

January 23, 2019

The Honorable Alissa Keny-Guyer

Oregon House of Representatives

District 46 Portland

900 Court St. NE, H-272

Salem, Oregon 97301

Testimony regarding House Bill 2001

Dear Representative Keny-Guyer,

HB 2001 is an ill-considered attempt to force the redevelopment of older, established neighborhoods that are loosely called “single-family” neighborhoods – *but HB 2001 would leave untouched all future and existing wealthier neighborhoods that are protected by CC&Rs* (Covenants, Conditions and Restrictions).

While some legislators appear to be mesmerized by the latest “shiny object” – so-called “Missing Middle Housing,” a thoughtful evaluation of the proposed HB 2001 clearly demonstrates that the bill’s dictates would do no significant good, and would harm Oregon communities and citizens in multiple ways.

Summary

- **HB 2001 is inequitable.** It would harm home owners who live in neighborhoods that are not protected by CC&Rs, while holding harmless all home owners who live in current and new subdivisions protected by CC&Rs. The wealthier neighborhoods typically have CC&R protections.
- **HB 2001 would exacerbate climate change.** It would increase gross vehicle miles travelled and exacerbate vehicle congestion in urban neighborhoods, which would increase emissions that worsen climate change. It would also increase the “heat island effect” by removal of trees and large-scale vegetation in urban neighborhood areas that are redeveloped more intensively.
- **HB 2001 would diminish, not increase, the supply of “affordable” housing.** It would lead to redevelopment that demolishes older, lower-cost homes (both rentals and owner-occupied) with more expensive condos and rentals. The purported “trickle-down” effect of adding expensive dwellings, rather than affordable housing, to the local supply has been discredited.
- **HB 2001 violates the bedrock intent of Statewide Planning Goal 1 — Citizen Involvement.** The bill imposes a sweeping, radical dictate that would affect hundreds of thousands of home owners in varied locations and circumstances – *except wealthier homeowners who live in current and future areas protected by CC&Rs*. There has been almost no notice to citizens or involvement of homeowners outside of Portland; and these measures have divided even Portland’s communities.
- **HB 2001 is an unnecessary and radical usurpation of local governmental authority and responsibilities.** It reaches far beyond the necessary or appropriate role of the Legislature and usurps local authority and responsibility for zoning decisions.
- **HB 2001’s language isn’t clear and objective; is internally inconsistent; and is rife with ambiguities and flawed legal terminology.** As detailed below, the bill would create chaos as various parties battled in cities across the state over the legal interpretation of the bill’s poorly-written provisions.
- **Conclusion:** HB 2001 is poorly-written and would have numerous negative effects, which conflict with the unsupported claims that the HB 2001 provisions for “middle housing” would improve housing affordability. The Legislature should reject this bill in its entirety.

The superior alternative is for the Legislature to adopt measures that would help develop more medium- and high-density housing, both market-rate and subsidized, in areas that are well-served by public transit. These measures should include provisions that support “family-friendly” and “multiple-generation” housing and mixed-use developments, as well.

HB 2001 is inequitable

From the very start, HB 2001 would exacerbate housing inequity because it would expand the current practice of many developers who record CC&Rs that protect the property rights of prospective single-family home buyers by limiting additional dwellings on lots covered by the CC&Rs. Economically mobile households (like mine) would simply move to a protected development, while less well-off homeowners in older, close-in neighborhoods (like my neighborhood) would be stuck as developers redeveloped properties around them.

If the Legislature believes it’s necessary and proper to impose land use statutes promoting redevelopment of “single-family” neighborhoods, then the Legislature must not only *allow* so-called “middle housing” in these neighborhoods, but also *impose* minimum densities and maximum lot sizes on *all* new residential development. (CC&Rs can impose stricter limits on development, but cannot waive zoning requirements.) To do otherwise gives the lie to this thinly veiled effort to give developers the right to redevelop vulnerable, older and less expensive “single-family” neighborhoods.

HB 2001 would exacerbate climate change

Private vehicle use is one of the major contributors to emissions that exacerbate climate change. It’s the State’s long-standing transportation policy to reduce average Vehicle Miles Travelled (VMT). (See Statewide Planning Goal 12 Transportation.) A key policy to reduce VMT is to promote “transit-oriented development” (TOD) so that residents can use public transit for significant portions of their travel. To implement TOD functionally requires that housing be located close to public transit that delivers an effective alternative to use of a private car.

In many Oregon cities (Portland’s “street car” neighborhoods may be the only exception), most older, established “single-family” neighborhoods are dispersed and not organized around current or potential mass transit routes. HB 2001 incentivizes exactly the wrong approach to future housing by promoting the dispersal of new dwellings across areas that cannot ever be efficiently served by mass transit. In addition, the transportation infrastructure in most of the older “single-family” neighborhoods is not adequate for the additional vehicles that will need to be parked or for the increased circulation of additional vehicles. The result will inexorably be an increase in gross vehicle miles travelled and more vehicle congestion, both of which will increase emissions impacting the climate.

In addition, although older “single-family” neighborhoods may be less dense, this has allowed space for big trees and other large-scale vegetation, which are a significant means of sequestering carbon emissions and counteracting the “heat island” effect in urbanized areas. Of the sixty largest U.S. cities, Portland had the 4th *worst* (most intense) summer heat island, according to research by Climate Central. <https://www.climatecentral.org/news/urban-heat-islands-threaten-us-health-17919>

Furthermore, even supporters of so-called “missing middle housing” acknowledge that this form of housing is far too low in density to support mass transit when developed in otherwise low-density areas.

In contrast to the harmful effects that would arise if HB 2001 were approved, a focus on zoning, tax breaks and subsidies for high-density development within a walkable distance to mass transit would do enormous good both for addressing climate change, resource use and housing affordability (see next issue).

Take the following example: Eugene and Springfield are building a bus rapid transit system, called “EmX,” and one of the EmX routes that is already providing “10-minute” service runs east-west along W. 6th & 7th Aves., which is State Highway 99. This couplet is currently developed with mostly one- and two-story commercial, lower-quality apartments and a few lower-quality motels. There are vacant lots for sale and numerous closed businesses on lots that have the potential for redevelopment as high-density apartments or mixed-use. To the north and south are older mixed neighborhoods with many blocks that are predominantly developed as single-family dwellings with a number of duplexes and ADUs. The effect of HB 2001 would be to add a miniscule number of additional dwellings, most of which would be too distant from the EmX service to impact the new occupants’ vehicle use. In contrast, this long stretch of EmX service could support thousands of new dwellings, all of which would benefit not only from available transit, but also from the amenity of healthy, walkable neighborhoods with shady tree-lined streets surrounding the transit corridor.

HB 2001 would diminish, not increase, the supply of “affordable” housing

Advocates for HB 2001 incorrectly claim that it will address the “housing affordability” crisis. Their simple theory is that more dwellings leads to less cost. There is no evidence for this; and, in fact recent development practices demonstrate the contrary. Keep in mind two things: a) Cities like Eugene already allow “by right” a *new* subdivision to have ADUs and all “middle housing” forms; and b) current and future subdivisions can record CC&Rs that exclude ADUs and all “middle housing” forms. So there is no potential increase in dwellings, except in established “single-family” neighborhoods *without* CC&Rs.

There are very, very few (if any) vacant lots in these established neighborhoods. And while many of these neighborhoods have a substantial number of developed lots that could accommodate an ADU or a larger attached dwelling that forms a duplex, very few of the lots could accommodate a triplex, fourplex or cottage cluster without scraping the lot and redeveloping it. Depending on the local economy and housing market, only a range of lots would be financially attractive to such redevelopment, and those are precisely the smaller, less expensive homes on medium-sized lots. (There are several such areas in Eugene; for example the post-war houses between Amazon Parkway and South Willamette Street.)

Developers seeking to exploit the provisions of HB 2001 would target such areas for redevelopment that takes one affordable house out of the inventory and replaces it with two, three or four condominiums or “skinny” houses on the same lot. At market rate, there is no question that each of these would be more expensive than the house that was removed. All of the experts on “housing affordability” agree that the first rule is: “Don’t destroy existing lower-cost housing.” Housing experts have also researched the so-called “trickle down” effect and determined that building more expensive housing generally does not have an impact of reducing the cost of housing in a lower price range.

In summary, what advocates “brand” as “missing middle housing” should actually be labelled “mything middle housing” – It’s certainly myth that HB 2001 would reduce inventory of lower-cost housing.

In contrast, housing experts also agree that the most serious “affordability” issue is for what are technically “extreme low income” and “very low income” households. (The main problem *is not* that the price of hip, new condos exceeds the purchasing power of some millennials advocating for HB 2001.) Experts also agree that low-income households also need transportation and daycare support. Which is why the Legislature should be focusing on measures that would support medium- and high-density housing that is “family-friendly” and near good transit service, as discussed under the previous section.

HB 2001 violates the bedrock intent of Statewide Planning Goal 1 — Citizen Involvement.

Tom McCall must be rolling over in his grave at the disregard for the first and most important goal of the statewide planning structure for which he fought so hard.

If considered at all, such sweeping, radical dictates as proposed in HB 2001, and which would affect so many residents in such a wide set of circumstances (except, of course, homeowners who live in current and future areas protected by CC&Rs) should at least be decided by a statewide ballot measure.

There may have been a lot of public awareness and involvement in the *local* discussions about *Portland's* residential zoning, but I have yet to encounter among friends and family members in Eugene, Salem, Corvallis or Bend *anyone* who has heard anything about this bill and its potential impacts on their lives. This bill is being pushed by special interest groups, including homebuilders and the zealous “believers” driving the 1000 Friends of Oregon and Oregon Housing Alliance agendas. These organizations are entitled to advocate for their narrow objectives, but the Legislature cannot rightfully let these advocacy groups’ opinions substitute for broad citizen involvement.

Most egregiously, the following HB 2001 provision would effectively put a thumb on the scales of justice when a city evaluates a “middle housing” application:

“An applicant whose proposal to develop middle housing under this section is denied is entitled to attorney fees if the applicant is the prevailing party on an appeal to the Land Use Board of Appeals.”

A city would be faced with the possibility of a very large financial liability for any application that the city denies – but no similar exposure for applications that the city approves. How then could a city evaluate a “middle housing” application even-handedly? In addition, this poorly-written provision may expose ordinary citizens to considerable risk of financial liability if they intervene on the side of a city defending the denial of an application.

This is a patently one-sided provision. If a “wronged” applicant is entitled to recover attorney fees, than “wronged” citizens who appeal a city’s *approval* of a “middle housing” application should also be “entitled to attorney fees if [the opponent] is the prevailing party.”

Furthermore, it is entirely unnecessary, since LUBA rules already provide appropriate protection against meritless appeals:

“OAR 661-010-0075(1)(e)(A) Attorney fees shall be awarded by the Board to the prevailing party as specified in ORS 197.830(15)(b) ...” [which states]:

‘The board shall also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information.’

In addition, applicants already benefit from the following, one-sided rule on LUBA appeals:

“OAR 661-010-0075(1)(e)(B) Attorney fees shall be awarded to the applicant, against the governing body, if the Board reverses a land use decision or limited land use decision and orders a local government to approve a development application”

Individuals who appeal an application *approval* to LUBA are accorded no equivalent award of fees if they prevail.

In effect, HB 2001 just stacks the deck even more against opponents of any “middle housing” application that doesn’t actually conform to local regulations. Such biased treatment would further undermines meaningful citizen involvement in land use decisions regarding “middle housing.”

HB 2001 is an unnecessary and radical usurpation of local governmental authority and responsibilities.

The bedrock of Oregon’s vaunted planning framework is trust in local communities and their citizens. While the State has the role of setting overall policy and ensuring that local jurisdictions establish policies and implementation code and programs that are consistent with and further the Statewide Planning Goals, it is a fundamental principle that local elected officials and citizens can forge the specific policies, code and other solutions that are most appropriate for their varying communities.

HB 2001 (and the ADU statutes in SB 1051) reach far beyond the necessary or appropriate role of the Legislature. The other sections of this testimony provide ample evidence that the authors of HB 2001 did not have the knowledge or competence to properly craft legislation that would actually further State goals and policies. (As discussed below, the authors also appear to have been incapable of even writing clear and unambiguous law.)

The State has already established an extensive set of laws, administrative rules and agencies to ensure that local governments plan and implement sound transportation and housing policies, and that there is adequate housing for local jurisdictions’ current and projected populations. If the State’s policies or regulations need improvements, legislation to do that would be understandable. However “ADUs” and “Middle Housing” are nothing more than very specific forms of housing that may or may not be beneficial, depending on the context. These specific housing forms are frankly just “shiny objects” that have been marketed as the “missing” solution to housing affordability, even DLCD has told me that they have no evidence supporting significant effects on housing affordability by opening established “single-family” neighborhoods to “middle housing” by right. (Many cities already allow these forms in new subdivisions and planned developments.)

While the Legislature, for example, has an appropriate role to prohibit exclusionary zoning or to require that housing approval criteria be “clear and objective,” it has no business imposing specific housing forms that some group of “we know best” advocates (wrongfully) believes must be dictated because this would be a “magic” fix to housing affordability or preventing “sprawl.”

The language of HB 2001 is not clear and objective; is internally inconsistent; and is rife with ambiguities and flawed terms.

The language of HB 2001 appears to have been written by one or more individuals who weren’t at all adequately informed on real-world local zoning and the art of drafting clear statutes. The following provides a critique by section of the bill.

SECTION 2. (1)(a) “Cottage clusters” means groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard.

- “[U]nits per acre” is a measure of *density*, not a count of units. Does this provision set “four” as the minimum number of units that a “cottage cluster” must have on a single lot? Or minimum for a contiguous development site. Does it set the minimum density for a “cottage cluster” as “four ... units per acre”?
- What comprises a “common courtyard”; e.g., do all units have to face the courtyard?
- Why must *all* “cottages” in a cluster be *detached*? Two of the best examples of “courtyard clusters,” right in my Eugene neighborhood have a few structures that comprise two side-by-side cottages. That’s efficient and compatible in the right location. (This definition is one of the most glaring examples revealing that someone who didn’t even understand “cottage clusters” helped write this bill.)

SECTION 2. (1)(b) "Middle housing" means:

- (A) Duplexes;
- (B) Triplexes;
- (C) Quadplexes; and
- (D) Cottage clusters.

- Where are the clear and objective definitions of "duplex," "triplex," and "quadplex"? Note that while these housing forms might seem "obvious," that is not at all the case. For example, defining a "quadplex" as "four attached dwellings" depends on how "attached" is defined; and in Eugene this was problematic at one time because some builders were using an unenclosed breezeway to claim two structures were "attached." In practice, these are significant terms that need to be defined.

SECTION 2. (2) Each city with a population greater than 10,000 and each county with a population greater than 15,000 shall allow, within its urban growth boundary in areas zoned for detached single-family dwellings, the development of at least one middle housing type on each lot, subject to reasonable local regulations related to siting and design.

- The scope of "area zoned for detached single-family dwellings" is ambiguous and not defined. The proper term of art in zoning would be "district," not "area," but that's not the main problem. The interpretation of "zoned for" could reasonably mean any one of the following:
 - Most expansive: Any zoning district that allows detached single-family dwelling by some means, e.g., a conditional use permit; or
 - Intermediate: Any zoning district that allows a detached single-family dwelling "by right" on buildable lots; or
 - Most restrictive: Any zoning district with a "Purpose" section that explicitly states that a primary purpose of the zone is for the development of single-family housing, including detached, single-family housing.

This is a very real issue. Eugene has only one zone ("R-1") with an explicit "Purpose" section that would clearly meet the HB 2001 language: "The R-1 zone is designed for one-family dwellings" However, Eugene's zones include the following cases in which this criterion of HB 2001 could not be resolved on its face:

- One medium-density residential zone ("R-2") and two high-density residential zones ("R-3" and "R-4") whose "Purposes" are all for *multi-unit* housing forms, including "middle housing" and apartments, but which allow single-family homes, as well. These zones have a minimum density requirement that would prohibit developing only one single-family detached home on almost all lots, but the code also contains exceptions, e.g.: waiving the minimum density requirement for "[l]ots or development sites in the R-3 or R-4 zones that are [already] developed and are 13,500 square feet or less in size."
- Commercial zones ("C-1," "C-2" and "C-3") that allow single-family dwellings "by right" under the list of allowable "uses," but only when 80% of the ground floor of the structure is used for commercial purposes. For example, there could be a single dwelling in the second floor above a bookstore. That example dwelling would be "single-family," but not "attached" to another dwelling. Would these zones fall within the scope of HB 2001?
- A number of zones allow single-family dwellings under a conditional use permit, not "by right."

- The requirement to allow “the development of at least one middle housing type on each lot” is ambiguous and potentially impractical and inconsistent with the later phrase “subject to reasonable local regulations related to siting and design.”

This overly lengthy and convoluted sentence, with its sequence of “and’s” and “or’s” and subordinate phrases, is impossible to satisfactorily unwind. On the one hand it requires that a “middle housing” structure be allowed “*on each lot*”; and on the other hand, it permits “local regulations related to siting.” It’s not clear whether or not this provision would allow, for example, a minimum lot size regulation that requires a larger lot for a duplex than for a single-family dwelling?

Depending on the intent, this requirement could prevent jurisdictions from allowing creation (by land division) of “tiny” lots or small lots accessed only from an alley. Eugene has two special area zones (I live in one of them) that allow these kinds of new lots to be split off from an existing lot with a single-family home. If the bill would *force* the allowance of a duplex on these specialized lots, the appropriate response would be to remove those special provisions from the current zoning code. It’s likely that other cities may have, or may consider adding, allowance for these small lots because they are a significant factor in lowering the cost barrier to home ownership in established neighborhoods.

- The phrase “reasonable local regulations related to siting and design” is widely discretionary with no guidelines for interpreting “reasonable” or determining the scope of “siting regulations” or “design regulations.” Most critically, does this provision allow local regulations for the following?
 - Requirements for safe and adequate access for emergency response, both fire and medical.
 - Limits on housing forms within the Willamette Greenway or other sensitive environmental areas.
 - Minimum lot sizes, including larger minimum size for each of the “plex” forms
 - Maximum net density
 - Calculating a proposal’s “effective density” that adjusts a “calculated dwelling count” up for multi-dwelling development with an exceptionally large number of bedrooms. (E.g., calculating the effective density of a fourplex with five bedrooms in each unit as *five* dwellings, based on there being twenty bedrooms).

Further, how is “reasonableness” to be adjudged for maximum building heights, setback and set-to requirements, “open space” requirements, vehicle use area maximums, parking space minimums, etc., etc.?

The authors of HB 2001 may not have realized that SECTION 7’s amendment, which would add the following section to ORS 197.312(5)(b), may determine how LUBA and the courts will interpret “[r]easonable local regulations relating to siting and design.”

ORS 197.312(5)(b)(B) “Reasonable local regulations relating to siting and design” does not include owner occupancy requirements of either the primary or accessory structure or requirements to construct additional off-street parking.

Under normal rules of statutory construction, by enumerating *exclusions* to “reasonable” regulations, this provision would leave all other siting and design regulations that aren’t on their face “unreasonable” as allowable with regard to ADUs. For example, local regulations could specify minimum lot sizes that required a larger lot for a “main” and “accessory” dwelling than for only one (“main”) dwelling. (Obviously, an extreme, such as a one acre minimum for an ADU could still be challenged as “unreasonable” on the face.)

Further, under normal rules of statutory construction, adding these two exclusions would demonstrate that the Legislature knows how to state exclusions when that’s their intent; therefore,

“reasonable” regulations for “middle housing” would also effectively allow all types of siting and design regulations that aren’t on their face “unreasonable.”

The bottom line; however, is that the bill would create chaos as various parties battled in cities across the state over whether or not proposed local regulations were “reasonable” and within the scope of “siting” and/or “design.” This would be a sorry way to make sweeping new laws governing residential development.

SECTION 4. (2)(b) The State of Oregon Structural Specialty Code to exempt all middle housing that is three stories or less above grade from requirements of the code.

- The criterion “three stories or less above grade” is inadequately defined. If there is somewhere else in the statutes that provides clear and objective criteria to determine whether a structure conforms, then the statute should be referenced. As anyone who has worked on local development regulations would know, establishing “grade” and a structure’s extent “above grade” is fraught with complexities, including sloped sites and partially under-grade first stories, “half stories” (living space under a sloped roof), etc.

SECTION 8. Adding the following provision:

(3) An applicant whose proposal to develop middle housing under this section is denied is entitled to attorney fees if the applicant is the prevailing party on an appeal to the Land Use Board of Appeals.

The chilling effect of this provision on “Citizen Involvement” is discussed above. In addition the language itself is flawed.

- The criterion of “prevailing party” is an imprecise legal criterion for what is the apparent purpose of this section. The same application may be subject to a sequence of appeals to LUBA. One or more LUBA appeals may result in a remand, which is not the ultimate determination whether an application is ultimately approved. An applicant may appeal an application that is initially denied, and LUBA may remand the decision for (e.g.,) lack of adequate findings. On that appeal, the applicant might be the only prevailing party. The city might adopt adequate findings during the remand process and again deny the application. The applicant might again appeal to LUBA, and LUBA might affirm the city’s decision. Thus, it might be the city – not the applicant – that is ultimately the “prevailing party.”
- Furthermore, parties may join a LUBA appeal as “intervenor.” When a party intervenes, the party does so either on the side of the “petitioner” (which may be an applicant whose application was denied) or on the side of the “respondent” (e.g., the city). In some cases both an applicant whose application was denied and opponents who disagree with some of the city’s findings may appeal. LUBA may remand based on errors cited by the applicant, as well as other errors cited by opponents. In such cases, there are two prevailing parties, on opposite sides – there is no party that is “*the* prevailing party.”
- The language doesn’t state who would recompense the applicant. Would only the respondent (e.g., the city) be responsible or would the respondent and intervenors on the side of the city?

As with other flaws in the language of HB 2001, this provision is evidence that the author didn’t actually understand the legal framework of land use application approval and appeal processes.

Conclusion

HB 2001 is poorly-written and would have numerous negative impacts, including conflicting with proponents' claims that the HB 2001 provisions for "middle housing" would improve housing affordability. The Legislature should reject this bill in its entirety.

The superior alternative is for the Legislature to adopt measures that would help develop more medium- and high-density housing, both market-rate and subsidized, in areas that are well-served by public transit. These measures should include provisions that support "family-friendly" housing forms, as well.

If, despite all the reasons to reject HB 2001, the Legislature chooses to pass this bill, the bill must be amended to make the language clear and unambiguous and to eliminate such onerous and misguided provisions as awarding attorney fees to applicants.

Respectfully submitted,

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About the author: *In addition to certification as an EarthAdvantage Sustainable Homes Professional, I've been published in the **Oregon Planners' Journal**, which is the publication of the Oregon Chapter of the American Planning Association. I also led the community process to develop the land use code for Eugene's only two zones that already allows ADUs and all forms of so-called "middle housing." This project resulted in the Eugene City Council unanimously adopting the **Jefferson-Westside Special Area Zone** and the **Chambers Special Area Zone**, in which I live. Subsequently, the **Jefferson Westside Neighbors** organization, which I chaired, was recognized as a "Neighborhood of the Year" finalist by the **Neighborhoods USA** organization for its successful citizen involvement in the development of these two special area zones.*