

MIDDLE HOUSING BY RIGHT: LESSONS FROM AN EARLY ADOPTER

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Abstract

Cities, states, affordable housing advocates, scholars, and others are looking to Oregon as the earliest adopter of statewide reform of restrictive residential zoning. Oregon's bold new "middle housing" mandate required cities throughout the state to end the monopoly of single-family residential zoning—a monopoly borne from a century-old policy preference for economically and racially segregated neighborhoods, a monopoly that undermines affordable housing reforms by inflating rent and sale prices in U.S. cities.

Oregon's new law required cities to amend their zoning codes to allow "middle housing" in residential areas that allow single-family detached housing and to remove other regulatory requirements that effectively exclude small-scale multi-family and clustered housing by increasing development costs. By requiring cities to allow middle housing, the law facilitates development of duplexes, triplexes, cottage clusters, and other forms of housing that proliferated before the widespread adoption of single-family residential zoning.

This Article provides an overview of Oregon's 2019 middle housing law, examines the subsequent administrative rulemaking, and draws lessons from cities' efforts to amend their zoning codes to

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implement the new law. Drawing on theoretical and empirical research, the Article finds that Oregon's middle housing law took significant and unprecedented steps to dismantle exclusive single-family zoning, increase the supply of affordable housing, and remove inter-neighborhood mobility barriers. The law stopped short, however, of including affordable housing mandates or incentives and did not invalidate existing restrictive covenants or common interest community governing documents that limit lots to single-family use. Moreover, a grand compromise in the administrative rulemaking effectively allows large cities to continue to permit exclusive single-family zoning in some residential areas and potentially dilutes the middle housing mandate in master planned communities. Enforcement issues and the likelihood of litigation over perceived and actual conflicts between the middle housing requirements and local codes may also limit or delay the effectiveness of Oregon's middle housing law.

Finally, although the Oregon legislature's broad suite of laws targeting housing affordability and equity are essential components of housing reform, absent 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 in and near multifamily and less restrictively zoned single-family neighborhoods, housing justice will remain unrealized.

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I. INTRODUCTION

Around the United States, many are questioning the viability of exclusive zoning for detached single-family housing. Sociologists, planners, political scientists, and others document how single-family residential zoning has been used since its inception a century ago to segregate communities by race, ethnicity, religion, and class.¹ Transportation planners raise concerns about mobility, sprawl, and related equity and climate implications of single-family zoning.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.⁴

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

1. See *infra* notes 254–261 (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/>.

3. See *infra* notes 254–261; see also, e.g., 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, 110 (2020) (citing SONIA HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATIONS* (2014) and WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)).

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, although the index improved slightly through the first quarter of 2021, affordability fell in each of the last three quarters of that year.⁸ In fact, while the index rose in 2019 and 2020, rising home prices in 2021 more than offset the historically low rates and increases in median family income.⁹

Income growth for renters also continued to be more than offset by “staggering” increases in rents.¹⁰ As Fannie Mae reported in 2022, “year-over-year rent growth in the middle market . . . segment has outpaced wage growth almost every month since August 2021[.] . . . [A]s of December 2021, year-over-year [middle market] rent growth was a whopping 14.9%, three times as high as the 4.7% wage growth recorded.”¹¹ As shown in Figure 1 below, median rents, which averaged \$1,255 per month nationally in the first quarter of 2022, have nearly doubled over the past ten years.¹² Over the same time period, national vacancy rates for rental housing dropped from

5. Matthew Desmond, Assistant Professor of Sociology and Social Studies at Harvard, reported on significant increases in the percentage of renter households spending more than 30% and more than 50%, respectively, even before the Covid Crisis, and these rising rent burdens fell disproportionately on Black and Latinx households. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, FAST FOCUS No. 22-2015 (Institute for Research 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. 419, 436–38 (1980) (discussing systemic oppression of Black, Indigenous and other People of Color 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).

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, *Methodology: Housing Statistics*, <https://www.nar.realtor/research-and-statistics/housing-statistics/housing-affordability-index/methodology> (visited June 29, 2022).

8. U.S. DEP’T OF HOUS. & URB. DEV., OFF. OF POL’Y DEV. & RSCH., U.S. HOUSING MARKET CONDITIONS NATIONAL HOUSING MARKET SUMMARY & DATA, https://www.huduser.gov/portal/ushmc/hd_hsg_aff.html. To view the Composite Housing Affordability Index from 1970 to 2021, select composite as an indicator and total as the series.

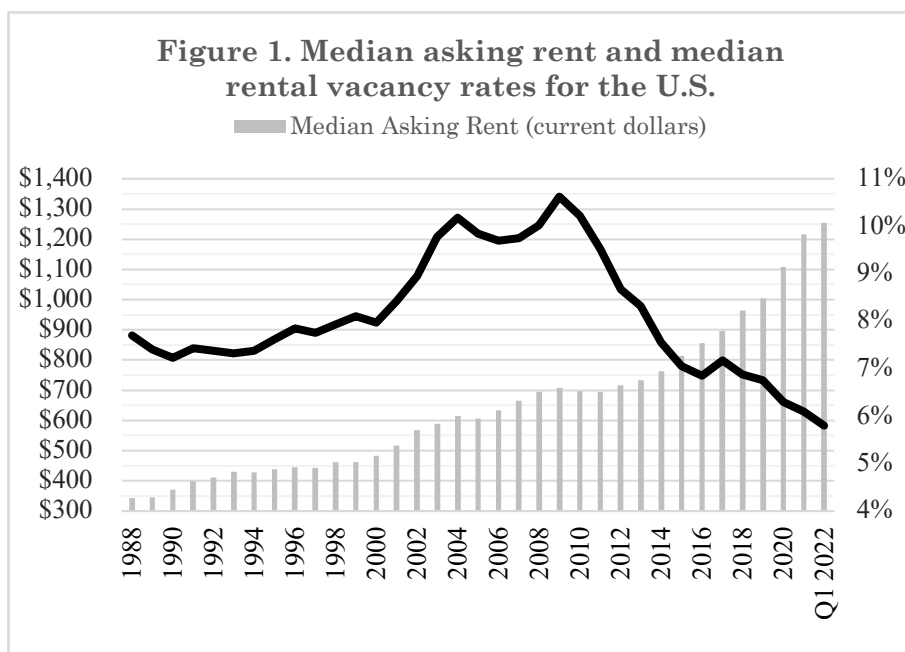
9. U.S. DEP’T OF HOUS. & URB. DEV. PD&R, NATIONAL HOUSING MARKET SUMMARY FOR 4TH QUARTER 2021, at 6 (Mar. 2022).

10. FANNIE MAE, MULTIFAMILY ECONOMIC AND MARKET COMMENTARY 3 (Feb. 2022).

11. *Id.* at 1 (reporting on Class B rents, which are “rents that fall between the top 20% and bottom 20% of the rent distribution for a given market”).

12. Figure 1 depicts data from U.S. CENSUS BUREAU, QUARTERLY RENTAL VACACY RATES: 1956 TO PRESENT and U.S. CENSUS BUREAU, Table 11A/B, QUARTERLY MEDIAN ASKING RENT AND SALES PRICE OF THE U.S. AND REGIONS: 1988 TO PRESENT.

10.6 percent in 2009 to 5.8 percent in the first quarter of 2022,¹³ and rental vacancy rates in lower-cost rental markets were even lower.¹⁴ From 2018–2019, vacancy rates in 135 metro areas stayed below 5 percent and, in 45 metro areas, vacancy rates stayed below 3 percent.¹⁵ Possibly 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.¹⁶



13. U.S. CENSUS BUREAU, CB22-58, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FIRST QUARTER 2022 (Apr. 27, 2022).

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

15. *Id.*

16. JOINT CTR. FOR HOUS. STUD., *supra* note 6, at 13–19. *But see* SHANE PHILLIPS, MICHAEL MANVILLE & MICHAEL LENS, RESEARCH ROUNDUP: THE EFFECT OF MARKET-RATE DEVELOPMENT ON NEIGHBORHOOD RENTS 3 (2021) (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, 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”).

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,¹⁷ or living in manufactured homes (isolated or in manufactured home parks),¹⁸ single-room occupancies,¹⁹ or boarding houses²⁰—where available and within the household’s means. As demand for these housing options increases, others find themselves displaced into cars or campers,²¹ or simply houseless.²²

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.²³ Economic realism counsels that

17. See generally AM. ASS’N OF RETIRED PERSONS, ASSESSING HOUS. 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, June 10, 2019, <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”).

18. See generally MANUFACTURED HOUS. INST., 2020 MANUFACTURED HOUSING FACTS (updated May 2020), <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> (visited June 29, 2022).

19. See generally 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*, ALLIANCE FOR HOUS. AFFORDABILITY, <https://housingallies.org/guide/matching-needs/microhousingsingle-room-occupancy-housing/> (visited June 29, 2022); Mary Ann Burki, *Housing the Low-Income, Urban Elderly: A Role for the Single Room Occupancy Hotel* (1982) (Ph.D dissertation, Portland State University), <https://doi.org/10.15760/etd.847>.

20. 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).

21. See generally 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/>.

22. See generally NAT’L ALL. TO END HOMELESSNESS, WHAT CAUSES HOMELESSNESS?, <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/> (visited June 29, 2022); 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>.

23. 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 allowable as

housing must change in order to accommodate the American family such that the detached single-family dwelling, so prevalent in American iconography,²⁴ 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 and supplant the exclusive single family detached housing pattern that dominates most residential land in American cities.²⁵

In 2019, the Oregon legislature recognized this need for change by passing House Bill 2001, which required cities with populations over 10,000 and urban areas in Metro²⁶ to allow “middle housing”—that is, multi-unit or clustered housing that is similar in scale and

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 ADUs, 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 Jan. 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 reduced regulations on accessory dwelling units in residential zones. Am. Plan. Ass’n Utah, *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/> (visited June 29, 2022) (providing links to materials on Connecticut’s reforms and other states’ reforms).

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

25. Jake Wegmann, Viewpoint, *Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. OF THE AM. PLANNING ASS’N 113, 113 (2020) (reporting that most residential land 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 (citation omitted). Eighty-two percent of the residential land in Portland is zoned for single-family detached homes. Hongwei Dong and J. Andy Hansz, *Zoning, density, and rising housing prices: A Case Study in Portland, Oregon*, 56 URB. STUDIES 3486, 3491 (2019) (reporting on 2016 data).

26. Metro is a regional agency in the Portland region with certain planning powers which include the authority to establish and change regional urban growth boundaries. 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).

form to single-family housing²⁷—in all residential districts that allow single-family housing.²⁸ 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.²⁹ The city is currently embroiled in litigation, however, regarding whether adoption of the 2040 Plan violated the Minnesota Environmental Rights Act.³⁰ Oregon’s statewide middle housing reform is not at risk of a similar challenge because Oregon is not one of the fifteen states that have environmental review statutes, sometimes referred to as “mini-NEPAs.”³¹

After a lengthy state rulemaking process,³² cities throughout Oregon began implementing the new middle housing law. In broad strokes, the new administrative rules require so-called “medium”

27. Oregon’s new law defines middle housing as duplexes, triplexes, quadplexes, cottage clusters, and townhouses. OR. REV. STAT. § 197.758(1)(b) (2021).

28. H.B. 2001, 2019 Leg., Reg. Sess. (Or. 2019), codified at OR. REV. STAT. § 197.758 (2021).

29. 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.lincolnst.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*, THE ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/how-minneapolis-defeated-nimbyism/600601/>.

30. On Feb. 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, *Minnesota ex rel. Smart Growth Minneapolis v. City of Minneapolis*, 2018 WL 6326461 (2018) (No. 27-CV-18-19587).

31. 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).

32. OR. ADMIN. R. 660-046-0000–0235 (2022).

and “large” cities³³ to allow a duplex on each lot or parcel³⁴ 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.³⁵ Large cities must also allow triplexes, quadplexes, townhouses, and cottage clusters on lots and parcels in residential zones that allow single-family detached dwellings.³⁶ In a grand bargain of sorts,³⁷ 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 large 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.³⁸ 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 triplexes³⁹—and requires that triplexes, quadplexes or townhouses be allowed on 75 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 group.⁴⁰

Recognizing that many regulatory “poison pills” 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

33. Medium cities are cities with populations more than 10,000 and less than 25,000 that are not within a metropolitan service district. OR. ADMIN. R. 660-046-0020(11). The large city rules apply to cities with populations of 25,000 or more and each county or city within a metropolitan service district. OR. ADMIN. 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 26.

34. The statute and its implementing rules apply to “lots or parcels.” See OR. REV. STAT. § 197.758 (2021). Lots are created by the subdivision of land, § 92.010(4), and parcels are created by the partition of land, § 92.010(6).

35. See *infra* Part II.A.

36. See *infra* Part II.B.

37. See *infra* Part IV.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).

38. OR. ADMIN. R. 660-046-0205(3)(a); see also *infra* Part II.B.

39. OR. ADMIN. R. 660-046-0205(3)(b); see also *infra* Part II.B.

40. OR. ADMIN. R. 660-046-0205(3)(b)(F); see also *infra* notes 120–121 and accompanying text.

duplexes.⁴¹ 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.⁴² Although the Oregon legislature chose to prospectively invalidate deed restrictions and other private land use restrictions that maintain single-family exclusivity,⁴³ 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—withstanding the legislative requirement that large cities make triplexes, quadplexes, townhouses and cottage clusters permissible on lots and parcels on which single-family detached housing is allowed.⁴⁴

This Article examines implementation trends and challenges that surfaced as Oregon cities revised their zoning codes to comply with the new middle housing regulations. Part II summarizes the new state regulations. Part III examines cities’ efforts 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.⁴⁵ While this initial task may appear fairly straightforward, incorporation of this requirement into local codes involved the 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 through unreasonable cost or delay.⁴⁶ These first steps, which the law required medium cities to complete by June 30, 2021, were also an important test of the state interventions that require a wider range of allowable-by-right middle housing forms in formerly

41. See, e.g., *infra* notes 172–176 and accompanying text (discussing off-street parking requirements).

42. See *infra* notes 73–93 and 132–150 and accompanying text (summarizing allowable restrictions on middle housing development); Tables 1 and 2, *infra* Part II.A. and part II.B. (same).

43. 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 accessory dwelling unit, 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.

44. See *infra* notes 103–109 and accompanying text (discussing middle housing rules for master planned communities); see also *infra* Table 2 (summarizing exceptions to requirement that middle housing be allowed on a lot or parcel that is residentially zoned and allows single family detached unit).

45. See *infra* Part III.A.

46. See *infra* notes 72–74, 92–93 and accompanying text.

exclusive single-family zones in large cities.⁴⁷ After examining efforts by medium cities to implement the new duplex requirement, Part III considers how some of Oregon's largest cities implemented their middle housing mandates.

Finally, Part IV 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.⁴⁸ Part IV concludes in part that the success of the law in achieving these goals may hinge on other legislative reforms to Oregon's housing laws. This may include 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,⁴⁹ as well as Senate Bill 8, enacted in 2021, 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 certain affordable housing at increased density and development of certain affordable housing on lands not zoned for residential uses.⁵⁰ Although Oregon's ambitious legislative agenda recognizes the systemic nature of housing inequity, Part IV 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 and other less restrictively zoned neighborhoods that are often home to larger proportions of People of Color.⁵¹

Nevertheless, a careful examination of Oregon's experience implementing its middle housing law may provide insights for other state and local governments grappling with the need to reform restrictive residential zoning.⁵²

47. See *infra* Part II.B.

48. See *infra* Part IV.

49. 2019 Or. Laws ch. 640 (amending OR. REV. STAT. §§ 197.296, 197.299, 197.303, 197.319, 197.320). 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.

50. 2021 Or. Laws ch. 385 (Enrolled S.B. 8), codified at codified at OR. REV. STAT. 197.308. See *infra* Part IV.E. (discussing SB 8 and other 2021 reforms).

51. See *infra* Part IV.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, 81st Legis. Assemb. (Or. 2021).

52. 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 23, 29.

II. 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 Land Conservation and Development Commission (LCDC) that provides policy direction to a state land use planning agency, the Department of Land Conservation and Development (DLCD), and adopts binding state policies (“the statewide planning goals”) for incorporation into required local land use plans, which must be acknowledged by LCDC, after which the local plans provide the basis for local land use regulations, as well as public and private land use actions.⁵³ The statewide goals, and their implementing administrative rules, have the force and effect of law and provide an efficient means of realizing state policy.⁵⁴ 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.⁵⁵

One of the statewide planning goals (Goal 10) refers to housing and its simple opening statement, “[t]o provide for the housing needs of citizens of the state,” belies its complexity.⁵⁶ The goal contemplates planning for the housing needs of the local jurisdiction over a twenty-year period, allocating sufficient lands to accommodate those needs, considering a range of housing prices and rent levels to meet state housing needs, as well as the “flexibility of housing location, type and density.”⁵⁷ 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

53. Sullivan, *supra* note 26, at 369–74, 377–80.

54. *Id.* at 377.

55. See *id.* at 372; 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, 441 (2000).

56. 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.*

57. See Paul A. Diller & Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools and Outcomes*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. 183, 207 (2018).

Portland regional planning agency, Metro)⁵⁸ to provide housing opportunities.⁵⁹

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.⁶⁰ Among those policies were requirements that local governments assess housing needs and plan and zone sufficient lands to meet those needs; 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 local governments not discriminate against government assisted housing.⁶¹ 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.⁶²

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 required large cities to allow duplexes, triplexes, quadplexes, cottage clusters, and townhouses in single-family zones by June 30, 2022 and medium cities to allow duplexes⁶³ in single-family zones

58. 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).

59. Diller & Sullivan, *supra* note 57, at 224–28; Edward J. Sullivan, *Will States Take Back Control of Housing from Local Governments?*, 43 ZONING & PLAN. L. REP. 1, 1, 4, 8 (2020); see also Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental 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).

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

61. *Id.* More recently, the Oregon legislature has doubled down to assure housing availability. Sullivan, *supra* note 59, at 1.

62. Hongwei Dong & J. Andy Hansz, *Zoning, Density, and Rising Housing Prices: A Case Study in Portland, Oregon*, 56 URB. STUD. 3486, 3491 (2019) (reporting on 2016 data).

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

that allow for the development of detached single-family dwellings by June 30, 2021.⁶⁴

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.⁶⁵

LCDC undertook rulemaking to fill in the details of the legislation and promulgated new rules in late 2020.⁶⁶ 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 single-family residences, with limited exceptions.⁶⁷ 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.⁶⁸ The rules made the model code the default local

64. 2019 Or. Laws ch. 639, § 3(4).

65. 2019 Or. Laws ch. 640 (amending OR. REV. STAT. §§ 197.296, 197.299, 197.303, 197.319, 197.320).

66. OR. ADMIN. R. 660-046-0100 provides that OR. ADMIN. R. 660-046-0105 through -0130 apply to medium cities, while OR. ADMIN. R. 660-046-0200 provides that OR. ADMIN. R. 660-046-0205 to 0235 apply to large cities.

67. OR. REV. STAT. § 197.758(3) (2021) 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).

68. 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).

code in the event a city neither amended its code to comply with HB 2001 by June 30, 2021 nor received an extension from LCDC.⁶⁹

The rules define a duplex as any two housing units on a single lot and require cities to allow duplexes with a shared wall or breezeway (side-by-side units) and duplexes created through conversion of an existing detached single-family dwelling.⁷⁰ Although the rules stopped short of requiring cities to allow duplexes in any configuration, the model code definition includes stacked (upstairs-downstairs units) and detached duplexes.⁷¹ Duplexes subject to the rules must be treated under the same process as single-family dwellings, which, under existing Oregon law means “clear and objective standards, conditions and procedures” must be applied.⁷² 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.⁷³ Cities also must allow conversions of existing detached single-family dwellings to duplexes unless the conversion would increase nonconformity with existing clear and objective code standards, and they may not apply design standards to conversions.⁷⁴

69. 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. “Extension” under the rules for medium cities is used in two contexts. The first is a request to extend the June 30, 2021, deadline for medium cities to adopt amendments to their development codes to make duplexes allowable in zones in which single-family homes are allowed. The other is an infrastructure based time extension request (IBTER) under OR. ADMIN. R. 660-046-0300 to 0370. OR. LAWS 2019, ch. 639, § 3-4. *See infra* Part II.C. (discussing IBTERs).

70. 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) (2021). 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) (2021).

71. MODEL CODE FOR MEDIUM CITIES, OR. ADMIN. R. 660-046-0010(4), Ex. A, Figures 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), Ex. B, ch. 1(B) (defining duplex, triplex, and quadplex as two, three, and four dwelling units, respectively, “on a lot or parcel in any configuration”) and Figures 7–8, 11 & 13 (illustrating detached configurations).

72. OR. REV. STAT. § 197.307(4) (2021). 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 id.* § 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>.

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

74. OR. ADMIN. R. 660-046-0130; OR. ADMIN. R. 660-046-0125(2).

The rules also clarify which local regulations adopted to implement Oregon's statewide planning goals a city may apply to middle housing development. As summarized in Table 1 below, for land use regulations adopted under the state's natural and historic resource protection goal, Goal 5,⁷⁵ estuarine resource protection goal, Goal 16,⁷⁶ and coastal shorelands protection goal, Goal 17,⁷⁷ cities may regulate duplexes in the same manner that they regulate detached single-family dwellings in the same residential zone.⁷⁸ 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.⁷⁹ For protective measures adopted pursuant to the state's natural hazard and beaches and dunes goals, Goal 7⁸⁰ and Goal 18,⁸¹ respectively, a city may apply more restrictive protective measures to duplexes and other middle housing only if the city justifies the need for more restrictive measures⁸²; 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.⁸³

75. OR. ADMIN. R. 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 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.

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

77. OR. ADMIN. R. 660-015-0010(17).

78. OR. ADMIN. R. 660-046-0110(1); OR. ADMIN. R. 660-046-0010(3).

79. OR. ADMIN. R. 660-046-0010(3).

80. OR. ADMIN. R. 660-015-0000(7).

81. OR. ADMIN. R. 660-015-0010(18).

82. OR. ADMIN. R. 660-046-0010(3)(c) (natural hazards), (3)(i) (beaches and dunes).

83. OR. ADMIN. R. 660-046-0010(3)(c)(A).

Table 1.
Statewide Land Use Goals and Middle Housing

		Duplexes	Triplexes	Quadplexes	Town homes	Cottage Clusters
Goal 5: Natural Resources		Same as SFDs	May limit in significant resource sites			
Goal 5: Historic Resources		Same as SFDs with exceptions				
Goal 6: Air, Water and Land Resources Quality		May limit within an urban growth boundary to comply with federal and state requirements				
Goal 7: Areas Subject to Natural Hazards	Special Flood Hazard Areas identified on FEMA FIRM	May limit				
	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				
Goal 9: Economic Development		May limit on lots or parcels zoned for residential use but designated for future industrial or employment uses				
Goal 15: Willamette Greenway		May allow and regulate middle housing, but standards must be clear and objective				
Goal 16: Estuarine Resources		Same as SFDs				
Goal 17: Coastal Shorelands		Same as SFDs				
Goal 18: Beaches and Dunes		May limit where middle housing presents greater risk to life or property than SFDs				

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

- Cities may not require for duplexes minimum lot or parcel size, setbacks, or building heights greater than those required for detached single-family dwellings in the same zone.⁸⁴
- Cities must allow the development of a duplex on any property zoned to allow detached single-family dwellings that was

84. OR. ADMIN. R. 660-046-0120(1), (3), (4).

legally created before the medium city's current lot size minimum for detached single-family dwellings in the same zone.⁸⁵

- Cities may not apply density maximums to the development of duplexes.⁸⁶

- 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.⁸⁷

- 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.⁸⁸

- 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.⁸⁹

Finally, the Oregon legislature understood that the cost and delay imposed by local siting and design standards⁹⁰ can act as a poison pill even when middle housing forms are permitted by right.⁹¹ To address this, the middle housing law prohibits cities (both medium and large) from using siting and design standards, conditions, or procedures that, individually or cumulatively, discourage middle housing development through unreasonable cost

85. OR. ADMIN. R. 660-046-0120(1).

86. OR. ADMIN. R. 660-046-0120(2).

87. OR. ADMIN. R. 660-046-0120(6).

88. OR. ADMIN. 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).

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

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

91. 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, OR. ADMIN. R. 660-046-0000, and directs the application of a state-established "Model Code" for medium or large cities that do not comply with the rules. OR. ADMIN. R. 660-046-0010(4).

or delay.⁹² 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.⁹³

B. New Rules for “Large Cities”

Cities with populations of 25,000 or more and each county or city within a metropolitan service district must allow duplexes under the same requirements as medium cities.⁹⁴ 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 dwellings⁹⁵: triplexes,⁹⁶ quadplexes,⁹⁷ townhouses,⁹⁸ and “cottage clusters.”⁹⁹ What 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 below summarizes the middle housing mandates and restrictions that medium and large cities may apply

92. Following existing state housing policy found in Or. Rev. Stat. § 197.307(4), the rules require the application of “clear and objective standards, conditions, or procedures” that “[d]o not, individually or cumulatively, discourage the development of Middle Housing through unreasonable costs or delay.” OR. ADMIN. R. 660-046-0210 (large cities) and -0110 (medium cities).

93. 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 91 (discussing legislative purpose).

94. 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 26 and 33.

95. 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 OR. ADMIN. R. 660-046-0230, discussed *infra* at note 151 and accompanying text.

96. “[T]hree attached dwelling units on a Lot or Parcel” under any configuration of three units. OR. ADMIN. R. 660-046-0020(19).

97. “[F]our attached dwelling units on a Lot or Parcel” under any configuration of four or more units. OR. ADMIN. R. 660-046-0020(14).

98. “[A] 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.” OR. ADMIN. R. 660-046-0020(17).

99. “[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 to be located on either on a single lot or parcel, or on individual lots or parcels. OR. ADMIN. R. 660-046-0020(2).

to the development of middle housing on a lot or parcel that is residentially zoned and allows a single family detached unit.¹⁰⁰

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.¹⁰¹ Essentially, the rules allow regulation of middle housing in goal-constrained areas consistent with existing goal protections while recognizing that, on a per housing unit basis, middle housing typically is no more intense a land use than single family detached housing.¹⁰²

Large cities may also limit middle housing development (except duplexes) on some lots or parcels in “master planned communities”¹⁰³ approved after January 1, 2021, and, undeveloped areas of master planned communities approved before this date.¹⁰⁴ 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.¹⁰⁵ Specifically, for master planned communities approved after January 1, 2021, the master planned community must allow all middle housing types within the master plan area based on whichever compliance pathway the city adopted for middle housing citywide or regulate the development of middle housing under one of the following three options¹⁰⁶: (a) require the master plan to

100. See Table 2 *infra*.

101. See *supra* notes 75–83 and accompanying text.

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

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

(a) Greater than twenty 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;

(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 Jan. 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).

104. OR. ADMIN. R. 660-046-0205(2)(b).

105. OR. ADMIN. R. 660-046-0110(2).

106. OR. ADMIN. R. 660-046-0205(2)(b)(A).

provide for urban water, sanitary sewer, stormwater, and transportation systems 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; (b) require the plan to provide for urban infrastructure based on a variable rate system development charge “that more accurately reflects the actual cost of providing urban services to Middle Housing and other housing types in an adopted master plan and which incentivize[s] the development of Middle Housing and smaller and more affordable housing types generally by reducing development cost”;¹⁰⁷ or (c) require a housing mix that includes at least two middle housing types in addition to duplexes.¹⁰⁸ Master planned communities approved before January 1, 2021, may limit the development of middle housing (except duplexes) and need only have a net residential density of at least eight dwelling units per acre.¹⁰⁹

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.”¹¹⁰ 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,¹¹¹ 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.”¹¹²

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

107. OR. ADMIN. R. 660-046-0205(2)(b)(A)(ii).

108. OR. ADMIN. R. 660-046-0205(2)(b)(A). Cities may also require the applicant to 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.*

109. OR. ADMIN. R. 660-046-0205(2)(b)(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.*

110. OR. ADMIN. R. 660-046-0205(2)(c).

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

112. Memorandum from Jim Rue, DLCD Director, to LCDC, *Agenda Item 7, Sept. 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).

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.”¹¹³ DLCDC 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].”¹¹⁴

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,¹¹⁵ including prescribed minimum lot size and maximum density provisions applicable for each denser form of middle housing.¹¹⁶ 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,¹¹⁷ 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 townhouses.¹¹⁸ The rules include detailed provisions to ensure that a lot counts as allowing a middle housing type only if that housing

113. OR. REV. STAT. § 197.758(2)(a) (2021).

114. See Memorandum from Jim Rue, DLCDC Director, et al., to LCDC, *Agenda Item 4, November 12–13, 2020 – LCDC Meeting, Middle Housing Large Cities Model Code and Minimum Standards* 13 (Oct. 29, 2020).

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

116. See OR. ADMIN. R. 660-046-0220(2)-(4); see also *supra* notes 139–142 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).

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

118. OR. ADMIN. 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. OR. ADMIN. 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 OR. ADMIN. R. 660-046-0205(2)(c).

type could actually be developed on the lot.¹¹⁹ 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 group.¹²⁰ 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.¹²¹

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.¹²²

119. OR. ADMIN. R. 660-046-0205(3)(b)(E). In order 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.*

120. OR. ADMIN. 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 119, *supra*, and applies to any constellation of at least four eligible lots and parcels within the large city.

121. OR. ADMIN. 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.*

122. *See* Table 1, *supra* Part II.A. (summarizing allowable restrictions adopted to implement statewide planning goals).

Table 2.
Limited Restrictions to Allowable Middle Housing

	MEDIUM CITY Res. District + lot allows SFDU + not goal constrained	LARGE CITY Res. District + lot allows SFDU + not goal constrained + not in MPC	LARGE CITY Master Plan Community			Deed or governing doc. allows SFDU and restricts middle housing
			Adopted after 1/1/21	Adopted before 1/1/21		
				No areas developed as of 1/1/21	Any area developed as of 1/1/21	
New duplexes	Must allow	Must allow	Must allow			Post-HB 2001 restriction unenforceable HB 2001 did not address pre-HB 2001 restrictions
Duplex conversions	Must allow unless increases nonconformity					
Triplexes	May allow	Must allow based on lot size/density, or on at least 80% of lots	Must allow based on applicable compliance pathway, or plan to accommodate at least 20 (Metro) or 15 DU/acre, implement variable rate SDC based on middle housing cost, or require at least 2 middle housing types plus duplex	May restrict if duplexes allowed, net residential density of at least 8 DUs/acre authorized for entire plan area, and restriction necessary to implement or comply with state or federal law	May restrict if restriction necessary to implement or comply with state or federal law	
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- & Quadplex conversions	May allow	Must allow unless increases nonconformity				
Equitable distribution	NA	Req'd under performance metric pathway				NA

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,¹²³ and more than four dwelling units for triplexes and quadplexes.¹²⁴ Regarding townhouses, a large city must require a minimum of two attached units and must allow a minimum of four attached units subject to

123. OR. ADMIN. R. 660-046-0205(4)(a).

124. OR. ADMIN. R. 660-046-0205(4)(b).

the applicable siting and design standards.¹²⁵ 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 3, 4, or 5 dwelling units and may allow a greater number of units;¹²⁶ 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.¹²⁷ Because the rules set the floor, cities may allow larger quantities of middle housing units on a lot or parcel.

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 permitted¹²⁸ and to certain "clear and objective" siting and design standards.¹²⁹ So too does 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.¹³⁰

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.¹³¹ 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

125. OR. ADMIN. 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 OR. ADMIN. R. 660-046-0205(3)(b) and have fairly limited authority to impose siting and design standards under OR. ADMIN. R. 660-046-0220 to -0235.

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

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

128. OR. ADMIN. R. 660-046-0210(1) applies these exemptions to "goal protected lands" under OR. ADMIN. R. 660-046-0010(3), *see supra* note 68, or where large cities have discretion to apply percentage restrictions under OR. ADMIN. R. 660-046-0205(3)(b).

129. 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 of siting and design for middle housing. OR. ADMIN. R. 660-046-0010(4).

130. OR. ADMIN. 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) (2021).

131. OR. REV. STAT. § 197.758(5).

conversions; and alternative siting and design standards.¹³² 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.”¹³³

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.¹³⁴

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.¹³⁵
- 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.¹³⁶
- Setbacks – These may be no more restrictive than those applicable to single-family detached dwellings.¹³⁷

132. 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 “[a]lternative design standards as provided in OAR 660-046-0235.” See *infra* notes 152 and 153 and accompanying text.

133. OR. ADMIN. 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.*

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

135. OR. ADMIN. R. 660-046-0220(2)(b).

136. 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)(a)(A) and (B). Large cities may choose to facilitate more middle housing development by setting lower minimum lot sizes. *Id.*

137. OR. ADMIN. R. 660-046-0220(2)(c).

- 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 quad-plex may not be less than 25-feet or two stories.¹³⁸

- Off-street parking space requirements – These requirements vary depending on the size of the lot or parcel being developed,¹³⁹ and the rules provide for some assurances that state housing choice policy will be furthered through the use of flexible parking requirements.¹⁴⁰ 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 more restrictive than for single-family detached housing.¹⁴¹

The rules for townhouses and cottage clusters follow this pattern for lot or parcel sizes.¹⁴² Townhouse street frontage requirements are not required, but, if a city uses them, minimum street frontage is capped at twenty feet.¹⁴³ 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.¹⁴⁴ Limitations on large city

138. OR. ADMIN. R. 660-046-0220(2)(d).

139. OR. ADMIN. 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.*

140. 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.*

141. OR. ADMIN. R. 660-046-0220(2)(f).

142. 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. OR. ADMIN. 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. OR. ADMIN. R. 660-046-0220(4)(a).

143. OR. ADMIN. R. 660-046-0220(3)(b). A large city may allow the frontage to be on a public or private street or alley or on a common driveway; however, if the city allows flag lots or parcels, it is not required to allow townhouse development on them. *Id.*

144. OR. ADMIN. R. 660-046-0220(4)(b).

density,¹⁴⁵ setbacks,¹⁴⁶ and height and dwelling unit regulations¹⁴⁷ 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 costs.¹⁴⁸ 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.¹⁴⁹ In addition to these limitations, large cities are given other specific directions to facilitate these housing types.¹⁵⁰

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

145. 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. OR. ADMIN. 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.” OR. ADMIN. R. 660-046-0220(4)(c).

146. For townhouses, OR. ADMIN. R. 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, OR. ADMIN. R. 660-046-0220(4)(d) requires perimeter setbacks to be the lesser of 10 feet or the perimeter setback for single-family dwellings in the same zone and distance requirements between structures to be the lesser of 10 feet or the distance requirement provided under the applicable building code.

147. For townhouses, OR. ADMIN. R. 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, OR. ADMIN. R. 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.

148. For townhouses, OR. ADMIN. R. 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, OR. ADMIN. R. 660-046-0220(4)(f) 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.

149. For townhouses, OR. ADMIN. R. 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, OR. ADMIN. R. 660-046-0220(4)(g), “[the] Large City may not apply lot or parcel coverage or floor area ratio standards to Cottage Clusters.”

150. For townhouses, OR. ADMIN. R. 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. OR. ADMIN. R. 660-046-0220(4)(h) allows large cities the use of separate lots or parcels for cottage cluster developments.

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.”¹⁵¹

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 unreasonable cost or delay to the development of Middle Housing.”¹⁵² The Department 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.¹⁵³ 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

151. OR. ADMIN. R. 660-046-0230(1). The conversion must thus be consistent with OR. ADMIN. R. 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. OR. ADMIN. R. 660-046-0230(3).

152. OR. ADMIN. R. 660-046-0235.

153. 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 OR. ADMIN. R. 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.

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

support density increases might not already be in place¹⁵⁴ 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.¹⁵⁵ 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.¹⁵⁶

LCDC adopted administrative rules to clarify the form and substance of requests for an infrastructure-based extension¹⁵⁷ 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.¹⁵⁸ Medium cities had until December 31,

154. Goal 11, Public Facilities and Services, is designed to provide the facilities and services to serve all urban uses during the 20-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).

155. 2019 Or. Laws ch. 639, § 4(1). The statute contemplates “an” extension.

156. 2019 Or. Laws ch. 639, § 4(2).

157. OR. ADMIN. R. 660-046-0300 to -0370. The rules provide the details for the content and completeness of applications, “considerations” the department must make in evaluating applications, an obligation to respond to “valid” third-party comments, conditions on approval of extensions, and appeals, OR. ADMIN. R. 660-046-0350 to -0360.

158. 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

2020, to request an extension and large cities had until June 30, 2021.¹⁵⁹ Only one medium city (Newberg, Oregon) and one large city (Forest Grove) applied for an extension.¹⁶⁰ Notwithstanding that LCDC granted Newberg's extension,¹⁶¹ the city amended its code by the statutory deadline for medium cities.¹⁶² LCDC granted Forest Grove's infrastructure-based extension for a portion of the city, but only for sanitary sewer and stormwater systems.¹⁶³

III. IMPLEMENTATION TRENDS AND CHALLENGES

This section examines 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.¹⁶⁴ With financial and

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 (OR. ADMIN. R. 660-046-0330(1)) or through Oregon's statutory moratorium process, OR. REV. STAT. § 197.505-.540 (2021) (OR. ADMIN. R. 660-046-0330(2)).

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

160. 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); Letter from Jim Rue, Director, DLCD, to Dan Riordan, Community Development Director, Forest Grove (Jan. 1, 2022) (on file with authors).

161. LCDC granted the City of Newberg's application at its meeting of Mar. 18-19, 2021. Dep't of Land Conservation and Dev., *LCDC Meeting (Day 1)*, GRANICUS (Mar. 18, 2021, 8:30 AM), https://lcd.granicus.com/MediaPlayer.php?view_id=1&clip_id=96; Dep't of Land Conservation and Dev., *LCDC Meeting (Day 2)*, GRANICUS (Mar. 19, 2021, 8:30 AM), https://lcd.granicus.com/MediaPlayer.php?view_id=1&clip_id=100.

162. See NEWBERG, OR., DEV. CODE § 15.05.030 (2021). Anticipating its 2022 transition to large city status, Newberg's amended code appears to conform to the large city requirements. See *id.*; Email from Ethan Stuckmayer, Senior Planner of Housing Programs, Oregon Department of Land Conservation and Development, to Sarah Adams-Schoen and Edward Sullivan, Re: Confirmation of status of medium and large cities (June 23, 2022) (on file with authors).

163. Letter from Jim Rue, *supra* note 160.

164. OR. DEPT 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, which qualified as a "medium city" in 2021, amended its development code in Aug. 2021 to comply with the medium city housing requirements. BAKER CITY, OR., BAKER CITY COUNCIL MEETING AGENDA, PLANNING DEPARTMENT MEDIUM CITY

technical assistance from the Oregon Department of Land Conservation and Development, eighteen of these cities amended their land use laws to comply with the new legislation; the default model code regulations applied in the three cities that did not amend their laws by the statutory deadline.¹⁶⁵

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. Side-by-side units tend to cost more to build than stacked units.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ Detached duplexes may also be more marketable in some contexts.¹⁶⁹ Nearly all medium

REQUIREMENTS (Mar. 23, 2021); BAKER CITY, OR., DEVELOPMENT CODE, amended by Ordinance No. 3382 (effective Nov. 8, 2021). 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., MUN. CODE § 17-2.2.040 (2021).

165. Those cities were Canby, Central Point and Klamath Falls. Klamath Falls adopted middle housing code amendments on Feb. 8, 2022. KLAMATH, OR., ORD. 22-02 (2022). As of June 23, 2022, the model code still applied in Canby and Central Point. Email from Sean Edging, Housing Planner, Oregon Department of Land Conservation and Development, to Sarah Adams-Schoen and Edward Sullivan, Re: Klamath Falls PAPA (June 23, 2022) (on file with authors).

166. FIXR, *How Much Does It Cost to Build a Duplex* (updated Jan. 21, 2022), <https://www.fixr.com/costs/build-duplex>. The cost of roofing, foundations and plumbing fixtures tend to be lower for stacked duplexes. *Id.*

167. *See id.* (reporting national average cost to convert single-family home to duplex was between \$80,000 and \$100,000 in 2017); Carmel Ford, Nat'l Ass'n of Home Builders Economics and Housing Policy Group, *Cost of Constructing a Home*, NAT'L ASS'N OF HOME BUILDERS (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).

168. *See generally* Hannah Hoyt & Jenny Schuetz, *Flexible Zoning and Streamlined Procedures Can Make Housing More Affordable*, BROOKINGS (May 19, 2020), <https://www.brookings.edu/research/flexible-zoning-and-streamlined-procedures-can-make-housing-more-affordable/>.

169. *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->

cities adopted code amendments that define “duplex” or “two-family dwelling” to include both attached shared-wall duplexes and stacked duplexes,¹⁷⁰ and at least six medium cities opted to permit detached duplexes as of right wherever duplexes are permitted.¹⁷¹

Similarly, the rules allow a maximum of one required off-street parking space per unit.¹⁷² Cities can facilitate production of more affordable duplexes by requiring fewer than one off-street parking space per unit.¹⁷³ So far, no medium cities have done this¹⁷⁴; however, at least one medium city included in its HB 2001 code amendments a voluntary reduction in the minimum number of spaces the city requires for triplexes (reducing the minimum from two to one space per dwelling unit)¹⁷⁵ and another medium city voluntarily reduced the minimum for triplexes, quadplexes, cottage clusters, and apartments to one space per dwelling unit.¹⁷⁶ The rules also allow cities to establish a parking credit system by which off-street parking requirements may be met

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).

170. The following cities define duplexes to include attached shared-wall and stacked duplexes: COTTAGE GROVE, OR., DEV. CODE TIT. 14.13.300 (2021); DALLAS, OR., DEV. CODE § 6.1.030 (2021); HERMISTON, OR., DEV. CODE § 157.002 (2021); ONTARIO, OR., PLAN. AND ZONING DEV. STANDARDS § 10A-03-74.5 (2021); PRINEVILLE, OR., LAND USE 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., MUN. CODE § 14.01.020 (2021); PENDLETON, OR., UNIFIED DEV. CODE § 3.10.3 (2021).

171. ASHLAND, OR., LAND USE ORDINANCE § 18.6.1.030 (2021); COOS BAY, OR., DEV. CODE § 17.150 (2021); ROSEBURG, OR., LAND USE AND DEV. REGULS. § 12.02.090 (2021); ST. HELENS, OR., MUN. CODE § 17.16.010 (2021); THE 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., LAND USE CODE § 153.004 (2021).

172. OR. ADMIN. R. 660-046-0120(5) (2022); OR. ADMIN. R. 660-046-0220(2)(e), (3)(f), (4)(f). 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.” OR. ADMIN. R. 660-046-0220(2)(c)(E) and (3)(f)(C).

173. Section F(3) of the model code for medium cities invalidates off-street parking requirements for duplexes. MODEL CODE FOR MEDIUM CITIES, OR. ADMIN. R. 660-046-0010(4), Ex. A. For large cities, the model code authorizes 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.” MODEL CODE FOR LARGE CITIES, OR. ADMIN. R. 660-046-0010(4), Ex. B, Chs. 3(B)(7)(b) (triplexes and quadplexes), 4(B)(5)(b) (townhouses), 5(B)(7)(b) (cottage clusters).

174. Medium city adopted codes are on file with the authors.

175. THE DALLES, OR., MUN. CODE § 10.7.060.010.

176. COTTAGE GROVE, OR., DEV. CODE Table 14.33.300.A.

without supplying all or part of a city's required parking spaces.¹⁷⁷ Grounds for allowing credits range from availability of existing street space, proximity to public transit, and use of angled parking.¹⁷⁸

Illustrative of the widespread misperception that each U.S. household has and needs two cars,¹⁷⁹ many cities appeared to struggle with the new rule that they require no more than one off-street parking space per dwelling unit.¹⁸⁰ 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:

177. OR. ADMIN. R. 660-046-0120(5); OR. ADMIN. R. 660-046-0220(2)(e), (3)(f), (4)(f).

178. See AMERICAN PLANNING ASSOCIATION PLANNING ADVISORY SERVICE, PARKING SOLUTIONS (2009) (examples of parking credits).

179. 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), <https://sightline-wpengine.netdna-ssl.com/wp-content/uploads/2020/12/ParkingDemandsAcrossCities.pdf> [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, COMMUNITING IN AMERICA: THE NATIONAL REPORT ON COMMUTING PATTERNS AND TRENDS 15, 19 (2021), <https://traveltrends.transportation.org/wp-content/uploads/sites/62/2021/04/CA01-5.pdf> [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, *Household, Individual, and Vehicle Characteristics*, BUREAU OF TRANSPORTATION STATISTICS (Dec. 1, 2011), https://www.bts.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).

180. 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; *infra* note 181 and accompanying text. Notwithstanding the research on parking demand conducted during the rulemaking process, see PARKING AND MIDDLE HOUSING, *supra* note 179, 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).

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 [sic] parking requirements for duplexes.*¹⁸¹

B. Large Cities

Oregon HB 2001 required the thirty-four Oregon cities subject to the large city rules to amend their zoning codes to comply with the middle housing law by June 30, 2022.¹⁸² 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.¹⁸³

Other issues also complicate implementation of the large city rules. For example, although housing in Oregon must generally be allowed under “clear and objective standards, conditions, or procedures,”¹⁸⁴ 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.¹⁸⁵ Local governments often use increased density to incentivize an applicant and 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, has detracted from public support for these changes. For example, the uniform

181. 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>.

182. As of June 30, 2022, all but two of Oregon’s large cities have met the statutory deadline; the cities of Fairview and Grants Pass will adopt the state model code pending completion of their ongoing code amendments processes. Email from Sean Edging, *supra* note 180.

183. *See, e.g.,* O’Neil, *supra* note 180, 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).

184. OR. REV. STAT. § 197.307(4) (2019).

185. OR. REV. STAT. § 197.307(4) (2019).

one-space per dwelling unit maximum parking requirement engendered skepticism and resistance, which the use of parking credits (discussed above) and experience¹⁸⁶ must address.

Not surprisingly, concerns some medium city residents raised about the one-space per dwelling unit off-street parking maximum foreshadowed even more strenuous objections in large cities. For example, the following public comments were filed in response to the City of Eugene Planning Commission's proposal to incentivize development of smaller and income-qualified middle housing and middle housing in public transit corridors by eliminating the off-street parking requirement for such developments:

- “[N]ot requiring parking (even where transportation is within ¼ mile) will cause many more cars on the streets.”¹⁸⁷

- “How would you like to live in a neighborhood where fewer and fewer homes have off-street parking? . . . Where short term rentals crowd in and three story tri-plexes (with no off street parking, I say again) tower over small bungalows?”¹⁸⁸

- “Do we need to ruin single-house areas as well? Single dwelling neighborhoods do not want obnoxious multiplexes ruining our environment (more street traffic, more street parking, infrastructure capacity, etc.).”¹⁸⁹

- “I . . . am extremely upset with what I believe is the city's attempt to destroy our peaceful neighborhood by allowing densely packed construction to overwhelm so many of the established parts of this town. The idea that a three story condo complex can be jammed right next to a single family house, with no on-site parking needed, I find insulting to the long term residents who have invested so much in their properties.”¹⁹⁰

- “[E]ven with generous parking along the curb, it doesn't take much to create a 'war zone' for access to parking. . . . Hoping that tenants don't purchase too many vehicles is a lost hope.”¹⁹¹

Parking demand data, however, suggests these concerns are often more of a perception problem than an actual congestion

186. 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. See NAT'L REPORT ON COMMUTING PATTERNS, *supra* note 179, at 21–23.

187. CITY OF EUGENE, MIDDLE HOUSING CODE AMENDMENTS TESTIMONY BATCH 25, at 262 (May 11, 2022–5:30 PM, May 17, 2022).

188. CITY OF EUGENE, MIDDLE HOUSING CODE AMENDMENTS TESTIMONY BATCH 10, at 224–25 (Nov. 9–Nov. 14, 2021).

189. CITY OF EUGENE, MIDDLE HOUSING CODE AMENDMENTS TESTIMONY BATCH 16, at 60 (Mar. 1–Mar. 6, 2022).

190. *Id.* at 140.

191. *Id.* at 160.

problem.¹⁹² 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.¹⁹³ As part of the HB 2001 rulemaking, DLCD 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.¹⁹⁴

Regarding the significant costs related to off-street parking minimums, the DLCD 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.¹⁹⁵

Additionally, the study reported that minimum off-street parking requirements incentivize developers to build larger, less affordable housing.¹⁹⁶

Although the state's 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.¹⁹⁷ Early twentieth century zoning

192. *See supra* note 179 (citing studies).

193. PARKING AND MIDDLE HOUSING, *supra* note 179, at 2, 5–10; *see also id.* at 11–12 (citing relevant literature).

194. *Id.* at 2.

195. *Id.* at 3.

196. *Id.* at 3.

197. Email from Sean Edging, Housing Planner, Oregon Department of Land Conservation and Development, to Sarah Adams-Schoen and Edward Sullivan, June 11, 2021

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.¹⁹⁸ The intentional and unintentional exclusionary effect¹⁹⁹ 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.”²⁰⁰

Historic resistance to even modest reforms of exclusive single-family zoning, such as laws making ADUs permissible by-right, also provided a preview of the resistance large cities would encounter.²⁰¹ Reflective of this resistance, some public comments urged the City of Eugene, for example, to preserve an area known as the “Willamette River Greenway” by prohibiting middle housing development²⁰² even where single-family housing and other developments are permitted.²⁰³ Other examples of regulatory requirements that are not justified for middle housing that is compatible in scale and intensity to single-family detached housing range from distinct façade requirements to restrictions on lot shape and size.²⁰⁴ Although such requirements may appear innocuous,

(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 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 (2022).

198. See, e.g., Edward Bassett, ZONING (National Municipal League 1922); see also Sonia Hirt, *Home, Sweet Home American Residential Zoning in Comparative Perspective*, 33 J. PLAN. EDUC. AND RSCH. 296, 298–99 (2013) (reviewing stated rationale for excluding multifamily structures from single-family districts in early zoning documents).

199. See Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. OF THE 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).

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

201. See, e.g., *Kamps-Hughes v. City of Eugene*, 305 Or. App. 224, 236 (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 OR. REV. STAT. § 197.312).

202. See, e.g., CITY OF EUGENE, MIDDLE HOUSING CODE AMENDMENTS TESTIMONY BATCH 22, at 32-34 (Apr. 19–Apr. 30, 2022).

203. CITY OF EUGENE, WILLAMETTE GREENWAY CODE AMENDMENTS FREQUENTLY ASKED QUESTIONS (Feb. 2022).

204. See Hoyt & Schuetz, *supra* note 168, at 54–57 (discussing façade flexibility as a strategy for reducing cost of multifamily housing) and 36–37 (discussing lot shape and size flexibility as a strategy for reducing cost of multifamily housing).

they can drive up the cost and timeframe of housing development.²⁰⁵ However, while 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.²⁰⁶

An initiative petition filed in Eugene was illustrative of efforts to constrain housing reform efforts. The initiative petition sought to pose the following question to the city’s voters: “Shall voters adopt a protected ordinance amending the definitions of duplex, triplex, and four-plex to prohibit detached dwelling units”?²⁰⁷ 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.²⁰⁸ The effort to limit Eugene’s middle housing through a voter initiative was particularly pernicious because the “protected ordinance” sought to prohibit the City Council from adopting any future ordinance that would allow detached duplexes, triplexes, or quadplexes.²⁰⁹

Notwithstanding pervasive entrenched resistance to the diversification and densification of neighborhoods dominated by single-family detached homes, some of Oregon’s large cities responded 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 engaged citizens through Facebook live mini-lectures and Q&A sessions on housing economics, the racist history of exclusionary residential zoning, and other topics; an Equity RoundTable comprised of representatives from local organizations representing underserved communities in Eugene;

205. *Id.*

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

207. *See* Memorandum from Eugene City Recorder to Mayor and City Council (June 2, 2021) (attaching proposed ballot title and Petition 2021-1, Proposed Ord. for Adoption by Initiative) (on file with authors).

208. *See* OR. ADMIN. R. 660-046-0020 (2022) (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), Ex. 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), Ex. 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).

209. Eugene, Or., Petition 2021-1, Proposed Ord. for Adoption by Initiative § 2.

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.²¹⁰ The City also partnered with Healthy Democracy, a nonprofit that designs and coordinates deliberative democracy programs,²¹¹ to provide a lottery-selected panel of Eugene residents representative of eight local demographic factors with an opportunity to deeply engage with issues related to middle housing and provide feedback to the City.²¹² The 29-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.²¹³ 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).²¹⁴

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

210. 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).

211. *Our Story*, HEALTHY DEMOCRACY, <https://healthydemocracy.org/about/> (last visited Feb. 24, 2022).

212. *2020 Eugene Review Panel on Housing*, HEALTHY DEMOCRACY, <https://healthydemocracy.org/what-we-do/local-government-work/2020-eugene-review-panel-on-housing/> (last visited Feb. 24, 2022); HEALTHY DEMOCRACY, 2020 EUGENE REVIEW PANEL DEMOGRAPHIC PROFILE (undated), <https://healthydemocracy.org/wp-content/uploads/201112-2020-21-EugeneRP-Demographics.pdf>.

213. *2020 Eugene Review Panel on Housing*, HEALTHY DEMOCRACY, <https://healthydemocracy.org/what-we-do/local-government-work/2020-eugene-review-panel-on-housing/> (last visited Feb. 24, 2022).

214. EUGENE REVIEW PANEL FIRST REPORT: GUIDING PRINCIPLES 2 (Dec. 11, 2020), <https://healthydemocracy.org/wp-content/uploads/2020-21-EugeneRP-First-Report-Guiding-Principles.pdf>. 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.

neighborhoods across the city,” and “make the code less restrictive to remove barriers” to the development of housing.²¹⁵

At the culmination of this unprecedented public engagement process, Eugene’s Planning Commission voted unanimously in favor of a set of proposed code amendments that exceed the state’s minimum standards in a number of ways.²¹⁶ Although the City Council ultimately adopted the bulk of the Planning Commission’s proposal, it rejected a small increase in maximum building height for middle housing and an off-street parking credit for small middle housing developments, narrowed the geographic scope of an off-street parking credit for middle housing in transit corridors, and decreased the maximum buildable lot area for middle housing from the proposed 75% to 60%.²¹⁷ The adopted code modestly exceeds the state minimum requirements and includes provisions that will both decrease the cost to develop housing and incentivize development of affordable housing in neighborhoods throughout the city. For example, the adopted code amendments allow duplexes, triplexes and fourplexes to be attached or detached;²¹⁸ exempts from maximum residential density standards duplexes, triplexes, quadplexes, and cottage clusters;²¹⁹ and provides a maximum density for townhouses in Eugene’s lowest- and second-lowest-density residential zones of 25 units per acre and 39 units per acre, respectively.²²⁰

The adopted code amendments also eliminate off-street parking requirements for “income-qualified middle housing” and middle housing within ¼ mile of certain public transit stops,²²¹ provide density bonuses of 5 units per acre for “small” townhouses and “income-qualified townhouses,”²²² and provide smaller minimum lot sizes for small and income-qualified middle housing.²²³ Small middle housing units are less than 900 square feet and small middle housing development projects are projects in which the average unit

215. *Id.* at 3–4.

216. Memorandum from Eugene Planning Commission to Eugene Mayor and City Council, Recommendation for Middle Housing Code Amendments (Jan. 25, 2022); CITY OF EUGENE, PLANNING COMMISSION, DRAFT AMENDMENTS VERSION 4 (Jan. 20, 2022), https://www.eugene-or.gov/DocumentCenter/View/64625/Eugene-Middle-Housing-Code-Amendments_Planning-Commission-Recommendation?bidId=.

217. Eugene City Council, *Agenda Item Summary* 1–2 (May 18, 2022); City of Eugene, City Council Special Meeting at 28:35 (May 24, 2022), <https://eugene.ompnetwork.org/embed/sessions/246941/city-council-special-meeting-may-24-2022>.

218. EUGENE, OR., ORD. 20667 § 9.0500 (May 24, 2022).

219. *Id.* at 35–36.

220. § 9.2750(1).

221. § 9.6410(6).

222. § 9.2751(1)(b).

223. §§ 9.2741(4), 9.2761(3).

size is less than 900 square feet.²²⁴ Income-qualified middle housing is a “unit in a duplex, triplex, fourplex, or cottage cluster exclusively for individuals and/or families, sponsored by a public agency, a non-profit housing sponsor, [or] a developer . . . to undertake, construct, or operate housing for households that . . . [have] income at or below 80 percent of the area median income.”²²⁵ For middle housing development projects to meet the income-qualified standard, at least fifty percent of the dwelling units in the project must be made available at prices or rent levels appropriate for persons with incomes at or below 80% of the area median income.²²⁶

The City of Bend revised its comprehensive plan housing policies and enacted a middle housing code that exceeds many of the minimum standards provided in the large city model code.²²⁷ The plan policies specifically recognize HB 2001 as a principal source of these revisions²²⁸ and the code revisions track with the 2019 statutory changes.²²⁹ Bend’s code had already allowed duplexes and triplexes in any configuration (side-by-side attached, stacked, or detached), and its amended code extended that flexibility to quadplexes.²³⁰ The amended code also allows duplexes, triplexes and quadplexes permitted by right in all residential zones, except that triplexes are only permitted in Bend’s lowest-density residential zone as part of a master plan.²³¹

Bend also exceeded the state minimum standards by eliminating minimum offstreet parking requirements for duplexes and triplexes and by requiring two offstreet parking spaces per quadplex development (i.e., 0.5 spaces per unit) in the city’s lowest-density residential zone and one offstreet parking space per quadplex development (i.e., 0.25 spaces per unit) in the city’s other residential zones.²³² Homeowners and developers may, of course, choose to exceed the regulatory minimum. Along with its middle housing amendments, the city amended its code to exempt middle housing,

224. §§ 9.2741(4), 9.2751(1)(b), 9.2761(3),

225. § 9.0500.

226. §§ 9.2741(4), 9.2751(1)(b), 9.2761(3), 6410(6)(c).

227. BEND, OR., ORD. 2423 (Oct. 6, 2021), https://www.bendoregon.gov/home/show_publisheddocument/51172/637695585748470000.

228. *Id.* at 1–7.

229. *Id.* at 7–114.

230. BEND, OR., DEVELOPMENT CODE ch. 1.2 (May 2021); BEND, OR., DEVELOPMENT CODE ch. 1.2 (amended Oct. 6, 2021) (defining quadplex).

231. BEND, OR., DEVELOPMENT CODE, Table 2.1.200.

232. *Id.* § 3.3.300 and Table 3.3.300.

single-unit detached dwellings, and manufactured dwellings from the code's maximum number of ground surface parking spaces.²³³

Bend's amended code also incentivizes 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.²³⁴ Bend's amended code also exempts from maximum density standards ADUs in all residential zones and manufactured home parks in the city's "Standard Density Residential" zone.²³⁵

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."²³⁶ 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.²³⁷ The reform also made allowable large group co-living homes, double ADUs, and tiny backyard homes on wheels.²³⁸

Coupled with these reforms, the city removed regulatory barriers that have inhibited middle housing development even where such development was permitted by right²³⁹—namely, mandatory minimum off-street parking requirements and overly restrictive caps on the size of new middle housing.²⁴⁰ 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.²⁴¹ In these ways,

233. BEND, OR., ORD. 2423 at 71. The city code provides that the maximum number of parking spaces in ground surface parking lots may not exceed the required minimum number by more than fifty percent. BEND, OR., DEVELOPMENT CODE Section 3.3.300(E).

234. BEND, OR., DEVELOPMENT CODE § 2.1.600(B)(2).

235. *Id.* § 2.1.600 (B)(2).

236. 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/>.

237. PORTLAND, OR. ORD. NO. 190093 (Aug. 12, 2020). The amended code went into effect Aug. 1, 2021. The code amendment also allows larger price-regulated fourplexes. *Id.*

238. *Id.*

239. 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).

240. CITY OF PORTLAND, RESIDENTIAL INFILL PROJECT, VOL. 2: 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 Table 110-3 (maximum building coverage)).

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

Portland's 2020 reform went 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.²⁴²

On June 30, 2021, Portland enacted significant changes to its design review process²⁴³ to respond to concerns that the process could discourage needed housing through unreasonable cost or delay, which would be contrary to state policy.²⁴⁴ The city exempted certain housing applications from its design review process,²⁴⁵ loosened some requirements from those applications still subject to that process,²⁴⁶ and otherwise simplified and consolidated those regulations.²⁴⁷

Portland's amended code does, however, allow the city to regulate middle housing more restrictively than single-family detached housing in some areas of the city, including, for example, in conservation and historic districts.²⁴⁸ The 2020 reforms also did not affect middle housing allowable in the city's two lowest density single-dwelling zones²⁴⁹ and the amended

242. See *supra* notes 172 and 173 (parking), and 87, 141 and 149 (lot coverage).

243. PORTLAND, OR., ORD. NO. 190477. The record for this effort is found at <https://www.portland.gov/bps/doza/documents-and-resources>. As background, the City operated under state laws, which, *inter alia*, allowed two parallel design review processes— one that was “clear and objective,” and an alternative track that allowed discretion but prohibited the city from reducing density. OR. REV. STAT. § 197.307(4)-(6) (2019). With these limitations, the City was entitled to revise its design review regulations.

244. OR. REV. STAT. §§ 197.307(4)(b), 197.309(9)(a), 197.758(5) (2021). In support of these changes, the City Council considered a report, *The DOZA Draft Report and Housing Affordability Memo*, dated February 6, 2017, by Leland Consulting Group, that found the amendments conformed to then-existing state law. PORTLAND, OR., ORD. NO. 190477, Vol. 4, App. B. However, that report was not revised to assure compliance with HB 2001. The amendments were not challenged as enacted, but may later be challenged as to future individual housing projects.

245. See *e.g.*, PORTLAND, OR., ZONING CODE §§ 33.420.041, .045 (2022).

246. See *e.g.*, PORTLAND, OR., ZONING CODE §§ 33.420.041, .451. Additionally, the City changed some design review decisions from those that required a hearing to those that included a hearing only if requested. See PORTLAND, OR., ORD. NO. 190477, DOZA: DESIGN OVERLAY CODE AMENDMENTS, VOL. 2 – CODE & MAP AMENDMENTS § 6 (amending PORTLAND ZONING CODE § 33.825).

247. See *e.g.*, PORTLAND, OR., ZONING CODE §§ 33.218.010, .015, which seek to substitute as much as possible overall design standards for those of individual plan districts.

248. RESIDENTIAL INFILL PROJECT, VOL. 2, at 117 (discussing amendments to PORTLAND ZONING CODE § 33.110.265.E).

249. 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.” RESIDENTIAL INFILL PROJECT, VOL. 2, at 265. Reflecting Oregon's commitment to preserving farm uses, R20's primary uses are “[v]ery low-density single-dwelling residential and agriculture . . . uses.” *Id.* R20 is “intended for areas that are generally far from centers and corridors where urban public

code retains regulations of plan districts and historical landmarks that can prevent the development of middle housing.²⁵⁰

For medium and large cities, a key implementation question that remains is whether, with their middle housing code amendments, local regulations will, individually or cumulatively, discourage through unreasonable costs or delay the development of the middle housing types Oregon's new law makes allowable-by-right.²⁵¹ For example, one local regulation that may initially appear reasonable is a lot coverage maximum of less than 60% for middle housing. Such a standard, especially combined with restrictive height standards, can increase the cost to develop middle housing and make development of some middle housing forms infeasible.²⁵² The state model code does not contain lot coverage maximums and the middle housing rules prohibit local governments from making lot coverage standards for middle housing more restrictive than the standard for single-family housing.²⁵³ However, in the case of lot coverage maximums, application of restrictive single-family standards to middle housing may impose a significant regulatory barrier to the development of middle housing, and, in particular, below-market rate middle housing.

IV. WILL IMPLEMENTATION OF OREGON'S NEW MIDDLE HOUSING LAW INCREASE HOUSING CHOICE AND AFFORDABILITY?

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.²⁵⁴ By requiring local governments to allow duplexes and other middle housing types in medium and large cities, the new legislation offers the prospect of more diverse

services are extremely limited or absent, and future investments in urban public services will be limited." *Id.*

250. RESIDENTIAL INFILL PROJECT, Vol. 2 § 6. The project increased 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 provided that an ADU is allowable on a lot with a duplex. *Id.* (amending PORTLAND, OR., ZONING CODE §§ 33.205.020 and 33.205.040).

251. OR. REV. STAT. § 197.758(5) (2021).

252. See Anderson, *supra* note 239; Allan Lazo, et al. letter to City of Eugene Mayor Lucy Vinis and the Eugene City Council at 2–3 (May 24, 2022) (on file with authors).

253. OR. ADMIN. R. 660-046-0220(2)(f) (2022).

254. See Jessica Trounstein, *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).

neighborhoods and takes a turn away from the segregative patterns that are hallmarks of American cities.²⁵⁵ However, numerous political, sociological and logistical barriers remain that may prevent Oregon's new middle housing law from achieving its intended purpose of increasing housing choice and affordability and decreasing the mobility barrier of restrictive single-family zoning.

*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.²⁵⁶ 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.²⁵⁷ To the extent 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 liveability and homes and schools are not adjacent to land uses that are incompatible with residential life.²⁵⁸

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. As Michael Manville and colleagues observed, restrictive residential zoning has the effect of

255. See Hirt, *supra* note 198; Hirt, *supra* note 24; Trounstone, *supra* note 254.

256. See Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 BROOKLYN L. REV. (forthcoming 2023); Douglas S. Massey, *American Apartheid: Segregation and the Making of the Underclass*, 96 AM. J. SOCIOLOGY 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).

257. See *infra* Part IV.B.

258. 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. OF URB. AFFAIRS 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").

concentrating new development in less restrictively zoned areas of the city and the urban fringe:

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.²⁵⁹

Implementation of the middle housing law also offers an opportunity for local governments and the land use planning community to build trust with Black, Indigineous, 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.²⁶⁰ Although racial segregation is not usually an express justification for modern residential zoning actions,²⁶¹ 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.²⁶²

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.²⁶³ Although they ultimately embraced the need for comprehensive zoning, the codes they drafted deemed high intensity land uses compatible with multifamily residential use²⁶⁴—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

259. Manville et al., *supra* note 4, at 108.

260. 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).

261. Trounstine, *supra* note 254, at 443; but see generally Adams-Schoen, *supra* note 256 (detailing historic and modern racist and xenophobic design and enforcement of zoning law).

262. Hirt, *supra* note 198, at 7–8.

263. *Id.*

264. *Id.* at 11–12.

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.²⁶⁵

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 99 percent of toxic air emissions in Eugene are released in one zip code, which is where the Eugene area’s first Black community resettled after the city razed their neighborhood.²⁶⁶ This zip code continues to be home to a larger concentration of People of Color and low- and very-low-income households.²⁶⁷ Data showed that the people who live in this zip code suffered higher rates of respiratory illnesses, cancer, and neurological symptoms; school children were 77 percent more likely to have asthma; families were burdened with higher medical costs; and parents and children missed more work and school.²⁶⁸ Moreover, the neighborhood was considered a food desert, had no county health care centers, more brownfield sites, and less vegetation; access to public transportation was also lacking.²⁶⁹

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.²⁷⁰ Nonconforming use regulations must also be amended where they allow uses that harm nearby residents to continue unabated.²⁷¹

265. *See generally supra* notes 254, 256, 258 (citing sources regarding land use law and environmental racism).

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

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

268. *Id.*

269. *Id.* at 30.

270. *See supra* note 258.

271. 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 (2022); NAPA, CA., MUNIC. CODE § 17.52.320(B)(1) (2022).

*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 middle housing is a more intense land use than single-family detached housing.²⁷²

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.”²⁷³ Unlike some Northeastern states that require local governments to accommodate their “fair share” of affordable housing or face penalties,²⁷⁴ Oregon’s middle

272. See Hoyt & Schuetz, *supra* note 168 (regarding association between regulatory restrictions and housing cost); Christopher J. Mayer & C. Tsurriel Somerville, *Land Use Regulation and New Construction*, 30 REG’L SCI. AND 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 59, at 98; Anderson, *supra* note 239 (regarding housing cost and regulatory restrictions on building mass).

273. Elmendorf, *supra* note 59, at 94.

274. 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 59, at 95 (“The Northeastern Model treats the affordability/housing supply problem as essentially about suburban

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-unit detached homes to be torn down and replaced with higher-cost townhouses or other higher-cost middle housing.²⁷⁵ 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.²⁷⁶ 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 City Council amended its Municipal Code to allow two ADUs per lot in single-unit residential zones, one of which may be detached from the primary dwelling unit.²⁷⁷ 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 standards²⁷⁸ or is affordable to, and reserved for 50 years for, "income-eligible-households."²⁷⁹ Similarly, Portland's Residential Infill Project allows development of sixplexes and larger footprint fourplexes provided they meet certain affordability requirements.²⁸⁰

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

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.").

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

276. SEATTLE, WASH., ORDINANCE NO. 125854, at 2 (2019).

277. *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) (2022).

278. 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. *Id.*

279. *Id.* "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. *Id.*

280. PORTLAND, OR., ZONING CODE § 33.110.265(E)-(F).

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.”²⁸¹

Many studies find that removal of regulatory barriers to the production of housing decreases the cost of housing for households across income levels.²⁸² Vicki Been, Ingrid Gould Ellen and Katherine O’Regan recently 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.”²⁸³ 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.²⁸⁴ Studies have found that even

281. 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/>.

282. Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUSING POLICY DEBATE 25, 26–27 and n.3 (Aug. 2018) (citing and discussing “considerable empirical evidence” that “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 OF PHILADELPHIA WORKING PAPER NO. 20-07 (Feb. 2020) (finding new buildings decrease nearby rents by 5 to 7 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-The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market 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).

283. Been, Gould Ellen & O’Regan, *supra* note 282, at 27. *But see* Anthony Damiano & Chris Frenier, *Build Baby Build?: Housing Submarkets and the Effects of New Construction on Existing Rents*, CTR. FOR URBAN & REGIONAL AFFAIRS WORKING PAPER (Oct. 16, 2020) (estimating that new construction increased rent by 6.6 percent in the lowest rent tercile, had no effect on the middle tercile, and decreased rent by 3.2 percent 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).

284. Been, Gould Ellen & O’Regan, *supra* note 282; see, e.g., Calder, *supra* note 272. *But see* Daniel Kuhlmann, *Upzoning and Single-Family Housing Prices*, 0 J. OF AM. PLANNING ASS’N 1, 2 (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 study compared Zillow data

the production of high-end housing can put downward pressure on nearby sales costs and rents across all price points.²⁸⁵

Some studies even suggest 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.²⁸⁶ 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.²⁸⁷ As a result, households that would have occupied 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 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.²⁸⁸ 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 existing exclusively single-family detached dwelling neighborhoods and, potentially, to plan for more of the same. The legislation's failure to invalidate pre-2021 deed restrictions and homeowners' association governing documents that require only single-family use allows entire neighborhoods to use private agreements to maintain their exclusive single-family zoning.²⁸⁹ The middle housing rules applicable to master planned communities also appear to provide an exemption from many of the large city middle housing

from the year before Minneapolis adopted its 2040 Plan and the year after—a period that predated Minneapolis's code amendments. *Id.* at 6.

285. PHILLIPS, MANVILLE & LENS, *supra* note 16 (citing and discussing studies); *see, e.g.*, Li, *supra* note 282 (study finding new high-rises lower rents for nearby high-end rental buildings and mid-range rental buildings).

286. *See, e.g.*, Elmendorf, *supra* note 59, 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>.

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

288. *See* Anderson, *supra* note 236.

289. *See infra* notes 299–303 and accompanying text.

mandates for existing master planned communities²⁹⁰ and to allow new master planned communities to plan for 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 lots and parcels on which single-family detached housing is allowed.²⁹¹

*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 prospective invalidation of deed restrictions and governing document provisions that restrict middle housing development but allow development of single-family housing. Together, these five provisions confront some of the exclusionary and segregationist effects of a century of single-family restrictive residential zoning.²⁹²

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

290. *See supra* note 108 and accompanying text (discussing middle housing rules applicable to master planned communities approved before Jan. 1, 2021).

291. *See id.*

292. *See generally* Adams-Schoen, *supra* note 256.

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.²⁹³

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 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 development²⁹⁴; (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.²⁹⁵ 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.²⁹⁶

The rules advisory committee accepted and LCDC adopted a “compromise” result proposed by DLCD 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

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

294. *Id.* § 197.758(4).

295. 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 nonconforming 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.*

296. Memorandum from Jim Rue, *supra* note 112, at 7–8.

zoned land that allows single-family housing.²⁹⁷ As noted above, the performance metric pathway also includes the equitable distribution requirement.²⁹⁸

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.²⁹⁹ Restrictions based on race have long been held invalid throughout the United States,³⁰⁰ although they exist “on paper” in many cities throughout the country.³⁰¹ 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, immigrants, and religious minorities³⁰²—these restrictions are not prohibited under court decisions relating to racial covenants and therefore continue to operate.

HB 2001 invalidates covenants that prohibit middle housing in instruments such as deeds, or subdivision covenants, but does so only prospectively.³⁰³ It is thus possible for a city to designate areas for middle housing types “on paper” that are, in fact, restricted by

297. OR. ADMIN. R. 660-046-0205(3)(b) (2022) (requiring triplexes be allowed on 80% of lots or parcels, quadplexes and cottage clusters on 70%, and townhouses on 60%).

298. See *supra* notes 115–121 and accompanying text (discussing compliance pathways and equitable distribution requirement).

299. OR. REV. STAT. § 94.776 (2021) prohibits the future use of recorded restrictions that would frustrate implementation of HB 2001; however, that prohibition does not extend to restrictions adopted before Aug. 8, 2019. No case has been brought over whether public policy would overcome existing restrictions and there is no information as to how extensive those restrictions are in large cities; nevertheless their use is of concern to housing advocates.

300. See *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948).

301. 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 (2021). 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>.

302. See generally Frank S. Alexander, *The Housing of America’s Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231 (2005) (examining single-family restrictive covenants, housing and building codes, and zoning law as tools for social control); *id.* at n.7 (noting “overlap of racial discrimination with the control of family”); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 561 (2007) (“Exclusionary versions of housing as providing social order—excluding people from a neighborhood because of their race or economic class—arguably were one of the dominant housing ethics in U.S. housing law and policy for decades.”).

303. OR. REV. STAT. § 93.277 (2021). The stated effective date of the prohibition is Aug. 8, 2019.

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.³⁰⁴ 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 allow the denser middle housing types on undeveloped residential lots or parcels in master planned communities adopted before January 1, 2021.³⁰⁵

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,³⁰⁶ enforcing compliance with the large city mandates, which encompass four other housing types, each with its own limitations 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,³⁰⁷ increases the likelihood of confusion, disagreement and litigation regarding when a particular model code provision supersedes a

304. OR. ADMIN. R. 660-046-0220(2)(a) (regarding minimum lot or parcel size standards).

305. *See supra* Part II.B. Table 2; Or. Admin. R. 660-046-0205(2)(b)(A).

306. OR. REV. STAT. § 197.758(2)(b) (2021); *see supra* note 180 (regarding scope and complexity of medium city code amendments).

307. 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-empt any provisions of that Medium or Large City’s development code that conflict with the applicable sections of the Model Code.”).

provision in the existing code.³⁰⁸ 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.³⁰⁹ This raises the potential for uncertainty and litigation regarding the legal status of permits issued before the declaration of invalidity, especially given that the only means of testing a city’s HB 2001 amendments or the model code provisions is within the context of an enforcement order.³¹⁰

Some medium city officials and residents also object to the new state requirements as an infringement on their local home rule 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:

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

308. While the model code must “prevail,” conflicts will arise between a locality’s pre-HB 2001 code provisions and the model code that will generate litigation. These conflicts will arise over, *inter alia*, differences in format and policy approaches, vague or erroneous cross-references, criteria that contain complying and non-complying elements, 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.”

309. 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).

310. OR. REV. STAT. § 197.319- .350 (2021).

at a joint work session in March was to explore these alternative paths for future consideration.³¹¹

Such local resistance to state preemption is nothing new in Oregon or elsewhere,³¹² 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.³¹³ Local governments and many local residents also view local land use planning and lawmaking as necessary to respond to local conditions and preferences.³¹⁴

Unlike most states, however, Oregon has for nearly 50 years taken a supervisory role in local land use planning and decision making.³¹⁵ 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.³¹⁶

Oregon's home rule model gives sub-state entities the authority to supersede state law in limited circumstances related to local procedural matters,³¹⁷ but the State retains its authority to preempt

311. CITY OF HERMISTON PLANNING DEP'T, HB 2001 TWO FAMILY DWELLING CODE AMENDMENTS, STAFF REPORT FOR PLANNING COMMISSION MEETING OF MAY 12, 2021 (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) (2021).

312. *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).

313. Richard Briffault, *Our Localism: Part I-the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 23–24 (1990).

314. *Id.*

315. *See supra* notes 53–55 and accompanying text (briefly describing aspects of Oregon's statewide planning system).

316. H.B. 2001, 80th Legis. Assemb., Reg. Sess. (Or. 2019), codified at OR. REV. STAT. § 197.758 (2021).

317. OR. CONST., art. XI, § 2 (guaranteeing local governments the right to draft, amend, and vote on municipal charters and ordinances); *id.* art. VI, § 10 (extending guarantee to home rule charter counties); *City of La Grande v. Pub. Employes Ret. Bd.*, 576 P.2d 1204 (Or. 1978), *adh'd to on recons.*, 586 P.2d 765 (Or. 1978) (interpreting Article XI, section 2 as guaranteeing local autonomy over the structure and form of local government but not the policy preferences of local government).

local laws that frustrate state policy.³¹⁸ Because the legislature enacted HB 2001 to address a matter of statewide concern, the new law will likely survive challenges based on local home rule authority.³¹⁹

Nevertheless, effective enforcement as a planning tool requires discretion, judgment, resources, and stakeholder buy-in.³²⁰ The enforcement order process in Oregon,³²¹ 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 the particulars of the middle housing 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 exacerbates³²² 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 non-governmental understanding of regional housing needs and provide a graduated

318. 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 (2021) declares that implementation and enforcement of local comprehensive plans and land use regulations that have been acknowledged by LCDC are matters of “statewide concern.” Those plans are acknowledged because they implement state policy embodied in the statewide planning goals. Those plans and regulations must also conform to preemptive state statutory law.

319. Local government challenges to state-directed policies and procedures have not been successful. *See generally, e.g.,* Tillamook Cnty v. Land Conservation & Dev. Comm’n, 642 P.2d 691 (Or. Ct. App. 1982) (upholding preemptive state role in land use matters), *rev. den.*, 648 P.2d 854 (Or. 1982); Seto v. Tri-Cnty. Metro. Transp. Dist., 814 P.2d 1060, 1064–66 (Or. App. 1991) (upholding statute providing means of siting light rail line against objections that local prerogatives were violated); City of Sandy v. Metro, 115 P.3d 960, 967–68 (Or. App. 2005) (upholding over city objections authority of regional planning agency in Portland metropolitan area to designate and direct use of lands).

320. *See* Elmendorf, *supra* note 59, at 148–49.

321. OR. REV. STAT. § 197.319- .350 (2021).

322. Trounstone, *supra* note 254, at 443.

system of penalties for cities that are not meeting state expectations.³²³ 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, 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.³²⁴ 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.³²⁵ The 2021 legislature also passed legislation that (1) requires local governments to allow affordable housing on lands zoned for commercial use or owned by a public entity or a religious institution, and, (2) 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.³²⁶ The legislature also passed legislation removing residential occupancy restrictions based on familial or nonfamilial relationships among any occupants,³²⁷ making a tax abatement program easier to access for builders of multi-unit housing,³²⁸ making it easier for nonprofit housing providers to use surplus public lands,³²⁹ and promoting more equitable access to land use hearings and public meetings.³³⁰

V. 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

323. 2019 Or. Laws ch. 640 (H.B. 2003) (amending OR. REV. STAT. § 197.290–.293 (2021)).

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

325. 2021 Oregon Laws ch. 103 (Enrolled S.B. 458); see OR. DEP’T OF LAND CONSERVATION & DEV., SENATE BILL 458 GUIDANCE (July 8, 2021).

326. 2021 Or. Laws ch. 385 (Enrolled S.B. 8).

327. 2021 Or. Laws ch. 24 (Enrolled H.B. 2583).

328. 2021 Or. Laws ch. 476 (Enrolled S.B. 141).

329. 2021 Or. Laws ch. 624 (Enrolled H.B. 2918).

330. 2021 Or. Laws ch. 228 (Enrolled H.B. 2560).

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 restrictively zoned single-family detached housing would continue to exert upward pressure on 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 residential 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 residentially zoned areas that allow single-family detached housing. 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 also may delay or undermine 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 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 an early reformer.