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**March 11, 2022**

**MEMO**

**To:** **Sherri Layne, Attorney III**

**CC:** **Rob Palmer, City Attorney**

**From:** **Beth McKibben, Senior Planner AICP**

**Through:** **Jill Maclean, Director, AICP**

**Case Number:** **AME2018 0001**

**RE: A text amendment to Title 49, Land Use Code 49.25.510(k) Accessory Apartments**

At their June 22, 2021 meeting, the Planning Commission recommended the Assembly adopt a text amendment to revise and update Title 49 with respect to Accessory Apartments. Changes to the accessory apartment regulations aim to encourage in-fill housing development, streamline permitting, and address equity concerns by encouraging more housing development to meet identified community shortages. The proposed changes recommended by the Commission are:

- All accessory apartments may be approved by the Director.
- On lots equal to or larger than 250% of the minimum lot size, with two single-family dwellings, this amendment provides for one accessory apartment up to 1,000 square feet and 2 bedrooms, not to exceed 50% of area of the primary dwelling for each single-family dwelling.
- On lots 150% of the minimum lot size (the minimum needed for a duplex), this amendment provides for a duplex to have one accessory apartment up to 600 square feet or less with one or fewer bedrooms;
- On lots larger than 175% of the minimum lot size, this amendment provides for a duplex to have up to two accessory apartments 600 square feet or less with one or fewer bedrooms.

The draft ordinance as presented to the Commission amends CBJ 49.25.510(k) – Special density considerations to no longer allow single-family dwellings on under-sized lots located in a multi-family zoning district to have an accessory apartment. This is in conflict with the Planning Commission's recommendation and the definition of accessory apartment, which speaks to "single-family dwelling" or "primary dwelling unit". It is also in conflict with current regulation.

*CBJ 49.80 Definitions.*

*Accessory apartment* means one or more rooms with private bath and kitchen facilities comprising an independent, self-contained dwelling unit within or attached to a single-family dwelling, a duplex dwelling, or in a detached building on the same lot as the primary dwelling unit. An accessory apartment is distinguishable from a duplex in that, unlike a duplex, it is clearly subordinate to the primary dwelling unit, both in use and appearance.

In 2015, when Title 49 was last amended to modify the accessory apartment requirements, one of the amendments made was to allow the Commission to approve, through the Conditional Use Permit process, an accessory apartment for single-family dwelling in a multi-family zoning district where density (number of units per lot) is calculated by units/acre (D10, D15, D18, LC, GC, MU2, and WC). For example, in the D18 zoning district, a minimum of 2,420 square feet of lot area is required per dwelling unit (43,560/18). If a nonconforming lot is less than 2,420 square feet, it may have a single-family dwelling. The 2015 amendment provided for a single-family dwelling on a lot less than 2,420 square feet to have an accessory apartment with an approved Conditional Use Permit. Prior to the 2015 amendments, that single-family dwelling would not have been allowed to have an accessory unit. The Planning Commission, at the July 27, 2021, meeting clarified and affirmed their intent to continue to allow accessory apartments with single-family dwellings in multi-family zoning districts when the lot size is too small to accommodate a second dwelling unit. Furthermore, their recommendation is this application will no longer require an approved Conditional Use Permit, but would be permitted through a Director's review.

The language added at CBJ 49.25.510 (k) "*An apartment in D-10, D-15, D18, MU, MU2, LC, GC, and WC is exempt from this section and treated as a primary dwelling unit"* removes the ability for a single-family dwelling in a multi-family zoning district, where density is calculated as number of units per lot to have an accessory apartment when the lot is not large enough to accommodate a second primary dwelling unit based on density. It is important to remember that accessory uses/structures in a zoning context are incidental and subordinate to the "primary" use or structure. Many communities make clear in their accessory apartment regulations that an accessory apartment is not counted towards density.

For example:

- Bremerton, Washington: *"An accessory dwelling unit (ADU) may be permitted anywhere a new or existing single-family dwelling unit (hereafter, "principal unit") is allowed. Accessory dwelling units are exempt from the density requirements of the underlying zone"*.

- Louisville, Kentucky: "*Dwelling Unit, Accessory (ADU) – A smaller, secondary dwelling unit located on the same lot as a principal dwelling. ADUs provide complete, independent living facilities (which at a minimum includes permanent provisions for living, sleeping, eating, cooking and sanitation which are accessed independently). The ADU shall not constitute a dwelling unit for purposes of calculating permissible density. There are two types of ADUs:*

  *(a) Attached ADUs which are connected to or part of the principal dwelling. Examples include converted living space, attached garages, basements or attics; additions; or a combination thereof.*

  *(b) Detached ADUs which are separate accessory structures from the principal dwelling. Examples include converted garages or new construction.*

Additionally, the Oregon Department of Land Conservation and Development (DLCD) develops model code to be used by Oregon cities and counties, with the intent of helping local governments follow best practices or adhere to new state standards. In 2019, DLCD published a model code for "Accessory Dwellings" which recommends the following language: "Accessory dwellings are not included in density calculations."

The proposed amendment meets goals and policies of the 2013 Comprehensive Plan, 2015 Economic Development Plan and the 2016 Housing Action Plan. Specific goals of the CBJ Housing Action Plan met:

- Streamline/fast track in-fill housing permitting
- Look at reducing setback and minimum lot sizes for duplex, ADU's, and bungalow in-fill units
- Incentivized through CBJ Accessory Apartment Grant program

In light of heighted sensitivity to social equity, many communities have found that accessory apartments reduce segregation of people by race, ethnicity, and income, and may decrease potential economic displacement by reducing upward pressure on rents and housing prices. Additionally, accessory units are considered to realize equity objectives by increasing economic diversity in neighborhoods. The Regional Plan Association, a non-profit organization that works in the New York, New Jersey, Connecticut metropolitan area states: "By implementing policies and programs that promote ADUs and conversions as soon as possible, we will be in a better

position to address many of the physical and institutional barriers we have created and ensure everyone has the opportunity to live a full and healthy life."

Sara J. Adams-Shoen, an Assistant Professor at the University of Oregon School of Law, published a paper entitled "Dismantling Segregationist Land Use Controls". The paper acknowledges that zoning has historically been used to racially and economically segregate neighborhoods. Examples of communities where steps have been taken to address the zoning system that supports segregation by integrating affordable housing into predominately white, single-family neighborhoods are included. Facilitating the production of affordable ADU's and backyard cottages on lots with single-family dwellings is the first example provided, accomplished by removing regulatory barriers. Additionally, Oregon Court of Appeals rejected the 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 accessory units. Another example provided discusses increasing the number of accessory units in areas previously held for single-family development. The conclusion, in part, recommends that zoning laws must recognize a broad range of residential uses as inherently compatible.

Removing accessory apartments from density calculations across all zoning districts ensures equitable application of accessory apartment regulations, comports with current practice, and helps meet CBJ's housing goals.

Attachments:

A. "Dismantling Segregationist Land Use Controls".

B. February 5, 2015 Memorandum to Assembly Committee of the Whole

C. Ordinance 2021-21 vPC1 with Staff Comments

# DISMANTLING SEGREGATIONIST LAND USE CONTROLS

*Sarah J. Adams-Schoen*[*]

***Abstract***

*Since the inception of the American law of zoning, communities with local political power have used zoning to exclude from white neighborhoods Black and Indigenous people and other People of Color. Modernly, restrictive residential zoning continues to be used as a tool by those with local political power to keep those without local political power out of their neighborhoods, schools, and parks. The result is that land use law continues to be used in municipalities throughout the United States to racially and economically segregate neighborhoods, further entrenching one of the root causes of racial injustice.*

*Dismantling a segregationist land use system embraced by US cities for more than a century requires a bold shift in paradigm, a redefining or rejection of the American land use law concept of "compatible uses" of land that communities have used and continue to use to exclude People of Color from predominantly white neighborhoods and the myriad privileges that attach to residence and home-ownership in those neighborhoods.*

*This article briefly reviews the segregationist history of land use controls and the many ways modern zoning regulations continue to facilitate segregation by race and class of communities throughout the United States. The article then examines four examples of recent land use law reforms that land use planners and lawyers, state and local government officials, and affected communities have instituted to confront this historic and continuing system of oppression.*

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[*] © Sarah J. Adams-Schoen is an Assistant Professor at the University of Oregon School of Law, where she teaches land use law, local government law, and ocean and coastal law. She is the faculty advisor to Oregon Law's Environmental & Natural Resources Law Center's Sustainable Land Use Project, and Co-Chair of the Land Use Committee of the State & Local Government Law Section of the American Bar Association. The author is grateful to Gianina Spano (Oregon Law 2022) for truly excellent research assistance, and to Edward J. Sullivan and Andrew Gowder for thought provoking comments that helped improve the article.

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> "Nothing is more powerful than an idea whose time has come." – Victor Hugo[1]

At the beginning of the Summer of 2020, the nation was rocked by a deadly pandemic spiraling out of control and an overdue reckoning with racism. In the frenzy of the moment I found myself, like many other white people, consumed by a need to do everything I could to confront racism in myself and others. I found myself reading articles, books and social media posts, tweeting, marching, and engaging in daily conversations about racism and privilege. For those like myself with the privilege to have been less than fully engaged in fighting racism, something had shifted.

But those who have been battling all along know the fight for racial justice is a life-long endeavor.[2] How do we sustain for a battle with no end in sight? How do we contribute to meaningful change? One answer is that we focus our anti-racism efforts in our everyday lives.

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[1] CAROLYN FINNEY, BLACK FACES, WHITE SPACES: REIMAGINING THE RELATIONSHIP OF AFRICAN AMERICANS TO THE GREAT OUTDOORS xi (2014) (quoting Victor Hugo).

[2] As Resmaa Menakem observes: "None of this will be easy. It will take great effort from many white Americans, individually and collectively, over a period of years. Yet the only alternative is the perpetuation of white-body supremacy and a great deal of dirty pain for all." RESMAA MENAKEM, MY GRANDMOTHER'S HANDS: RACIALIZED TRAUMA AND THE PATHWAY TO MENDING OUR HEARTS AND BODIES 274 (2017).

For those of us who work in land use planning and zoning, real estate law, and local government law, our fields provide abundant opportunities to work to dismantle structural racism and contribute to the creation and preservation of racially just communities. Zoning and other related local laws have been used since their inception to exclude black Americans, immigrants, and other people of color from white neighborhoods, parks and pools, schools, and, ultimately, from access to wealth, opportunity and safety.[3] Although some progress toward racial equity in land use has been made around the margins, the Summer of 2020 brought with it a call to action: We must act now to remake a land use system that perpetuates segregated housing patterns, which are one of the root causes of racial injustice in this country.

Parts I and II of this article describe the segregationist history of land use controls and the myriad ways zoning restrictions continue to facilitate segregation by race and class of communities throughout the United States. Part III provides four examples of recent land use law reforms that land use planners and lawyers, state and local government officials, and affected communities have instituted to confront this historic and continuing system of oppression.

## I. The Segregationist History of American Zoning Law

Throughout the first half of the twentieth century, the racist scaffolding used to maintain racially segregated neighborhoods was, for the most part, overt. Early twentieth century state laws prohibited black and other people of color from purchasing property.[4] Baltimore and a number of southern cities adopted racial segregation ordinances that prohibited black purchasers from buying property on blocks with predominantly white households and vice versa.[5] Developers, realtors, lenders and federal guarantors promoted the use of racially restrictive deed covenants.[6] The American Institute of Real Estate

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[3] RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 39-57 (2017).

[4] *See, e.g.,* ORE. CONST. Art. XVIII, adopted Sept. 18, 1857; *see also* Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. OF BLACK STUDIES 646 (2013).

[5] *See, e.g.,* Baltimore, Md., Ord. No. 610 (May 15, 1911) (for "preserving peace, preventing conflict and ill feeling between the white and colored races in Baltimore city, and promoting the general welfare of the city by providing... for the use of the separate blocks by white and colored people for residences, churches and schools"); Gretchen Boger, *The Meaning of Neighborhood in the Modern City: Baltimore's Residential Segregation Ordinances, 1910—1913*, 35 J. OF URBAN HISTORY 236 (2009).

[6] *See* CATHERINE SILVA, RACIAL RESTRICTIVE COVENANTS HISTORY: ENFORCING NEIGHBORHOOD SEGREGATION IN SEATTLE, REPORT FOR THE SEATTLE CIVIL RIGHTS AND LABOR HISTORY PROJECT (2009), https://depts.washington.edu/civilr/covenants_report.htm. Racial covenants persist; although, following *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), they are no longer enforceable.

Appraisers took the position that the presence of BIPOC households in white neighborhoods depressed property values, and Realty Boards adopted codes of ethics that declared it unethical for an agent to sell property in a white neighborhood to black buyers.[7] Driven largely by explicitly racist federal policies favoring racial segregation, "[f]rom the 1930s through the 1960s, black people across the country were largely cut out of the legitimate home-mortgage market through means both legal and extralegal."[8]

Although the Supreme Court invalidated expressly racially restrictive zoning in *Buchanan v. Warley*,[9] white communities throughout the United States found that other zoning tools, including, in particular, the single-family detached residential zone (R1), could achieve the same or similar effects without running afoul of *Buchanan*.[10]

> "R1 first proliferated after the Supreme Court struck down racial zoning in 1917's *Buchanan v. Warley* decision. *Buchanan* made single-family mandates appealing because they maintained racial segregation without racial language. Forcing consumers to buy land in bulk made it harder for lower income people, and therefore most non-White people, to enter affluent places. R1 let prices discriminate when laws could not."[11]

The first zoning code of the City of Portland, Oregon, is illustrative of this covert form of racially restrictive zoning. The City's code, approved by voters in 1924, included two residential zones: Zone I—Single-Family and Zone II—Multi-Family. The code

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[7] Karen Gibson, *Bleeding Albina: A History of Community Disinvestment*, 15 TRANSFORMING ANTHOLOGY 3, 6 (2007); ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS (1969).

[8] Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 6, 2014, https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/.

[9] 245 U.S. 60 (invalidating City of Louisville ordinance districting and restricting residential blocks based on race).

[10] Additionally, many localities continued to adopt and enforce expressly racially restrictive zoning decades after *Buchanan*. See RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 45-48 (2017) (discussing examples and noting that Kansas City and Norfolk used official planning documents instead of ordinances to continue racially restrictive zoning into the 1980s).

[11] Michael Manville et al., *It's Time to End Single Family Zoning*, 86 J. OF THE AMERICAN PLANNING ASS'N 106, 107 (2020) (citing J. TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018), and M.A. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING (1987)).

designated fifteen "highest quality" neighborhoods Zone I.[12] The City adopted these zoning designations knowing Portland realtors would not show homes in Zone I to buyers or renters of color.[13]

Repeatedly throughout the history of American zoning law, courts have upheld exclusive residential zoning laws like Portland's by finding that municipalities have a legitimate public welfare interest in preserving quality of life by excluding from the residential neighborhood land uses that are incompatible with a kind of pastoral ideal[14] of the American family living in a detached home with a wide lawn on a quiet, tree-lined street.

The flipside of the myth of the peaceful and ordered rural or suburban neighborhood is the barely veiled racist trope that pathologizes black spaces as urban, crime ridden, and impoverished[15]—a powerful countervailing myth that dehumanizes those who live in cities and multifamily housing and casts them as an existential threat to the American family. The Supreme Court's seminal 1926 land use decision, *Village of Euclid v. Ambler Realty Co.*, relied on this trope when it found that the multi-family residences of people who could not afford to live in a single-family detached home constituted land uses that were incompatible with residential land uses—that they were "mere parasite[s]" that, in a residential neighborhood, "come very near to being nuisances."[16] On this basis, the Court found that segregating multi-family and detached single-family residences promotes the public welfare, by among other things preserving "the residential character of neighborhood[s] and [their] desirability as a place of detached residences."[17]

Almost fifty years after *Euclid*, the Court in *Village of Belle Terre v. Boraas* relied again on the dehumanization of people who could not afford to own a single-family detached home to uphold a zoning law that essentially prohibited low-income renters from residing in the municipality. Again, the Court expressly invoked the pastoral myth, implicitly invoking racist and classist fears of those who live in multifamily residences,

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[12] CITY OF PORTLAND BUREAU OF PLANNING AND SUSTAINABILITY, HISTORICAL CONTEXT OF RACIST PLANNING: A HISTORY OF HOW PLANNING SEGREGATED PORTLAND 5 (Sept. 2019).

[13] *Id.* at 6 ("In 1919, the Portland Realty Board adopted a rule declaring it unethical for an agent to sell property to either Negro or Chinese people in a White neighborhood.").

[14] In this sense, the pastoral ideal is a "myth functioning as a memory" of a simpler time that contrasts the urban as industrial, disordered and unsafe against the rural—and, more modernly, suburban—as residential, ordered and peaceful. RAYMOND WILLIAMS, THE COUNTRY AND THE CITY 43 (1973).

[15] *See* Bryan Adamson, *Thugs, Crooks, and Rebellious Negroes: Racist and Racialized Media Coverage of Michael Brown and the Ferguson Demonstrations*, 32 HARV. J. RACIAL & ETHNIC JUST. 189 (2016).

[16] 272 U.S. 365, 394–95 (1926).

[17] *Id.*

to find that the municipality's segregationist zoning law furthered a legitimate public welfare interest.[18]

> "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[19]

By upholding on this basis a law that narrowly defined the class of people Belle Terre homeowners could rent to, the Court essentially found that the presence in a home of renters not related by blood, adoption or marriage is sufficiently incompatible with "family" and "youth values" to justify their exclusion from the municipality, the entirety of which was zoned R1.

The clear implication of this is that the American family with a legitimate public welfare interest in enjoying "[a] quiet place where yards are wide, people few, and motor vehicles restricted"[20] expressly and implicitly has not included families living in poverty. Exclusion on this basis provided a proxy for the expressly racially restrictive zoning laws invalidated by *Buchanan*, effectively denying zoning's promise to many communities of color.

## II. Modern Zoning Practices Further Racial and Economic Segregation of Neighborhoods

As the City of Portland, Oregon, example shows, the segregationist legacy of zoning is not limited to states that permitted slavery, affluent suburbs, or areas that tend to vote for any particular party. Nor is it a relic of the past that most municipalities have actively worked to dismantle. Rather, just about everywhere, restrictive residential zoning and related mechanisms like height and density maximums, minimum lot sizes, and parking requirements—although frequently based on racially-neutral purposes—continue to be used as a tool by those with local political power to keep those without local political power out of their neighborhoods, schools, and parks. The result is that land use law continues to be used in municipalities throughout the United States to racially and economically segregate neighborhoods, further entrenching one of the root causes of racial injustice.

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[18] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). Nothing in the Court's precedent supported the use of this pastoral myth to justify exclusive residential zoning.

[19] *Id.*

[20] *Id.*

Although the motivation for continuing to use restrictive residential zoning may not be overtly racist or xenophobic,[21] the language used to describe and justify single-family residential zones continues to dehumanize persons who cannot afford detached single-family homes on large lots, a demographic that is disproportionately BIPOC. The R1 zone is still characterized as a "precious asset" worthy of protection from the threat of multi-family residences. Unlike areas that allow multi-family residences, R1 zones have "suitable characteristics of family life" that are worthy of "protection" from less desirable land uses and upzoning.[22]

The harms that result from continued economic and racial segregation of neighborhoods are pervasive, multi-generational and existential.

> "In places where housing demand is high, R1 inflates home values . . . . Higher property values for owners mean higher rents for tenants. Because homeowners as a group are richer and Whiter than renters, policies that increase housing prices redistribute resources upward, increasing homeowner wealth, reducing renter real incomes, and exacerbating racial wealth gaps. When cities prohibit development in amenity-rich neighborhoods, furthermore, 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."[23]

Over the last few decades, the national median rent has risen 20 percent faster than inflation and the median home price has risen 41 percent faster than inflation. At the same time, "real median income of households in the bottom quartile increased only 3 percent between 1988 and 2016, while the median income among young adults in the key 25–34 year-old age group was up just 5 percent."[24] Age 65 and over rental and

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[21] But sometimes it clearly is. *See, e.g.,* United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1192 (2d Cir. 1987) ("Local residents opposed the project on the ground that it contained the "seeds of a ghetto," and the project was killed by the refusal of the City's Zoning Board to grant minor zoning variances for parking.").

[22] *See* Michael Manville, Paavo Monkkonen, Michael Lens, *It's Time to End Single-Family Zoning*, 86 J. OF THE AM. PLANNING ASS'N 106, 108 (2020) (quoting and citing examples from study).

[23] *Id.* at 107–08.

[24] JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, STATE OF THE NATION'S HOUSING 2018, at 1–2 (2018).

homeowner households are also cost burdened.[25] And these numbers do not convey the human dimensions of the housing crisis. The 2018 State of the Nation's Housing Report found that "[n]early half of all renters can't afford rent, . . . over half a million Americans are homeless on any given night,"[26] and "[m]ore than 38 million U.S. households have housing cost burdens [that] leav[e] little income left to pay for food, healthcare, and other basic necessities."[27] And this was before the pandemic.

These cost burdened households are disproportionately households of color, who face disproportionately higher public health and morbidity risks and significantly lower access to wealth, opportunity and local public services.[28] Add to this that local governments routinely allow industrial and other hazardous and undesirable uses as of right or as conditional uses in neighborhoods with predominantly BIPOC households, further driving down property values and increasing health risks.[29]

Ultimately, zoning's promise of promoting compatible uses did not extend to all American families, and it still doesn't.

## III. Seizing this Moment to Remake Residential Zoning Law

Seattle, Minneapolis, Portland, and the State of Oregon, provide examples of how practitioners of land use law, real estate law, fair housing law, and state and local government law, can work together with local communities to tackle the racist system of residential zoning head-on and contribute to the creation and preservation of racially just communities. Although we have yet to see whether these reforms will successfully integrate affordable housing into predominantly white single-family neighborhoods, the reforms adopted by these cities, and statewide in Oregon, suggest that the time for making residential zoning inclusive is now.

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[25] *Id.* at 30.

[26] Bryce Covert, *The Deep, Uniquely American Roots of Our Affordable-Housing Crisis*, THE NATION, May 24, 2018, https://www.thenation.com/article/give-us-shelter/.

[27] JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *supra* n. 24, at 30.

[28] JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 2 (2018).

[29] Julia Mizutani, Note, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENVTL. L. REV. 363, 364 (2019) ("The distribution of landfills, incinerators, power plants, toxic waste, and air pollution is highly correlated with the geographic distribution of minorities, especially poor minorities.").

### A. Facilitating production of affordable ADUs and backyard cottages on lots with single-family homes

The City of Seattle has allowed a single attached or single detached ADU since 1994 and 2010, respectively.[30] Despite this, numerous regulatory barriers stymied production of detached ADUs (also known as "backyard cottages") such that, by 2019, detached ADUs had been constructed on less than 1% of eligible single-family lots in Seattle.[31]

To remove these regulatory barriers and to promote production of affordable, sustainable housing options, the Seattle City Council amended its Municipal Code on July 1, 2019, to allow two ADUs per lot in single-family residential zones, one of which may be detached from the primary dwelling unit.[32] A second ADU on a lot is allowable only if it either meets green building standards[33] or is subject to a recorded agreement specifying it is affordable to, and reserved for 50 years for, "income-eligible-households."[34] To prevent discrimination against non-traditional families, the ordinance permits up to twelve unrelated people on a single-family lot with a primary dwelling unit and two ADUs.[35] The ordinance also addresses the economic feasibility of ADU and

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[30] Seattle, Wash., Ordinance No. 125854, at 2 (July 1, 2019).

[31] *Id.*

[32] *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. 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).

[33] The amended Code requires the second ADU, if detached, or the principal structure, if the second ADU is attached to a new primary unit, to meet a green building standard. § 23.44.041(A)(1). To satisfy the green building standard, a building must adhere to one of the building industry certification programs designated by rule or adhere to a substantially similar or superior standard. Seattle Department of Construction & Inspections, Director's Rule 20-2017, Green Building Standard (Nov. 14, 2017), http://www.seattle.gov/dpd/codes/dr/DR2017-20.pdf.

[34] "Income eligible households" means households at or below 80% of median income. § 23.58A.004. Affordable means that the cost of rent and basic utilities for the unit must cost no more than 30% of household income. § 23.84A.016. Dan Bartolet & Margaret Morales, *Seattle Says Yes to the Best Rules in America for Backyard Cottages*, SIGHTLINE INSTITUTE, July 1, 2019, 4:21 PM, https://www.sightline.org/2019/07/01/seattle-approves-best-backyard-cottages-rules-united-states/.

[35] Seattle, Wash. Code of Ordinances § 23.44.041(A)(3). The building code may be a more appropriate regulatory mechanism for regulating occupancy limits. *See generally* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 728, 115 S. Ct. 1776, 1778–79, 131 L. Ed. 2d 801 (1995) (concluding that occupancy limits based on a definition of family are not occupancy limits within the meaning of the Fair Housing Act, which are "rules that cap the total number of occupants in order to prevent overcrowding of a dwelling").

backyard cottage development by removing owner-occupancy requirements,[36] off-street parking requirements,[37] and, for detached ADUs, decreasing minimum lot size requirements and increasing maximum floor area and height requirements.[38]

A recent amendment to Oregon law clarified that cities and counties may not apply owner-occupancy and off-street parking requirements to ADUs. Under Oregon's ADU law, local governments must allow the development of at least one ADU for each detached single-family dwelling on a lot "subject to reasonable local regulations relating to siting and design."[39] In 2019, the legislature clarified that "reasonable local regulations relating to siting and design" of ADUs do not include owner-occupancy requirements of either the primary or accessory structure or requirements to construct additional off-street parking.[40] With sufficient resources and alternative infrastructure, elimination of off-street parking requirements can also improve public health and reduce emissions by encouraging alternative transportation, transit-oriented design, and walkable neighborhood design.

The legislative intent of Oregon's ADU law is to increase the availability of affordable housing by promoting the development of additional dwelling units on lots zoned for single-family units.[41] Even before passage of Oregon's middle housing law in 2019, Oregon's ADU law and other "needed housing statutes"[42] included provisions that "impose relatively short timelines for processing applications for development of affordable multifamily housing, prohibit counties from reducing the density associated with certain proposed housing developments, redefine 'needed housing' to expressly address 'affordab[ility] to households within the county with a variety of incomes,' require certain municipalities to allow accessory dwelling units, and permit places of worship to use their real property to provide affordable housing."[43]

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[36] Seattle, Wash. Code of Ordinances § 23.44.041(C).

[37] *Id.* § 23.44.041(A)(5).

[38] *Id.* § 23.44.041 tbl. A (from 4,000 square feet to 3,200 square feet).

[39] Or. Rev. Stat. § 197.312 (applicable to cities with populations greater than 2,500 and counties with populations greater than 15,000). For a description of Oregon's land use system and housing law, *see* Edward J. Sullivan, *Will States Take Back Control of Housing from Local Governments?*, 43 ZONING & PLANNING L. REPORTS 1 (July 2020).

[40] 2019 Or. Laws ch. 639 § 7(5)(b) (2019) (HB 2001).

[41] Kamps-Hughes v. City of Eugene, 305 Or. App. 224, 233 (2020).

[42] *Id.*

[43] Warren v. Washington County, 296 Or. App. 595, 600, 439 P.3d 581, *rev. den.*, 365 Or. 502, 451 P.3d 988 (2019) (citing Or. Laws 2017, ch. 745, §§ 1, 2, 3, 4, 6, 7, 8); *see also* Sullivan, *supra* n. 39.

Recognizing the legislative intent to promote production of affordable housing, the Oregon Court of Appeals recently rejected the 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. The court characterized these standards—which localities have used for nearly a century to justify restrictive single-family zoning—as "essentially policy arguments" against ADU development in existing residential neighborhoods, contrary to the intent of the legislature.[44] The court also rejected the city's argument that siting standards include occupancy limits or minimum lot-size or lot-dimension requirements. Rather, "reasonable local regulations 'relating to siting' means reasonable local regulations relating to where ADUs are sited on a lot, not where they are sited within areas zoned for detached single-family dwellings."[45]

Absent regulation by state or local governments, including, for example, Seattle's incentives for developing affordable ADUs, an ADU law intended to increase affordable housing can result in ADU development for the short-term rental market with little to no production of affordable ADUs for the long-term rental market.

### B. Allowing duplexes and other middle housing as of right everywhere single-family housing is allowed

In 2019, the City of Minneapolis and State of Oregon each made history by effectively eliminating restrictive single-family detached residential zoning. The City of Portland, Oregon, followed in August 2020 with passage of an ordinance adopting the City's Residential Infill Project, a project that, consistent with Oregon's new middle housing law, allows a duplex on all lots that allow a single dwelling, but also goes farther than the state mandate to promote production of affordable middle housing.

#### 1. The Minneapolis 2040 Comprehensive Plan

The Minneapolis 2040 Comprehensive Plan provides for increasing housing availability and affordability by allowing more housing units on residential lots—in all the City's residential districts.[46] As amended to implement the plan, Minneapolis' zoning code designates three-family units as principal uses in all residential districts (R1 – R6). In R1 through R4, single-family and two-family units are also principal uses; in R3 through R6, four-family or more units are also principal uses; and cluster units are

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[44] *Kamps-Hughes*, 305 Or. App. at 238.

[45] *Id.*

[46] Steven P. Katkov & Jon Schoenwetter, *Minneapolis's Great Experiment: An Introduction to the Minneapolis 2040 Comprehensive Plan*, BENCH & B. MINN., Mar. 2020, at 21, 24.

conditionally allowed in R1 through R6.[47] The package of reforms also includes provisions that promote housing density near transit, require new apartment developments set aside 10 percent of units for moderate-income households, provide financial assistance to developers who agree to set aside 20 percent of units for moderate income households, and increase funding for affordable housing from $15 million to $40 million.[48]

Recognizing that single-family zoning is not the only land use regulatory barrier to the development of middle housing or affordable missing housing, Minneapolis relaxed and eliminated other provisions of its zoning code that would have made development of middle housing less economically feasible. Significantly, Minneapolis eliminated what the "poison pill" of off-site parking requirements[49] and, in lieu of off-street parking will require single-, two-, and three-family dwellings to provide 200 square feet of enclosed storage.[50] The revised code will also allow conversion of single-family units, including non-conforming single-family structures, into three-family units.[51] The revised code also adjusts per-dwelling minimum lot size requirements to facilitate middle housing development;[52] allows the city to grant variances to three-family-dwelling width requirements, enclosed storage requirements, and curb-cut requirements;[53] and allows in some circumstances reduced front yard setbacks, separate entrances, and alternative locations for fire escapes and mechanical boxes.[54] Notably, Minneapolis has not amended minimum or maximum floor areas, minimum lot widths, height restrictions, or rear or side yard setbacks.

Although some forms of middle housing are now primary uses in all residential zones, the different zones retain their traditional land use regulatory distinctions. As a result, "develop-ability will vary based on the existing "R" classifications."[55] To

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[47] § 546.30 tbl. 546-1 (2019).

[48] RICHARD D. KAHLENBERG, HOW MINNEAPOLIS ENDED SINGLE-FAMILY ZONING, CENTURY FOUNDATION REPORT (Oct. 24, 2019), https://tcf.org/content/report/minneapolis-ended-single-family-zoning.

[49] Jenny Schuetz, *Minneapolis 2040: The Most Wonderful Plan of the Year*, BROOKINGS INSTITUTION, Dec. 12, 2018, https://www.brookings.edu/blog/the-avenue/2018/12/12/minneapolis-2040-the-most-wonderful-plan-of-the-year/ (characterizing off-street parking requirements as "a poison pill for low-cost housing").

[50] Minneapolis, Minn. Code of Ordinances § 530.300 (2019).

[51] *Id.* § 535.90(e).

[52] *Id.* § 546.3 tbl.'s 546-3, 546-5, 546-7, 546-9.

[53] *Id.* §§ 525.520(12), 525.520(30), 525.520(31).

[54] *Id.* §§ 546.160, 535.90.

[55] Katkov & Schoenwetter, *supra* n. 46, at 21, 24.

illustrate, "the same three-family dwelling will have to abide by a 25-foot front yard setback on an R1 property and a 15-foot [setback] on an R4 property."[56]

In addition to the zoning code revisions, the city also recently adopted a Missing Middle Housing Pilot Program.[57] The Program resulted from 2040 Plan research "aimed at identifying barriers" to missing middle housing development.[58] The program provides funding to develop three to twenty ownership or rental middle housing units on vacant land in Minneapolis,[59] and the program will prioritize proposals that are cost-effective, meet local affordable housing needs, provide equitable work opportunities, and have certain design features, including disability access, units with three or more bedrooms, and that will be eligible for certification through a sustainable building program.[60]

Although more research is needed, a study by the Century Foundation suggests Minneapolis accomplished these historic reforms by empowering "a new generation of leaders who understood concerns young people have about housing affordability, racial justice, and climate change," and by successfully assembling a racially and economically diverse coalition to design and advocate for the reforms, including civil rights organizations, tenants' groups, labor leaders, environmentalists, AARP and residents who would be most impacted by the reforms.[61] A cofounder of Neighbors for More Neighbors, a Minneapolis housing advocacy organization created to advocate for the 2040 Plan reforms, said the new city leadership, which included a city council member who is a renter, "get how housing, racial justice, school success, school segregation and climate and all these other issues fit together."[62] The Century Foundation study found that, conscious of failures of predominantly white housing reform advocacy organizations to

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[56] *Id.*

[57] MINNEAPOLIS COMMUNITY PLANNING & ECONOMIC DEVELOPMENT, MISSING MIDDLE HOUSING PILOT PROGRAM (Oct. 2, 2019), http://www.minneapolismn.gov/cped/housing/MissingMiddle.

[58] Emma Dill, City Program Promotes 'Missing Middle' Affordable Housing, MINNESOTA DAILY, May 6, 2019, 9:40 pm, https://www.mndaily.com/article/2019/05/n-city-program-promotes-missing-middle-housing.html.

[59] CITY OF MINNEAPOLIS, MISSING MIDDLE HOUSING PILOT PROGRAM GUIDELINES, http://www2.minneapolismn.gov/cped/housing/MissingMiddle (updated Oct. 2, 2019).

[60] *Id.*

[61] RICHARD D. KAHLENBERG, HOW MINNEAPOLIS ENDED SINGLE-FAMILY ZONING, CENTURY FOUNDATION REPORT (Oct. 24, 2019), https://tcf.org/content/report/minneapolis-ended-single-family-zoning.

[62] *Id.* (reporting on phone interview Janne Flisrand). The shift in policy priorities appears also to align with William Fischel's "homevoter hypothesis," which asserts that political power in small to medium municipalities is typically held by homeowners who are interested primarily in maximizing the value of their homes. WILLIAM FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2005).

overcome gentrification and displacement criticisms and rally a broad coalition that included lower-income communities, immigrant communities, and communities of color, the city and reform advocates emphasized authentic involvement of community groups through a multi-year community engagement process.

Other essential features of a land use strategy for addressing racial disparities in housing include publicly funded programs to facilitate affordable middle housing development in neighborhoods traditionally restricted to single family houses, including development by small developers of colors, and public investment in parks, playgrounds, open space and schools in already-dense and densifying residential areas. According to University of Minnesota urban affairs researcher Brittany Lewis, "The city has to put its money where its mouth is and redistribute resources to make high density equally affordable." Dr. Lewis notes that this investment is needed to facilitate successful developments by the many small developers of color who are trying to "get in the development game," but finding development of affordable middle housing unfeasible.[63]

### 2. Portland, Oregon's Residential Infill Project

Portland, Oregon has allowed ADUs in residential areas for forty years and duplexes on corner lots for thirty years. But, as was the case with detached ADUs in Seattle, duplexes have been built on only a small fraction of Portland lots eligible for duplexes[64]—notwithstanding a large unmet demand for housing and skyrocketing prices.[65] With nearly 50% of the city's land area zoned for single-dwellings, housing demand and other factors have caused a housing shortage and driven up housing costs such the median priced Portland home is affordable only to households that earn at least 160% of the median family income to afford. And, like many growing cities, Portland's housing crisis is only going to get worse absent bold action to increase the production of affordable housing and dismantle regulatory structures that segregate neighborhoods by income and inflate costs.[66]

Responding to its worsening housing crisis, the Portland City Council adopted the Residential Infill Project on August 12, 2020.[67] The project makes duplexes, triplexes and fourplexes allowable in large swaths of city's three highest density single-dwelling

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[63] Erick Trickey, *How Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, POLITICO MAGAZINE, Jun. 11, 2019, https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265.

[64] Sullivan, *supra* n. 39, at n.62 (referencing city data showing only 3-5% of eligible lots had redeveloped into duplexes over a year period of more than 20 years).

[65] *Id.*

[66] By 2035, Portland projects it will grow by more than 100,000 households.

[67] City of Portland, Ord. No. 190093 (Aug. 12, 2020).

residential zones, which the code designates as Residential 2,500 (R2.5), Residential 5,000 (R5) and Residential 7,000 (R7) zones. Three or more dwelling units are not permitted in the portions of these base zones covered by new "z overlay," which designates where natural resources or hazards are present or where streets are not maintained by the city.[68] The project facilitates ADU basement conversions and increases the number of ADUs allowed on a lot in all zones except areas covered by the z overlay with a single-family dwelling from one to two and allows for one ADU on a lot with a duplex.[69] With the exception of ADUs, which state law requires be allowed on all lots with a single-family dwelling, the project does not provide for middle housing in the city's three lowest density single-dwelling zones, the Residential 10,000, Residential 20,000, and Residential Farm/Forest zones,[70] and retains regulations of plan districts and historical landmarks that can prevent the development of middle housing.[71] However, under Oregon's new middle housing law, the city will have to amend its comprehensive plan and code by June 1, 2022, to allow duplexes on every lot in a residential zone that allows a single dwelling and to allow other forms of middle housing in all residential zones that allow single-family dwellings.

The Residential Infill Project requires numerous code changes intended to promote development of affordable housing. Significantly, RIP calls for elimination of minimum parking requirements for houses, duplexes and triplexes in the city's single-dwelling zones.[72] To promote development of smaller and presumably more affordable houses, the cap on building floor area (FAR) in single dwelling zones will be decreased to effectively reduce the maximum allowable size of dwellings by one-third to one-half.[73] The project also provides bonuses for affordable housing, including additional FAR and allowance of up to six units for buildings or sites in the R2.5, R5, and R7 zones that qualify for the Deeper Housing Affordability FAR Density Bonus Program. For a

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[68] 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, Ore., Zoning Code § 33.418).

[69] *Id.* (amending Portland, Ore., Zoning Code §§ 33.205.020 and 33.205.040).

[70] Comprehensive plan amendments adopted as part of the RIP ordinance continue to designate R10's primary use as single-dwelling residential. R10 "is intended for areas far from centers and corridors where urban public services are available or planned but complete local street networks or transit service is limited," and "areas where ecological resources or public health and safety considerations warrant lower densities." Reflecting Oregon's commitment to preserving farm uses, R20's primary uses are "[v]ery low-density single-dwelling residential and agriculture . . . uses." R20 is "intended for areas that are generally far from centers and corridors where urban public services are extremely limited or absent, and future investments in urban public services will be limited." Residential Infill Project, Vol. 2 § 7.

[71] Residential Infill Project, Vol. 2 § 6.

[72] *Id.* (amending Portland, Ore. Zoning Code §§ 33.266.110.B.2 and 33.266.120.C.3).

[73] *Id.* (amending § 33.110.210).

building or site to qualify for the DHA, owners must covenant that dwelling units for sale will remain affordable for at least 10 years to households earning up to 80% of the median family income, and dwelling units for rent will remain affordable for at least 99 years to households earning up to 60% of the median family income.[74]

The project responds to concerns about the demolition of existing houses by providing additional FAR for conversions,[75] creating more flexible lot rules for oddly shaped lots when keeping an existing house,[76] allowing larger basement ADUs in older homes,[77] allowing small additions and remodels to exceed the FAR caps,[78] and restricting redevelopment options when historic resources are demolished without first receiving demolition review approval.[79] Additionally, the project requires at least two units on double-sized and larger lots when new development occurs, although one of the units can be an ADU.[80] Significantly, existing houses on these larger lots will become nonconforming in residential density, but the code will provide a 5-year grace period for rebuilding if the nonconforming house is damaged or destroyed by fire or other natural cause.

Upon adopting the Residential Infill Project, the Portland City Council expressly acknowledged that "the city's history of racially discriminatory decision-making and public policies have contributed to today's racial disparities in homeownership rates and wealth attainment and has resulted in geographic racial segregation in Portland."[81] Whether Portland's project will succeed in making the city's *de jure* segregated "highest quality" neighborhoods[82] accessible and affordable will depend on many variables. But, housing advocates in Oregon have applauded the project as "set[ting] the tone for cities all over America to acknowledge long-codified racist zoning practices, end exclusive single-dwelling zoning and provide the missing middle housing so many need [to] . . . prevent[] and mitigate[] displacement."[83] Catholic Charities of Oregon noted that the

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[74] *Id.* (amending § 30.01.140).

[75] *Id.* (amending § 33.110.210).

[76] *Id.* (amending § 33.110.255).

[77] *Id.* (amending § 33.205).

[78] *Id.* (amending § 33.110.210).

[79] *Id.* (amending § 33.445).

[80] *Id.* (amending §§ 33.110.205 and 33.110.260).

[81] City of Portland, Ord. No. 190093 § 1.3 (Aug. 12, 2020).

[82] *See* Part I discussion of Portland's first zoning code.

[83] City of Portland, Press release, Portland City Council Adopts the Residential Infill Project, Aug. 12, 2020 1:32 pm, https://www.portland.gov/bps/rip/news/2020/8/12/portland-city-council-adopts-residential-infill-project (quoting representative of 1000 Friends of Oregon).

project will provide more opportunities "for nonprofits and other socially minded developers to provide affordable homes."[84]

Clearly, the RIP represents a significant expansion of allowable forms of housing in Portland's traditionally single-dwelling neighborhoods. Cities looking at Portland as a model, however, will find that reversing a hundred years of *de jure* racial segregation will ultimately require even bolder revisions to the residential zoning paradigm, as well as changes to formal and informal state and local rules that contribute to maintaining and increasing gaps in wealth, health, access to education, and other disparities.[85]

### 3. Oregon's Middle Housing Laws

The State of Oregon responded in 2019 to its worsening housing crisis and racial and economic inequities of restrictive residential zoning by passing two laws intended to work in concert to increase housing affordability, production and equity throughout the state, and to build on affordable housing legislation passed in 2017 and 2018.[86] Oregon House Bill 2001 requires local governments to allow one or more types of middle housing in all residential zones that allow single-family dwellings. House Bill 2003 requires the Oregon Housing and Community Services Department, with assistance from other agencies, to establish the methodology for and conduct a "Regional Housing Needs Analysis" that identifies the total number of housing units necessary to accommodate anticipated populations in a region over the next 20 years.[87]

#### a. Allowing middle housing in all single-family zones

The middle housing law requires large cities[88] and counties and cities within a metropolitan service district to allow duplexes, triplexes, quadplexes, cottage clusters, and townhouses in all residential zones that allow single-family dwellings. Additionally, both large and small cities[89] must allow the development of "[a] duplex on each lot or

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[84] *Id.*

[85] To highlight just one example, code enforcement provisions with disparate impacts and discriminatory enforcement of code violations continues to place greater economic burdens on property owners of color, resulting in hefty fines, loss of title, and even criminal charges.

[86] *See* Sullivan, *supra* n. 39 (citing and discussing Oregon's 2017 and 2018 housing legislation).

[87] 2019 Or. Laws ch. 640 (HB 2003). The new law built on existing law, which required local governments to conduct 20-year housing analyses. Or. Adm. R. 660-008-0010 and -0020. *See* Sullivan, *supra* n. 39 (summarizing HB 2003).

[88] Large cities are cities with populations of 25,000 or more.

[89] Small cities are cities with a population of more than 10,000 and less than 25,000, which are not in a metropolitan service district.

parcel zoned for residential use that allows for the development of detached single-family dwellings."[90]

Large cities must adopt land use regulations to implement the middle housing law by June 30, 2022, and small cities must do so by June 30, 2021.[91] The law provides a time extension for "specific areas" where a 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 of Land Conservation and Development]."[92]

Oregon's middle housing law addresses potential local regulatory barriers to middle housing development by prohibiting 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."[93] The Oregon law also makes void and unenforceable any provision in a planned community governing document adopted on or after the Act's effective date that "prohibit[s] or [has] the effect of unreasonably restricting the development of housing" otherwise allowed by the underlying land use regulations.[94] Similarly, the law makes unenforceable a provision in a recorded instrument affecting real property executed on or after the Act's effective date that allows the development of a single-family dwelling on the property but prohibits the development of middle housing or an accessory dwelling unit.[95]

Oregon's law does not, however, directly or expressly prohibit local regulatory barriers to *affordable* middle housing development. The law directs local governments, as part of the planning and amendment process, to "consider ways to increase the affordability of middle housing by considering ordinances and policies that include but are not limited to: (a) [w]aiving or deferring system development charges; (b) [a]dopting or amending criteria for property tax exemptions . . . or property tax freezes . . . ; and (c) [a]ssessing a construction tax . . . ."[96]

A study of various middle housing development scenarios in Eugene, Oregon showed maximum unit, minimum lot size, and parking requirements as factors that can

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[90] HB 2001 § 2(2)-2(3); *see also id.* § 2(1)(b)-(c) (defining middle housing types).

[91] *Id.* § 3(3).

[92] *Id.* § 4(2).

[93] *Id.* § 2(5).

[94] *Id.* § 12, amending Or. Rev. Stat. §§ 94.550 - 94.783.

[95] *Id.* § 13.

[96] *Id.* § 3(4).

make the development of rentals unviable or keep rental rates and sale prices in or above the high middle-market range.[97] A consulting firm working with DLCD through the rulemaking process also found that minimum off-street parking requirements, minimum lot size, and floor area ratio can significantly limit development feasibility for triplexes and quadplexes.[98] Maximum density, maximum height, and various design standards also pose potential barriers to the feasibility of middle housing development, and especially affordable middle housing development.

HB 2001 also amended an existing reporting requirement that required cities to submit annual reports to the Department of Land Conservation and Development identifying how many units of various types of housing were permitted and produced in the preceding year. As amended, the report must now include tallies of permitted and produced accessory dwelling units, regulated affordable accessory dwelling units, units of middle housing, and regulated affordable units of middle housing.[99]

As the new Oregon law is implemented, issues to watch include whether the law allows an ADU to be treated as one unit of a duplex, as the newly adopted administrative rules for middle housing in small cities provide.[100] The rules fail to distinguish between primary dwelling units and accessory dwelling units, and consequently classify a primary dwelling and an ADU as a duplex. The clear intent of the middle housing law is to increase housing affordability and production by reducing to the extent practicable barriers to the construction of middle housing, as defined by the law, and, requiring local governments to allow, at a minimum, "[a] duplex on each lot or parcel zoned for residential use that allows for the development of detached single-family dwellings."[101] Although the law does not define duplex, it does define middle housing, and the definition does not include ADUs.[102] Additionally, the law treats middle housing and ADUs as separate forms of housing.[103] At the very least a good argument exists that the duplex mandate cannot be satisfied by the development of an ADU—indeed, if that were the

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[97] CLAY NEAL, MISSING MIDDLE HOUSING: RESPONDING TO EUGENE'S HOUSING CRISIS 78–98 (Oct. 24, 2017), http://www.pivotarchitecture.com/wp-content/uploads/2017/12/careers_fellowship_2017_missing_middle.pdf.

[98] Memo from Becky Hewitt and Tyler Bump, ECONorthwest, to Matt Hastie and Kate Rogers, Angelo Planning Group, July 24, 2020.

[99] *Id.* § 8(4), amending Section 1, ch. 47, Oregon Laws 2018.

[100] Or. Adm. R. 660-046-0105(2).

[101] HB 2001 § 2(2)-2(3); *see also id.* § 2(1)(b)-(c) (defining middle housing types).

[102] HB 2001 § 2.

[103] *See, e.g.*, HB 2001 § 13 (referring to "middle housing" or an ADU).

case, why require the allowance of duplexes at all since Oregon law already required the allowance of an ADU?

Another issue is the question of what the legislature meant when it required larger cities to allow "development of [a]ll middle housing types *in areas* zoned for residential use that allow for the development of detached single-family dwellings." Cities are lobbying for flexibility in defining these areas and housing advocates are pointing to the legislature's intent to limit the delegation of flexibility to local governments that has, for more than a hundred years, resulted in racially and economically segregated neighborhoods, inflated prices, and is a major cause of the state's severe housing shortage.

### b. Increasing the production of a diversity of affordable housing options

The Regional Housing Needs Analysis (RHNA) required by HB 2003 requires the state to develop a methodology for calculating projected housing data at a regional scale and conduct a housing shortage analysis, estimate the housing needed to accommodate growth over the next twenty years, and report its findings to the legislature by March 1, 2021.[104] The new law requires that the methodology classify housing by: (a) housing type, including attached and detached single-family housing, multifamily housing and manufactured dwellings or mobile homes; and (b) affordability to households with high, moderate, low and very low incomes.[105]

Notably, the law also requires cities to adopt a "housing production strategy" (HPS), which must identify actions the city will take to address its projected 20-year housing needs.[106] In adopting an HPS, a city must consider current actions, barriers, and market conditions.[107] The law authorizes the Department of Land Conservation and Development to prioritize state actions in cities that have not implemented an HPS or achieved production of needed housing and petition for an enforcement order against a noncompliant city.[108] Larger cities and Metro Regional Government must demonstrate that its plans provide "sufficient buildable lands within its urban growth boundary . . . to accommodate housing needs for 20 years."[109] Whether clear enforcement measures are

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[104] 2019 Or. Laws ch. 640 (HB 2003).

[105] *Id.* § 1(3).

[106] *Id.* § 4(2).

[107] *Id.* § 5.

[108] *Id.* § 6(3); id. §§ 11, 12 (amending existing statutes relating to enforcement orders to include failure to make "satisfactory progress" in taking actions under its HPS).

[109] *Id.* § 6 (amending Or. Rev. Stat. § 197.296). "Sufficiency of buildable lands is of great importance, particularly to developers, as well as housing advocates. Having a specific cycle in which the state can

created and implemented is an issue to watch as the administrative rules are adopted and the law is implemented.

LCDC will be considering proposed administrative rules implementing HB 2003 in September 2020. Rulemaking advisory committee (RAC) members have emphasized that the legislative intent of HB 2003 will be undermined if the HPS fails to address and include metrics on equity and segregation on the basis of race.[110] As of August 18, 2020, the RAC and agency staff appeared to agree that the HPS should require local jurisdictions to explicitly address "a city's ability to not only produce more housing, but produce more housing in a way that is more equitable with regards to housing location, affirmatively furthering fair housing principles, providing housing choice, providing for residents experiencing homelessness, wealth creation, and mitigating any future displacement."[111]

## IV. Conclusion

Dismantling a segregationist land use system embraced by US cities for more than 100 years requires a bold shift in paradigm, a rejection of the concept of compatible uses of land that has been used and continues to be used throughout the United States to exclude Black, Indigenous, and other People of Color from predominantly white neighborhoods and the myriad privileges that attach to residence and homeownership in those neighborhoods. Rather than classifying multifamily residences as land uses that are incompatible with residential neighborhoods that enjoy quiet streets and clean air—a classification that contributes to degradation of neighborhoods in multifamily zones that planners, local governments and residents point to as proof of the incompatibility—zoning law must recognize a broad range of residential uses as inherently compatible.

It is as true today as it was when the Supreme Court decided *Belle Terre* that the public welfare can be promoted by "lay[ing] out [residential] zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[112] What we cannot let stand, however, is a system of laws that purports to preserve good neighborhoods by excluding low-income renters and buyers and non-traditional families, effectively segregating cities by race and class.

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take action on Buildable Land Inventories (BLIs), without having to use the time-consuming and politically fraught use of the enforcement order." Sullivan, *supra* n. 39, at n.80.

[110] HOUSING RULEMAKING ADVISORY COMMITTEE MEETING, PACKET #9 (for Aug. 18, 2020, RAC meeting), https://www.oregon.gov/lcd/LAR/Pages/Housing.aspx?utm_medium=email&utm_source=govdelivery.

[111] *Id.* at 43.

[112] Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

# Community Development

City & Borough of Juneau • Community Development

155 S. Seward Street • Juneau, AK 99801

**Date:** February 5, 2015

**To:** Assembly Committee of the Whole

**From:** Beth McKibben, Planner
Community Development

**Re:** Ordinance 2015-07 An Ordinance Amending the Land Use Code Relating to Accessory Apartments

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The Ad Hoc Housing Committee identified housing affordability within the City and Borough of Juneau as primary goal. One suggested method to achieve this goal is to "allow higher square footage and two bedrooms for Accessory Apartments" (#7). Staff investigated this proposal by reviewing existing ordinances in other communities. CDD staff used the American Planning Association's Planner's Advisory Service assistance to compare various communities' "Accessory Dwelling Units" (ADU) regulations. Regulations from 24 communities were reviewed, yielding accessary dwelling unit size requirements ranging from 300 square feet to 1,500 square feet as well as limits on maximum percentage of the primary dwelling ranging from 25% to 90%.

The Planning Commission discussed potential changes to the Accessory Apartment regulations at its May 27th and June 25th, 2014 meetings. The Commission considered staff's report that analyzed the accessory apartment impacts on: traffic, noise, parking, mass/scale/harmony, with duplexes, commonwalls and multi-family development. Juneau vacancy rates for small apartments were considered. The report also focused on the question of when is an apartment no longer "accessory" and changes the density of an area?

The Commission asked staff to create a two tiered approach based on lot size. This was presented to the Commission at the October 28th, 2014 meeting. The Commission reviewed the draft language and recommended that it be forwarded to the Assembly for action. Staff worked with CBJ Law to draft the ordinance which is before you for consideration.

The ordinance would allow for larger accessory apartments, up to 1000 square feet, if certain conditions are met with respect to the net floor area of the primary dwelling, size of the lot, and wastewater treatment capacity. The ordinance also simplifies the review and approval process for accessory apartments that are proposed on lots that exceed the minimum lot size and are connected to sewer. Additionally, the ordinance provides that the Planning Commission may approve an accessory apartment application on a lot that is less than the minimum lot size and is not connected to sewer. The Commission may also approve an accessory apartment application with a Conditional Use permit for a single family home in a multi-family zone district where density (number of units per lot) is calculated by unit/acre (D10, D15, D18, LC, GC, MU2, and WC) that are located on a lot too small to permit a second dwelling unit.

Finally, the ordinance would also clarify the parking requirements, as well create a parking standard for the larger accessory apartments. It also makes a few housekeeping changes.

Presented by: Planning Comm.
Introduced:
Drafted by: R. Palmer III

**ORDINANCE OF THE CITY AND BOROUGH OF JUNEAU, ALASKA**

**Serial No. 2021-21 vPC1**

**An Ordinance Amending the Land Use Code Relating to Accessory Apartments.**

BE IT ENACTED BY THE ASSEMBLY OF THE CITY AND BOROUGH OF JUNEAU, ALASKA:

**Section 1. Classification.** This ordinance is of a general and permanent nature and shall become a part of the City and Borough of Juneau Municipal Code.

**Section 2. Amendment of Table.** CBJ 49.25.300 Table of Permissible Uses, is amended as shown in Exhibit A.

**Section 3. Amendment of Section.** CBJ 49.25.400 Table of Dimensional Standards, is amended as shown in Exhibit B.

**Section 4. Amendment of Section.** CBJ 49.25.510 Special density considerations, is amended to read:

**49.25.510 Special density considerations.**

. . .

(k) *Accessory apartments.* ~~No person shall construct or maintain an accessory apartment except in accordance with a permit issued under this section. An apartment in D-10, D-15, D18, MU, MU2, LC, GC, and WC is exempt from this section and treated as a primary dwelling unit.~~ An accessory apartment may be permitted anywhere a new or existing single-family or duplex dwelling is allowed in accordance with a permit issued under this section. Accessory apartments are exempt from the density requirements of the underlying zone.

. . .

(2) *Approval standards.*

(A) Unless otherwise provided, the accessory apartment shall be a one-bedroom or efficiency unit not exceeding 600 square feet in net floor area.

(B) Areas common to more than one dwelling unit - including entry ways, furnace rooms, laundry rooms, and interior stairways - shall not be included in the computation of the net floor area for the accessory apartment.

(C) The minimum lot size as used in this section refers to the minimum lot size for permissible uses listed in the table of dimensional standards, CBJ 49.25.400 ~~200~~.

(D) A permit under this subsection may be issued if the applicant establishes:

(i) The development meets all setback requirements;

(ii) The total building footprint does not exceed the maximum lot coverage allowable under section 49.25.400, the table of dimensional standards, or, in the case of nonconforming structures, the total building footprint does not increase with the proposed accessory apartment;

(iii) The development does not violate the vegetative cover requirements imposed by section 49.50.300; or, in the case of nonconforming structures, the proposed accessory apartment does not decrease the existing vegetative cover;

(iv) The development meets the parking standards required by chapter 49.40; and

**Commented [BM1]:** Exception here for ??

The application is for an efficiency or one-bedroom unit that does not exceed 600 square feet in net floor area, and is on a lot that is less than the minimum lot size.

Or see suggested language in section (E)
On lots that are less than the minimum lot size and have received nonconforming certification,

(v) The development is connected to public sewer or the existing wastewater disposal system has adequate capacity for the development, including the proposed accessory apartment.

(E) Single-family detached accessory apartment approval.

(i) The director may approve a 49.25.300.1.130 accessory apartment application if all of the requirements of this section and the following are met:

(a) The application is for an efficiency or one-bedroom unit that does not exceed 600 square feet in net floor area ~~and is on a lot that exceeds the minimum lot size~~; or

(b) The application is for an efficiency, one-bedroom, or two-bedroom unit that has a net floor area equal to or less than 50 percent of the primary dwelling unit's net floor area but not to exceed 1,000 square feet~~, and is on a lot that exceeds 125 percent of the minimum lot size~~.

~~(ii) The commission may approve, with a conditional use permit, a 49.25.300.1.130 accessory apartment application if all of the requirements of this section and the following are met:~~

~~(a) The application is for an efficiency or one-bedroom unit that does not exceed 600 square feet in net floor area, and is on a lot that is less than the minimum lot size; or~~

~~(b) The application is for an efficiency, one-bedroom, or two-bedroom unit that has a net floor area equal to or less than 50~~

**Commented [BM2]:** One dwelling per lot. a suggestion to make clear

**Commented [BM3]:** IF we take this out then any SF home can have a smaller AAP regardless of lot size. The rub is this isn't clear in the CBJ 49.25.400 Table of Dimensional Standards. I

**Commented [BM4]:** New paragraph

The application is for an efficiency or one-bedroom unit that does not exceed 600 square feet in net floor area and is on a lot that is less than the minimum lot size and has received nonconforming certification.

**Commented [BM5]:** Because the revised TPU doesn't address this situation and it is now to be directors approval we need to figure out how to best address it. Maybe we do that in section 2 Approval standards above?

~~percent of the primary dwelling unit's net floor area but not to exceed 1,000 square feet, and is on a lot that exceeds 125 percent of the minimum lot size~~.

(iii) ~~An application for an accessory apartment with a net floor area that exceeds 600 square feet shall not be approved on a lot that is less than 125 percent of the minimum lot size.~~

(F) Single-family detached, two dwellings per lot, accessory apartment approval.

(i) When a lot has two primary dwelling units, each primary dwelling unit may have up to one accessory apartment that is consistent with the requirements of this section. The lot shall not have more than two accessory apartments.

~~(ii) An application for an accessory apartment with a net floor area that exceeds 600 square feet shall not be approved on a lot that is less than 250 percent of the minimum lot size.~~

(ii)~~(iii)~~ The director may approve a 49.25.300.1.140 accessory apartment application if all of the requirements of this section and the following are met:

(a) The application is for an efficiency, or one-bedroom unit that does not exceed 600 square feet in net floor area, ~~is on a double sized lot (two times the minimum lot size), and the lot does not have another accessory apartment in excess of 600 square feet in net floor area~~; or

**Commented [BM6]:** The proposed language below more closely mirrors that from the section of one single family and puts the lot size into positive language vs negative.

(F) Single-family detached, two dwellings per lot, accessory apartment approval.
(i) The director may approve 49.25.300.1.140 accessory apartment applications if all of the requirements of this section and the following are met:
(a) The application(s) is for efficiency or one-bedroom unit(s) that does not exceed 600 square feet in net floor area; or
(b) The application(s) is for efficiency, one-bedroom, or two-bedroom unit(s) that has a net floor area equal to or less than 50 percent of the primary dwelling unit's net floor area but not to exceed 1,000 square feet.

(b) The application is for an efficiency, one-bedroom, or two- bedroom unit that has a net floor area equal to or less than 50 percent of the primary dwelling unit's net floor area but not to exceed 1,000 square feet~~, on a lot that exceeds 250 percent of the minimum lot size, and the lot does not have more than one other accessory apartment in excess of 600 square feet in net floor area.~~

~~(iv) The commission may approve, with a conditional use permit, a 49.25.300.1.140 accessory apartment application if all of the requirements of this section and the following are met:~~

~~(a) The application is for an efficiency, or one-bedroom unit that does not exceed 600 square feet in net floor area, is on a lot that is less than the minimum lot size, and the lot does not have another accessory apartment in excess of 600 square feet in net floor area;~~

~~(b) The application is for an efficiency, one-bedroom, or two-bedroom unit that has a net floor area equal to or less than 50 percent of the primary dwelling unit's net floor area but not to exceed 1,000 square feet, is on a lot that exceeds 250 percent of the minimum lot size, and where the lot does not have more than one other accessory apartment in excess of 600 square feet in net floor area.~~

. . .

(l) Duplex accessory apartment approval.

(i) The director may approve a 49.25.300.1.210 accessory apartment application if all of the requirements of this section and the following are met:

~~(a)~~ The application is for an efficiency or one-bedroom unit that does not exceed 600 square feet in net floor area; or

~~(b)~~ The application is for a second accessory apartment for an efficiency or one-bedroom units that does not exceed 600 square feet in net floor area.

**Section 5. Amendment of Section.** CBJ 49.80.120 Definitions, is amended at the following definitions to read:

*Accessory apartment* means one or more rooms with private bath and kitchen facilities comprising an independent, self-contained dwelling unit within or attached to a single-family dwelling, a duplex dwelling, or in a detached building on the same lot as the primary dwelling unit. An accessory apartment is distinguishable from a duplex in that, unlike a duplex, it is clearly subordinate to the primary dwelling unit, both in use and appearance.

*Duplex* means a building on a single lot containing two attached primary dwelling units, each of which, except for a common stairwell exterior to both dwelling units, is separated from the other by an unpierced wall extending from floor to roof or an unpierced ceiling and floor extending from exterior wall to exterior wall.

**Commented [BM7]:** I recommend we have some language in each of these sections that refers the reader back to CBJ 49.25.400 Table of Dimensional Standards. Its confusing since we took out the lot size language – especially in this section. The reader will wonder what is the difference?

**Commented [BM8]:** Alternative definition for consideration

means a residential living unit on the same parcel as a single-family dwelling or duplex dwelling. An accessory apartment provides complete independent living facilities and may be within, attached, or detached to the primary dwelling. An accessory apartment is distinguishable from a duplex in that, unlike a duplex, it is clearly subordinate to the primary dwelling unit, both in use and appearance.

*Dwelling, multifamily,* means a building designed for or occupied by three or more families. A duplex with an approved accessory apartment(s) is not considered a multifamily dwelling.

**Section 6. Effective Date.** This ordinance shall be effective 30 days after its adoption.

Adopted this_____day of_____, 2021.

_____
Beth A. Weldon, Mayor

Attest:

_____
Elizabeth J. McEwen, Municipal Clerk