HB 2001 Interpretation and Implementation FAQ

General Questions

Q 1: How is model code applied, and does it pre-empt existing regulations for a jurisdiction*?*

> ***A:*** *If a city is not in compliance, the model code does not necessarily apply in its entirety. If cities are out of compliance for a certain section (i.e., townhouses), the model code would not apply for other sections that are in compliance with Division 46 (i.e., plexes). In this scenario, only the townhouse portion of the model code would preempt local codes.*

Q 2: Some cities have tree ordinance processes, especially tree preservation, which could clearly come into conflict with middle housing provisions. Do you suspect litigation around this provision?

> ***A:*** *If a tree preservation provision applied equally to proposals to develop a single detached dwelling on a lot, then it would equally be applied to middle housing development on the lot, even if it meant a developer couldn't put middle housing development on-site. This is similar to a floodplain or natural resource protection, where development might be limited to a particular footprint.*

Applicability in Mixed-Use Zones

Q 3: Does HB 2001 and Division 46 apply in Mixed-Use Zones?

> ***A:*** *There are three criteria that need to be met for HB 2001 applicability: 1) Residential Comprehensive Plan Designation (this includes both residential comprehensive plan designations and mixed-use comprehensive plan designations as they are both commercial and residential), 2) Primarily Residential Zoning Districts (based on purpose and allowed uses), and 3) allows single-family detached as a permitted use. As an example where HB 2001 would apply is a low- or medium-density residential zoning district that implements a mixed-use comprehensive plan district.*

Subdivision vs. Master Planned Community

Q 4: How does a city adequately plan infrastructure in new subdivision areas where the subdivision does not meet the definition of a Master Planned Community as described in OAR 660-046-0020 and OAR 660-046-0205?

> ***A:*** *This issue was considered as part of planning master planned communities, which allows middle housing types and provides jurisdictions with certainty for infrastructure planning (i.e., 15 units/acre or 20 units/acre within the Portland Metro region). While this doesn't apply to subdivisions, it at least provides guidance to cities on how to approach subdivision planning in relation to new middle housing allowances.*
>
> *At the subdivision stage, it is acceptable for a city to require a developer to identify the intended housing types for the purpose of infrastructure planning. It would be possible for a developer to apply for a building permit for a middle housing type after final plat, but the city retains the*

ability to require a demonstration that there is sufficient infrastructure to serve the proposed middle housing type. If there was not sufficient planned capacity from the subdivision process to accommodate the proposed middle housing type, the City retains the ability to require a developer to remedy the deficiency before issuing any building permits.

Q 5: Can members of DLCD speak on CC&Rs?

***A:** HB 2001 rules did not address existing CC&Rs head-on. Rules prohibit future CC&Rs that prohibit the development of middle housing, but did nothing to alter CC&Rs retroactively. DLCD and the state are not a party to private CC&Rs (nor are local governments). It would be a monumental task for cities to understand where CC&Rs exist, what they prescribe, and whether they are actually enforceable through private legal action by a party to those CC&Rs. For these reasons, DLCD recommends that local governments not consider CC&Rs when formulating zoning code provisions for middle housing, or for any other type of development for that matter. It is an open question as to whether the Oregon Legislature has the authority under the state or federal constitutions to render existing CC&Rs unenforceable, much less for LCDC to take such action through an administrative rule.*

Affordability

Q 6: HB 2001 requires cities to write findings explaining how they have considered increasing the affordability of housing. A construction excise tax indirectly supports affordable housing. For other measures, as well, cities should consider how they apply to middle housing as a broader consideration, but not just do that in context of middle housing. It's not a requirement to adopt a construction excise tax, just a requirement to start the conversation about what adopting one might mean and creates context for a deeper dive as part of the Housing Production Strategy. Is that correct?

***A:** Correct, cities should be thinking of affordability in a much broader sense, especially as they gear up to have conversations regarding their Housing Production Strategy that will develop a more comprehensive local approach to affordability. There is available guidance in administrative rule, OAR 660-008-0050, Exhibit B for cities to consider other approaches. DLCD encourages cities to be proactive in exploring these strategies.*

Q 7: How should a city prepare Middle Housing Affordability considerations and Goal 10 findings?

A: Middle Housing Affordability Considerations

House Bill 2001 requires local governments to consider ways to increase the affordability of middle housing, including considerations related to SDCs, property tax exemptions, and construction taxes.

Sections 3, chapter 639, Oregon Laws 2019:

> *(4) In adopting regulations or amending a comprehensive plan under this section, a local government shall consider ways to increase the affordability of middle housing by considering ordinances and policies that include but are not limited to:*
>
> *(a) Waiving or deferring **system development charges**;*

*(b) Adopting or amending criteria for **property tax exemptions** under ORS 307.515 (Definitions for ORS 307.515 to 307.523) to 307.523 (Time for filing application), 307.540 (Definitions for ORS 307.540 to 307.548) to 307.548 (Termination of exemption) or 307.651 (Definitions for ORS 307.651 to 307.687) to 307.687 (Review of denial of application) or property tax freezes under ORS 308.450 (Definitions for ORS 308.450 to 308.481) to 308.481 (Extending deadline for completion of rehabilitation project); and*

*(c) Assessing a **construction tax** under ORS 320.192 (City or county ordinance or resolution to impose tax) and 320.195 (Deposit of revenues).*

Please note that this is not a requirement to adopt these measures, but to consider them and directly address them within the findings. We advise that local governments use this opportunity to consider the myriad of policies that affect middle housing development. The policies outlined within the bill are specific to the subsidization of middle housing development and affordable housing generally. We also advise the consideration of other policies that affect the feasibility and affordability of housing options, such as the provision and finance of public facilities, incentives for regulated affordable housing development, incentives for the retention or conversion of existing affordable housing supply, and incentives and barriers within the development code.

Starting these conversations will be helpful for local jurisdictions as they embark on their housing production strategy, a new planning requirement for cities above 10,000 implemented by House Bill 2003 (now ORS 197.290). This document will require cities to identify and develop an implementation schedule for strategies that promote the development of housing. Rulemaking for this new requirement included the compilation of a library of potential strategies local governments could consider as part of a housing production strategy. While this list is not exhaustive, it's a good place to start the conversation. You can access this document as an attachment on the Secretary of State webpage: <https://secure.sos.state.or.us/oard/view.action?ruleNumber=660-008-0050>

Goal 10 Findings

ORS 197.175(2)(a) requires cities and counties to prepare, adopt, amend and revise comprehensive plans in compliance with Oregon's statewide land use planning goals, including Goal 10. In any plan amendment or adoption of land use regulations, cities and counties must address via findings how the proposed plan amendments affect compliance with each applicable goal.

In adopting land use regulations to comply with House Bill 2001, local jurisdictions will need to consider how these regulations will affect their compliance with Goal 10, including how it affects an adopted Buildable Lands Inventory (BLI) and Housing Needs Analysis (HNA), to ensure the sufficient availability of buildable lands to accommodate needed housing types identified in the HNA.

House Bill 2001 will enable to development of housing types where they were previously prohibited, increasing the capacity of lands to accommodate identified housing need. However, local jurisdictions

will still need to consider how these regulations impact capacity in greater depth. ORS 197.296(6)(b), as amended by House Bill 2001, allows jurisdictions to assume up to a three percent increase in zoned capacity, unless they demonstrate a quantifiable validation that the anticipated capacity will be greater. In developing Goal 10 findings, we recommend that local jurisdictions apply this assumption to the adopted buildable lands inventory. Additionally, we recognize that adopted inventories may be dated and the true development capacity may not be known at the time of adoption. In these cases, we recommend that jurisdictions note that they will further consider the impacts of middle housing ordinances on land capacity in the next Housing Needs Analysis, as required on a regular schedule by House Bill 2003.

Goal Protections

Q 8: How does a city treat lands subject to natural hazards?

> ***A:*** *Cities are allowed to limit density and occupancy in areas subject to natural hazards (e.g., 100-yr. floodplain, landslide hazards) that increases risk to people and property. Areas subject to natural hazards must be inventoried and mapped, and the city should demonstrate in findings that middle housing development in these areas pose risk to people or property.*

Q 9: Does Goal 7 (Areas Subject to Natural Hazards) protection mean a city can regulate middle housing in these areas differently than they regulate single-family detached housing?

> ***A:*** *Yes. Cities can limit housing here if it poses a risk to life and property. This is fairly discretionary and requires a reasonable argument outlined in the findings, as discussed previously.*

Q 10: Does Goal 15 (Willamette Greenway) mean that the city can only apply goal 15 clear and objective standards? Will city need to update Goal 15 standards in local code in order to comply?

> ***A:*** *This goal reveals an underlying conflict between statute and Goal 15, because Goal 15 outlines a discretionary review process applied to development adjacent to the Willamette Greenway, but ORS 197.307 prevents the application of such a review to housing. Areas around Goal 15 (Willamette Greenway) would be well-suited to middle housing, but DLCD understands there is a need for guidance on clear and objective standards which currently does not exist. DLCD hopes to have future guidance on the process using clear and objective standards. Staff recognize it would be unreasonable to fully update adopted Goal 15 code given its breadth and depth of scope in such a short time-frame. Therefore, it is not the Department's expectation that cities amend these codes as part of middle housing updates. However, the rule leaves the door open for jurisdictions to consider doing so in the future.*

Manufactured Dwellings as Middle Housing

Q 11: Can cities prohibit manufactured ADUs? What about manufactured dwellings for detached duplexes?

A: *The relationship between manufactured dwellings and middle housing is still an open question. This is mostly because the statute for manufactured homes was written and adopted in a time where middle housing was not a consideration. In general, DLCD advice is to tread lightly in this regard. It is okay to regulate the siting and design of manufactured ADUs, but we would recommend against prohibiting manufactured ADUs to limit the potential for legal challenge.*

The same is true for detached duplexes; it is not yet clear whether manufactured homes must be permitted in a -plex configuration, provided that the development standards overall still allow for the development of manufactured homes per ORS 197.314. DLCD has not specified parameters around detached duplex regulations, as it is intended to provide jurisdictions options to increase flexibility of development, and the Department would not want to deter jurisdictions from this path. However, ORS 197.314 does not specify how many manufactured homes must be allowed on a lot (because this was previously assumed to be "one"). We recommend allowing manufactured configurations with appropriate siting and design regulations to prevent undesirable scenarios.

Q 12: If a city allows manufactured housing or prefabricated units as cottage clusters, when does an application change from being a cottage cluster to being a manufactured home park?

A: *This distinction is unclear in statute at the moment. This is an example of inconsistencies in manufactured home statute because of the time the statute was written, which was decades in advance of middle housing statutes. It may be advisable to distinguish the two via some sort of partition or subdivision process that is unique to a manufactured dwelling park. Typically, manufactured homes in manufactured home parks have underlying land ownership models which could distinguish them as something other than middle housing.*

ORS 446.055 provides an exemption for between four and six manufactured dwellings to be sited on a lot without meeting requirements applicable to manufactured home parks. This may be an option for local jurisdictions to consider in the context of manufactured cottage cluster siting.

Q 13: If manufactured dwelling parks were on their own lots that might be a trigger for cottage clusters. Can jurisdictions say that cottage clusters need to be on their own lot and a platted subdivision is required. Is this correct?

A: *In that case, yes, but that may change if HB 2283 (2021) or similar legislation becomes law.*

Parking/Access

Q 14: Through model code can a city require alley-loaded parking for townhouses in order to save on-street parking and minimize curb cuts?

A: *Yes, there is an option in model code to provide alley-loaded parking for townhouses, but not a requirement. With OAR 660-046, a city cannot require any parking standard that isn't applied to single detached residence. So if a city requires alley-loaded parking for townhomes, it must also require alley-loaded parking for a single detached residence on the same lot or in the same district.*

Q 15: Regarding driveway cuts, especially for duplexes/triplexes, a lot of access standards can be somewhat discretionary. For duplexes, can a city only limit one curb cut for a duplex (same as single-family detached)? OR, does there have to be one curb cut/unit for each duplex/triplex/quadplex?

> ***A:*** *For higher middle housing types, requiring access for each unit could be difficult to achieve and would be good to avoid. Another option would be to require combined driveways for two or more units, to limit curb cuts and retain on-street parking.*

Q 16: If there is already existing minimum spacing standards between driveways, would that apply to townhouses that need front access? That would mean that every townhouse in every development would not have its own driveway.

> ***A:*** *This creates a risk of appeal, because such a spacing standard could result in preclusion of townhouses, as they couldn't meet the same spacing standards that apply to a single-family dwelling. We would definitely steer cities away from this possibility, but that scenario could hypothetically happen, since not addressed directly by Division 046. One possible remedy is to apply driveway spacing standards but provide an exception to the standards to allow each lot at least one driveway. Another option would be to require combined driveways for two townhomes, to provide more spacing.*

Q 17: Alternatively, there are three standards in large city model code for driveway access to townhouses. Could a city not permit the third, which is front-loaded driveways? Could model code be modularly adopted?

> ***A:*** *Yes, a city could pick parts of model code, and it could also be interspersed with Division 46 compliance. The Department recommends avoiding implementing standards that would be more restrictive than the Model Code, such as only permitting rear-loading alleys for townhouses (and precluding front-access townhouses) in an area where no alleys currently exist or could be designed as part of a larger land division.*

Q 18: Some cities are looking at a standard whereby narrow lots will have to be alley-loaded due to driveway width standards which will make it harder to do townhouse development.

> ***A:*** *Some cities exempt development from driveway spacing requirements to ensure there is one driveway per lot. DLCD recommends cities do not adopt standards that would make development of middle housing more difficult. If a city required in the context of a larger subdivision the use of alley access, it would have to require such access for single detached unit development as well. These types of standards could open cities to legal challenges.*

Q 19: A city may allow required parking on-street, but have more heartburn over the fact that if they require the space, allow it, and parking space goes away, housing becomes non-conforming. As a result, cities are stuck with the choice to not require parking or will not allow on-street parking in order to not have parking space attached to a house. What are your thoughts on that?

> ***A:*** *That is a good policy discussion on the local level. We would advise to include some provision in code written that specifying that the loss of on-street parking via a future action does not make the dwelling unit non-conforming. This shifts the responsibility to the city to consider on-street parking as they do street improvements.*

Q 20: Some jurisdictions actually require on-street parking in addition to off-street parking. They've been wondering whether they can apply those standards to middle housing.

> ***A:*** *The rules don't mention on-street parking except as a possibility for jurisdictions to allow in lieu of off-street parking. If standards are a per-unit standard, it probably would not be permissible. One per lot or development may be permissible as a frontage standard, but generally, DLCD would not recommend requiring it, because it precludes options for flexibility, such as a narrower street width.*

Q 21: If we have to allow middle housing in the same manner as single family detached dwellings, what happens in an instances where single family detached was allowed with a hammerhead access aisle? Is allowing middle housing in that way okay, even if it will make it into a cul-de-sac?

> ***A:*** *It's not an absolute right to develop middle housing. There are still underlying standards, such as fire and emergency access, which have to be met before middle housing development is permitted. This would also hold true for detached homes being converted to duplexes.*

Townhouses, Generally

Q 22: Townhouses can only happen on every lot through a land division, which can be a barrier to middle housing. How does DLCD anticipate to address these barriers that may arise through land divisions in the future? *[Recording Time Stamp: 0:54:36]*

> ***A:*** *Currently, there are two policy directions that could lead to an increase in ownership opportunities for middle housing: 1) requirements for local governments to allow land divisions of middle housing developments, and 2) condominium law reform for smaller projects. HB 2283 (2021) may be adopted in this legislative session, which requires local governments to allow land divisions for middle housing development. The definition of "townhomes" set forth in HB 2001 specifies that they are located on individual lots. A townhome-style development without a land division would be considered the equivalent of a "plex" development.*

Q 23: Requirement for frontage on a street would remain a barrier for fee-simple ownership for many middle housing types. Does the House Bill 2283 address that? *[Recording Time Stamp: 0:58:28]*

> ***A:*** *No, it does not. However, HB 2283 or similar legislation may address this issue.*

Cottage Clusters, Generally

Q 24: In model code, the definition of cottage cluster states that a medium/large city may allow cottage cluster units to be located on a single lot/parcel or on individual lots/parcels. What does this mean for cities with how they allow for cottage clusters? Do they need to allow single lot or individual lot? Can it be one or the other?

> ***A:*** *Cities can do any of the following. 1) Require cottage clusters allowed on single lot (only) OR 2) cottage clusters allowed on individual lot (only), OR 3) allow both single lot and individual lot cottage clusters.*

Q 25: What is the maximum number of cottages a city can regulate in a cluster?

> ***A:*** *There is nothing in OARs that prohibits a city from putting a maximum number of cottages in a cottage cluster. The middle housing rules in OAR don't speak to a maximum number of cottage cluster as a way to provide maximum flexibility for developers to provide as many cottages as a site could bear, within the bounds of reasonable building permit approval criteria such as stormwater mitigation, utility connections, and state building code.*

Q 26: According to OARs it seems like jurisdictions can have one unit/lot or infinite units/lot, but nothing in-between is possible. It would be helpful for a jurisdiction to know if they can limit clusters on a site. At what point is too much before becoming a small unit subdivision?

> ***A:*** *The rule does not prohibit establishing an upper limit on the number of cottages on a lot. The requirement to allow at least eight units in a cluster means that there really is a floor to allow at least eight units within a cottage cluster, but a local jurisdiction may limit the upper threshold of how many units or clusters are allowed in a lot.*

Design Standards for Middle Housing

Q 27: Can a main entry for each townhouse unit be required to face the street (a common requirement for other housing types) or would that be considered an alternative design standard?

> ***A:*** *This type of design standards would be acceptable and wouldn't be considered an alternative design standard. The intent is to move from standards that scale by dwelling unit (which disproportionately impact a quadplex as compared to a single family detached dwelling), while still providing a path for jurisdictions that wanted to apply single family design standards to middle housing. DLCD recommends structuring design standards to focus on form, e.g. requiring main entryways that face the street for townhouses.*

Q 28: Can design standards ever be deemed to cause unreasonable cost or delay for middle housing?

> ***A:*** *Division 46 doesn't define what unreasonable cost or delay is. It defines what it isn't. The standards that apply to single-family dwellings are generally much less restrictive than what is traditionally applied to middle housing types. If jurisdictions want to apply higher design standards to middle housing, their options include standards in the Model Code or standards that they demonstrate do not cause unreasonable cost or delay via the allowed Alternative Siting and Design Standards process established in OAR 660-046-0235.*

Q 29: For large cities, can duplex design standards fall under the provision of OAR 660-046-0225 "Large Cities Design Parameters" allowing the same parameters as other middle housing types?

> ***A:*** *No. HB 2001 requires that a duplex be allowed on each lot or parcel that allows for the development of a single-family detached dwelling. Whichever standards a city applies to a detached single family dwelling represents the threshold that may be applied to a duplex in the same zone.*

Q 30: Cities cannot apply design standards to middle housing related to "Conversions." A city cannot apply design standards to middle housing that is converted from single family detached dwelling to

middle housing. What about a triplex created by adding 2 detached units on a lot with an existing single family dwelling? Are those new units considered conversions of or additions to an existing single family dwelling to middle housing, and therefore, exempt from design standards?

> ***A:*** *The provisions of OAR 660-046-0230 are primarily intended to provide incentives for the retention, rather than the demolition and replacement, of single-family detached dwellings in conjunction with middle housing. This policy is meant to preserve what is often called naturally-occurring affordable housing. If a property owner were to pursue converting or adding to an existing single family detached dwelling to create a middle housing structure, there may be instances where the existing structure will be out of compliance with middle housing siting and design standards – creating a non-conforming situation. This rule prohibits requiring those existing structures to conform to design standards. Additions to the existing structure, such as adding two detached units to the lot, would be subject to all applicable clear and objective design standards, so as to not increase the non-conformity of the lot beyond any non-conformity already created by the existing structure.*

Q 31: Cottage clusters created on a lot with an existing single-family dwelling - would cottage cluster development be exempt from design standards?

> ***A:*** *Additional cottage units added to a lot with an existing single-family detached dwelling would not be exempt from applicable design standards. The intent is to incentivize the retention of existing dwellings, and to allow the construction of cottages around that. Cities could apply design standards to the remainder of the cluster, including common space provisions.*

Q 32: Could a standard require that each lot or parcel require an entry facing a street?

> ***A:*** *Yes, because this is a form-based approach, and not one that scales with the number of units on a lot, it is allowed.*

Q 33: The siting and design standards in the model code and in OAR 660-046 are clear and objective standards. Alternatively, can a city provide a discretionary review path with additional siting or design standards?

> ***A:*** *Yes, there must be a clear-and-objective path to regulate middle housing. However, there can also be a discretionary alternative path provided for middle housing consistent with ORS 197.307(6), which allows the applicant a choice between clear and objective standards and discretionary standards.*

Sufficient Infrastructure

Q 34: When planning for infrastructure at-large, can we assume a 3% increase for housing and infrastructure for both medium and large cities?

> ***A:*** *Yes, for any measure to increase residential capacity in the UGB, you can assume up to a 3% increase in housing. It is okay to use this same assumption for infrastructure planning.*

Q 35: What are DLCD's thoughts on sufficient infrastructure language around middle housing other than duplexes? May be onerous for individual property owners to be required to provide these analyses.

A: *Infrastructure was a big consideration during rulemaking. Ultimately, the rules are structured such that cities treat middle housing similar to other forms of development in terms of ensuring infrastructure is available, or can be made available, to serve its demand. Just like any other type of urban development, cities should work with developers of proposed middle housing to remedy infrastructure constraints as they arise. The rules do not however, allow cities to categorically remove infrastructure-constrained lands from the middle housing allowances (unless through the IBTER process prescribed in OAR 660-046-0300). The city may require developers of middle housing to provide reasonable and proportionate mitigation of localized infrastructure constraints like is required for any other development proposal.*

Q 36: A city must plan infrastructure capacity to accommodate densities at 15 (outside of Portland Metro) and 20 (inside of Portland Metro) units/acre in new master planned communities. Can conditions of approval that limit density run afoul of rules, and do you have any advice of how consultants can approach this problem?

A: *Before the subdivision stage for master planned communities, cities have to have discuss this issue with developers. Once lots are platted, there is possibility for a developer to increase density, but city can still retain the right to only plan for smaller infrastructure capacity if a higher density triggers an infrastructure constraint.*

Q 37: According to model code, how do cities both review sufficient infrastructure, but yet not review and not require review of any applicant? How is an individual property owner supposed to evaluate the infrastructure capacity?

A: *There is a process that can happen from subdivision > building permit stage. It is great for developers to specify what type of housing they will be developing, understanding it is not binding.*

Analysis of sufficient infrastructure is inherent in that review process, which often involves local government engineers and public works departments. The calculation for differential in capacity is still there. We are not adding additional processes, but reinforcing already-embedded processes.

Q 38: How do we square our system development funding methodologies with the capacity assumptions we're being required to make? How do we make sure we don't overcharge/undercharge and ensure we can deliver the infrastructure system?

A: *This would have to be a conversation between developer, city, and subdivider/future builder to better understand what types of development will actually be built in the initial phase. Future planning and increased capacity need to accommodate demand is also an important part of this conversation.*

Q 39: How about establishing future SDC rates for future infrastructure? Would you divide the cost between # of units you realistically anticipate to show up, or an ambitious # of units you hope develops in the future?

A: *A per-unit basis for SDCs encourages infrastructure-inefficient and less affordable land uses. Density increasingly does not correlate with actual intensity of infrastructure usage. In the long-*

term, the state may need to re-think how local governments approach SDCs, and public facilities financing for housing, which will require consideration of applicable rules/statutes for SDC collection. In the short-term, DLCD encourages local governments to consider charging differential SDCs for different types and sizes of dwelling units depending upon the relative impacts of such units upon public facilities systems (such as through the findings and analyses of these issues required by HB 2001). However, DLCD recognizes that the intent of HB 2001 was not to require jurisdictions to change SDC calculations.

Middle housing development will complicate the collection and use of SDCs. SDCs are used to pay for larger city-wide or area improvements to transportation, water, sewer, storm drainage, and parks facilities. Provision of additional dwelling units beyond the traditional "one unit per lot" calculation will increase the need and cost of many such facilities. However, the city will also be collecting additional SDCs from the additional units beyond what was initially expected. Local governments will need to sort out these complications in their planning for public facilities.

The rulemaking process concluded with adoption of rules for master planned communities, but with request of staff by commission to do a study if 15 or 20 units/acre are the right numbers by December, 2021. This study will inform the appropriate thresholds for master planned communities and may inform future approaches to public facilities financing.

Q 40: Are exemptions to public works standards granted to single family homes that may not also be granted to middle housing.

***A:** The rules require those same exemptions to be granted to duplex development, but not for higher level middle housing.*