



ARTICLES

Reforming Restrictive Residential Zoning: Lessons from an Early Adopter

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Introduction

Around the United States, many are questioning the viability of exclusive zoning for detached single-family housing. Sociologists, planners, political scientists, and others are delving into the historic and current use of single-family residential zoning to segregate communities by race, ethnicity, religion and class.¹ Transportation planners raise concerns about mobility, sprawl, and related equity and climate implications.² Urban planners link restrictive residential zoning to inequitable and inefficient provision of local services.³ As Michael Manville, Paavo Monkkonen, and Michael Lens recently asserted,

The American way of zoning is unique. Many countries privilege homeownership, and many households worldwide live in single-family homes. The United States is almost alone, however, in using regulation to promote and protect neighborhoods of detached single-family homes and to imply that life in these neighborhoods is synonymous with good citizenship and responsible family life. This valorization of detached single-family living embeds a long line of prejudice and bias—against non-Whites, nontraditional families, the poor, immigrants, and urbanity—into local zoning. Planners have twin obligations to equity and efficiency, and [single-family zoning] fails on both counts. America's inefficient allocation of urban land creates unequal opportunities and unequal outcomes.

Zoning is important. By offering residents some assurance about the future of their communities, it can encourage people to invest both time and money in the places they live. That is undoubtedly to the good. . . . [But the benefits of certainty and stability] must be weighed against their costs, and those costs include the burdens carried by people who live *outside* strictly zoned areas. No one has an inviolate right to steadily appreciating property wealth, and reasonable certainty about the future is not the same as perpetual protection from all threats, real and imagined, that might come from new development.⁴

1. See *infra* notes 245–50 (citing articles and studies).

2. See *id.*; see also, e.g., Rayla Bellis, *The Argument for Ending Single-Family Zoning*, STATE SMART TRANSP. INITIATIVE (Feb. 24, 2020), <https://ssti.us/2020/02/24/the-argument-for-ending-single-family-zoning>; Eric Jaffe, *Is It Time to End Single-Family Zoning?*, SIDEWALK TALK (Feb. 6, 2020), <https://medium.com/sidewalk-talk/is-it-time-to-end-single-family-zoning-56233d69a25a>.

3. See Mike Albanese, *A Shift from Single-Family Zoning*, M REP. (July 28, 2020), <https://themreport.com/featured/07-28-2020/a-shift-from-single-family-zoning>.

4. Michael Manville, Paavo Monkkonen & Michael Lens, *It's Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 106, 112 (2020) (citing SONIA HIRT, *ZONED IN THE USA: THE*

But quite possibly the greatest obstacle to the continued ascendancy of the current housing regime is economics. Although the single-family detached home has never been affordable to people with low incomes and limited access to funding mechanisms,⁵ the affordability crisis has become more acute for low-income households and has grown to encompass more middle-income households.⁶ In 2018, the Housing Affordability Index⁷ dropped to its lowest point since 2008 and the index continued to fall in 2019.⁸ As shown in Figure 1 below, median rents, which averaged \$1,226

ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATIONS (2014); WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)).

5. Matthew Desmond, Assistant Professor of Sociology and Social Studies at Harvard, observed that even before the Covid crisis:

Between 1991 and 2013, the percentage of renter households in America dedicating under 30 percent of their income to housing costs fell from 54 percent to 43 percent. During that same time, the percentage of renter households paying at least half of their income to housing costs rose from 21 percent to 30 percent. African American and Hispanic American families, the majority of whom rent their housing, were disproportionately affected by these trends. In 2013, 23 percent of black renting families and 25 percent of Hispanic renting families spent at least half of their income on housing.

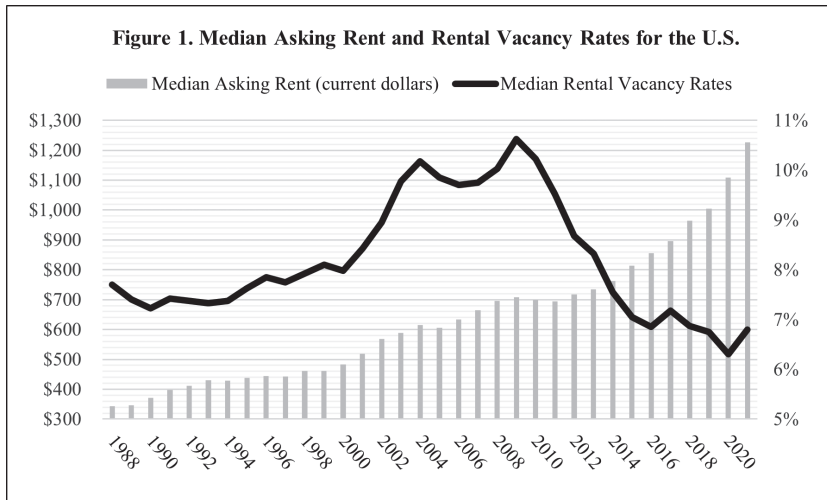
Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, FAST FOCUS No. 22-2015 (Inst. for Rsch. on Poverty, 2015), <http://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>; see also Kenneth Jackson, *Race, Ethnicity and Real Estate Appraisal: The Home Owners Loan Corporation and the Federal Housing Administration*, 6 J. URB. HIST. 421 (1980) (discussing systemic oppression of Black, Indigenous, and Other People of Color (BIPOC) through deprivation of mortgages and other lending tools by Home Owners Loan Corporation and Federal Housing Administration).

6. JOINT CTR. FOR HOUS. STUD., *AMERICA'S RENTAL HOUSING 2020* at 13–20 (2020) (“While new multifamily construction has soared to its highest levels in decades, most newly built units are high-end apartments in urban locations with asking rents that are well out of reach for middle- and lower-income households.”).

7. The Housing Affordability Index measures the extent to which a household earning the median income has sufficient income to qualify for a mortgage loan on a median-priced home at the national and regional levels based on the most recent price and income data. Nat'l Ass'n of Realtors, Housing Statistics, Methodology, <https://www.nar.realtor/research-and-statistics/housing-statistics/housing-affordability-index/methodology> (visited June 16, 2021).

8. U.S. DEP'T OF HOUS. AND URB. DEV., OFF. OF POL'Y DEV. AND RSCH., *U.S. HOUSING MARKET CONDITIONS NATIONAL HOUSING MARKET SUMMARY AND DATA*, https://www.huduser.gov/portal/ushmc/hd_hsg_aff.html. To view the Composite Housing Affordability Index from 1970 to 2018, select composite as an indicator and total as the series. The index rose in 2020, likely reflecting historically low mortgage rates and the increase in median family income from federal pandemic relief payments. Michael Hyman, *Housing Affordability Advances in January 2021 as Incomes Rise*, Nat'l Ass'n of Realtors, *ECONOMISTS OUTLOOK* (Mar. 15, 2021), <https://survey1inc.com/housing-affordability-advances-in-january-2021-as-incomes-rise>.

per month nationally in the first quarter of 2021, have nearly doubled over the past ten years.⁹ Over the same time period, national vacancy rates for rental housing dropped from 10.6% in 2009 to 6.8% in the first quarter of 2021,¹⁰ and vacancy rates in lower-cost rental markets were even lower.¹¹ In 2018–2019, vacancy rates in 135 metro areas stayed below 5% and, in forty-five metro areas, rates stayed below 3%.¹²



Compounding these trends was a “profound shift” in rental stock over the past decade toward higher-priced large multifamily buildings and fewer apartments in small buildings, which tend to have significantly lower rents regardless of the age of the building.¹³

9. Figure 1 depicts data from U.S. CENSUS BUREAU, QUARTERLY RENTAL VACANCY RATES: 1956 TO PRESENT and Table 11A/B, and U.S. CENSUS BUREAU, QUARTERLY MEDIAN ASKING RENT AND SALES PRICE OF THE U.S. AND REGIONS: 1998 TO PRESENT.

10. U.S. CENSUS BUREAU, CB21-56, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FIRST QUARTER 2021 (Apr. 27, 2021), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>; see also U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP (CPS/HVS) (2021), <https://www.census.gov/housing/hvs/index.html> (regarding definitions and method of calculation).

11. JOINT CTR. FOR HOUS. STUD., *supra* note 6, at 20 (reporting 2018 vacancy rates ranging from 5.4–4.7% for three, two, and one-star markets).

12. *Id.*

13. *Id.* at 13–19. But see SHANE PHILLIPS, MICHAEL MANVILLE & MICHAEL LENS, RESEARCH ROUNDUP: THE EFFECT OF MARKET-RATE DEVELOPMENT ON NEIGHBORHOOD RENTS 3 (2021), <https://escholarship.org/uc/item/5d00z61m?> (analyzing six recent empirical studies of the impact of new market-rate development on neighborhood rents, five of which found that market-rate housing makes nearby housing more affordable across the income distribution of rental units, and one found mixed results); VICKI BEEN

One result of these trends is that housing options for low- and middle-income households are more limited and many households find themselves sharing homes with kin or others,¹⁴ or living in manufactured homes (isolated or in parks),¹⁵ single-room occupancies,¹⁶ or boarding houses¹⁷—where available and within the households’ means. As demand for these housing options increases, others find themselves displaced into cars or campers,¹⁸ or simply houseless.¹⁹

ET AL., SUPPLY SKEPTICISM: HOUSING SUPPLY AND AFFORDABILITY 4 (2018), https://furmancenter.org/files/Supply_Skepticism_-_Final.pdf (concluding that “the preponderance of the evidence shows that restricting supply increases housing prices and that adding supply would help to make housing more affordable”).

14. See e.g., AM. ASS’N OF RETIRED PERS., ASSESSING HOUSING OPTIONS, https://assets.aarp.org/external_sites/caregiving/options/knowning_your_options.html; U.S. DEP’t of Hous. and Urb. Dev., *Expanding Multigenerational Housing Options*, OFF. POL’Y DEV. & RSCH. EDGE, <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-061019.html>. This is not to suggest that shared housing is substandard. See Sherry Ahrentzen, *Choices in Housing*, 9 HARV. DESIGN MAG., Summer 1999 at 62, <http://www.harvarddesignmagazine.org/issues/8/choice-in-housing> (discussing research on non-kin shared housing that found “transitional shared housing enhanced the domestic life of many households”).

15. There are a variety of views on the manufactured housing alternative. See, e.g., Michelle Miley, *The Pros & Cons of Buying Manufactured Housing*, S.F.GATE S.F. CHRON. (Dec. 9, 2018); MANUFACTURED HOUS. INST., *2020 Manufactured Housing Facts*, <https://www.manufacturedhousing.org/wp-content/uploads/2020/07/2020-MHI-Quick-Facts-updated-05-2020.pdf>; Will Van Vactor, *Buying a Mobile Home Instead of a Regular Home: Pros and Cons*, NOLO, <https://www.nolo.com/legal-encyclopedia/buying-mobile-home-instead-regular-home-pros-cons.html>.

16. See, e.g., U.S. DEP’T OF HOUS. AND URB. DEV., UNDERSTANDING SRO (2001), <https://files.hudexchange.info/resources/documents/Understanding-SRO.pdf>; *Microhousing/Single Room Occupancy Housing*, ALL. FOR HOUS. AFFORDABILITY, <https://housingallies.org/guide/matching-needs/microhousing-single-room-occupancy-housing>; Mary Ann Burki, *Housing the Low-Income, Urban Elderly: A Role for the Single Room Occupancy Hotel* (1982) (Ph.D dissertation, Portland State Univ.), <https://doi.org/10.15760/etd.847>.

17. See Matthew Yglesias, *Homelessness Is About Housing: The Solution Is to Legalize More and More Kinds of It*, SLOW BORING (May 17, 2021), <https://www.slowboring.com/p/homelessness-housing> (discussing demise of boarding houses).

18. See, e.g., NAT’L LEAGUE OF CITIES, VEHICULAR HOMELESSNESS AND THE ROAD TO HOUSING DURING AND AFTER COVID-19 (May 28, 2020), <https://www.nlc.org/article/2020/05/28/vehicular-homelessness-and-the-road-to-housing-during-and-after-covid-19>; Patrick Sisson, *High Housing Costs and Long Commutes Drive More Workers to Sleep in Cars*, CURBED (Mar. 6, 2018), <https://archive.curbed.com/2018/3/6/17082570/affordable-housing-commute-rent-apartment>; Graham Pruss, *Without Parking, Thousands of Americans Who Live in Vehicles Have Nowhere to Go*, CONVERSATION (July 10, 2019), <https://theconversation.com/without-parking-thousands-of-americans-who-live-in-vehicles-have-nowhere-to-go-114256>.

19. There are multiple views as to the definition, nature, and effect of houselessness and what can and should be done about it. See, e.g., NAT’L ALL. TO END HOMELESSNESS, WHAT CAUSES HOMELESSNESS?, <https://endhomelessness.org/homelessness>

Although no single reform offers a panacea, recent reform efforts suggest that local and state governments are examining the role of single-family zoning in inflating home and rental prices and exacerbating housing shortages.²⁰ Economic realism counsels that housing must change in order to accommodate the American family so that the detached single-family dwelling, so prevalent in American iconography,²¹ necessarily becomes a less significant part of the housing picture. For that to happen, land use regulations must also change to accommodate other housing types to supplant the exclusive single-family detached housing pattern that dominates most residential land in American cities.²²

-in-america/what-causes-homelessness; Nicholas Slayton, *Time to Retire the Word 'Homeless' and Opt for 'Houseless' or 'Unhoused' Instead?*, ARCHITECTURAL DIG. (May 21, 2021), <https://www.architecturaldigest.com/story/homeless-unhoused>; AM. PUB. HEALTH ASS'N, HOUSING AND HOMELESSNESS AS A PUBLIC HEALTH ISSUE (Nov. 7, 2017), <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue>; Ruth Gourevitch & Mary Cunningham, *Dismantling the Harmful, False Narrative That Homelessness Is a Choice*, URB. INST. (Mar. 27, 2019), <https://www.urban.org/urban-wire/dismantling-harmful-false-narrative-homelessness-choice>.

20. See e.g., H.B. 6107, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021) (prohibiting caps on the number of multifamily dwelling units, making accessory dwelling units (ADUs) allowable as of right, capping parking requirements, requiring development of a model form-based code, requiring definition of character based on physical standards, mandating training for land use commissioners, eliminating unreasonable application fees, and, among other things, requiring zoning regulations to affirmatively further fair housing and protect the state's historic, tribal, cultural, and environmental resources); S.B. 237, 2020 Gen. Assemb., Reg. Sess. (Vt. 2020) (loosening restrictions on accessory dwelling units, prohibiting towns from denying multi-unit housing based on "character" considerations, increasing the class of small lots under an eighth of an acre on which development must be allowed, and invalidating deed restrictions and covenants entered into after January 1, 2021, that prohibit or have the effect of prohibiting land development allowed under a municipality's bylaws); S.B. 34, 63rd Leg., 2019 Gen. Sess. (Utah 2019) (requiring cities to select strategies from a menu of options to increase moderate income housing development). In response to the Utah law, many Utah municipalities have reduced regulations on ADUs in residential zones. Am. Plan. Ass'n, *SB 34 Affordable Housing Modifications Update*, APA UTAH NEWS & EVENTS (Dec. 10, 2019), <https://apautah.org/sb-34-affordable-housing-modifications-update>. Note that, even before Vermont's 2020 reform, Vermont law made one ADU permissible on any lot with an owner-occupied single-family dwelling except in flood and erosion hazard areas. VT. STATS. ANN. tit. 24, § 4412 (2021). See also Thomas Silverstein, *State Land Use Regulation in the Era of Affirmatively Furthering Fair Housing*, 24 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 305, 317–322 (2015) (discussing reforms in New Jersey, California, Massachusetts, and Connecticut); *Desegregate Connecticut*, <https://www.desegregatect.org> (providing links to materials on other Connecticut's and other states' reforms).

21. See Sonia A. Hirt, *Privileging the Private Home: A Case of Persuasive Storytelling in Early Twentieth-Century Professional Discourses*, 11 J. URBANISM 277 (2018).

22. Jake Wegmann, *Viewpoint, Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. AM. PLAN. ASS'N 113, 113 (2020) (reporting that most residential land

In 2019, the Oregon legislature recognized this need for change by passing House Bill 2001, which requires cities with populations over 10,000 and urban areas in Metro²³ to allow “middle housing,” which is multi-unit or clustered housing that is similar in scale and form to single-family housing,²⁴ in all residential districts that allow a detached single-family dwelling.²⁵ The Oregon legislation is the first successful state legislative effort to end the virtual monopoly of the detached single-family dwelling in exclusively residential zones. Oregon’s legislative reform followed closely on the heels of Minneapolis’s 2040 Comprehensive Plan, which effectively banned exclusive single-family detached zones in Minneapolis.²⁶ The city is currently embroiled in litigation, however, regarding whether adoption of the 2040 Plan violated the Minnesota Environmental Rights Act.²⁷ Oregon’s statewide middle housing reform is not at risk of a similar challenge

in nearly all U.S. cities is zoned for exclusive single-family detached residences). “In San Francisco (CA), home to some of the most valuable and productive land on Earth, about 38% of residential land is [zoned single-family detached]. In Los Angeles (CA) the proportion is more than 70%. Seattle’s (WA) estimated share is more than 80%, and San Jose’s (CA) approaches 90%. In the prosperous suburbs of urban areas, moreover, [single-family detached exclusive zoning] approaches ubiquity.” Manville et al., *supra* note 4, at 107. Eighty-two percent of the residential land in Portland is zoned for single-family detached homes. Hongwei Dong & J. Andy Hansz, *Zoning, Density, and Rising Housing Prices: A Case Study in Portland, Oregon*, 56 *URB. STUD.* 3486 (2019) (reporting on 2016 data).

23. Metro is a regional agency with certain planning powers in the Portland region, including the establishment and change of a regional urban growth boundary. There are twenty-four cities and the urban unincorporated areas of three counties in the region. Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 *J. MARSHALL L. REV.* 357, 377–80 (2012) [hereinafter *Quiet Revolution*].

24. Oregon’s new law defines middle housing as duplexes, triplexes, quadplexes, cottage clusters, and townhouses. OR. REV. STAT. § 197.758(1)(b).

25. H.B. 2001, 2019 Leg., Reg. Sess. (Or. 2019), codified at OR. REV. STAT. § 197.758.

26. In January 2020, Minneapolis, Minnesota, became the first major city in the United States to implement a ban on single-family zoning in every neighborhood through adoption of its 2040 Comprehensive Plan, which allowed duplexes and triplexes outright in all residential zones. Kathleen McCormick, *Rezoning History*, LINCOLN INST. LAND POL’Y (Jan. 16, 2020), <https://www.lincolninst.edu/publications/articles/2020-01-rezoning-history-minneapolis-policy-shift-links-affordability-equity>. The change was much-analyzed and generally praised. See, e.g., Richard Kahlenberg, *Minneapolis Saw That NIMBYism Has Victims*, ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/how-minneapolis-defeated-nimbyism/600601>.

27. On February 10, 2021, the Minnesota Supreme Court allowed a lawsuit seeking to enjoin the 2040 Plan to proceed. *Minnesota ex rel. Smart Growth Minneapolis v. City of Minneapolis*, 954 N.W.2d 584 (Minn. 2021) (holding comprehensive plans are not exempt from environmental review under the Minnesota Environmental Rights Act and facts alleged in complaint, if true, state claim upon which relief can be granted). The plaintiffs alleged that the 2040 Plan, if built out, is likely to cause increased pollution of already impaired city lakes, increased soil erosion, increased flooding, diminished air quality, and reduced wildlife habitat. Complaint at 13, 15–16, *id.*, No. 27-CV-18-19587 (Dec. 4, 2018).

because Oregon is not one of the fifteen states that have environmental review statutes, sometimes referred to as “mini-NEPAs.”²⁸

After a lengthy state rulemaking process,²⁹ cities throughout Oregon are beginning to implement the new middle housing law. In broad strokes, the new administrative rules require so-called “medium” and “large” cities³⁰ to allow a duplex on each lot or parcel³¹ in areas zoned for residential use that allows a single-family detached dwelling and to subject duplexes to regulatory standards that are no more restrictive than the standards that apply to single-family detached dwellings in the same zone.³² Large cities must also allow triplexes, quadplexes, townhouses, and cottage clusters on lots and parcels in residential zones that allow single-family detached dwellings.³³ In a grand bargain of sorts,³⁴ in lieu of requiring these denser middle housing forms be allowable on each residentially zoned lot or parcel on which a single-family detached dwelling is allowed, the rules instead permit cities to opt between a minimum compliance pathway or an alternative performance metric pathway. The minimum compliance pathway requires cities to allow the denser forms of middle housing on residentially zoned lots based on minimum lot size and maximum density standards no more restrictive than those set forth in the administrative rules.³⁵ The performance metric pathway sets a minimum percentage of lots or parcels on which each middle housing type must be allowed—ranging from 60 percent for townhouses to 80 percent for triplexes³⁶—and require that triplexes, quadplexes or townhouses be allowed on 75 percent or more of

28. Fifteen states and the District of Columbia have environmental review statutes modeled on the National Environmental Policy Act. DANIEL R. MANDELKER, *NEPA LAW AND LITIG.* § 12:1 (2020); *see also id.* § 12:2 (listing states).

29. OR. ADMIN. R. 660-046-0000-0235.

30. Medium cities are cities with populations more than 10,000 and fewer than 25,000 that are not within a metropolitan service district. OR. ADMIN. R. 660-046-0020(11). Large cities are cities with populations of 25,000 or more. *Id.* R. 660-046-0020(8). The large city rules also apply to cities with populations over 1,000 within a metropolitan service district and unincorporated areas of counties that are within an urban service district boundary. *Id.*; *see also supra* note 23.

31. The statute and its implementing rules apply to “lots or parcels.” *See* OR. REV. STAT. § 197.758 (2021). Oregon law defines a “lot” under Oregon Revised Statutes § 92.010(4) (2021), which occurs when four or more lots are created in a calendar year. *Id.* § 92.010(16). Local governments must regulate subdivisions. *Id.* § 92.040(1). A “parcel,” on the other hand, is a single unit of land that is created by a partition of land. *Id.* § 92.010(6). Partitions may, but are not required to be, regulated by local governments.

32. *See infra* part I.A.

33. *See infra* part I.B.

34. *See infra* part III.C (discussing compromise between allowable by-right denser forms of middle housing in all areas except those excluded expressly by HB 2001 and unfettered local legislative discretion with respect to these middle housing forms).

35. OR. ADMIN. R. 660-046-0205(3)(a); *see also infra* part I.B.

36. OR. ADMIN. R. 660-046-0205(3)(b); *see also infra* part I.B.

all lots or parcels zoned for residential use that allow for the development of detached single-family dwellings within each census block.³⁷

Recognizing the many “poison pills” that can stymie otherwise allowable development of housing, the rules identify impermissible development restrictions that would impose unreasonable cost and delay on middle housing, such as minimum off-street parking requirements in excess of one space per unit for duplexes.³⁸ The rules also set forth the limited circumstances under which medium and large cities may restrict middle housing development, such as where certain natural hazard protections apply.³⁹ Although the Oregon legislature chose to prospectively invalidate deed restrictions and other private land use restrictions that maintain single-family exclusivity,⁴⁰ the new rules allow large cities to permit “master planned communities” that allow only single-family detached dwellings and duplexes on some lots or parcels—notwithstanding the legislative requirement that large cities make triplexes, quadplexes, townhouses and cottage clusters permissible on residentially zoned lots and parcels on which single-family detached housing is allowed.⁴¹

This article examines implementation trends and challenges that are surfacing as Oregon cities revise their zoning codes to comply with the new middle housing regulations. Part I summarizes the new state regulations. Part II examines early efforts by cities to update their plans and codes to implement the new law, beginning with implementation of the requirement that medium cities allow duplexes wherever a single-family home is allowed in a residential zone.⁴² While this initial task may appear fairly straightforward, incorporation of this requirement into local codes involved amendment of a host of siting and design standards, all of which are subject to state requirements that cities use clear and objective siting and design standards that do not, individually or cumulatively, discourage duplex development

37. OR. ADMIN. R. 660-046-0205(3)(b)(F); see also *infra* notes 126–127 and accompanying text.

38. See, e.g., *infra* notes 189–94 and accompanying text (discussing off-street parking requirements).

39. See *infra* notes 70–99 and 149–67 and accompanying text (summarizing allowable restrictions on middle housing development); Tables 1, 2, *infra* part I.A., part I.B. (same).

40. HB 2001 makes unenforceable any provision in a recorded instrument executed on or after the Act’s effective date that would allow the development of a single-family dwelling but prohibit the development of middle housing or an ADU, 2019 Or. Laws ch. 639, § 13, and makes void and unenforceable any provision in a planned community governing document adopted or amended on or after the Act’s effective date that “prohibit[s] or [has] the effect of unreasonably restricting the development of housing that is otherwise allowable under the maximum density of the zoning for the land.” *Id.* § 12.

41. See *infra* notes 109–15 and accompanying text (discussing middle housing rules for master planned communities); see also Table 2 *infra* (summarizing exceptions to requirement that middle housing be allowed on a lot or parcel that is residentially zoned and allows single family detached unit).

42. See *infra* part II.A.

through unreasonable cost or delay.⁴³ These first steps, which the law required medium cities to complete by June 30, 2021, are also an important test of the state interventions that require a wider range of allowable-by-right middle housing forms in formerly exclusive single-family zones in large cities.⁴⁴ After examining efforts by medium cities to implement the new duplex requirement, Part II then considers how some of Oregon's largest cities are preparing to implement their more robust middle housing mandates.

Finally, Part III provides a preliminary analysis of whether Oregon's new middle housing law will in fact increase housing availability and affordability and decrease the mobility barrier of restrictive single-family zoning.⁴⁵ Part III concludes in part that the success of the law in achieving these goals may hinge on other legislative reforms to Oregon's housing laws, including another piece of 2019 legislation, House Bill 2003, which authorized a single methodology for measuring housing availability and fulfilling the needs for additional housing on a regional basis.⁴⁶ The Oregon legislature also recently enacted Senate Bill 8, which amended the definition of affordable housing, expanded the availability of attorney fees for local governments and applicants developing affordable housing, and requires local governments to allow development of certain affordable housing on lands not zoned for residential uses and to allow certain affordable housing at increased density.⁴⁷ Although Oregon's robust legislative agenda recognizes the systemic nature of housing inequity, Part III concludes that housing equity cannot be achieved without reform that directly addresses the inequitable distribution of residential amenities across neighborhoods and the environmental and other harms caused by allowing industrial and other high-intensity land uses to be sited near (or in) multifamily neighborhoods.⁴⁸

A careful examination of Oregon's experience implementing its new middle housing law may provide insights for other state and local governments grappling with the need to reform restrictive residential zoning.⁴⁹

43. See *infra* notes 69–71, 98–99 and accompanying text.

44. See *infra* part II.B.

45. See *infra* part III.

46. 2019 Or. Laws Ch. 640 (H.B. 2003), amending OR. REV. STAT. § 197.290–.293. HB 2003 requires cities to adopt strategies beyond land use to encourage the development of housing, and requires the state to establish enforcement mechanisms to assure that sufficient housing is available for Oregonians. See part III.E. (discussing HB 2003). While HB 2001 and 2003 were enacted at the same time, this article focuses primarily on the former.

47. S.B. 8, 2021 Leg., Reg. Sess. (Or. 2021); see *infra* part III.E. (discussing SB 8 and other 2021 reforms).

48. See *infra* part III.A. The 2021 legislature failed to pass Oregon House Bill 2488, a bill that, as introduced, would have at least partially addressed these aspects of land use law's segregationist legacy. See H.B. 2488 (A-Engrossed), 2021 Leg., Reg. Sess. (Or. 2021).

49. Among the efforts of other state and local governments to expand housing choice in otherwise exclusive single-family districts are the City of Minneapolis, the City of Berkeley, and the states of Connecticut, Vermont, and Utah. See *supra* notes 26 and 20.

I. Oregon's Statewide Middle Housing Law

Oregon has had a distinctive land use program for almost a half century. Instead of the usual pattern of legislative delegation of planning and zoning power to local governments to administer with the courts acting as arbiters, Oregon has a state land-use planning agency, the Department of Land Conservation and Development (DLCD), that adopts binding state policies (“the statewide planning goals”) for incorporation into required local land-use plans, which must be acknowledged by the Land Conservation and Development Commission (LCDC), after which the local plans provide the basis for land use regulations, as well as public and private land use actions.⁵⁰ The statewide goals, and their implementing administrative rules, have the force and effect of law and provide an efficient means of realizing state policy.⁵¹ The system is completed by the use of a specialized state agency, the Land Use Board of Appeals (LUBA), to replace trial courts in adjudication of most land use disputes.⁵²

One of the statewide planning goals (Goal 10) refers to housing and its simple opening statement, “To provide for the housing needs of citizens of the state,” belies its complexity.⁵³ The goal contemplates planning for the housing needs of the local jurisdiction over a twenty-year period and allocating sufficient lands to accommodate housing needs, considering a range of housing prices and rent levels to meet those needs, and provide “flexibility of housing location, type and density.”⁵⁴ Over the years as housing need has become more acute, pressure from the legislature and LCDC has increased on local governments (mostly cities and the Portland regional planning agency, Metro⁵⁵) to provide housing opportunities.⁵⁶

50. *Quiet Revolution*, *supra* note 23, at 377–80. LCDC provides policy direction and oversight for DLCD. *Id.*

51. *Id.* at 377.

52. *See id.*; Edward J. Sullivan, *Reviewing the Reviewer: The Impact of the Land Use Board of Appeals on the Oregon Land Use Program 1979–1999*, 36 WILLAMETTE L. REV. 441 (2000).

53. OR. ADMIN. R. 660-015-0000(10). The rest of the goal, apart from its definitions, gives insight as to the complexity of state housing policy: “Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed 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. *Id.*”

54. *See* Paul Diller & Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools and Outcomes*, 27 J. HOUS. & CMTY. DEV. 183 (2018).

55. Because Oregon’s housing policies generally promote housing within urban growth boundaries, save for housing supporting resource-based industries, these policies are oriented towards cities, which are the basis for those urban growth boundaries. Edward J. Sullivan, *Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*, 47 URB. LAW. 165, 172–75 (2015).

56. Diller & Sullivan, *supra* note 54; Edward J. Sullivan, *Will States Take Back Control of Housing from Local Governments?*, 43 ZONING & PLAN. L. REP. 1 (2020); *see also* Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans As Preemptive Intergovernmental*

Oregon already had in place significant legislative and administrative policies to deal with providing additional housing choices, including statutory limits and prohibitions on local measures that frustrate state housing policies.⁵⁷ Among those policies were requirements that local governments assess housing needs and plan and zone sufficient lands to meet those needs; that housing be generally dealt with through “clear and objective” standards, conditions, and procedures; that manufactured housing generally be treated on a par with other housing types; and that local governments not discriminate against government assisted housing.⁵⁸ But even these substantial steps were insufficient to alleviate the pressure to provide more housing. In fact, even with a state agency that has authority to establish minimum densities and direct local governments to implement the housing components of their state-approved comprehensive plans, eighty-two percent of the residential land in Portland remained zoned for single-family detached homes.⁵⁹

The pressure to address a growing housing shortage again manifested itself in 2019, when the Oregon legislature passed and the governor signed into law House Bills 2001 and 2003. HB 2001 requires large cities to allow duplexes, triplexes, quadplexes, cottage clusters, and townhouses on residentially zoned lots and parcels that allow the development of detached single-family dwellings by June 30, 2022, and medium cities to allow duplexes⁶⁰ on residentially zoned lots and parcels that allow for the development of detached single-family dwellings by June 30, 2021.⁶¹

HB 2003 authorized a scheme for Regional Housing Needs Analysis to assess housing needs in lieu of local housing needs analyses, required presentation of the regional scheme to the Oregon legislature in the 2021 legislative session, and created a housing production strategy scheme with a state review process to assure that local governments are taking actions to promote the development of housing to meet the standards provided for by the housing goal.⁶²

Compacts, 71 HASTINGS L.J. 79, 101–02 (2019) (observing that California, Oregon, Washington, and Florida follow a similar model under which local governments must plan for enough housing to meet projected population needs, periodically update the plan or “housing element,” submit their plans and updates for review and approval by a state agency, and conform local regulations and permitting decisions to the approved plan; the states differ in many respects including planning mandate enforcement and scope of authority of the relevant state oversight entity).

57. Diller & Sullivan, *supra* note 54, at 205–10.

58. *Id.* More recently, the Oregon legislature has doubled down to assure housing availability. Sullivan, *supra* note 56.

59. Doug & Hansz, *supra* note 22 (reporting on 2016 data).

60. *Duplex* is defined as “two attached dwelling units” on a lot or parcel. However, the definition also allows a medium or large city to define a *duplex* to include two detached dwelling units on a lot or parcel. OR. ADMIN. R. 660-046-0020(6).

61. 2019 Or. Laws Ch. 639, sec. 3(4).

62. 2019 Or. Laws Ch. 640 (H.B. 2003), amending OR. REV. STAT. § 197.290–.293.

LCDC undertook rulemaking to fill in the details of the legislation and promulgated new rules in late 2020.⁶³ The following sections summarize the housing obligations of medium and large cities respectively and the availability of an “infrastructure-based” extension of the compliance deadline.

A. New Rules for “Medium Cities”

HB 2001 required cities with populations greater than 10,000 and less than 25,000 to allow duplexes as a matter of right on all lots or parcels zoned for residential use that allow for detached single-family residences, with limited exceptions.⁶⁴ The LCDC administrative rules follow that direction, while providing additional detail, resolution of conflicts with Oregon’s other statewide planning goals, and a Model Code.⁶⁵ If a city has not amended its code to comply with HB 2001 by June 30, 2021, or received an extension from LCDC,⁶⁶ the Model Code for medium cities will apply

63. Oregon Administrative Rule 660-046-0100 provides that Oregon Administrative Rule 660-046-0105 through -0130 apply to medium cities, while Oregon Administrative Rule 660-046-0200 provides that Oregon Administrative Rules 660-046-0205 to 0230 apply to large cities.

64. Oregon Revised Statutes § 197.758(3) provides: “[E]ach city not within a metropolitan service district with a population of more than 10,000 and less than 25,000 shall allow the development of a Duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings.” There are exceptions under subsection (4) for cities with lands outside an urban growth boundary or which lack the ability to provide urban services, among other circumstances; however, these are rare circumstances. Similarly, while the statute provides some limitations on what medium cities must do with respect to duplexes, it specifically does not prohibit medium cities from permitting single-family housing or other types of middle housing that are not required under the legislation. § 197.758(6).

65. See OR. ADMIN. R. 660-046-0010(1). Subsection (2) exempts lands within medium cities not zoned for residential use, which do not allow for detached single-family dwellings, or which are in unincorporated areas and under an interim land use designation that maintains the potential for single-family development. Subsection (3) deals with potential conflicts with other statewide planning goals. See also OR. ADMIN. R. 660-046-0040 (requiring timely amendment of plans and land use regulations, providing for extensions of time to do so, and providing for application of the state’s Model Code in the event of noncompliance).

66. “Extension” under the rules for medium cities is used in two contexts. The first is a request to extend the deadline for completion of the work to add duplexes in zones in which a single-family home is allowed, which otherwise must be done by June 30, 2021. The other is an infrastructure based time extension request (IBTER) under Oregon Administrative Rule 660-046-0300 to 0370, in which a local government has not acted to comply with its obligations to amend its plan and land use regulations as a medium or large city to meet those responsibilities and asks for an extension of time to do so. OR. LAWS 2019, ch. 639, secs. 3–4. The minimal incremental difference between one and two units involved with medium cities and the reference to IBTER only with respect to large cities lead to the conclusion that this tool is not a significant factor with respect to medium city obligations.

in the city.⁶⁷ Compared to the wider variety of middle housing types applicable to large cities as of June 30, 2022, these regulations are not extensive, as the legislative command for medium cities is only to allow duplexes on lots in residential zones where detached single-family housing is allowed.

With respect to medium cities, the rules allow medium cities to define a duplex as any two housing units on a single lot, whether the two units are attached or detached, including separate dwelling units created through conversion of an existing detached single-family dwelling.⁶⁸ Duplexes subject to the rules must be treated under the same process as single-family dwellings, which, under existing Oregon law means that “clear and objective standards, conditions, and procedures” must be applied.⁶⁹ Although medium cities are not required to apply design standards to new duplexes, if they do, they may apply only the same clear and objective standards they apply to single-family detached structures in the same zone.⁷⁰ Cities also must allow conversions of existing detached single-family dwellings unless the conversion would increase nonconformity with existing clear and objective code standards, and the cities may not apply design standards to conversions.⁷¹

Where state-acknowledged local regulations have been adopted to implement Oregon’s statewide planning goals, the rules clarify which of these protective regulations may be applied to middle housing development. As summarized in Table 1, for land use regulations adopted under the state’s natural and historic resource protection goal (Goal 5),⁷² estua-

67. OR. ADMIN. R. 660-046-0040(4)(a). The Model Code for medium cities was adopted by reference as Exhibit “A” to this section of the rules.

68. OR. ADMIN. R. 660-046-0105(1). However, the rules do not require cities to allow more than two dwelling units on a lot or parcel, including any accessory dwelling units allowed under OR. REV. STAT. § 197.312(5). Under Oregon law, an ADU is an “interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling” that must be allowed in areas within the urban growth boundaries of most cities and counties that are zoned for detached single family dwellings, “subject to reasonable local regulations relating to siting and design.” OR. REV. STAT. § 197.312(5).

69. OR. ADMIN. R. 660-046-0115. This process is generally required for all urban housing and, like the generally applicable process, there is an opportunity to use a “second track” of discretionary standards that are available at the option of the applicant. See OR. REV. STAT. § 197.307(6). These statewide policies apply notwithstanding local plans or land use regulations. See LEAGUE OF OREGON CITIES GUIDEBOOK, LEGAL GUIDE TO OREGON’S STATUTORY PREEMPTIONS OF HOME RULE (2019), <https://www.orcities.org/application/files/4715/7904/6324/StatutoryPreemptionSummary02-10-19.pdf>.

70. OR. ADMIN. R. 660-046-0125(1).

71. OR. ADMIN. R. 660-046-0130; *id.* R. 660-046-0125(2).

72. Oregon Administrative Rule 660-023-0050 through -0110 require cities to adopt land use regulations to protect water quality, aquatic habitat, and the habitat of threatened, endangered and sensitive species. Cities can apply these regulations to middle housing as follows: “(i) Medium and Large Cities may apply regulations to Duplexes that apply to detached single-family dwellings in the same zone; (ii) Medium and Large

rine resource protection goal (Goal 16),⁷³ and coastal shorelands protection goal (Goal 17),⁷⁴ cities may regulate duplexes in the same manner that they regulate detached single-family dwellings in the same residential zone.⁷⁵ However, with respect to historic resource protective measures, cities may not apply measures that limit use, density, or occupancy to prohibit middle housing where single-family detached housing is allowed and may not apply standards that prohibit development of middle housing but permit development of single-family detached housing.⁷⁶ For protective measures adopted pursuant to the state's natural hazard and beaches and dunes goals, Goal 7⁷⁷ and Goal 18,⁷⁸ respectively, a city can apply more restrictive protective measures to duplexes and other middle housing only if the city justifies the need for more restrictive measures;⁷⁹ however, cities are not required to justify the application of more restrictive measures to middle housing development in areas designated on FEMA Flood Insurance Rating Maps as Special Flood Hazard Areas.⁸⁰

Cities may limit the development of Middle Housing other than Duplexes in significant resource sites identified and protected pursuant to Goal 5; and (iii) If a Medium or Large City has not adopted land use regulations pursuant to OAR 660-023-0090, it must apply a 100-foot setback to Middle Housing developed along a riparian corridor." OR. ADMIN. R. 660-046-0010(3)(a)(A). Or. Admin. R. 660-023-0200(7) requires cities to adopt land use regulations to protect locally significant historic resources.

73. OR. ADMIN. R. 660-015-0010(16).

74. *Id.* R. 660-015-0010(17).

75. *Id.* R. 660-046-0110(1); 660-046-0010(3).

76. *Id.* R. 660-046-0010(3)(a)(B).

77. *Id.* R. 660-015-0000(7).

78. *Id.* R. 660-015-0010(18).

79. *Id.* R. 660-046-0010(3)(c) (natural hazards), (3)(i) (beaches and dunes).

80. *Id.* R. 660-046-0010(3)(c)(A).

Table 1. Statewide Land Use Goals and Middle Housing

	Duplexes	Triplexes	Quadplexes	Townhomes	Cottage clusters
Goal 5: Natural Resources	Same as SFDs	May limit in significant resource sites ⁸¹			
Goal 5: Historic Resources	Same as SFDs with exceptions ⁸²				
Goal 6: Air, Water and Land Resources Quality	May limit within an urban growth boundary to attain federal and state environmental requirements ⁸³				
Goal 7: Areas Subject to Natural Hazards	Special Flood Hazard Areas identified on FEMA FIRM	May limit ⁸⁴			
	Other hazard areas identified in adopted comp. plan or dev. code	May limit where middle housing presents greater risk to life or property than SFDs ⁸⁵			
Goal 9: Economic Development	May limit on lots or parcels zoned for residential use but designated for future industrial or employment uses ⁸⁶				
Goal 15: Willamette Greenway	May allow and regulate middle housing, but standards must be clear and objective ⁸⁷				
Goals 16: Estuarine Resources	Same as SFDs ⁸⁸				
Goal 17: Coastal Shorelands					
Goal 18: Beaches and Dunes	May limit where middle housing presents greater risk to life or property than SFDs ⁸⁹				

The rules further limit the regulations medium cities may apply to duplexes to the following:

81. Id. R. 660-046-0010(3)(a)(A).

82. Id. R. 660-046-0010(3)(a)(B).

83. *Id.* R. 660-046-0010(3)(b).

84. *Id.* R. 660-046-0010(3)(c)(A).

85. *Id.* R. 660-046-0010(3)(c)(B).

86. Id. R. 660-046-0010(3)(d).

87. *Id.* R. 660-046-0010(3)(f).

88. Id. R. 660-046-0010(3)(g) (estuarine), (3)(h) (coastal shorelands).

89. *Id.* R. 660-046-0010(3)(i).

- For duplexes, cities may not require minimum lot or parcel size, setbacks, or building heights greater than those required for detached single-family dwellings in the same zone.⁹⁰
- Cities must allow the development of a duplex on any property zoned to allow detached single-family dwellings that was legally created before the medium city's current lot size minimum for detached single-family dwellings in the same zone.⁹¹
- Cities may not apply density maximums to the development of duplexes.⁹²
- Cities are not required to apply lot coverage or floor area ratio standards to new duplexes; but, if they do, they may not establish a cumulative lot coverage or floor area ratio for a duplex that is less than established for detached single-family dwellings in the same zone.⁹³
- Cities may not require more than a total of two off-street parking spaces for a duplex (i.e. one per unit); however, a city may allow on-street parking credits to be used to satisfy off-street parking requirements.⁹⁴
- If a city or other utility service provider grants clear and objective exceptions to public works standards for detached single-family dwelling development, it must grant the same exceptions for duplexes.⁹⁵

Finally, the Oregon legislature apparently understood that the cost and delay imposed by local siting and design standards⁹⁶ can act as a poison

90. *Id.* R. 660-046-0120(1), (3), (4).

91. *Id.* R. 660-046-0120(1).

92. *Id.* R. 660-046-0120(2).

93. *Id.* R. 660-046-0120(6).

94. *Id.* R. 660-046-0120(5); see also Donald Shoup, *The Access Almanac: On-Street Parking Management v. Off-Street Parking Requirements*, 42 ACCESS 38 (2013), <https://www.accessmagazine.org/spring-2013/access-almanac-street-parking-management-v-street-parking-requirements> (examining relationship between on-street parking credits and off-street parking).

95. OR. ADMIN. R. 660-046-0120(7).

96. The rules define a "siting standard" as a standard related to the position, bulk, scale, or form of a structure or a standard that makes land suitable for development. OR. ADMIN. R. 660-046-0020(15). Siting standards include, but are not limited to, standards that regulate perimeter setbacks, dimensions, bulk, scale, coverage, minimum and maximum parking requirements, utilities, and public facilities. *Id.* A "design standard" means a standard related to the arrangement, orientation, materials, appearance, articulation, or aesthetic of features on a dwelling unit or accessory elements on a site. *Id.* R. 660-046-0020(4). Design standards include, but are not limited to, standards that regulate entry and dwelling orientation, façade materials and appearance, window coverage,

pill even when middle housing forms are permitted by right.⁹⁷ To address this issue, the middle housing law prohibits cities (both medium and large) from using siting and design standards that, individually or cumulatively, discourage middle housing development through unreasonable cost or delay.⁹⁸ The medium city rules clarify this standard by providing an exhaustive list of standards that do not, individually or cumulatively, discourage the development of duplexes through unreasonable cost and delay.⁹⁹

B. New Rules for “Large Cities”

The cities with populations of 25,000 or more must allow duplexes under the same requirements as for medium cities.¹⁰⁰ These large cities must also allow the following additional housing types under the circumstances described in the rules on lots and parcels zoned for residential use that allow for the development of detached single-family dwellings¹⁰¹: triplexes,¹⁰² quadplexes,¹⁰³ townhouses,¹⁰⁴ and “cottage clusters.”¹⁰⁵ What

driveways, parking configuration, pedestrian access, screening, landscaping, and private, open, shared, community, or courtyard spaces. *Id.*

97. The purpose section of the rules, which relates to all forms of middle housing, discloses a policy to limit discretion in the application of siting and design standards, *Id.* R. 660-046-0000, and directs the application of a state-established “Model Code” for those medium or large cities that do not comply with the rules. *Id.* R. 660-046-0010(4).

98. Following existing state housing policy found in Oregon Revised Statutes § 197.307(4), the rules require the application of “clear and objective standards, conditions, or procedures” that “do not have, individually or cumulatively, discourage the development of middle housing through unreasonable cost or delay.” OR. ADMIN. R. 660-046-0210 (large cities) and -0110 (medium cities).

99. OR. ADMIN. R. 660-046-0110(2). Subsection (3) elaborates that any duplex standard that is more restrictive than that applicable to single family standards applied to single-family dwellings in the same zone creates unreasonable cost or delay. *See also infra* note 100 (discussing legislative purpose).

100. OR. ADMIN. R. 660-046-0205(1). The large city rules also apply to cities with populations over 1,000 within a metropolitan service district and unincorporated areas of Metro. *See supra* notes 23, 30.

101. OR. ADMIN. R. 660-046-0205(2). The large city rules also allow for conversion of single-family dwellings into any of these middle housing types under Oregon Administrative Rule 660-046-0230, discussed *infra* at note 168 and accompanying text.

102. “[T]hree attached dwelling units on a Lot or Parcel” under any configuration of three units. OR. ADMIN. R. 660-046-0030(19).

103. “[F]our attached dwelling units on a Lot or Parcel under any configuration of four or more units. *Id.* R. 660-046-0030(14).

104. “[A] dwelling unit that is part of a row of two or more attached dwelling units, where each unit is located on an individual Lot or Parcel and shares at least one common wall with an adjacent dwelling unit.” *Id.* R. 660-046-0030(17).

105. “[A] grouping of no fewer than four detached dwelling units per acre with a footprint of less than 900 square feet each that includes a common courtyard.” Large cities, and those medium cities that choose to allow those clusters may allow those units

follows is a discussion of the regulatory restrictions that large cities may apply to otherwise allowable middle housing, two alternative compliance paths from which large cities may elect, and restrictions on regulatory standards that would, if permitted, delay and increase the cost of middle housing development. Table 2 summarizes the middle housing mandates and restrictions that medium and large cities may apply to the development of middle housing on a lot or parcel that is residentially zoned and allows a single family detached unit.¹⁰⁶

As with the siting of duplexes in medium cities, the rules allow large cities to apply only limited restrictions to otherwise allowable middle housing, such as certain natural hazard protections.¹⁰⁷ Essentially, the rules allow regulation of middle housing in goal-constrained areas consistent with existing goal protections while recognizing that middle housing may be no more intense a land use than single family detached housing.¹⁰⁸

However, large cities “must demonstrate that regulations or limitations of Middle Housing other than Duplexes are necessary to implement or comply with an established state or federal law or regulation on these types of lands.”¹⁰⁹ Although the phrase “these types of lands” appears to refer to lands subject to protective measures adopted pursuant to a statewide goal and lands within a master planned community,¹¹⁰ DLCD staff noted in a memorandum to LCDC that an example of a permissible limitation necessary to implement or comply with an established state or federal law includes “limitations mandated by the federal government in the vicinity of an airport.”¹¹¹

Large cities may also limit middle housing development (except duplexes) on some lots or parcels in “master planned communities”¹¹² allowed after January 1, 2021, and, undeveloped areas of master planned

to be located on either on a single lot or parcel, or on individual lots or parcels. *Id.* R. 660-046-0030(2).

106. See Table 2 *infra*.

107. See *supra* notes 72–80 and accompanying text.

108. See Table 1 *supra* (summarizing allowable application to middle housing development of regulations adopted to implement statewide planning goals).

109. *Id.* R. 660-046-0205(2)(c).

110. See *Id.* R. 660-046-0205(2)(c) (apparently referring to lands described in -0205(2) (a) and (b)).

111. Memorandum from Jim Rue, DLCD Director, to LCDC, *Agenda Item 7, September 24-25, 2020 – LCDC Meeting: House Bill 2001 Implementation – Oregon Administrative Rules Chapter 660 Division 46, Large Cities Model Code, and Related Fiscal and Housing Impact Statements* 8 (Sept. 11, 2020).

112. A master planned community means one of the following:

(a) Greater than 20 acres in size within a Large City or adjacent to the Large City within the urban growth boundary that is zoned for or proposed to be Zoned For Residential Use, and which is not currently developed with urban residential uses, for which a Large City proposes to adopt, by resolution or ordinance, a master plan or a plan that functions in the same manner as a master plan;

communities approved before this date.¹¹³ Per the medium city duplex rules, which apply to large cities, a large city must allow development of a duplex on each lot or parcel that allows development of a single-family detached dwelling and must allow conversion of single-family dwellings to duplexes unless the conversion will increase an impermissible nonconformity.¹¹⁴ Specifically, for master planned communities approved after January 1, 2021, the master planned community must (a) allow all middle housing types within the master plan area based on the minimum compliance pathway in the large city rules,¹¹⁵ and (b) provide for infrastructure at densities of at least twenty dwelling units per acre in master planned communities in the Portland Metro area and fifteen dwelling units per acre elsewhere.¹¹⁶ Master planned communities approved before January

(b) Greater than 20 acres in size within a Large City or adjacent to the Large City within the urban growth boundary for which a Large City adopted, by resolution or ordinance, a master plan or a plan that functions in the same manner as a master plan after the site was incorporated into the urban growth boundary; or

(c) Added to the Large City's urban growth boundary after January 1, 2021 for which the Large City proposes to adopt, by resolution or ordinance, a master plan or a plan that functions in the same manner as a master plan.

OR. ADMIN. R. 660-046-0020(10).

113. *Id.* R. 660-046-0205(2)(b).

114. *Id.* R. 660-046-0110(2).

115. *Id.* R. 660-046-0205(2)(b)(A) ("If a Large City has adopted a master plan or a plan that functions in the same manner as a master plan after January 1, 2021, it must allow the development of all Middle Housing types as provided in OAR 660-046-0205 through OAR 660-046-0235."). Note that the unavailability of the performance metric pathway likely resulted from a scrivener's error in the performance metric pathway rule, which, as published, excludes both goal-constrained and master planned communities from the pathway. See OR. ADMIN. R. 660-046-0205(3)(b) (excluding lands described in -0205(2)); Memorandum from Jim Rue, DLCD Director, et al., to LCDC, *Agenda Item 4, November 12-13, 2020—LCDC Meeting, Middle Housing Large Cities Model Code and Minimum Standards* 13-28 (Oct. 29, 2020) [hereinafter October 2020 Staff Memo] (describing performance metric pathway, providing examples of percentages of affected lands in cities, and excluding certain goal-constrained areas but not master planned community areas).

116. The city must plan to provide urban water, sanitary sewer, stormwater, and transportation systems that accommodate at least twenty dwelling units per net acre if located within a metropolitan service district boundary, and fifteen dwelling units per net acre if located outside of a metropolitan service district boundary and may require an applicant for a middle housing development to demonstrate, through an amended public facility plan or similar mechanism, "the sufficient provision of public services needed to serve the proposed development," if the proposed development exceeds the planned public service capacity of a master plan. OR. ADMIN. R. 660-046-0205(2)(b)(A). The city may also require the applicant to include two or more middle housing types in a master plan development and may designate areas within the master plan exclusively for other housing types (such as multi-family residential structures of five dwelling units or more or manufactured home parks). *Id.*

1, 2021,¹¹⁷ may limit the development of middle housing (except duplexes), need only have a net residential density of at least eight dwelling units per acre, and allow all dwelling units, at minimum, to be detached single-family dwellings or duplexes.¹¹⁸

In contrast to the duplex requirements, the rules do not require large cities to allow triplexes, quadplexes, townhouses, and cottage clusters on “each lot or parcel” zoned for residential use that allows for the development of detached single-family dwellings. This difference stems from disagreement during the rulemaking about the scope of the legislative mandate for large cities, which requires these cities to allow “[a]ll middle housing types *in areas* zoned for residential use that allow for the development of detached single-family dwellings.”¹¹⁹ DLCD staff described the conflicting positions as essentially, on the one hand, “a call for additional flexibility and clarity in the process that will allow cities the ability to regulate middle housing within their own context,” and, on the other hand, concern that “processes that provide flexibility for local governments to further regulate middle housing are counter to the intent of HB 2001 [to eliminate barriers to middle housing in all residential neighborhoods].”¹²⁰

Ultimately, the rules resolved the conflict over the meaning of “in areas” by allowing a large city to satisfy the statutory requirement to allow development of these denser middle housing forms in areas that allow single-family detached housing by electing between two compliance pathways. The first is the minimum compliance pathway, which requires large cities to adopt the generally applicable siting and design standards set forth in the rules,¹²¹ including prescribed minimum lot size and maximum density provisions applicable for each denser form of middle housing.¹²² The second is the performance metric compliance pathway, which allows cities to depart from the minimum lot size and maximum density standards prescribed in the rules,¹²³ provided that the middle housing types are allowed on the following minimum percentages of lots or parcels: 80 percent for triplexes, 70 percent for quadplexes and cottage clusters, and 60 percent for

117. Note that the rules delineate pre- and post-January 1, 2021, and do not address master planned communities approved on January 1, 2021. *Id.* R. 660-046-0205(2)(b).

118. *Id.* R. 660-046-0205(2)(b). The rule contains time limitations on the use of these restrictions, but also provides that a large city may prohibit redevelopment of other housing types, such as multi-family residential structures and manufactured home parks as part of a master plan. *Id.*

119. OR. REV. STAT. § 197.758(2).

120. See October 2020 Staff Memo, *supra* note 113, at 13.

121. OR. ADMIN. R. 660-046-0205(3)(a). The standards are set out in Oregon Administrative Rule 660-046-0205 to -0235.

122. See *id.* R. 660-046-0220(2)–(4); see also *infra* notes 156–59 and accompanying text (discussing minimum lot or parcel sizes for triplexes, quadplexes, townhouses and cottage clusters). The rules provide that local maximum densities may not be applied to triplexes or quadplexes. OR. ADMIN. R. 660-046-0220(2).

123. See OR. ADMIN. R. 660-046-0205(3)(b).

townhouses.¹²⁴ Detailed provisions are made to ensure that a lot counts as allowing a middle housing type only if that housing type could actually be developed on the lot.¹²⁵

Additionally, the performance metric pathway rules include an “equitable distribution” provision that responds to the legislative intent to integrate middle housing into all areas that allow single-family detached housing. To do this, the rules require that triplexes, quadplexes or townhouses must be allowed on seventy-five percent or more of all lots or parcels zoned for residential use that allow for the development of detached single-family dwellings within each census block.¹²⁶ The rules thus provide for some flexibility to respond to local conditions, but require the removal of regulatory barriers to housing choice in all census tracts. Finally, the rules require large cities to demonstrate continuing compliance with these standards.¹²⁷

Table 2 below provides a summary of the types of middle housing medium and large cities must allow and the limited restrictions cities can place on middle housing development.¹²⁸

124. *Id.* R. 660-046-0205(3)(b). A city may exclude from the denominator lots on which middle housing development is limited under the rules’ provisions for goal-protected lands, and, based on the wording of the published rules, master-planned communities. *Id.* R. 660-046-0205(2)-(3). Although the rule provision is unclear, it seems likely the Commission also intended to exclude lands otherwise restricted by state or federal law. *See id.* R. 660-046-0205(2)(c).

125. *Id.* R. 660-046-0205(3)(b)(E). To qualify as “allowed” on a lot or parcel, the middle housing type must be allowed under the same administrative process applicable to single-family dwellings in the same zone, the lot or parcel must have sufficient area to meet applicable minimum lot size requirements, the middle housing type must not be prohibited by maximum density requirements, and “siting or design standards” may not “individually or cumulatively cause unreasonable cost or delay to the development of that Middle Housing type as provided in OAR 660-046-0210(3).” *Id.*

126. *Id.* R. 660-046-0205(3)(b)(F). This provision must be read in conjunction with OR ADMIN. R. 660-046-0205(3)(b)(E), discussed in note 126, *supra*, and applies to any constellation of at least four eligible lots and parcels within the large city.

127. *Id.* R. 660-046-0205(3)(b)(G). The rules require such a demonstration when a city submits for state review its initial middle housing comprehensive plan or land use regulation amendments, as part of housing capacity reviews, and as part of the process of state review that occurs when local governments in Oregon amend their land use regulations or comprehensive plans, except that demonstration of compliance is not required more frequently than once every six years. *Id.*

128. *See also* Table 1, *supra* part I.A. (summarizing allowable restrictions adopted to implement statewide planning goals).

Table 2. Limited Restrictions to Allowable Middle Housing

	MEDIUM CITY	LARGE CITY	LARGE CITY Master Plan Community			Deed or governing doc. allows SFDU and restricts middle housing			
	Res. District + lot allows SFDU + not goal constrained	Res. District + lot allows SFDU + not goal constrained + not in MPC	Adopted after 1/1/21	Adopted before 1/1/21		Post-HB 2001	Pre-HB 2001		
				No areas developed as of 1/1/21	Any area developed as of 1/1/21				
New duplexes	Must allow	Must allow	Must allow ¹²⁹			Restriction unenforceable ¹³⁰	HB 2001 did not address		
Duplex conversions	Must allow unless increases nonconformity ¹³¹								
Triplexes	May allow	Must allow based on lot size/density, ¹³² or on at least 80% of lots ¹³³	Must allow subj. to large city rules, must plan to accommodate at least 20 (Metro) or 15 (non-Metro) DUs/acre ¹³⁴	May restrict if duplexes allowed, net residential density of at least 8 DUs/acre authorized for entire plan area, ¹³⁵ and restriction necessary to implement or comply with established state or federal law ¹³⁶	May restrict if restriction necessary to implement or comply with established state or federal law ¹³⁷				
Quadplexes	May allow	Must allow based on lot size/density, or on at least 70% of lots							
Townhomes	May allow	Must allow based on lot size/density, or at least 60% of lots							
Cottage clusters	May allow	Must allow based on lot size/density, or on at least 70% of lots							
Tri- & Quad-plex conversions	May allow	Must allow unless increases nonconformity ¹³⁸							
Equitable distribution	NA	Req'd under performance metric pathway ¹³⁹	NA ¹⁴⁰	NA	NA	NA	NA		

129. OR. ADMIN. R. 660-046-0220(1).

130. 2019 Or. Laws ch. 639, §§ 12–13.

131. OR. ADMIN. R. 660-046-0230(1)

132. See *supra* notes 121–22 and accompanying text (minimum compliance pathway); see *supra* notes 152–53, 159, 161 and accompanying text (minimum lot size and maximum density standards).

133. OR. ADMIN. R. 660-046-0220(2)–(4)-0205(3)(b) (performance metric standards); see also *supra* notes 119 – 127 and accompanying text (minimum compliance and performance metric compliance pathways).

134. *Id.* R. 660-046-0205(2)(b)(A).

135. *Id.* R. 660-046-0205(2)(b)(B).

136. *Id.* R. 660-046-0205(2)(c).

137. *Id.*

138. OR. ADMIN. R. 660-046-0205(2).

139. *Id.* R. 660-046-0205(3)(b)(F).

140. The rules exempt both goal-constrained lands and master planned community lands from the performance metric compliance pathway, which includes the equitable

After having set the parameters of large city housing obligations, the rules turn to the specific expectations for the numerical standards for each middle housing type. Large cities “may” allow, in addition to any permitted accessory dwelling unit on each lot or parcel, more than two dwelling units for duplexes,¹⁴¹ and more than four dwelling units for triplexes and quadplexes.¹⁴² Regarding townhouses, a large city must require a minimum of two attached units and must allow a minimum of four attached units subject to the applicable siting and design standards.¹⁴³ For cottage cluster units, large cities are not required to establish a minimum number of dwelling units, but if a city does establish a minimum the city may require a minimum of three, four, or five dwelling units and may allow a greater number of units, though it is not required to do so;¹⁴⁴ and, where those cottages include a common courtyard, large cities must allow at least eight cottages per common courtyard and may allow more than that number.¹⁴⁵ Because the rules set the floor, cities may allow larger quantities of middle housing units on lots or parcels.

The Oregon legislature’s and LCDC’s commitment to broad application of Oregon’s new housing policies is demonstrated by both the limited specific exemptions from application of the rules to lots or parcels in residential zones on which detached single-family dwellings are permitted¹⁴⁶ and to certain “clear and objective” siting and design standards.¹⁴⁷ So too does

distribution requirement. OR. ADMIN. R. 660-046-0205(3)(b) (A large city may “[a]pply separate minimum lot size and maximum density provisions . . . , provided that the applicable Middle Housing type other than Duplexes is allowed on the following percentage of Lots and Parcels zoned for residential use that allow for the development of detached single-family dwellings, *excluding lands described in subsection (2).*”) (emphasis added). The administrative record suggests, however, that LCDC intended to exclude only goal-constrained lands. See October 2020 Staff Memo, *supra* note 113, at 13–21.

141. OR. ADMIN. R. 660-046-0205(4)(a). State law has required most cities to allow ADUs, defined as “an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling,” since 2017. OR. REV. STAT. § 197.312(5).

142. *Id.* R. 660-046-0205(4)(b).

143. *Id.* R. 660-046-0205(4)(c). Recall that the rules allow for some limited discretion for the large city to set out portions of those single-family zones in which detached single-family dwellings are permitted under Oregon Administrative Rule 660-046-0205(3)(b) and have fairly limited authority to impose siting and design standards under Oregon Administrative Rule 660-046-0220 to -0235.

144. OR. ADMIN. R. 660-046-0205(4)(d)(A).

145. *Id.* R. 660-046-0205(4)(d)(B). The courtyard cottage clusters are subject to the limited siting and design standards of Oregon Administrative Rule 660-046-0220 to -0235. *Id.*

146. Oregon Administrative Rule 660-046-0210(1) applies these exemptions to “goal protected lands” under Oregon Administrative Rule 660-046-0010(13), see *infra* note 65, or where large cities have discretion to apply percentage restrictions under Oregon Administrative Rule 660-046-0205(3)(b).

147. The purpose section of the rules, OR. ADMIN. R. 660-046-0000, which relates to all forms of middle housing, discloses a policy to limit discretion in the application

the consistent view of requiring middle housing types authorized by the rules under the same permit processes as those used for detached single-family dwellings and under the same clear and objective standards, processes, and conditions as for those dwellings.¹⁴⁸

Further emphasizing this commitment, the law prohibits the application to middle housing of siting and design standards that would, individually or cumulatively, discourage middle housing development through unreasonable cost or delay. The large city rules provide an exhaustive list of the siting and design standards that do not run afoul of this requirement, which the rule identifies as “only” the standards set forth in the model code and the standards allowed by the large city rules that are applicable to goal-protected lands; use, siting, and design; middle housing conversions; and alternative siting and design standards.¹⁴⁹ Large cities are also prohibited from applying design standards to middle housing conversions from single-family dwellings and from using design standards that “scale by the number of dwelling units or other features that scale with the number of dwelling units, such as primary entrances.”¹⁵⁰

The new housing rules also attempt to resolve potential conflicts between individual large city standards and state assurances that those standards will not undermine application of policies that militate for greater housing choices in all residential zones that allow single-family detached housing. For duplexes, the large city rules reaffirm that policy by imposing on large cities the same limitations on regulation of that housing type that are placed on medium cities.¹⁵¹

For triplexes and quadplexes, the following siting limitations apply:

- Density standards—Consistent with state policy on housing choice, local density maximums may not be applied to triplexes or quadplexes.¹⁵²

of siting and design for such housing and directs the application of a state-established “Model Code” for those medium or large cities that do not comply with the rules. *Id.* R. 660-046-0010(4).

148. *Id.* R. 660-046-0215. However, consistent with state policy on clear and objective processes, the rules allow a large city to authorize an “alternative track” for discretionary approvals based on clear and objective standards, conditions and procedures, so long as a clear and objective track is also available. *See* OR. REV. STAT. § 197.307(6).

149. OR. ADMIN. R. 660-046-0210(3). The rules further limit design standards applicable to middle housing to standards no more restrictive than those provided in the Model Code for large cities under Or. Admin. R. 660-046-0010(4)(b); to the “same clear and objective design standards that the large city applies to detached single-family structures in the same zone”; or to alternative design standards as provided in Oregon Administrative Rule 660-046-0235, discussed *infra*.

150. *Id.* R. 660-046-0225(1)(c). But, “design standards may scale with form-based attributes, including but not limited to floor area, street-facing façade, height, bulk, and scale.” *Id.*

151. *Id.* R. 660-046-0220(1).

152. *Id.* R. 660-046-0220(2)(b).

- Minimum lot or parcel size—These standards depend on the underlying zoning requirements for single-family detached homes. For minimum lot or parcel size standards over a certain threshold, the minimum size can be no greater than that applicable to single-family detached homes, and, for standards at or below the threshold, the rules set a minimum lot or parcel size.¹⁵³
- Setbacks—These may be no more restrictive than those applicable to single-family detached dwellings.¹⁵⁴
- Height limitations—These may be no more restrictive than those applicable to single-family detached dwellings, except that the maximum height for a tri- or quadplex may not be less than twenty-five feet or two stories.¹⁵⁵
- Off-street parking space requirements—These requirements vary depending on the size of the lot or parcel being developed,¹⁵⁶ and the rules provide for some assurances that state housing choice policy will be furthered through the use of flexible parking requirements.¹⁵⁷ However, in no case may off-street parking space requirements exceed one space per unit.
- Lot or parcel coverage—No such regulations are required under the rules; however, if a city utilizes such standards, they may be no greater than for single-family detached housing.¹⁵⁸

153. The minimum lot or parcel size for triplexes and quadplexes may be no greater than the minimum for detached single-family dwellings in the same zone, except that cities may require a minimum lot or parcel size for triplexes of 5,000 square feet and for quadplexes of 7,000 square feet even if the minimum for single-family detached dwellings is less than 5,000 square feet or 7,000 square feet, respectively. OR. ADMIN. R. 660-046-0220(2). Large cities may choose to facilitate more middle housing development by setting lower minimum lot sizes. *Id.*

154. *Id.* R. 660-046-0220(2)(c).

155. *Id.* R. 660-046-0220(2)(d).

156. *Id.* R. 660-046-0220(2)(e). For triplexes and quadplexes, if the lot or parcel is less than 3000 square feet, no more than one total off-street parking space may be required, and if 3000–4999 square feet, no more than two total off-street parking spaces may be required. Up to three spaces may be required for triplexes on lots or parcels 5000 square feet or more and quadplexes on lots 5000–6999 square feet. Up to four spaces may be required for quadplexes on lots 7000 square feet or more. *Id.*

157. For example, the rules allow large cities to use on-street parking credits to satisfy off-street parking requirements; allow cities to permit, but not require, on-street parking to be in a garage or carport; limit parking standards for triplexes and quadplexes to those applicable to single-family detached housing; and prohibit additional minimum parking requirements. *Id.*

158. *Id.* R. 660-046-0220(2)(f).

The rules for townhouses and cottage clusters follow this pattern for lot or parcel sizes.¹⁵⁹ Townhouse street frontage requirements are not required, but, if a city uses them, they are limited.¹⁶⁰ Similarly, a large city is not required to have a minimum lot or parcel width for a cottage cluster, but, if it does, it may not be different from that applied to a single-family detached dwelling in the same zone.¹⁶¹ Limitations on large-city density,¹⁶² setbacks,¹⁶³ and height and dwelling unit regulations¹⁶⁴ favor townhouse and cottage cluster development. The rules also limit parking regulations in such a way as to reduce their number as a means of reducing housing

159. Townhouses have no required minimum lot or parcel sizes; however, if minimum sizes are utilized, they must be no more than 1500 square feet, and different sizes may be employed for internal, external or corner lots or parcels, so long as they average no more than 1500 square feet. *Id.* R. 660-046-0220(3)(a). For new cottage clusters, no minimum sizes are required; however, if the minimum lot or parcel size for single-family detached dwellings in the zone is 7000 square feet or less, the cottage cluster minimum is capped at 7000 square feet, and if the minimum for single-family detached dwellings is greater than 7000 square feet, that minimum for cottage clusters must be no greater than the minimum for single-family detached dwellings. *Id.* R. 660-046-0220(4)(a).

160. That frontage requirement may be no greater than twenty feet and the large city may allow that frontage to be on a public or private street or alley or on a common driveway; however, if that city allows flag lots or parcels, it is not required to allow townhouse development on them. *Id.* R. 660-046-0220(3)(b).

161. *Id.* R. 660-046-0220(4)(b).

162. For townhouses, if a large city uses density maximums, the maximum applicable to townhouses must be at least the lesser of four times the maximum density for single-family detached dwellings in the same zone or 24 dwelling units per acre. *Id.* R. 660-046-0220(3)(c). For cottage clusters, there can be no density maximums and those developments “must meet a minimum density of at least four units per acre.” *Id.* R. 660-046-0220(4)(c).

163. For townhouses, Oregon Administrative Rule 660-046-0220(3)(d) prohibits large cities from establishing setback limits greater than those for detached single-family dwellings in the same zone and from providing greater than zero-foot side setbacks for lot or parcel lines where townhouses are attached. For cottage clusters, Oregon Administrative Rule 660-046-0220(4)(d) requires perimeter setbacks to be the lesser of ten feet or the perimeter setback for single-family dwellings in the same zone and distance requirements between structures to be the lesser of ten feet or the distance requirement provided under the applicable building code.

164. For townhouses, Oregon Administrative Rule 660-046-0220(3)(e) prohibits use of height limits lower than those applicable to single-family structures in the same zone, and raises those height limits to three stories if the large city requires covered or structured parking for townhouses (with the alternative being at least two stories otherwise). Cottage clusters do not have height prohibitions; however, Oregon Administrative Rule 660-046-0220(4)(e) sets limits on large city regulation of dwelling unit sizes, so that the number or maximum size of units may be regulated so long as there is a maximum building footprint of 900 square feet per dwelling unit, allowing the large city to exempt up to 200 square feet per unit in calculating that footprint to accommodate an attached garage or carport. However, the large city may not include detached garage, carport or accessory structures in those calculations.

costs.¹⁶⁵ Finally, lot coverage and bulk and scale limitations on large city regulation of these housing types are designed to encourage their use and compare favorably to those limits on single-family houses in the same zone.¹⁶⁶ In addition to these limitations, large cities are given other specific directions to facilitate these housing types.¹⁶⁷

Two additional rule provisions are also relevant to middle housing in large cities. First, existing single-family dwellings may be converted or added to, in order to accommodate middle housing, so long as “the addition or conversion does not increase nonconformance with applicable clear and objective standards, unless increasing nonconformance is otherwise permitted by the Large City’s development code.”¹⁶⁸

Second, a large city may adopt “alternative siting or design standards” to those provided in the rules, except to those provisions that relate to minimum lot or parcel size or to maximum density requirements, if the city submits to DLCD “findings and analysis demonstrating that the proposed standard or standards will not, individually or cumulatively, cause

165. For townhouses, Oregon Administrative Rule 660-046-0220(3)(f) prohibits requiring more than one off-street parking space per unit (though allowing that city to allow on-street parking credits to satisfy off-street parking requirements) and requires the large city to apply the same off-street parking surfacing, dimensional, landscaping, access, and circulation standards that apply to single-family detached dwellings in the same zone. For cottage clusters, Oregon Administrative Rule 660-046-0220(4)(e) also prohibits parking requirements in excess of one off-street parking space per unit and allows the use of on-street parking credits, but prohibits cities from requiring that off-street parking be provided in a garage or carport.

166. For townhouses, Oregon Administrative Rule 660-046-0220(3)(g) does not require a large city to have bulk or scale standards for new projects, but if a city does regulate in these areas (including but not limited to provisions including lot coverage, floor area ratio, and maximum unit size) “those standards cannot cumulatively or individually limit the bulk and scale of the cumulative Townhouse project greater than that of a single-family detached dwelling.” For cottage clusters, under Oregon Administrative Rule 660-046-0220(4)(g), the large city may not apply lot or parcel coverage or floor area ratio standards to cottage clusters.

167. For townhouses, Oregon Administrative Rule 660-046-0220(3)(h) requires large cities to “work with an applicant” to determine whether sufficient infrastructure can or will be provided upon submittal of an application. Oregon Administrative Rule 660-046-0220(4)(h) allows large cities the use of separate lots or parcels for cottage cluster developments.

168. *Id.* R. 660-046-0230. The conversion must thus be consistent with Oregon Administrative Rule 660-046-0205(2). Perhaps the limitation is likely imposed to limit the use of discretion in such conversions or additions. If so, that end may be defeated if the increase be discretionary. If middle housing is created through this addition or conversion, any large city or utility provider that grants “clear and objective exceptions to public works standards to detached single-family dwelling development “must allow” the grant of a similar exception to middle housing. Specific detailed provisions are made for conversion of a single-family dwelling to a cottage cluster. *Id.* R. 660-046-0230(3).

unreasonable cost or delay to the development of Middle Housing.”¹⁶⁹ The DLCD is given a series of factors to evaluate these applications and, presumably, must use the findings demonstrating such consideration in order to approve or deny the alternative standards.¹⁷⁰ Although demonstration of the required factors likely will require a “heavy lift” for those local governments that seek to deviate from the standards imposed by the rules, the option to adopt alternative standards provides cities with the flexibility necessary to develop innovative standards to facilitate equitable middle housing development and achieve other compelling purposes such as, for example, standards intended to increase the accessibility of middle housing units for people with disabilities.

C. Infrastructure-Based Time Extensions

In enacting the statewide reform of residential zoning, the Oregon legislature responded to concerns that infrastructure to support density increases might not already be in place¹⁷¹ by providing LCDC the authority to grant an extension of the deadline to amend comprehensive plans and land use regulations to comply with the new law.¹⁷² The scope of the extension is limited in terms of time, geographic area, and subject matter:

An extension under this section may be applied only to specific areas where the local government has identified water, sewer, storm drainage or transportation services that are either significantly deficient or are expected to be significantly deficient before December 31, 2023, and for which the local government has established a plan of actions that will remedy the deficiency in those services that is approved by the department. The extension may not extend beyond the date that the local government intends to correct the deficiency under the plan.¹⁷³

169. *Id.* R. 660-046-0235.

170. To apply these factors, the large city must consider “how a standard or standards, individually and cumulatively,” affect the following factors in comparison to what would otherwise be required under Oregon Administrative Rules 660-046-0220 and 660-046-0225: “(1) The total time and cost of construction, including design, labor, and materials; (2) The total cost of land; (3) The availability and acquisition of land, including in areas with existing development; (4) The total time and cost of permitting and fees required to make land suitable for development; (5) The cumulative livable floor area that can be produced; and (6) The proportionality of cumulative time and cost imposed by the proposed standard or standards in relationship to the public need or interest the standard or standards fulfill.” *Id.* R. 660-046-0235.

171. Goal 11, Public Facilities and Services, is designed to provide the facilities and services to serve all urban uses during the twenty-year planning period. OR. ADMIN. R. 660-015-0000(15). See, Edward J. Sullivan & Benjamin H. Clark, *A Timely, Orderly, and Efficient Arrangement of Public Facilities and Services—The Oregon Approach*, 49 WILLAMETTE L. REV. 411 (2013). It is possible that the demand for these facilities and services may precede their availability; hence, the availability of the extension to provide the same.

172. 2019 Or. Laws Ch. 639, sec. 4(1). The statute contemplates “an” extension.

173. *Id.*, sec. 4(2). If an extension has not been approved, the local government must either comply with the new law by adoption of plan and land use regulatory amendments

LCDC adopted administrative rules to clarify the form and substance of requests for an infrastructure-based extension¹⁷⁴ and provide details as to the nature of deficiencies in water, sewer, storm drainage or transportation services that may constitute a sufficient basis for an extension.¹⁷⁵

Medium cities had until December 31, 2020, to request an extension and large cities had until June 30, 2021.¹⁷⁶ Only one medium city (Newberg, Oregon) and one large city (Forest Grove) applied for such an extension.¹⁷⁷

that meet those standards or apply the Model Code provisions, which achieve the same objectives.

174. OR. ADMIN. R. 660-046-0300 to -0370. The adopted rules provide the details for the content and completeness of applications. *Id.* R. 660-046-0350 to -0360. Aside from the details regarding the filing and consideration of applications, Oregon Administrative Rule 660-046-0360(5) sets out the “considerations” the department must make in evaluating applications, requires it to respond to “valid” third-party comments, and allows the Department to condition approval of extensions under subsections (6) and (7). Finally, detailed appeal provisions are found in subsection (8).

175. The administrative rules identify the infrastructure deficiencies that would justify an extension:

“Significant infrastructure deficiency” means a local government has met the burden of proof to demonstrate a situation or situations where the following exists:

- (a) A local government or service provider is unable to provide acceptable service levels within a developed, or developing, area zoned to allow detached single-family dwellings; or
- (b) A local government or service provider anticipates that it will be unable to provide acceptable service levels by December 31, 2023, based either on extrapolated current development rates alone, or based on extrapolated current rates and additional anticipated Middle housing development.
- (c) There is no single service level for demonstrating a significant infrastructure deficiency for transportation infrastructure. Supporting information regarding the magnitude and severity of the deficiency must support a determination that the deficiency has a significant impact on transportation function or safety in the affected area. Higher street classifications, traffic volumes, and impacts to the function of transportation corridors, rather than a single intersection, will help to support the significance of the transportation deficiency. The severity of safety issues may be supported with information such as crash data, posted speed limits, sight distance at intersections, or similar information.

OR. ADMIN. R. 660-046-0320(6). Other limitations on the use of the extension include exclusions of infrastructure deficiencies if they could be addressed by improvements required in conjunction with a single-family dwelling (*id.* R. 660-046-0330(1)) or through Oregon’s statutory moratorium process, OR. REV. STAT. § 197.505 to .540 (OR. ADMIN. R. 660-046-0330(2)).

176. OR. ADMIN. R. 660-046-0350(1).

177. See Letter from Doug Rux, Newberg Community Development Director to LCDC, Dec. 31, 2020 (on file with the authors) (well-documented request identifying lack of fire flow capacity that will not be fully met until 2029); Email from Robert Mansolillo,

Notwithstanding that LCDC granted Newberg's extension,¹⁷⁸ the city amended its code by the statutory deadline for medium cities.¹⁷⁹ DLCD has 120 days from the date of Forest Grove's IBTER request to approve, approve with conditions, or deny the request.¹⁸⁰

II. Early Implementation Trends and Challenges

This section examines early efforts by cities in Oregon to update their plans and codes to implement the new law.

A. Medium Cities

On June 30, 2021—the statutory deadline for medium cities to conform their land use codes to HB 2001—twenty-one Oregon cities met the statutory definition of a medium city.¹⁸¹ With financial and technical assistance from the Oregon Department of Land Conservation and Development, eighteen of these cities have amended their land use laws to comply with the new legislation; the default model code regulations apply in the three cities that did not amend their laws by the statutory deadline.¹⁸²

The middle housing rules establish the minimum standards for facilitating duplex development. An indicator of whether cities are fully committed to housing choice and affordability is whether their amended codes go beyond the minimum standards. For example, although the rules are satisfied by a city allowing attached duplexes with a shared wall or breezeway (side-by-side units) on lots in residential zones that allow single-family detached houses, cities can support more housing production and choice by also allowing stacked (upstairs-downstairs units) and detached duplexes.

Housing Policy Analyst, Oregon Department of Land Conservation and Development, to Sarah J. Adams-Schoen & Edward J. Sullivan, July 6, 2021 (on file with authors).

178. LCDC granted the City of Newberg's application at its meeting of March 18–19, 2021.

179. See NEWBERG, OR., DEV. CODE § 15.05.030 (2021).

180. OR. ADMIN. R. 660-046-0360(5).

181. Or. Dep't of Land Conservation & Development, Cities Required to Expand Housing Choices by HB 2001 (undated), https://www.oregon.gov/lcd/UP/Documents/2019-11-20_CityList_HB2001_HB2003.pdf (based on 2019 population estimates). An additional city, Baker City, qualified as a "medium city" in 2021 and, under Oregon Administrative Rule 660-046-0040(3), will have one year from the date of qualification to comply with the medium housing requirements. Email from Sean Edging, Housing Policy Analyst, Oregon Department of Land Conservation and Development, to Sarah J. Adams-Schoen & Edward J. Sullivan (June 11, 2021) (on file with authors). The City of Molalla, a city with a population of 9,910, has also adopted code changes to allow duplexes in all residential districts. MOLALLA, OR., ORD. 2021-09.

182. Those cities are Canby, Central Point and Klamath Falls. Robert Mansolillo, Hous. Planner, Or. Dep't of Land Conservation and Dev., Addressing the Land Conservation and Development Commission, Agenda Item #8, Reporting and Monitoring of Middle Housing (HB 2001) Compliance at 05:06:12 (July 22, 2021), https://lcd.granicus.com/MediaPlayer.php?view_id=1&clip_id=106&meta_id=1928.

Side-by-side units tend to cost more to build than stacked units.¹⁸³ Additionally, many homeowners may find converting their existing home to a duplex is unfeasible, undesirable, or more expensive than converting an existing detached structure (such as a detached garage) or adding a second detached unit.¹⁸⁴ Codes that allow detached, attached with a shared wall, and stacked options also facilitate more economical duplex development by allowing duplexes to be developed on a wider range of lots.¹⁸⁵ Detached duplexes may also be more marketable in some contexts.¹⁸⁶ So far, nearly all medium cities have proposed or adopted code amendments that define “duplex” or “two-family dwelling” to include both attached shared-wall duplexes and stacked duplexes,¹⁸⁷ and at least six medium cities have opted to permit detached duplexes as of right wherever duplexes are permitted.¹⁸⁸

183. FIXR, HOW MUCH DOES IT COST TO BUILD A DUPLEX (updated May 31, 2021), <https://www.fixr.com/costs/build-duplex>. The cost of roofing, foundations and plumbing fixtures tend to be lower for stacked duplexes. *Id.*

184. *See id.* (reporting national average cost to convert single-family home to duplex was between \$80,000 and \$100,000 in 2017); CARMEL FORD, NATIONAL ASSOCIATION OF HOME BUILDERS ECONOMICS & HOUSING POLICY GROUP, COST OF CONSTRUCTING A HOME (Jan. 2, 2020), <https://www.nahb.org/-/media/8F04D7F6EAA34DBF8867D7C3385D2977.ashx> (reporting NAHB Construction Cost Survey for 2019 showed national average construction cost for a single-family unit was approximately \$114 per square foot).

185. *See generally* HANNAH HOYT & JENNY SCHUETZ, BROOKINGS INSTITUTE REPORT, FLEXIBLE ZONING AND STREAMLINED PROCEDURES CAN MAKE HOUSING MORE AFFORDABLE (May 19, 2020).

186. *See* Teri Slavik-Tsuyuki, *America at Home: Almost Half of Renters Want to Buy a Home After COVID-19*, BUILDER, June 12, 2020, https://www.builderonline.com/design/consumer-trends/america-at-home-almost-half-of-renters-want-to-buy-a-home-after-covid-19_o (reporting findings from 2021 survey of renter households earning \$50,000 or more, which showed strongest demand among those who want to continue renting is to rent single-family detached home rather than attached duplex, townhouse or apartment).

187. The following cities define duplexes to include attached shared-wall and stacked duplexes: COTTAGE GROVE, OR., DEV. CODE TIT. 14.3 (2021); DALLAS, OR., DEV. CODE § 6.1.030 (2021); HERMISTON, OR., DEV. CODE § 157.002 (2021); ONTARIO, OR., DEV. CODE § 10A-03-74.5 (2021); PRINEVILLE, OR., DEV. CODE § 153.004 (2021). Four more medium cities specify that duplexes are attached and do not limit the allowable configurations of attached duplexes. LA GRANDE, OR., LAND DEV. CODE § 1.3.002 (2021); NEWBERG, OR., DEV. CODE § 15.05.030 (2021); NEWPORT, OR., DEV. CODE § 14.01.020 (2021); PENDLETON, OR., UNIFIED DEV. CODE § 3.10.3 (2021).

188. ASHLAND, OR., DEV. CODE § 18.6.1.030 (2021); COOS BAY, OR., DEV. CODE § 17.150 (2021); ROSEBURG, OR., DEV. CODE § 12.02.090 (2021); ST. HELENS, OR., MUN. CODE § 17.16.010 (2021); DALLES, OR., MUN. CODE § 10.2.030 (2021). The City of Pendleton does not permit detached duplexes, but does permit in all residential districts two attached or detached single-family dwelling units on one lot, as well as townhouses. PENDLETON, OR., UNIFIED DEV. CODE Tbl. 3.1. The City of Prineville conditionally permits detached duplexes. PRINEVILLE, OR., DEV. CODE § 153.004 (2021).

Similarly, the rules allow a maximum of one required off-street parking space per unit, although the rules also allow cities to establish a parking credit system by which off-street parking requirements may be met without supplying all or part of these parking spaces.¹⁸⁹ Grounds for allowing credits range from availability of existing street space, proximity to public transit, and use of angled parking.¹⁹⁰ Cities can facilitate production of more affordable duplexes by requiring fewer than one off-street parking space per unit.¹⁹¹ So far, no medium cities have done this¹⁹²; however, at least one medium city included in its HB 2001 code amendments a voluntary reduction in the minimum number of spaces that the city requires for triplexes (reducing the minimum from two to one space per dwelling unit),¹⁹³ and another medium city voluntarily reduced the minimum for triplexes, quadplexes, cottage clusters, and apartments to one space per dwelling unit.¹⁹⁴

Illustrative of the widespread misperception that each U.S. household has and needs two cars,¹⁹⁵ many cities appeared to struggle with the new

189. The relevant middle housing rules on parking, OR. ADMIN. R. 660-046-0120(5) and -0220(2)(e), (3)(f) and (4)(f), allow for parking credits to satisfy off-street parking requirements and, with respect to duplexes, triplexes, and townhouses, large cities “must apply the same off-street parking, surfacing, dimensional, landscaping, access, and circulation standards that apply to single-family detached dwellings in the same zone.” *Id.* R. 660-046-0220(2)(e)(E), (3)(f)(C).

190. See e.g., AM. PLAN. ASS’N PLANNING ADVISORY SERVICE, PARKING SOLUTIONS (2009), https://planning-org-uploaded-media.s3.amazonaws.com/document/product_EIP_E_IP24.pdf, for examples of parking credits.

191. Section F(3) of the Model Code for medium cities would invalidate off-street parking requirements for duplexes. See OR. ADMIN. R. 660, Div. 046, Ex. A. For large cities, the Model Code would authorize credits for on-street parking if the following conditions exist: “i. The space must be abutting the subject site; ii. The space must be in a location where on-street parking is allowed by the jurisdiction; iii. The space must be a minimum of 22 feet long; and iv. The space must not obstruct a required sight distance area.” OR. ADMIN. R. 660, Div. 046, Ex. B.

See OR. ADMIN. R. 660, Div. 046, Ex. B, Ch. 3(B)(7)(b) (triplexes and quadplexes); Ch. 4(B)(5)(b) (townhouses) and Ch. 5(B)(7)(b) (cottage clusters).

192. Medium city proposed and adopted codes are on file with the authors.

193. DALLES MUN. CODE § 10.7.060.010 (amended June 14, 2021).

194. COTTAGE GROVE DEV. CODE tbl. 14.33.330 (amended Feb. 8, 2021).

195. See OR. DEP’T OF LAND CONSERVATION & DEV., PARKING AND MIDDLE HOUSING: ANALYSIS OF DEMAND AND IMPACTS—IMPLICATIONS FOR MIDDLE HOUSING RULEMAKING 2 (Mar. 30, 2020) [hereinafter PARKING AND MIDDLE HOUSING] (“In all cities impacted by HB 2001, the majority of smaller and rental households have zero or one car.”); AM. ASS’N OF STATE HWY. & TRANSP. OFFICIALS, COMMUTING IN AMERICA: THE NATIONAL REPORT ON COMMUTING PATTERNS AND TRENDS 15, 19 (2021) [hereinafter NAT’L REPORT ON COMMUTING PATTERNS] (in 2017, 8.6% of U.S. households were zero-vehicle households, but more than 75% of households with incomes in the bottom quartile were zero-vehicle households); U.S. DEP’T OF TRANSPORTATION, BUREAU OF TRANSPORTATION STATISTICS, HOUSEHOLD, INDIVIDUAL, AND VEHICLE CHARACTERISTICS, Dec. 1, 2011, <https://www.bts>

rule that they require no more than one off-street parking space per dwelling unit.¹⁹⁶ In fact, one city observed that the parking requirement was a heavier lift than the requirement that duplexes be permitted as of right in all residential districts that allow single-family detached dwellings. In reviewing its HB 2001 housing code audit, the City of Pendleton Housing and Neighborhood Improvement Committee observed:

The main findings are good news in that the City land use regulations are supportive of developing middle housing in many areas. Duplexes are allowed in all of the zones where they ought to be allowed. There are really only two fixes that are recommended to comply with the Bill[,] one of which has to do with the maximum allowed density in residential zones. *The second is more challenging[,] which has to do with minimum parking requirements for duplexes.*¹⁹⁷

Finally, some medium city officials and residents also objected to the new state requirements as an infringement on their local authority over land uses. For example, the City of Hermiston planning department staff included the following comment in a report to the Planning Commission on the recommended HB 2001 code amendments:

.gov/archive/publications/highlights_of_the_2001_national_household_travel_survey/section_01 (reporting that renter households were almost six times as likely as nonrenter households to have zero vehicles, households living in condominiums or apartments were almost five times as likely as households living in nonapartment dwellings to have zero vehicles, and households in urban areas were more than twice as likely than those in rural areas to have zero vehicles).

196. See, e.g., Kelly O'Neil, Jr., Dev. Servs. Dir., City of Sandy, Or., addressing Land Conservation and Development Commission, HB 2001 Code Amendments: Background and Lessons Learned, at 05:24:45 (July 22, 2021) (describing off-street parking limit as "probably the biggest concern we heard from elected officials, the planning commission and the public"), https://lcd.granicus.com/MediaPlayer.php?view_id=1&clip_id=106&meta_id=1928. Notwithstanding the research on parking demand conducted during the rulemaking process, see PARKING AND MIDDLE HOUSING, *supra* note 195, discussions of parking at public meetings regarding conforming local plans and regulations to the new rules tended to focus on anecdotal evidence:

In almost every city discussion I've attended where they've talked parking, I've heard something to the effect of "we don't have robust transit and are a more car dependent community," yet the data suggest that their car ownership isn't substantially different than other communities in the Metro (in fact, the Metro is where there is the biggest variation, with affluent, exclusive satellite communities having more cars . . .).

Email from Sean Edging, Housing Policy Analyst, Oregon Department of Land Conservation and Development, to Sarah Adams-Schoen and Edward Sullivan (July 27, 2021) (on file with authors).

197. CITY OF PENDLETON, HOUSING AND NEIGHBORHOOD IMPROVEMENT COMMITTEE MINUTES (Dec. 1, 2020), <https://cityofpendletonor.civicweb.net/filepro/document/66237/Housing%20and%20Neighborhood%20Improvement%20Committee%20-%2001%20Dec%202020%20-%20Minutes%20-%20Draft.docx>.

It is important to state in this report and for the record that the City does not agree with the method of amendment as a legislative fiat. The requirement that all cities over 10,000 unilaterally amend their development codes goes against the fundamental concept of home rule. The City will continue to explore alternative paths to maintain a level of development control consistent with the desires of the citizens of the City of Hermiston. ORS 197.307(6) allows cities to create an alternative path to development as long as the required clear and objective path is maintained. The recommendation of the planning commission and city council at a joint work session in March was to explore these alternative paths for future consideration.¹⁹⁸

Local resistance to state preemption is nothing new in Oregon or elsewhere,¹⁹⁹ and is especially commonplace when the state legislates in the area of land use law given the nearly ubiquitous perception in U.S. cities of land use as an inherently local governmental function. Local governments and many local residents also view land use planning and lawmaking as necessary to respond to local conditions and preferences.²⁰⁰ Unlike most states, however, Oregon has for nearly 50 years taken a supervisory role in local land use planning and decision making²⁰¹ and the Oregon legislature frequently enacts legislation with a view to preempt substate entities from actions that frustrate state policy. For example, Or. Rev. Stat. § 197.013

198. CITY OF HERMISTON PLANNING DEPARTMENT, HB 2001 TWO FAMILY DWELLING CODE AMENDMENTS, STAFF REPORT FOR PLANNING COMMISSION MEETING OF MAY 12, 2021. It should be noted that the duplex requirements for medium cities are not subject to the “alternative track” provisions applicable to clear and objective standards, conditions, or procedures” that may be otherwise applied to housing under OR. REV. STAT. § 197.307(6).

199. See, e.g., *City of Damascus v. Brown*, 472 P.3d 741, 749 (Or. 2020) (regarding local government claim that home rule authority to establish and modify their political structures was unlawfully restricted by state statute); *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 666 (Ariz. 2017) (local government claimed home rule powers were unlawfully restricted by state statute prohibiting city ordinance requiring the destruction of certain firearms obtained by city).

200. Richard Briffault, *Our Localism: Part I-the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 23–24 (1990). Local governments have, albeit grudgingly, accepted that implementation and enforcement of LCDC acknowledged comprehensive plans are matters of statewide concern. LEAGUE OF OREGON CITIES MUNICIPAL HANDBOOK, Ch. 2, Home Rule and Its Limits, https://www.orcities.org/application/files/3715/9917/4968/Handbook_-_Chapter_2_Home_Rule_and_Its_Limits.pdf.

201. See *supra* notes 50-52 and accompanying text (describing aspects of Oregon’s statewide planning system). The Oregon Supreme Court upheld a preemptive state role in land use matters in *Tillamook County v. LCDC*, 642 P.2d 691 (Or. 1981), *rev. den.*, 648 P.2d 854 (Or. 1982). The Oregon Court of Appeals upheld a statute that provided a means of siting a light rail line against objections, *inter alia*, that local prerogatives were violated. *Seto v. Tri-Met*, 814 P.2d 1060, 1064-66 (Or. App. 1991). More recently, the Oregon Court of Appeals upheld the power of the regional planning agency in the Portland metropolitan area to designate and direct the use of lands over city objections. *City of Sandy v. Metro*, 115 P.3d 960, 967-68 (Or. App. 2005).

declares that implementation and enforcement of local comprehensive plans and land use regulations that have been acknowledged by LCDC are matters of “statewide concern.”

In enacting HB 2001, the Oregon legislature recognized that entrenched land use patterns and local politics favored the allocation of most residential land for single-family detached housing, an allocation that inflates home and rental prices, undermines affordable housing production, worsens the State’s housing crisis, and continues to entrench the racial, ethnic and class segregation of neighborhoods. The state legislature thus deemed the continued use of restrictive residential zoning a matter of statewide concern that required state preemption.²⁰² Because the legislature enacted HB 2001 to address a matter of statewide concern, the law will likely survive challenges based on local home rule authority.

B. Large Cities

It is difficult to anticipate the issues that will arise over the next year as the thirty-four cities subject to the large city rules adopt or amend measures to comply with the new law by the statutory deadline of June 30, 2022. The middle housing requirements for these cities are more complex than the relatively simple addition of a housing unit, which for medium cities nevertheless required extensive public engagement and revision of their development codes.²⁰³

There are other practical issues. For example, although housing in Oregon must generally be allowed under “clear and objective standards, conditions, or procedures,”²⁰⁴ local governments may use discretion as a means of encouraging an applicant to fulfill its planning objectives, so long as that applicant also has a “clear and objective track” as a fallback position.²⁰⁵ Local governments often use increased density as an incentive to an applicant to encourage the use of certain discretionary design regulations. Increasing required minimum density may lessen the frequency and effectiveness of these incentive measures.

Moreover, the public perception of density, particularly by those in single-family detached neighborhoods, may detract from public support for these changes. For example, the uniform one-space per dwelling unit maximum parking requirement engenders skepticism and resistance, which the use of parking credits (discussed above) and experience²⁰⁶ must

202. H.B. 2001, 2019 Leg., Reg. Sess. (Or. 2019), codified at OR. REV. STAT. § 197.758.

203. See, e.g., O’Neil, *supra* note 196, at 05:23:36 (stating that city initially thought it did not need DLCD grant assistance to amend its code to comply with medium city requirements, but city underestimated size of project, which ultimately required educating the public, planning commission and council; modifying 10 chapters of city development code; and two public meetings and three public hearings).

204. OR. REV. STAT. § 197.307(4).

205. *Id.*

206. Residential neighborhoods in larger cities appear to have adapted themselves to the lack of off-street parking facilities and have increased the demand for public transit.

address. Concerns some medium city residents raised about the one-space per dwelling unit off-street parking maximum likely foreshadow even more strenuous objections in more dense large city neighborhoods.

Parking demand data, however, suggests these concerns are often more of a perception problem than an actual congestion problem.²⁰⁷ Although fewer than ten percent of U.S. households nationally are zero-vehicle households and most U.S. households own more than one car, households that are likely to live in middle housing are significantly more likely to be zero- or one-vehicle households.²⁰⁸ As part of the HB 2001 rulemaking, DLCDC researched parking demand and cost impacts of off-street parking requirements. The study found that middle housing residents typically own zero or one car and the cost of unnecessary off-street parking significantly increases housing costs without appreciable benefit to the residents:

“For all cities, the majority of smaller and rental households have zero or one car, and requirements for additional off-street parking create an additional cost that these households have to bear with no benefit either to the household or community at large. This represents what economists refer to as deadweight loss or lost economic efficiency. Unlike taxes, which can be reinvested to offset deadweight loss imposed by the tax, parking requirements do not raise revenue to reinvest, so the deadweight loss imposed by parking mandates are borne entirely by households and producers.”²⁰⁹

Regarding the significant costs related to off-street parking minimums, the DLCDC study reported that:

Nationwide, the cost of garage parking to renter households is approximately \$1,700 per year, or an additional 17% of a housing unit’s rent. One parking space per unit increases costs by approximately 12.5%, and two parking spaces can increase costs by up to 25%. This effect is more pronounced for lower priced housing.²¹⁰

Additionally, the study reported that minimum off-street parking requirements incentivize developers to build larger, less affordable housing.²¹¹

Although the new rules require that the scale of middle housing match that of single-family dwellings, rather than larger-scale apartment complexes, public perception of density has engendered complaints about scale and massing since the inception of exclusive single-family zoning.²¹² Early

See NAT’L REPORT ON COMMUTING PATTERNS, *supra* note 195, at 21–23.

207. See *supra* note 196 (citing studies).

208. PARKING AND MIDDLE HOUSING, *supra* note 196, at 2, 5–10; see also *id.* at 11–12 (citing relevant literature).

209. *Id.* at 2.

210. *Id.* at 3.

211. *Id.*

212. Email from Sean Edging, Housing Policy Analyst, Or. Dep’t of Land Conservation & Dev., to Sarah Adams-Schoen & Edward Sullivan (June 11, 2021) (on file with authors). While large cities have considerable latitude in setting dimensional standards, Edging also points out that burdensome standards (such as those relating to frontage

twentieth century zoning advocacy documents often justified the need for exclusive single-family zones based on “some vague danger to light and air in an area dominated by [single-family] residences” often accompanied by illustrations of single-family detached homes dwarfed by large apartment buildings built to the lot lines.²¹³ The intentional and unintentional exclusionary effect²¹⁴ of such scale and mass concerns is tempered in Oregon by the preexisting requirement that housing developments be subject only to “clear and objective standards, conditions, and procedures.”²¹⁵

Historic resistance to even modest reforms of exclusive single-family zoning, such as laws making accessory dwelling units (ADUs) permissible by-right, also provides a preview of the resistance large cities can expect.²¹⁶ Reflective of this resistance, some large cities may attempt to discourage middle housing development by imposing burdensome requirements on middle housing that they do not impose on single-family detached housing and that are not justified for middle housing that is compatible in scale and intensity to single-family detached housing. Examples include distinct landscape or pedestrian pathway requirements for middle housing. Although such requirements may appear innocuous, they can drive up the cost and timeframe of housing development.²¹⁷ However, while large cities have considerable latitude in setting dimensional standards, burdensome standards will run up against the statutory prohibition on “siting or design standards” that individually or cumulatively cause unreasonable cost or delay.²¹⁸

An effort to constrain one large city’s housing reform efforts is already underway. A prospective initiative petition seeks to pose the following

and access) will run up against the prohibition on “siting or design standards” that individually or cumulatively cause unreasonable cost or delay. *Id.*; see OR. ADMIN. R. 660-046-0205(3)(B)(E)(iv), -0210(2)(b), -0235.

213. See, e.g., Edward Bassett, ZONING (Nat’l Mun. League 1922); see also Sonia Hirt, *Home, Sweet Home American Residential Zoning in Comparative Perspective*, 33 J. PLAN. EDUC. & RSCH. 1, 7–8 (2013) (reviewing stated rationale for excluding multi-family structures from single-family districts in early zoning documents).

214. See Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS’N 125, 139–40 (2000) (finding low-density residential zoning has historic and current correlation to racial exclusion); Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS (June Thomas Manning & Marsha Ritzdorf eds., 1997).

215. OR. ADMIN. R. 660-046-0115.

216. See, e.g., *Kamps-Hughes v. City of Eugene*, 305 Or. App. 224, 233 (2020) (rejecting City of Eugene’s argument that minimizing density and thereby limiting traffic, increasing livability, and preserving neighborhood character were reasonable siting standards as applied to an ADU; characterizing these standards as “essentially policy arguments” against ADU development in existing residential neighborhoods, contrary to the intent of the legislature as expressed in Oregon Revised Statutes § 197.312).

217. See HOYT & SCHUETZ, *supra* note 186.

218. OR. ADMIN. R. 660-046-0205(3)(B)(E)(iv), -0210(2)(b), -0235.

question to voters in the City of Eugene: “Shall voters adopt a protected ordinance amending the definitions of duplex, triplex, and four-plex to prohibit detached dwelling units?”²¹⁹ As discussed above, restrictions on the form of duplexes or other permitted middle housing types are likely to increase construction costs and decrease the number of lots that can accommodate middle housing development—which is why the rules encourage cities to allow all configurations subject only to objective siting and design standards that do not unreasonably delay or add costs to the development of the middle housing type.²²⁰ The effort to limit Eugene’s middle housing is particularly pernicious because the “protected ordinance” purports to prohibit the City Council from adopting any future ordinance that would allow detached duplexes, triplexes, or quadplexes.²²¹ While the lawfulness of this proposed initiative is open to question, the use of an instrument that purports to advance “direct democracy” by limiting a future city council’s ability to respond to a housing crisis must be confronted.

Notwithstanding pervasive entrenched resistance to the diversification and densification of neighborhoods dominated by single-family detached homes, some of Oregon’s large cities are responding to the middle housing law by engaging in thorough and innovative public engagement processes and proposing code amendments that may be characterized as best practices. For example, the City of Eugene has engaged citizens through Facebook live mini-lectures and Q&A sessions on housing economics, the racist history of exclusive residential zoning, and other topics; an Equity Roundtable; and a tool called “Meeting in a Box,” as well as other strategies designed to engage and solicit feedback from a diverse range of community members.²²² The City also partnered with Healthy Democracy, a non-

219. See Memorandum from Eugene City Recorder to Mayor and City Council attaching a ballot title for a prospective initiative petition (June 2, 2021) (on file with authors).

220. See OR. ADMIN. R. 660-046-0020 (providing that medium or large cities may define duplex to include detached dwelling units and large cities may define triplexes and quadplexes to include any combination of attached or detached dwelling units); MODEL CODE FOR MEDIUM CITIES, OR. ADMIN. R. 660-046-0010(4), Exhibit A, Figs. 1–4 (illustrating shared dwelling wall, shared breezeway wall, shared garage wall, and stacked duplex configurations); MODEL CODE FOR LARGE CITIES, OR. ADMIN. R. 660-046-0010(4), Exhibit B, ch. 1(B) (defining duplex, triplex, and quadplex as two, three, and four dwelling units “on a lot or parcel in any configuration,” respectively) and Figs. 7–8, 11 & 13 (illustrating detached configurations).

221. Petition 2021-1, Proposed Ord. for Adoption by Initiative § 2.

222. CITY OF EUGENE, FEBRUARY 2021 MIDDLE HOUSING PUBLIC ENGAGEMENT SUMMARY, <https://www.eugene-or.gov/DocumentCenter/View/61078/Middle-Housing-February-Public-Engagement-Report>. The “meeting in a box” tool included a discussion guide, middle housing walking tour, and feedback forms intended to help community members and groups like neighborhood associations provide input on the City’s implementation of the middle housing law. *Id.* at 8; see also CITY OF EUGENE, MIDDLE HOUSING CODE AMENDMENTS (IMPLEMENTATION OF HOUSE BILL 2001) PUBLIC INVOLVEMENT PLAN (approved Aug. 11, 2020).

profit that designs and coordinates deliberative democracy programs,²²³ to provide a diverse group of Eugene residents with an opportunity to deeply engage with issues related to middle housing and provide feedback to the City.²²⁴ The twenty-nine-member review panel met for thirty-five hours and produced four reports to advise the City on issues related to its implementation of the middle housing law.²²⁵ As part of this process, the panel drafted and ranked guiding principles. Apropos of the initiative petition discussed above, the review panel's top two guiding principles were:

- (1) Affordable housing is of paramount importance (Votes: Strongly Agree – 25, Somewhat Agree – 2, Neutral – 0, Disagree – 0), and
- (2) Provision for continuous improvement of policy; what we create will need to be revisited in the future. Establish a periodic form of review process on existing policy to change accordingly. Form a review process that is at least as representative as this Panel. (Votes: Strongly Agree – 25, Somewhat Agree – 3, Neutral – 0, Disagree – 0).²²⁶

All panelists also either “strongly agreed” or “agreed” that the City should “[a]llow any housing greater than two units which bring[s] the cost down for building and affordability in a greater number of neighborhoods across the city,” and “make the code less restrictive to remove barriers.”²²⁷

The City of Bend has completed a proposed middle housing code that exceeds many of the minimum standards provided in the large city model code.²²⁸ Bend's existing code allows duplexes and triplexes in any configuration (side-by-side attached, stacked, or detached), and its draft code would extend that flexibility to quadplexes.²²⁹ The draft code, if adopted, would also make duplexes, triplexes and quadplexes permitted by right in all residential zones, except that triplexes would be permitted in Bend's lowest-density residential zone only as part of a master plan.²³⁰ The proposed code requires a minimum of one off-street parking space per unit for

223. Healthy Democracy, <https://healthydemocracy.org/about>.

224. Healthy Democracy, 2020–21 Eugene Review Panel on Housing, <https://healthydemocracy.org/eugene>.

225. EUGENE REVIEW PANEL REPORT 4: REVIEW OF MIDDLE HOUSING DRAFT CODE & AFFORDABILITY CONSIDERATIONS 1–2 (Apr. 22, 2021), <https://healthydemocracy.org/wp-content/uploads/2020-21EugeneRP-Report-4-Review-of-Middle-Housing-Draft-Code-Affordability-Considerations.pdf> (summarizing process and reports).

226. EUGENE REVIEW PANEL FIRST REPORT: GUIDING PRINCIPLES 2 (Dec. 11, 2020). The principles are exclusively in the words of the panelists; the language was not edited by the City or Healthy Democracy staff. *Id.* at 1.

227. *Id.* at 3–4.

228. CITY OF BEND, PLANNING DEP'T, DRAFT DEVELOPMENT CODE UPDATE (June 25, 2021), <https://www.bendoregon.gov/home/showpublisheddocument/50286/637602193704970000>.

229. BEND, OR., DEVELOPMENT CODE ch. 1.2 (May 2021); CITY OF BEND, PLAN. DEP'T, DRAFT DEVELOPMENT CODE UPDATE, attach. A, at 9 (June 25, 2021) (defining quadplex).

230. *Id.* at 11.

duplexes and triplexes, but only a half space per unit for quadplexes and residential uses in a mixed-use development.²³¹ The proposed code would also incentivize affordable housing development by not only exempting all allowable forms of middle housing from maximum density standards, but also by exempting multi-unit affordable housing.²³²

In August 2020, the City of Portland passed code amendments that Michael Anderson of Sightline Institute referred to as “the most pro-housing reform to low-density zones in US history.”²³³ As part of the city’s Residential Infill Project, the city amended its zoning code to allow duplexes, triplexes, fourplexes, and mixed-income or below-market sixplexes in large swaths of the city’s three highest density single-dwelling residential zones.²³⁴ The reform also made allowable large group co-living homes, double ADUs, and tiny backyard home on wheels.²³⁵ Coupled with this reform, the city removed regulatory barriers that have inhibited middle housing development even when such development was permitted by right²³⁶—namely, mandatory minimum off-street parking requirements and overly restrictive caps on the size of new middle housing.²³⁷ Portland’s amended code uses a sliding scale to allow lot coverage to increase with the number of dwelling units, with a single unit limited to half the square footage of the lot, a duplex limited to three-fifths, and triplexes and fourplexes limited to seventy percent.²³⁸ In these ways, Portland’s reform goes beyond HB 2001, which allows cities to require one off-street parking space per unit and to impose more restrictive caps on building size than those allowed under Portland’s amended code.²³⁹

Portland’s amended code does, however, allow the city to regulate middle housing more restrictively than single-family detached housing in

231. *Id.* at 46.

232. *Id.* at 20–21.

233. Michael Anderson, *Portland Just Passed the Best Low-Density Zoning Reform in US History*, SIGHTLINE INST. (Aug. 11, 2020), <https://www.sightline.org/2020/08/11/on-wednesday-portland-will-pass-the-best-low-density-zoning-reform-in-us-history>.

234. City of Portland, Ord. No. 190093 (Aug. 12, 2020). The amended code will go into effect on August 1, 2021. The code amendment also allows larger price-regulated fourplexes. *Id.*

235. *Id.*

236. See Michael Anderson, *Do Portland’s Low-Density Zones Need a “Deeper Affordability” Option?*, SIGHTLINE INST. (Jan. 10, 2020), <https://www.sightline.org/2020/01/10/do-portlands-low-density-zones-need-a-deeper-affordability-option/> (discussing and presenting data regarding the effect of building lot coverage restrictions on building and subsidy costs).

237. 2 CITY OF PORTLAND, RESIDENTIAL INFILL PROJECT, ZONING CODE, COMPREHENSIVE PLAN, AND TITLE 30 AMENDMENTS § 6 (adopted Aug. 12, 2020, by Ord. No. 190093) (showing revisions to PORTLAND, OR., ZONING CODE § 33.418 and tbl. 120-3 (maximum building coverage)).

238. *Id.* at 31 (amending PORTLAND, OR., ZONING CODE tbl. 110-4).

239. See *supra* notes 189, 191 (parking), 93, 158, 166 (lot coverage).

some areas of the city, including, for example, in conservation and historic districts.²⁴⁰ The 2020 reforms also did not affect middle housing allowable in the city's two lowest density single-dwelling zones,²⁴¹ and the amended code retains regulations of plan districts and historical landmarks that can prevent the development of middle housing.²⁴² The city is in the process of further amending its code to conform to the new middle housing law, which, among other things, requires the city to allow duplexes on all lots in all residential zones that allow single-family detached dwellings, subject to limited exceptions,²⁴³ and, for the most part, to subject middle housing to the same standards and restrictions the city applies to single-family detached housing.²⁴⁴

III. Will Implementation of Oregon's New Middle Housing Law Increase Housing Choice and Affordability?

This preliminary analysis of whether Oregon's new middle housing law will achieve its intended purpose by increasing housing choice and affordability and decreasing the mobility barrier of restrictive single-family zoning is just that—preliminary. Highly preferential regulatory treatment of the single-family home with a private yard and off-street parking has operated to stymie a half-century of federal, state, and local fair housing laws by inflating home prices and rents and ghettoizing multi-family and affordable housing.²⁴⁵ By requiring local governments to allow duplexes and other middle housing types in medium and large cities and by allowing the market to be the driving force to realize increased housing opportunities,

240. 2 RESIDENTIAL INFILL PROJECT, at 117 (discussing amendments to 33.110.265.E).

241. Comprehensive plan amendments adopted as part of the RIP ordinance continue to designate R10's primary use as single-dwelling residential. R10 "is intended for areas far from centers and corridors where urban public services are available or planned but complete local street networks or transit service is limited," and "areas where ecological resources or public health and safety considerations warrant lower densities." Reflecting Oregon's commitment to preserving farm uses, R20's primary uses are "[v]ery low-density single-dwelling residential and agriculture . . . uses." R20 is "intended for areas that are generally far from centers and corridors where urban public services are extremely limited or absent, and future investments in urban public services will be limited." *Id.* § 7.

242. 2 RESIDENTIAL INFILL PROJECT § 6. The project did increase the number of ADUs allowed from one to two on a lot in all zones (except areas covered by the z overlay) with a single-family dwelling and provide that an ADU is allowable on a lot with a duplex. *Id.* (amending PORTLAND, OR., ZONING CODE §§ 33.205.020, 33.205.040).

243. OR. ADMIN. R. 660-046-0205(1); *see also infra* part I.B. (discussing large city rules).

244. *See supra* notes 65, 72–80, 107, 116 accompanying text (discussing middle housing development limitations on goal-constrained lands).

245. *See* Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 444 (2020) (empirical analysis of contribution of facially-neutral land use regulations to racial segregation); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125, 133 (2000).

the new legislation offers the prospect of more diverse neighborhoods and takes a turn away from the segregative patterns that are hallmarks of American cities.²⁴⁶ However, numerous political, sociological, and logistical barriers remain that may prevent Oregon's new middle housing law from achieving this long-overdue reform.

A. Partial Dismantling of a Powerful Segregationist Legal Regime

Oregon's middle housing law has the potential to increase the diversity of housing options in residential areas that have used land use restrictions to exclude lower-income and other historically marginalized households since the inception of zoning in Oregon and throughout the United States.²⁴⁷ The removal of regulatory barriers to housing development, and, in particular, barriers to development of smaller-scale single family homes (clustered or as townhomes) and small-scale multifamily developments, will allow for the production of more housing at lower cost.²⁴⁸ To the extent that such development allows more households to move to higher amenity neighborhoods, more households will have the option to live in neighborhoods where city services and other amenities increase livability and homes and schools are not adjacent to land uses that are incompatible with residential life.²⁴⁹

By requiring cities to permit middle housing development in previously exclusive, amenity-rich neighborhoods, Oregon's middle housing law also has the potential to decrease the pace of gentrification in and displacement from less restrictively regulated, often lower-amenity, neighborhoods. "When cities prohibit development in amenity-rich neighborhoods . . . housing demand does not disappear. It moves to other neighborhoods—where it may fuel gentrification and displacement—and into the urban fringe, resulting in longer commutes, greater emissions, and less open space."²⁵⁰

246. See Hirt, *supra* note 212; Hirt, *supra* note 22; Trounstine, *supra* note 244.

247. See Sarah J. Adams-Schoen, *Dismantling Segregationist Land Use Controls*, 43 ZONING & PLAN. LAW REPS. 1 (2020); Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOCIO. 329 (1990); Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

248. See *infra* part III.B.

249. See generally Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993); see also Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 105 (1998) (discussing empirical evidence regarding land-use law reform and environmental justice); Alexandra M. Curley, *Relocating the Poor: Social Capital and Neighborhood Resources*, 32 J. URB. AFFS. 79, 79 (2010) (finding "neighborhood resources, such as libraries, recreation facilities, parks, grocery stores, and social services, followed by place attachment and feelings of safety, were the strongest predictors of social capital").

250. Trounstine, *supra* note 244, at 107–08.

Implementation of the middle housing law also offers an opportunity for local governments and the land use planning community to build trust with Black, Indigenous, and other People of Color, as well as other historically marginalized communities who have been and continue to be harmed by racist and xenophobic land use policies.²⁵¹ Although racial segregation is not usually an express justification for modern residential zoning actions,²⁵² justifications for preserving exclusively single-family detached residential zones continue to rely on language and themes that dehumanize the low-income and disproportionately BIPOC residents of multi-family housing—often implicitly suggesting that the people who reside in these homes are not families at all and that they do not value clean air, water, sunlight, quiet, or other such things.²⁵³

Additional reform is needed, however, to fully address land use law's role in ghettoizing lower-income and disproportionately BIPOC neighborhoods. The segregationist legacy of American residential zoning law extends beyond its preferential treatment of single-family neighborhoods. Early twentieth century segregationists who conceived of restrictive residential zoning as a mechanism to protect "high class neighborhoods" from physical and moral invasions saw no need to restrict land uses in other residential areas.²⁵⁴ Although they ultimately embraced the need for comprehensive zoning, the codes they drafted deemed high intensity land uses compatible with multifamily residential use²⁵⁵—a feature of American zoning that proliferated and remains nearly ubiquitous. Although Oregon's middle housing law indirectly addresses this harmful legacy of zoning by making single-family detached neighborhoods less restrictive, Oregon law continues to allow high-intensity land uses near multi-family residences notwithstanding local legislative determinations that these land uses are incompatible with residential life in single-family detached residential zones.²⁵⁶

To illustrate just one example of the disregard for the health and dignity of people who live in less restrictive residential zones, an environmental justice investigation in 2011-2012 found that ninety-nine percent of toxic air emissions in Eugene are released in one zipcode, which is where the Eugene area's first Black community resettled after the city razed their

251. Building trust and increasing equity are not givens, of course. See *infra* part III.E. (discussing other Oregon legislation supporting affordable and equitable housing, including legislation providing for attorneys fees in affordable housing cases and legislation making public meetings and hearings more accessible).

252. Trounstine, *supra* note 244, at 443.

253. Hirt, *supra* note 212, at 7–8.

254. *Id.*

255. *Id.* at 11–12.

256. See generally *supra* note 249 (regarding land use law and environmental racism).

neighborhood²⁵⁷ and continues to be home to a larger concentration of People of Color and low- and very-low-income households.²⁵⁸ Data showed, not surprisingly, that the people who live in this zip code suffered higher rates of respiratory illnesses, cancer, and neurological symptoms; school children were seventy-seven percent more likely to have asthma; families were burdened with higher medical costs; parents and children missed more work and school, and more.²⁵⁹ Moreover, the neighborhood was considered a food desert, had no county health care centers, more brown-field sites, and less vegetation; access to public transportation was also lacking.²⁶⁰

Zoning reform that removes regulatory barriers to more diverse forms of housing from traditionally single-dwelling neighborhoods is essential, but equity also requires amending zoning codes to disallow industrial and other intense uses that are harmful to households in all residential zones.²⁶¹ Nonconforming use regulations must also be amended where they allow uses that harm nearby residents to continue unabated.²⁶²

B. Significant Indirect Support for Production of Affordable Housing

By removing a host of substantive and procedural regulatory barriers to the development of middle housing, HB 2001 may successfully increase the production and decrease the cost of both market-rate and below-market middle housing and put downward pressure on the sales and rental costs of other housing. HB 2001 and its implementing regulations remove regulatory barriers that have historically acted as “poison pills” to housing production and that contribute significantly to the cost of housing—including, most significantly, the regulatory mandate that vast swaths of city land be reserved for single-family detached housing, and offstreet parking minimums in excess of one space per dwelling unit; the application of density maximums to duplexes, triplexes, and quadplexes; limitations on conversions; minimum lot size requirements that make most residential land off-limits for middle housing; and siting and design standards that presume

257. CITY OF EUGENE, OR., HISTORY OF MIDDLE HOUSING AND EXCLUSION IN OREGON 2 (Oct. 2020).

258. See ALISIA GUZMAN AND LISA ARKIN, ENVIRONMENTAL JUSTICE IN WEST EUGENE: FAMILIES, HEALTH AND AIR POLLUTION 2011–2012, at 16–29 (2013).

259. *Id.*

260. *Id.* at 30.

261. See *supra* note 249.

262. A “nonconforming use” is a use that does not comply with the applicable zoning ordinance but lawfully existed before the enactment or amendment of the zoning ordinance. PATRICIA SALKIN, 2 AM. LAW. ZONING § 12:1 (5th ed.). Typical nonconforming use provisions allow nonconforming uses to continue (but not expand) indefinitely so long as the use is not discontinued or changed. *Id.* § 12:18–22; see, e.g., EUGENE, OR., DEV. CODE § 9.1220 (2021); NAPA, CA., MUNIC. CODE § 17.52.320(B)(1) (2021).

middle housing is a more intense land use than single-family detached housing.²⁶³

Oregon's approach to middle housing is consistent with what Christopher Elmendorf characterizes as the "West Coast Model," a state regulatory approach that treats the problem of housing scarcity and lack of affordability as "one of local regulatory barriers to producing enough housing to accommodate projected household growth across all income categories."²⁶⁴ Unlike some Northeastern states that require local governments to accommodate their "fair share" of affordable housing or face penalties,²⁶⁵ Oregon's middle housing law neither mandates nor directly incentivizes affordable housing production. As a result, some are concerned the law will actually worsen Oregon's housing affordability problem by allowing older, more affordable single-family detached homes to be torn down and replaced with higher-cost townhouses or other higher-cost middle housing.²⁶⁶ Seattle's 2019 reform of its ADU laws provides an example of an approach that incorporates incentives to develop housing that is affordable to low-income and very-low-income households.²⁶⁷ To remove regulatory barriers to the production of ADUs, which the City already allowed, and to promote production of affordable, sustainable housing options, the Seattle

263. See HOYT & SCHUETZ, *supra* note 186 (regarding association between regulatory restrictions and housing cost); Christopher J. Mayer & C. Tsuriel Somerville, *Land Use Regulation and New Construction*, 30 REG'L SCI. & URB. ECON. 639, 657–59 (2000); John Quigley & Steven Raphael, *Regulation and the High Cost of Housing in California*, 95 AM. ECON. REV. 323 (2005); Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, POLICY ANALYSIS: CATO INSTITUTE, No. 823, at 4 (Oct. 18, 2017); see also Elmendorf, *supra* note 56, at 98; Anderson, *supra* note 234 (regarding housing cost and regulatory restrictions on building mass).

264. Elmendorf, *supra* note 57, at 94.

265. Under the Mount Laurel doctrine and the New Jersey Fair Housing Act, an executive agency sets a municipality's "fair share" of affordable housing. *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 422 (N.J. 1983) (directing that low- and moderate-income housing be directed toward and allocated among municipalities in growth areas); New Jersey Fair Housing Act, N.J. STAT. ANN. § 52:27D-301–329.9 (2021) (establishing nonjudicial mechanism for enforcement of Mt. Laurel fair share housing doctrine through a state agency). See generally Peter Buchsbaum, *Chapter 8: The New Jersey Experience*, in ST. & REGIONAL COMPREHENSIVE PLAN, IMPLEMENTING NEW METHODS GROWTH MGMT. (1993); see also Elmendorf, *supra* note 57, at 95 ("The Northeastern Model treats the affordability/housing supply problem as essentially about suburban regulatory barriers to subsidized, income-restricted housing. The primary goal is to get each local government to accommodate its 'fair share' of low-income housing, and the primary tool is the 'builder's remedy,' a judicial or administrative proceeding whereby developers of housing projects with a large proportion of income-restricted units may obtain exemptions from local regulations.").

266. See, e.g., Paul Conte, *Guest View: House Bill 2001 Will Poison Our Communities*, REGISTER GUARD (Aug. 18, 2019, 12:01 a.m.), <https://www.registerguard.com/opinion/20190818/guest-view-house-bill-2001-will-poison-our-communities>.

267. SEATTLE, WASH., ORDINANCE No. 125854, at 2 (July 1, 2019).

City Council amended its Municipal Code to allow two ADUs per lot in single-family residential zones, one of which may be detached from the primary dwelling unit.²⁶⁸ To incentivize affordable and sustainable small-scale housing production, however, the amended code only allows a second ADU on a lot if it either meets green building standards²⁶⁹ or is affordable to, and reserved for fifty years for, “income-eligible-households.”²⁷⁰ Similarly, Portland’s Residential Infill Project allows development of sixplexes and larger footprint fourplexes provided they meet certain affordability requirements.²⁷¹

Although it’s too soon to assess whether Seattle’s or Portland’s incentive programs will increase the cities’ supply of affordable housing, some evidence suggests direct affordability incentives or mandates may not increase the production of affordable housing or may not do so as effectively as removing regulatory barriers to the production of all housing. Sightline Institute modeled development on a typical Portland lot of each of the housing types allowable in Portland as a result of its Residential Infill Project and found that even market-rate development is unlikely to occur and development of mixed market-rate and below-market rate sixplexes will not occur absent a significant subsidy—at least not until Portland prices “soar to Vancouver, B.C., levels.”²⁷²

Many studies find that removal of regulatory barriers to the production of housing decreases the cost of housing for households across income levels.²⁷³ Vicki Breen, Ingrid Gould Ellen and Katherine O’Regan recently

268. *Id.* As amended the code allows up to two ADUs on a lot with or proposed for a principal single-family dwelling unit in Seattle’s SF 5000, SF 7200, and SF 9600 zones. Note that the ordinance did not increase the number of ADUs allowed in Seattle’s Residential Small Lot (RSL) zone or Shoreline District. Seattle, Wash., Code of Ordinances § 23.44.041(A)(1).

269. The amended Code requires the second ADU, if detached, or the principal structure, if the second ADU is attached to a new primary unit, to meet a green building standard. § 23.44.041(A)(1).

270. § 23.44.041(A)(1). “Income eligible households” means households at or below 80% of median income and “affordable” means the cost of rent and basic utilities for the unit must be no more than 30% of household income. § 23.44.041(A)(1).

271. PORTLAND, OR., MUN. CODE § 33.110.265(E)–(F) (2020).

272. Michael Anderson, *We Ran the Rent Numbers on Portland’s 7 Newly Legal Home Options*, SIGHTLINE INST., (Aug. 1, 2021, 8:12 a.m.), https://www.sightline.org/2021/08/01/we-ran-the-rent-numbers-on-portlands-7-newly-legal-home-options/?utm_source=Sightline+Newsletters+II&utm_campaign=6de7ab9875-EMAIL_CAMPAIGN_2019_11_22_09_02_COPY_01&utm_medium=email&utm_term=0_3e1b0f73ac-6de7ab9875-296407025.

273. JASON FURMAN, BARRIERS TO SHARED GROWTH: THE CASE OF LAND USE REGULATION AND ECONOMIC RENTS, REMARKS TO THE URBAN INSTITUTE, Washington, DC (2015), available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf; Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25, 26–27 & n.3 (Aug. 2018) (citing and

concluded that the preponderance of theoretical and empirical evidence suggests that restricting supply increases housing prices and that adding supply helps make housing more affordable, “even in markets where much of the new construction is itself high-end housing that most people can’t afford” because “[a] lack of supply to meet demand at the high end affects prices across submarkets and makes housing less affordable to residents in lower-cost submarkets.”²⁷⁴ This is precisely the reason that many urban planners and economists have found that single-family detached zoning has driven up the cost of sales and rental housing in U.S. cities.²⁷⁵ Studies

discussing “considerable empirical evidence” “restricting supply increases housing prices and that adding supply would help to make housing more affordable”). See, e.g., Brian Asquith et al., *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas* (FRB Phila. Working Paper No. 20-07, 2020) (finding new buildings decrease nearby rents by five to seven percent relative to locations slightly farther away or developed later and increase in-migration from low-income areas); Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH POLICY AND RESEARCH BRIEFS (July 23, 2019) (finding that 100 new market-rate units create 70 vacancies in middle- and lower-income neighborhoods but effect may be smaller in least expensive neighborhoods where prices are close to marginal cost of providing housing); Xiaodi Li, *Do new housing units in your backyard raise your rents?*, NYU WAGNER & NYU FURMAN CTR. WORKING PAPERS (2019); see also sources cited *infra* at note 274.

274. Been, Gould Ellen & O’Regan, *supra* note 272, at 27; see also Brian Asquith et al., *supra* note 272 (finding new buildings decrease nearby rents by 5–7% relative to locations slightly farther away or developed later and increase in-migration from low-income areas); Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, W.E. UPJOHN INST. FOR EMP. RSCH. POL’Y & RSCH. BRIEFS (July 23, 2019) (finding that 100 new market-rate units create 70 vacancies in middle- and lower-income neighborhoods but effect may be smaller in least expensive neighborhoods where prices are close to marginal cost of providing housing); Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?* (NYU Wagner & NYU Furman Ctr. Working Papers, 2019). But see Anthony Damiano & Chris Frenier, *Build Baby Build?: Housing Submarkets and the Effects of New Construction on Existing Rents* (estimating that new construction increased rent by 6.6% in the lowest rent tercile, had no effect on the middle tercile, and decreased rent by 3.2% in the highest tercile with effects stronger for units located closer to new construction and effects persisting for up to two years after completion of new market-rate building).

275. Been, Gould Ellen & O’Regan, *supra* note 262; see, e.g., Calder, *supra* note 262. But see Daniel Kuhlmann, *Upzoning and Single-Family Housing Prices*, 87 J. AM. PLAN. ASS’N 383, 384, (2021) (preliminary analysis of Minneapolis 2040 Plan finding that, “relative to a similar set of nearby housing units, changing by-right development minimums from 1 to 3 units increased sales prices between 3% and 5%,” with data analysis suggesting “that this effect is larger for single-family houses located in census tracts where median assessed values are lower than the citywide median” and “houses that are relatively undersized compared with their immediate neighborhood”). Note that Kuhlmann’s

have found that even the production of high-end housing puts downward pressure on nearby sales costs and rents across all price points.²⁷⁶

Moreover, some studies suggests that affordability incentives like Seattle's and Portland's may have the perverse effect of reducing the production of both market-rate and below market-rate housing, an outcome that decreases housing availability and increases costs for households across income levels.²⁷⁷ These studies suggest that, for example, by allowing only price-regulated sixplex development, Portland prohibits the production of market-rate sixplexes notwithstanding the City's severe shortage of market-rate and below-market rate housing.²⁷⁸ As a result, households that would have occupied the market-rate sixplexes are left to compete for the remaining, insufficient supply of housing—a scenario that puts upward pressure on housing prices. However, by removing two significant barriers—namely, minimum offstreet parking requirements and restrictive maximum lot coverage standards—Portland has decreased the cost to produce price-regulated sixplexes such that developers of price-regulated housing may be able to produce them with significantly smaller subsidies.²⁷⁹ The question that remains is whether more affordable sixplexes or other affordable housing would be produced if Portland made sixplexes allowable as of right, as the City has done for duplexes, triplexes, and quadplexes.

The provisions in HB 2001 and its implementing regulations that likely pose the greatest threat to the legislative purpose of increasing the supply of affordable housing are those provisions that allow private landowners and cities to maintain exclusive single-family detached dwelling neighborhoods and, potentially, to plan for more of the same. The legislation's failure to invalidate existing deed restrictions and homeowners' association governing documents that allow only single-family use allows entire neighborhoods to use private agreements to maintain their exclusive zoning.²⁸⁰ The middle housing rules applicable to master planned communities also appear to provide an exemption from many of the large city middle housing mandates for existing master planned communities.²⁸¹ Additionally, until the rules are amended to apply the definition of

study compared Zillow data from the year before Minneapolis adopted its 2040 Plan and the year after—a period that predated Minneapolis's code amendments. *Id.* at 388.

276. See, e.g., PHILLIPS, MANVILLE & LENS, *supra* note 13 (citing and discussing studies); see, e.g., Li, *supra* note 271 (study finding new high-rises lower rents for nearby high-end rental buildings and mid-range rental buildings).

277. See, e.g., Elmendorf, *supra* note 55, at 98; see also Emily Hamilton, *Is Inclusionary Zoning Creating Less Affordable Housing?*, STRONG TOWNS (Apr. 11, 2018), <https://www.strongtowns.org/journal/2018/4/10/is-inclusionary-zoning-creating-less-affordable-housing>.

278. See generally CITY OF PORTLAND, HOUSING BUREAU, 2020 STATE OF HOUSING IN PORTLAND.

279. See Anderson, *supra* note 235.

280. See *infra* notes 289–93 and accompanying text.

281. See *supra* note 115 and accompanying text (discussing middle housing rules applicable to master planned communities approved before January 1, 2021).

“allowed” and the equitable distribution requirement to master planned communities,²⁸² some cities may attempt to use master planned communities to continue permitting residential developments that prohibit most middle housing forms.

C. Significant Steps to Ensure an Equitable Distribution of Middle Housing

HB 2001 and its implementing regulations contain five provisions that have the potential to equitably distribute smaller-scale single- and multi-family homes throughout existing and new neighborhoods: (1) the requirement that medium and large cities allow a duplex on any residential lot that allows a single-family detached dwelling; (2) the requirement that large cities allow triplexes, quadplexes, townhouses, and cottage clusters on residentially zoned lots and parcels that allow development of single-family detached dwellings; (3) the requirement that, under the alternative performance metric compliance pathway, large cities allow triplexes, quadplexes or townhouses on at least 75 percent of all lots or parcels zoned for residential use that allow for the development of detached single-family dwellings within each census block; (4) the prohibition of siting and design regulations that individually or cumulatively, discourage the development of all middle housing types permitted in the area through unreasonable costs or delay; and (5) the invalidation of deed restrictions and governing document provisions that restrict middle housing development but allow development of single-family housing. Together, these five provisions directly confront the exclusionary and segregationist effects of a century of single-family restrictive residential zoning.

Three additional issues remain, however, that threaten to undermine the effectiveness of Oregon’s middle housing reform. The first of these issues arose out of skirmishes in the adoption of the administrative rules over the following language: “Except as provided in subsection (4) of this section, each city with a population of 25,000 or more and each county or city within a metropolitan service district shall allow the development of . . . [a]ll middle housing types *in areas* zoned for residential use that allow for the development of detached single-family dwellings[, and a] duplex *on each lot or parcel* zoned for residential use that allows for the development of detached single-family dwellings.”²⁸³ The difficulty was over whether “in areas” meant *all areas* zoned residential and allowing single-family detached housing or whether the city could select only limited areas that would be available for middle housing.

Affordable housing advocate members of the rulemaking advisory committee argued that the text of the law requires that the denser middle

282. See *supra* note 140 and accompanying text (discussing apparent scrivener’s error that excluded post-January 1, 2021, master planned communities from the performance metric pathway). In the published rules, the definition of *allowed* and the equitable distribution requirement are nested within the performance metric pathway rules.

283. OR. REV. STAT. § 197.758(2) (2021) (emphasis added).

housing types be allowed in all residentially zoned areas except the areas excluded by the legislation from the middle housing mandate—namely, (1) cities with populations of 1,000 or fewer, lands outside an urban growth boundary, lands not incorporated and lacking sufficient urban services, and lands not incorporated and zoned under an interim zoning designation that maintains the lands’ potential for planned urban development;²⁸⁴ (2) lands where middle housing may be regulated to comply with protective measures adopted pursuant to statewide land use planning goals; (3) lands under an infrastructure time-based extension request; and (4) lands in a single-family zone that are otherwise disqualified under existing law from compliance with the proposed rules.²⁸⁵ Some large city representatives on the advisory committee argued that the “in areas” language reflects a legislative decision to let cities retain regulatory flexibility and thereby determine at the local level which areas are and are not suitable for the denser forms of middle housing.²⁸⁶

The rules advisory committee accepted and LCDC adopted a “compromise” result proposed by DLCDC staff under which cities need not make middle housing allowable in all residential areas, but must allow middle housing on all lots or parcels that meet the standards set out in the minimum compliance pathway or, under the performance metric compliance pathway, make each middle housing type allowable on a minimum percentage of residentially zoned land that allows single-family housing.²⁸⁷ As noted above, the performance metric pathway also includes the equitable distribution requirement.²⁸⁸

However, there is a significant unresolved issue that neither the legislature, nor LCDC, sought to address fully in dealing with the equitable distribution of middle housing: the existence and persistence of covenants, conditions, and restrictions on the development of such housing in single-family areas.²⁸⁹ Restrictions based on race have long been held

284. *Id.* § 197.758(4).

285. Memorandum from Allan Lazo, Fair Housing Council of Oregon, et al., to Or. Dep’t of Land Conserv. & Dev., Revisions to Oar 660, Div. 046 to Reflect Legislative Directions of HB 2001, at 1 (Oct. 26, 2020) (copy on file with authors). Housing advocates described the catchall category, category (4), as covering only “vested rights and non-conforming uses,” which “must be strictly construed, because it is contrary to the policy of HB 2001 to otherwise open all single-family zones and areas to middle housing.” *Id.*

286. SEPT. STAFF MEMO, *supra* note 119, at 7–8.

287. OR. ADMIN. R. 660-046-0205(3)(b) (requiring triplexes be allowed on 80% of lots or parcels, quadplexes and cottage clusters on 70%, and townhouses on 60%).

288. See *supra* notes 119–27 and accompanying text (discussing compliance pathways and equitable distribution requirement).

289. OR. REV. STAT. § 94.776 prohibits the future use of recorded restrictions that would frustrate implementation of HB 2001; however, that prohibition does not extend to restrictions adopted before August 8, 2019. No case has been brought over whether public policy would overcome existing restrictions and there is no information as to how

invalid throughout the United States,²⁹⁰ although they exist “on paper” in many cities throughout the country.²⁹¹ Although restrictions to confine covenanted lands to single-family use have been used to exclude lower-income households—often with the intent of excluding People of Color, recent immigrants, and religious minorities²⁹²—these restrictions are not prohibited under court decisions relating to racial covenants and, as a result, they continue to operate.

HB 2001 invalidates covenants that prohibit middle housing in instruments such as deeds, or subdivision covenants, but does so only prospectively.²⁹³ It is thus possible for a city to designate areas for middle housing types “on paper” that are, in fact, restricted by private covenants that were adopted before the effective date of HB 2001. The extent to which such designations will undermine the production and equitable distribution of middle housing forms remains to be seen.

Both compliance pathways also allow cities to potentially undermine the purpose of HB 2001 by avoiding the middle housing mandate (except with respect to duplexes) in some existing and new single-family neighborhoods. Under the minimum compliance pathway, cities are not required to allow the denser forms of middle housing on lots or parcels that are smaller in size than the minimum lot sizes established by the rules for each middle housing type.²⁹⁴ Thus, to illustrate, a new subdivision or master plan community could develop exclusively single-family neighborhoods by creating residential lots or parcel less than 5,000 square feet and designating 5,000 square feet as the minimum lot or parcel size for triplexes. Additionally, under both compliance pathways, cities are not required to

extensive those restrictions are in large cities; nevertheless their use is of concern to housing advocates.

290. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

291. For the persistence of these restrictions in Oregon’s largest city, Portland, see Portland Bureau of Planning and Sustainability, New research by PSU grad student reveals racist covenants across Portland (Mar. 22, 2018), <https://www.portland.gov/bps/news/2018/3/22/new-research-psu-grad-student-reveals-racist-covenants-across-portland>, which contains an interactive map that shows the restricted areas and the wording used in the covenants. The state legislature has provided a method to remove racial covenants from existing deeds and subdivision restrictions. OR. REV. STAT. §§ 93.270-.274. See also generally Richard Brooks & Carol Rose, *Racial Covenants and Segregation, Yesterday and Today* (Straus Inst. Working Paper No. 08/2010), <https://www.law.nyu.edu/sites/default/files/siwp/Rose.pdf>.

292. See Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARVARD L. REV. 1609, 1647–48 (2021) (discussing covenants banning “housing associated with the lower class (frequently immigrants and racial minorities)”).

293. OR. REV. STAT. § 93.277. The stated effective date of the prohibition is August 8, 2019.

294. See *supra* note 153 (regarding minimum lot or parcel size standards).

allow the denser middle housing types on residential lots or parcels in master planned communities adopted before January 1, 2021.²⁹⁵

D. The Problem of Enforcement

Enforcement is also a concern. Unlike the relative ease of enforcement of the duplex regulations mandate to allow a duplex wherever a single-family detached dwelling is allowed in a residential zone,²⁹⁶ enforcing compliance with the large city mandates, which encompass four other housing types, each with its own limitation on dimensional and other standards, may be more problematic.

The prospect of a large city adopting the large city model, which would operate as an overlay to its existing code with the model code superseding any inconsistent provisions in the existing code,²⁹⁷ increases the likelihood of confusion, disagreement and litigation regarding when a particular model code provision supersedes a provision in the existing code.²⁹⁸ Moreover, there will be cases in which a large city will assert its amended code complies with the LCDC administrative rules and a litigant will contend otherwise—raising the possibility the entire set of dimensional regulations applicable to a zoning district could be invalidated by Oregon’s Land Use Board of Appeals or an appellate court. Per the middle housing rules, it appears cities in this circumstance will be deemed to have adopted the model code on the HB 2001 compliance deadline, June 30, 2021, or June 30, 2022, for medium and large cities, respectively.²⁹⁹ What happens to permits issued before the declaration of invalidity is problematic, especially given that the primary means of testing a city’s HB 2001 amendments or the model code provisions is within the context of an enforcement order.³⁰⁰

295. See Table 2, *supra* part I.B.

296. OR. REV. STAT. § 197.758(2)(b).

297. OR. ADMIN. R. 660-046-0040(8) (“Where a Medium or Large City directly applies the Model Code . . . , the Model Code completely replaces and pre-empts any provisions of that Medium or Large City’s development code that conflict with the applicable sections of the Model Code.”).

298. While the model code must “prevail,” conflicts between the existing code provisions and the model code will generate litigation. These conflicts will arise, *inter alia*, over the differences in format and policy approaches, the use of cross-references, criteria that contain complying and non-complying elements in the same sentence, and judgments over whether a criterion is “clear and objective” and individually or cumulatively, discourages duplex or middle housing development through “unreasonable cost or delay.”

299. OR. ADMIN. R. 660-046-0040(6) (providing that, for medium or large cities that have amended their comprehensive plan or development code to comply with HB 2001, if the “city’s land use regulations or comprehensive plan changes are subsequently remanded by the Land Use Board of Appeals or an appellate court on any substantive grounds, the Medium or Large City is deemed” to have not amended its comprehensive plan or development code to comply with HB 2001).

300. OR. REV. STAT. § 197.319–.350.

Nevertheless, effective enforcement as a planning tool requires discretion, judgment, resources, and stakeholder buy-in.³⁰¹ The enforcement order process in Oregon,³⁰² however, lacks these attributes and can be fairly characterized as the “nuclear option.” There may be a contest of wills between a recalcitrant large city and a state agency that may have the duty, but not the will or resources, to enforce every portion of the new law. Prudence in the application and enforcement of the new legislation, in addition to the threat of enforcement by third parties, may be more effective than a command-and-control state agency policy.

E. A Legislative Agenda that Recognizes the Systemic Nature of Housing Inequity

The effectiveness of Oregon’s new law will be limited by the systemic nature of the problems the law attempts to address. The wealth gaps, education gaps, health gaps, and oppression of historically marginalized peoples that restrictive residential zoning exacerbates³⁰³ are systemic problems that require systemic reforms that include, but are not limited to, land use law reform.

Oregon’s new middle housing law is not, however, the only major legislative reform intended to increase housing availability, affordability and equity. The other major housing legislation of 2019, HB 2003, will increase governmental and nongovernmental understanding of regional housing needs and provide a graduated system of penalties for cities that are not meeting state expectations.³⁰⁴ The legislation provides that all cities over 10,000 population have a “housing needs analysis” so that existing and projected housing needs can be prepared, and that the state develop a prototype “Regional Housing Needs Analysis” to have a uniform methodology to analyze housing needs and provides for a Housing Production Strategy to assure that housing needs are met.³⁰⁵ One of the issues to be confronted in the preparation of the regional housing needs analysis is the acquisition and use of data on race and ethnicity, so that the effectiveness of the program in increasing housing equity can be evaluated in detail.

The 2021 Oregon legislature further encouraged individual holdings of middle housing units by enacting comprehensive legislation to allow for land divisions for these units.³⁰⁶ The 2021 legislature also passed legislation that requires that affordable housing be allowable on lands zoned for commercial use or owned by a public entity or a religious institution, and,

301. See Elmendorf, *supra* note 56, at 148–49.

302. OR. REV. STAT. § 197.319–.350.

303. Trounstone, *supra* note 244, at 443.

304. 2019 Or. Laws Ch. 640 (H.B. 2003), amending OR. REV. STAT. § 197.290–293.

305. See OR. DEP’T OF LAND CONSERVATION & DEV., KEY ELEMENTS OF HOUSE BILL 2003 (2019). The 2021 legislature appropriated funding for this analysis.

306. 2021 Oregon Laws Ch. ___ (Enrolled SB 458); see OR. DEP’T OF LAND CONSERVATION & DEV., SENATE BILL 458 GUIDANCE (July 8, 2021).

on lands zoned for residential use, provides for a density bonus for affordable housing, scaled to the surrounding area's density. This new law also provides support for local governments that carry out the state's affordable housing mandates by adding the risk of attorney fees to those who challenge local affordable housing actions.³⁰⁷ The legislature also passed legislation removing residential occupancy restrictions based on familial or nonfamilial relationships among any occupants,³⁰⁸ making a tax abatement program easier to access for builders of multi-unit housing,³⁰⁹ making it easier for nonprofit housing providers to use surplus public lands,³¹⁰ and promoting more equitable access to land use hearings and public meetings.³¹¹

Conclusion

Oregon's new law is bold and sweeping—representing the first time in the 100-year history of zoning in the United States that a state has effectively deemed single-family residential restrictions to be against the policies of the state. In enacting the middle housing law, the Oregon legislature recognized that entrenched land use patterns and local government politics favored the allocation of most residential land for single-family detached housing and, without state intervention, the regulatory preference for single-family detached housing would continue to inflate home and rental prices, stymie affordable housing production, and further entrench the racial, ethnic, and class segregation of neighborhoods.

The law takes significant steps to dismantle exclusive zoning, increase the supply of affordable housing through the removal of numerous regulatory barriers to housing production, and remove mobility barriers by requiring cities to allow middle housing in all areas zoned for residential use that allow for the development of detached single-family dwellings. The law stopped short, however, of invalidating existing restrictive covenants that limit lots and parcels to single-family use, and a grand compromise in the administrative rulemaking effectively allows large cities to continue to limit some residential areas to single-family use. Enforcement issues and the likelihood of litigation over perceived and actual conflicts between the middle housing requirements and local codes, local home rule authority, and Oregon's constitutional prohibition of unfunded mandates also may undermine, or at least limit, the effectiveness of Oregon's middle housing law in achieving its broad purposes.

Although middle housing reform will not overcome other drivers of poverty and oppression of historically marginalized communities, reforming single-family detached zoning laws is as important as other necessary

307. 2021 Or. Laws Ch. 385 (Enrolled SB 8).

308. 2021 Or. Laws Ch. 24 (Enrolled HB 2583).

309. 2021 Or. Laws Ch. 476 (Enrolled SB 141).

310. 2021 Or. Laws Ch. ____ (Enrolled HB 2918).

311. 2021 Or. Laws Ch. 228 (Enrolled HB 2560).

reforms such as those relating to reparations and mortgage qualification, credit scores, and interest rates. A close examination of the middle housing administrative rulemaking and cities' efforts to implement the new law provides an opportunity to learn from the successes and inevitable mistakes of these early reformers.