Goal?

As I have explained in previous memos, Oregon's courts have overturned several key LCDC rules constraining Oregon's urban land supplies, including involving urban reserves, incorporation of new cities, eligibility for Goal Two exceptions, and the definition of "farm use."

One example, showing how long it can take to correct an illegal interpretive rule, is ***Wetherell v. Douglas County***, 342 OR 666 (Or S Ct 2007), in which the Oregon Supreme Court invalidated a 25-year-old LCDC rule which ghosted the Oregon legislature's use of word "primary" in Oregon's Exclusive Farm Use statute. As the Court said:

> "We therefore hold that, because Goal 3 provides that "farm use" is defined by ORS 215.203, which includes a definition of "farm use" as "the current employment of land for the primary purpose of obtaining a profit in money[,]" LCDC may not preclude a local government making a land use decision from considering "profitability" or "gross farm income" in determining whether land is "agricultural land" because it is "suitable for farm use" under Goal
> 3. Because OAR 660-033-0030(5) precludes such consideration, it is invalid."

Notably, that invalid rule was applied by local governments, DLCD, LCDC, LUBA, and the Court of Appeals for over a quarter of a century before it was finally overturned by the Oregon Supreme Court in 2007. As a result LCDC's rule distorted for almost 30 of its 50 years the process of categorizing lands as "agricultural" or nonresource.

That unforced error has had the side effect of resulting in an indeterminate amount of land stranded in the wrong tier of Oregon statutes making agricultural lands essentially unavailable for urban growth boundary expansions. I have seen nothing since in the way of assessing or correcting the effects of that error on the integrity or accuracy of urban reserve and urban growth boundary analyses around Oregon's urban areas.

Also notably, the Oregon Court of Appeals has just rejected an ill-advised LCDC *amicus* brief arguing for a subjective "primary purpose" test. ***Redside Restoration v. Deschutes County,*** 344 Or App 343, P3d (October 25, 2025).

It should be, but unfortunately is not, hard to believe that the agency is spending its meager legal fee resources on a continuing effort to undermine the clear intent of the Oregon legislature, as recognized by the Oregon Supreme Court in ***Wetherell***, to put an end to the overinclusive misclassification of nonresource lands with its consequent distortions and constrictions of urban land forms and capacities.

Wouldn't that money better be spent in making sure that the new rules correctly interpret and faithfully implement Oregon's Needed Housing statutes and the LCDC's own statewide Housing Goal?

The following questions are based on the recent reclassification of several hundred acres of land owned by the Oregon Division of State Lands from agricultural to nonresource. Until recently, the Oregon Division of State Lands (DSL) owned a vacant 368-acre tract along the southeastern edge of Bend's Urban Growth Boundary. In the early 2000's, DSL determined that the land was surplus and sought to have it included in Bend's 2008-2028 "next-20-year" urban growth boundary. Unfortunately, the land had been misclassified as agricultural and was therefore excluded under the tiering statute. After Bend's initial submission was remanded by LCDC for other reasons in 2010, and before Bend resubmitted in 2016, DSL sought and obtained a corrected classification of the Stevens Road Tract as nonresource. As a result, DSL's 368-acre tract was moved up on the tiering ladder and was brought into Bend's UGB in 2016.

Key questions include:

1. Whether the same outcome would have been easier, more difficult, or impossible with the draft OHNA rules in place.

2. How will the changed priority of a city's "DSL tract" affect that city's next UGB expansion analysis if the city has an urban reserve? Would the city have to exhaust some percentage of its first-tier reserves? Would it have to amend its urban reserves?

3. How would all that work for a city that has not adopted urban reserves? Won't cities be much better off foregoing the urban reserve process and getting their study areas properly tiered instead?