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WILL HOUSING BECOME THE INFLECTION POINT FOR REALIGNMENT OF STATE LAND USE STRUCTURES

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WILL HOUSING BECOME THE INFLECTION POINT FOR REALIGNMENT OF STATE LAND USE STRUCTURES?

EDWARD J. SULLIVAN*

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I. INTRODUCTION

From its beginnings in the 1920s, American land use regulation (and its inferior sibling, planning) have shared a common structure defined by two model acts constructed by the United States Department of Commerce under its Secretary, Herbert Hoover. The more prevalent of the two was the Standard State Zoning Enabling Act, completed in 1926.¹ This model legislation was adopted in one form or another by three-quarters of the states and delegated authority to local governments to control the use of land with only the courts as a check on land use regulation.² The second was the Standard City Planning Enabling Act, completed in 1928.³ This act provided local governments with the power to adopt binding plans, but was organized around provision of public works.⁴ This act also provided for no

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1. U.S. DEP'T OF COM., ADVISORY COMM. ON ZONING, DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1926).

2. *Id.* Section 1 granted zoning power to municipalities with no substantive state sideboards. Section 7 allowed review for review of certain "quasi-judicial" permits through a certiorari-type proceeding. There was no provision for challenge of rezoning decisions, so lawyers used declaratory judgment and injunctive remedies in those cases.

3. U.S. DEP'T OF COM., ADVISORY COMM. ON CITY PLANNING AND ZONING OF THE U.S DEP'T OF COM., A STANDARD CITY PLANNING ENABLING ACT (1928).

4. As shown below in detail, section 6 of the Standard Planning Act, which allowed for the creation of a planning commission, was oriented to infrastructure and land use, providing:

It shall be the function and duty of the commission to make and adopt a master plan for the physical development of the municipality, including any areas outside of its

state supervision of activities under its provisions, similarly leaving disputes to the courts.

Some states have taken back one or more of the functions generally hitherto delegated to local governments.⁵ The purpose of this article is to consider the state interest in housing as an inflection point in the relationship of state and local governments so that states now expect, and may mandate, changes in local plans and land use regulations. In doing so, we focus on legislative actions enabling local governments to undertake planning and land use regulations, and administrative and judicial reactions to that relationship in the State of Oregon over the years as a harbinger of things to come on the national scene. Although Oregon already had a robust state role in planning and land use regulation since 1969, the years 2015 through 2020 saw an intensification of that role.

Following a brief overview of the role of the state in housing matters, this article will proceed to discuss housing legislation prior to 2015 and responses to that legislation by state administrative bodies and courts. The focus of the article will then shift to the legislation and administrative rules on housing enacted

boundaries which, in the commission's judgment, bear relation to the planning of such municipality. Such plan, with the accompanying maps, plats, charts and descriptive matter shall show the commission's recommendations for the development of said territory, including, among other things the present location, character, and extent of streets, viaducts, subways, bridges, waterways, water fronts, boulevards, parkways, playgrounds, squares, parks, aviation fields, and other public ways, grounds and open spaces, the general location of public buildings and other property, and the general location and extent of public utilities and terminals, whether publicly or privately owned or operated for water, light, sanitation, transportation, communication, power or other purposes; also the removal, relocation, widening, narrowing, vacating, abandonment, change of use, or extension of any of the foregoing ways, grounds, open spaces, buildings, properties, utilities or terminals; as well as a zoning plan for the control of the height, area, bulk, location and use of buildings and premises. As the work of the whole master plan progresses, the Commission may from time to time publish a part or parts thereof, any such part to cover one or more of the aforesaid or other functional matters to be included in the plan. The Commission may from time amend, extend, or add to the plan.

Section 9 of the Act stated that public works must be submitted to the planning commission and, if disapproved by the commission, required a two-thirds vote of the elected officials of the municipality or other agency having jurisdiction to override the same. This standard act did not extend this approval process to zoning, which was dealt with in the Standard Zoning Enabling Act, § 5, requiring a three-fourths vote of the elected officials to accomplish a zone change if there were a protest by 20% of the adjacent or nearby property owners.

5. It is not the purpose of this article to catalogue those legislative actions, *but see* FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971); Ernest J.T. Loo, *State Land Use Statutes: A Comparative Analysis*, 45 *FORD. L. REV.* 1154, 1154 n. 4 (1977). Suffice it to say that states have selectively eroded the previous complete delegation of land use powers to local governments.

between 2015 and 2020, which change the state-local relationship and establish a process by which significant state policy direction is inserted into local housing planning and land use regulation. Then the article will touch on the rulemaking process underway at present to provide the details of state participation. Finally, we consider any lessons learned from these activities.

II. OREGON LAND USE LAW ON HOUSING 1969-2015

Between 1969 and 1979 Oregon embarked on a land use program that required binding comprehensive planning, consistency between that planning and land use regulations and actions, establishment of a state agency to adopt and enforce binding policies (“goals”) on state agencies and local governments, and removal of most land use controversies from the courts to administrative agencies.⁶ For the purposes of this article, the system in place by 2015 included a state agency, the Land Conservation and Development Commission (LCDC) that could, and did, require local governments to adopt, amend, or change land use policies to conform to state goals;⁷ a system for continuing review of local government plans and land use regulations;⁸ an established administrative system that could respond to disputes over land use policies, subject to (usually deferential) appellate court review;⁹ and a generally supportive consensus over the need for planning generally and state participation particularly.¹⁰ A parallel, and sometimes identical system was provided for planning and land use regulation in the Portland region.¹¹

6. This process is set out in Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357, 365–72 (2012) [hereinafter *Quiet Revolution*].

7. OR. REV. STAT. §§ 197.175(1)–(2), 197.646 (1973). In addition, LCDC has the power to adopt binding administrative rules to interpret and provide details for the goals or land use legislation. OR. REV. STAT. § 197.040(1)(c) (1973).

8. Following initial “acknowledgment” (i.e., certification that a plan and implementing land use regulations meet the goals), a local government thereafter complies with the goals through “periodic review” of those documents or the “post-acknowledgment plan amendment” (PAPA) process. *Quiet Revolution*, *supra* note 6, at 372–76.

9. See, *inter alia*, OR. REV. STAT. §§ 197.040, 197.045 (general powers); 197.225–.250 (adoption of goals); 197.251–.274 (initial review of local plans and regulations); 197.610–.625, 197.628–.644 (further reviews of local plans and regulations); 197.805–.860 (review of most local decisions that are not within the jurisdiction of LCDC is by a state administrative agency, the Land Use Board of Appeals (LUBA)) rather than the trial courts.

10. See Carl Abbott, *Land Use Planning*, THE OREGON ENCYCLOPEDIA, https://oregonencyclopedia.org/articles/land_use_planning/#.Xt6pvS-z2u4 (last visited Mar. 22, 2022); see also *History of Land Use Planning*, OREGON EXPLORER, <https://oregonexplorer.info/content/history-land-use-planning?topic=4123&ptopic=62> (last visited Mar. 22, 2022); see also Katherine H. Daniels & Edward J. Sullivan, *Oregon’s 40-Year-Old Innovation*, PLANNING MAGAZINE (Feb. 2013), <https://www.planning.org/planning/2013/feb/oregon.htm>.

11. For housing purposes, the Portland Metropolitan Region (Metro) follows the same process for land use plans and ordinances as other local governments; however, Metro is subject to those

Concern with housing did not begin in 2015. LCDC had adopted Goal 10: Housing as one of its 19 statewide planning goals,¹² later accompanied in 1981 with more detailed binding administrative rules¹³ and some significant legislative activity and administrative and judicial decisions that enabled the housing policy preferences of the state to have effect.¹⁴ Significant decisions included:

- Litigation over exclusion of manufactured housing that led to general statutory prohibition of these practices and the adoption of an LCDC policy and rule that require local governments to plan and zone sufficient lands to meet the needs of renters and homeowners;¹⁵
- Defining “needed housing” and requiring that local land use decisions regarding such housing be made with only “clear and objective” conditions;¹⁶
- Prohibitions of charter and ordinance provisions that discriminate against government-assisted or farmworker housing or establishing a sales or rental price for housing.¹⁷

statutes applicable to cities of over 25,000 in population. OR. REV. STAT. § 197.296 And there are further statutes specifically applicable to Metro and providing for further scrutiny of its ability and willingness to provide for sufficient housing in accordance with Goal 10. OR. REV. STAT. §§ 197.299–.302 (2011). See *infra*. notes 12-18 and accompanying text.

12. That Goal provided, *inter alia*: “To provide for the housing needs of citizens of the state . . . [b]uildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.” OR. ADMIN. R. 660-0015-0000(10).

13. OR. ADMIN. R. 660, Divs. 006–007.

14. This extensive series of legislative, administrative, and judicial activity is set forth in Paul A. Diller & Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools, and Outcomes*, 27 J. AFFORDABLE HSG. & CMTY. DEV. L. 183, 202–13 (2018) [hereinafter *Housing Affordability*].

15. *Id.* at 207–11; see also OR. REV. STAT. §§ 197.303, 197.307, 197.314.

16. “Needed housing” is a key term for Oregon land use and includes:

[A]ll housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a.

The specific types of housing included in this term are set forth in OR. REV. STAT. § 197.303(1) (2015). See 2017 OR. LAWS ch. 745, § 4(1); see also OR. REV. STAT. § 197.307(4) (2011); see also *Parkview Terrace Dev. v. City of Grants Pass*, 70 Or. LUBA 37 (2014); *Home Builders Assn. v. City of Eugene*, 41 Or. LUBA 370 (2002); *Rogue Valley Assn. of Realtors v. City of Ashland*, 35 Or. LUBA 139 (1998).

17. OR. REV. STAT. §§ 197.309, 197.312.

- Establishing a review process for larger cities and the Portland Metropolitan Region (Metro) to determine whether the allocation of housing meets the needs of actual and potential homeowners and renters.¹⁸

It is on this base that the most recent housing efforts have been constructed.

III. OREGON HOUSING AND LAND USE LAW 2015-2020

A. Starting the Engine

This section traces the incremental progression of legislative activity and occasional administrative and judicial action in Oregon with respect to housing.

In 2015 the legislature increased the pressure on urban local governments to approve and facilitate needed housing developments, providing that those governments were subject to an LCDC enforcement order (which could involve effective control of local permitting by the state or withholding of state-shared revenues such as gasoline, liquor, marijuana and cigarette taxes)¹⁹ if, contrary to then-applicable law, they did not apply “clear and objective” standards to needed housing proposals or their approval procedures discouraged such housing through unreasonable cost or delay.²⁰ In addition, the legislature required that in deciding land division applications and granting or denying “permits” (a broad term encompassing quasi-judicial decisions, such as variances, conditional use or rezoning applications),²¹ a local government must allow an applicant to amend its application or propose conditions of approval to make the application conform to local plans and land use regulations, including extending statutory time limitations, to achieve that end.²² These were significant advantages for an applicant.

In 2016 during a “short session,”²³ the Oregon legislature enacted two measures that affected housing. One creates an affordable housing pilot program to assist cities in providing for affordable housing on lands not within a city’s urban growth boundary.²⁴ That program allows LCDC by rule to select two sites of not

18. OR. REV. STAT. §§ 197.286–.314. Though changed in some details since 2015, the legislative process required periodic analysis of urban areas for cities with a population of 25,000, and Portland Metro, to ensure sufficient capacity of existing urban growth boundaries to meet housing needs and a program to remedy deficiencies. See Edward J. Sullivan, *Urban Growth Management in Portland, Oregon*, 93 OR. L. REV. 455, 469–73 (2014).

19. OR. REV. STAT. §§ 197.319–.335.

20. 2015 OR. LAWS, ch. 374, § 1 (amending OR. REV. STAT. § 197.320 (2013)).

21. See OR. REV. STAT. §§ 215.402, 227.160.

22. 2015 OR. LAWS ch. 374, § 3 (amending OR. REV. STAT. § 197.522 (2011)).

23. Until enactment of article IV, § 10 of the current state constitution, the Oregon Legislature met on a regular biennial basis. The constitutional amendment (Measure 71, passed in 2010) provided for a 35 day “short session” and was prospective. The first such “short session” occurred in 2012. OR. CONST. ART. IV, § 10.

24. 2016 OR. LAWS ch. 52. The program is implemented by LCDC Administrative Rules. See OR. ADMIN. R. § 660, Div. 39.

more than 50 acres each (one in a city with a population of 25,000 or more and another in a city of less than that size) outside the more populated North Willamette River area to experiment in providing affordable housing in innovative ways.²⁵ The rules further provide for an expedited means of amending a local government's urban growth boundary to accommodate this proposal if at least 30 percent of the newly built housing is affordable and the newly added land is protected for this use for at least 50 years.²⁶ During this time, the local government must protect the site from conversion to other uses,²⁷ and LCDC must report progress and results to the legislature.²⁸

The second 2016 effort was more permanent and dealt with a number of measures to incentivize affordable housing.²⁹ The legislation extended the prohibition on local government efforts to establish rental prices through plans or land use regulations except as an inclusionary zoning measure to set aside some portion of a development for affordable housing.³⁰ It is not at all clear whether such

25. *Id.* §§ 1–5. According to the Department of Land Conservation and Development (DLCD), only one city, Bend, with a population of 200,000, applied. In 2019, the legislature authorized revisions to the program to allow the nearby City of Redmond (with a population of about 33,000) to be designated as well. 2019 Or. Laws ch. 32; *Affordable Housing Pilot Program*, OREGON.GOV, <https://www.oregon.gov/lcd/UP/Pages/HB4079-Pilot-Program.aspx> (last visited Mar. 27, 2021); see also OR. ADMIN. R. §§ 660-039-0000–0100 (2017).

26. 2016 Or. Laws ch. 52 §§ 6–9. These sections also place limits on the land that is eligible to be added to the urban growth boundary, consequences of removal of the affordable housing element, and authorization to allow the use of restrictions on home pricing and rentals to assure affordability. *Id.*

27. *Id.* § 7(2). That end may be achieved through:

- (a) Zoning restrictions;
- (b) Guaranteed rental rates or sales prices;
- (c) Incentives, contract commitments, density bonuses or other voluntary regulations, provisions or conditions designed to increase the supply of moderate or lower cost housing units;
- (d) Other regulations, provisions or conditions determined by the local government to be effective in maintaining the affordability of housing on land selected for a pilot project under section 4 of this 2016 Act;

or

- (e) Restrictive agreements entered into with sources of affordable housing funding. *Id.*

28. *Id.* § 9. The selected cities are required to send annual reports to LCDC for the next ten years with information on development costs, the housing units available, and lessons learned from the project. The program is now ongoing. *Affordable Housing Pilot Program*, OREGON.GOV, <https://www.oregon.gov/lcd/UP/Pages/HB4079-Pilot-Program.aspx> (last visited Mar. 27, 2021).

29. 2016 Or. Laws ch. 59. The term “affordable housing” is defined in § 1(1) to mean “housing that is affordable to households with incomes equal to or higher than 80 percent of the median family income.” *Id.* Most of the legislation (§§ 2–12) focuses on fiscal matters and is not considered here.

30. *Id.* § 1(2)–(10). The legislation does not apply to multifamily projects of less than 20 units and limits the affordable housing restrictions to 20% of the project. Additionally, the legislation provides for a number of alternatives to this imposition (such as using an in-lieu fee) and required or optional incentives, such as full or partial waiver of other fees and charges, other financial incentives and property

regulations, at least those without offsetting incentives, would survive a Fifth Amendment Takings Challenge, however.³¹

Most of the discussion at the intersection of housing and land use in 2017 focused upon HB 1051,³² which contained a variety of affordable housing facilitators. For “affordable housing” involving a five or more units in a “multifamily residential building”³³ a quasi-judicial application must be decided within 100 days of being “deemed complete” at the local level³⁴ for cities with a population over 5,000 and urban areas of counties with a population over 25,000. However, the legislation also requires that at least half of the residential units be “affordable” with accompanying binding covenants for 60 years from initial occupancy.³⁵ Additionally, with some exceptions, cities and counties may not deny housing applications conforming to clear and objective standards in their plans and land use regulations, nor reduce the height or density of such development unless necessary to resolve a health, safety or habitability issue or meet certain other planning goal requirements.³⁶

Other generally applicable changes to “needed housing” laws included an expansion of that term as set forth below:

tax reductions, expedited approval procedures, additional building areas and densities. As of this date, only the City of Portland has undertaken an inclusionary housing program and has met with modest success. See *Inclusionary Zoning*, PORTLAND.GOV, <https://beta.portland.gov/inclusionary-housing/inclusionary-housing-comprehensive-guide> (last visited Mar. 27, 2022); see also *18-Month Progress Report on Portland’s Inclusionary Housing Program*, HOUSING OREGON, <https://housingoregon.org/18-month-progress-report-on-portlands-inclusionary-housing-program/> (last visited Mar. 27, 2022), though it is not without criticism; Jim Redden, *Group Blasts Portland’s Inclusionary Housing Policy*, PORTLAND TRIBUNE (May 15, 2019), https://pamplinmedia.com/pt/9-news/428368-334553-group-blasts-portlands-inclusionary-housing-policy?wallit_nosession=1.

31. See *California Building Industry Ass’n v. City of San Jose*, California Supreme Court Upholds Residential Inclusionary Zoning Ordinance, 129 HARV. L. REV. 1460 (2016) (discussing *California Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974 (Cal. 2015), cert. denied, 136 S. Ct. 928).

32. See 2017 Or. Laws ch. 745.

33. *Id.* § 1(1)(b). The term means “housing that is affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the development is built or for the state, whichever is greater.” *Id.* § 1(1)(a). A “multifamily structure” means a structure that contains three or more housing units sharing at least one wall, floor or ceiling surface in common with another unit within the same structure. OR. REV. STAT. § 197.309(1)(a). The original definition in § 1(1)(a) was revised by §1(b) of 2019 Or. Laws ch. 412.

34. 2017 Or. Laws ch. 745 § 2. Under Oregon law, i.e., OR. REV. STAT. § 215.427 for counties and OR. REV. STAT. § 227.178 for cities, a quasi-judicial permit application must, with some exceptions, be acted upon within 150 days for rural parts of counties and 120 days for urban areas unless the applicant requests an extension. OR. REV. STAT. § 215.427 (2017); OR. REV. STAT. § 227.178 (2017). The 100-day period shortens these time periods by almost three weeks, an advantage to an applicant. See also 2017 Or. Laws ch. 745 §§ 10–11.

35. 2017 Or. Laws ch. 745 § 1.

36. *Id.* §§ 2–3.

“[N]eeded housing” means all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 U.S.C. 1437a.³⁷ * * *

The legislation applied to all cities with a population over 2,500 and counties over 15,000 and did not change the elements that composed needed housing, *viz.*

- (a) Attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
- (b) Government-assisted housing;
- (c) Mobile home or manufactured dwelling parks as provided in ORS 197.475 to 197.490;
- (d) Manufactured homes on individual lots planned and zoned for single-family residential use that are in addition to lots within designated manufactured dwelling subdivisions; and
- (e) Housing for farmworkers.³⁸

A further provision of this legislation, which presaged changes to local land use regulations, was the requirement that cities with a population over 2,500 and counties over 15,000 allow the development of accessory dwelling units in areas zoned for detached single family homes under “reasonable local regulations relating to siting and design.”³⁹

37. OR. REV. STAT. § 197.303(1) (2019) (including amendments made by 2017 Or. Laws ch. 745 § 4). Previously, the term was much narrower, defining “needed housing” in relevant part as “housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels, including at least

* * * [a]ttached and detached single-family housing and multiple family housing for both owner and renter occupancy[.]” OR. REV. STAT. § 197.303(1) (2015) (amended 2017). The increased emphasis on lower income households reflected a greater legislative awareness of the effect of the housing crisis on those who were less able to afford housing.

38. 2017 Or. Laws ch. 745 § 4(1).

39. *Id.* § 6(5). This legislation has been controversial; witness three cases of the same name. *Kamps-Hughes v. City of Eugene*, ___ OR LUBA ___ (LUBA No. 2019-115, February 26, 2020); *Kamps-Hughes v. City of Eugene*, 79 OR LUBA 500 (2019); *Kamps-Hughes v. City of Eugene*, 78 OR LUBA 451 (2018). Much of the dispute revolved around the reasonableness of siting and design regulations. The

There were other less profound changes for housing planning, including providing affordable housing on certain church sites⁴⁰ and a more extensive local government reporting requirement for housing matters to the state.⁴¹

In the “short session” of 2018, affordable housing was a significant legislative concern and could not be addressed comprehensively. Instead, HB 4006⁴² required the Oregon Department of Housing and Community Services (DHCS) to transmit annually to all cities with a population over 10,000 in the state data to show the percentage of renter households that were “rent burdened,”⁴³ i.e., the household spends more than 50% of its income on gross rent for housing.⁴⁴ Moreover, if DHCS determines that at least 25% of the renter households in a city are “severely rent burdened,” it shall transmit a survey form prepared with the cooperation of DLCD, which must be returned within 60 days of receipt.⁴⁵ The local government must hold at least one public hearing that year “to discuss the causes and consequences of severe rent burdens within the city, the barriers to reducing rent burdens and possible solutions” under rules adopted by HCS for the conduct of such hearing.⁴⁶ Finally, the legislation requires all cities with a population greater than 10,000 to submit an annual report to DLCD providing information on various

legislature intervened to clarify the standards for these terms with 2019 Or. Laws ch. 639 § 7, which provided:

(b) As used in this subsection: (A) “Accessory dwelling unit” means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling. (B) “Reasonable local regulations relating to siting and design” does not include owner occupancy requirements of either the primary or accessory structure or requirements to construct additional off-street parking.

(6) Subsection (5) of this section does not prohibit local governments from regulating vacation occupancies, as defined in ORS 90.100, to require owner-occupancy or off-street parking.

40. 2017 Or. Laws ch. 745 §§ 7-8. In both cases, the residential use must have at least half the units affordable to households with incomes equal to or less than 60 percent of the median family income for the county in which the property is located and be subject to a covenant that retains these restrictions for at least 60 years.

41. *Id.* § 9.

42. 2018 Or. Laws ch. 47.

43. *Id.* § 2(1).

44. *Id.* § 1(a).

45. *Id.* § 1(2)(c)–(d). Under § 1(1)(b), the survey must include information on actions taken by the local government to increase housing affordability and reduce rent burdens on severely rent burdened households and actions intended to reduce rent burdens for those households. *Id.* at § 1(2)(b).

45. *Id.* § 1.

46. *Id.* § 1(3).

housing types that were permitted and those that were produced.⁴⁷ The stage was now set for further structural changes by which the state would mandate the planning for, and production of, housing at the local level.

B. Revving up the Engine – The 2019 Oregon Legislature on Housing and Land Use

Two significant pieces of legislation, and some other less significant actions, characterized the work of the 2019 Oregon legislature and gained notoriety for the state in meeting housing needs. These significant actions were sometimes overlooked in the enactment of the other controversial legislation that, among other things, restricted rent increases, limited evictions, and made other sweeping changes to residential landlord-tenant relations.⁴⁸

The first piece, known as HB 2001,⁴⁹ is known principally for its termination of the monopoly of single-family detached housing in single family zones. For cities with a population between 10,000 and 25,000, a duplex must be permitted as of right where detached single-family dwellings are permitted,⁵⁰ and with respect to cities exceeding 25,000 in population, the following must be allowed outright in such zones where single-family detached dwellings are allowed:

- Cottage Clusters;
- Duplexes;
- Triplexes;
- Cottage Clusters; and

47. 2018 Or. Laws ch. 47 § (4). Those housing types specified by the legislation included:

- (a) Residential units.
- (b) Regulated affordable residential units.
- (c) Multifamily residential units.
- (d) Regulated affordable multifamily residential units.
- (e) Single-family units.
- (f) Regulated affordable single-family units.

Id. § 1(1)(b) defines a regulated affordable unit as a residential unit subject to a regulatory agreement that runs with the land and that requires affordability for an established income level for a defined period of time.

48. 2019 Or. Laws ch. 1. Space does not permit discussion of this related area. For some perspectives on the new law, see *Landlord and Tenant Law*, OREGON STATE BAR (last visited Apr. 4, 2022), <https://www.osbar.org/public/legalinfo/landlordtenant.html>; *Know Your Rights*, OREGON COMMUNITY ALLIANCE OF TENANTS (2019), <https://www.oregoncat.org/know-your-rights>; Johnathan Clay, *Legislative Changes Coming on January 1, 2020*, MULTIFAMILY NW (Dec. 11, 2019), <https://www.multifamilynw.org/news/legislative-changes-coming-on-january-1-2020##>.

49. 2019 Or. Laws ch. 639.

50. *Id.* at § 2(3).

– Townhouses.⁵¹

The legislation allows somewhat limited local government siting and design controls:

Local governments may regulate siting and design of middle housing required to be permitted under this section, provided that the regulations do not, individually or cumulatively, discourage the development of all middle housing types permitted in the area through unreasonable costs or delay. Local governments may regulate middle housing to comply with protective measures adopted pursuant to statewide land use planning goals.⁵²

The legislation contemplates different completion dates for amending comprehensive plans and adopting land use regulations: June 30, 2021 is the deadline for local governments in cities with populations between 10,000 and 25,000 and June 30, 2022 for more populous urban areas.⁵³ If the local government fails to do so, a Model Ordinance adopted by LCDC Rule containing such provisions shall directly apply to that local government.⁵⁴ Moreover, the legislation allows a deferral of these obligations if there be an infrastructure-based time extension requested with respect to water, sewer, storm drainage or transportation services that are deficient or expected to be deficient by December 31, 2023.⁵⁵ However, an approved extension where the local government has established a plan of action to

51. *Id.* at § 2(2). The legislation defines “cottage clusters” to mean groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each which include a common courtyard and “townhouses” to mean a dwelling unit constructed in a row of two or more attached units, where each dwelling unit is located on an individual lot or parcel and shares at least one common wall with an adjacent unit. In related activity, the legislature provided construction standards for small (“tiny”) homes. 2019 Or. Laws ch. 401.

52. *Id.* at § 2(5). The last sentence allows local government to protect natural resources designated in their comprehensive plans under Statewide Planning Goal 5 Natural Resources, Scenic And Historic Areas, And Open Spaces. OR. ADMIN. R. § 660-0015-0000(5) (1984).

53. 2019 Or. Laws ch. 639 § 3(1). In this context, “city” includes those urban unincorporated portions of counties. *Id.* In adopting those plans and land use regulations, local governments are urged to “consider” other methods of promoting alternative housing types including waiving or deferring system development charges, adopting or amending criteria for property tax exemptions under state law, and adopting a construction tax under state law. *Id.* at § 3(4). The legislation removes a significant obstacle to increased density, i.e., a state rule that requires an applicant to provide transportation infrastructure before a plan amendment or land use regulation would allow an increase in the density or intensity of a use. *Id.* at § 3(5).

54. *Id.* at § 3(2–3).

55. *Id.* at § 4.

remedy the deficiency in services may not extend beyond the date that the local government has set to correct the deficiency under the plan.⁵⁶

HB 2001 made a number of significant changes to Oregon land use law including:

1. Requiring additional housing data and analysis for any legislative or periodic⁵⁷ review of a regional or local comprehensive plan for local governments with populations of over 25,000 with regard to 20-year housing projections and specific findings on “density expectations” for that period,⁵⁸ thereby making reporting and demonstration of policy conformity more uniform.
2. Clarifying the obligation that most local governments allow accessory dwelling units in areas zoned for detached single family homes subject only to “reasonable local regulations relating to siting and design”⁵⁹ to allow additional opportunities for such housing.⁶⁰
3. Amending the “rent burdened household” statute of 2018 (HB 4006) to add to the number of housing types included in the

56. *Id.* at § 4(2). The legislation provides for treatment of the request, including the adoption of rules to judge the timing, nature, and sufficiency of the same and limits the exemption only to those areas where infrastructure is deficient. *Id.* at § 4.

57. See *supra* note 9.

58. Regarding those areas outside the Portland region, OR. REV. STAT. § 197.296 (2011), as amended by 2019 Or. Laws ch. 639 § 5, the local government may not project an increase in residential capacity beyond three percent of that achieved without “quantifiable validation” to demonstrate that assumed housing capacity has been achieved. For the Portland region, that validation must demonstrate that the assumed housing capacity has been achieved in areas that are zoned to allow no greater than the same authorized density level within the metropolitan service district. OR. REV. STAT. § 197.296(6)(b). Similarly, additional reporting data is required by 2019 Or. Laws ch. 639 § 6, regarding using population projections and estimating housing needs with respect to:

- (a) Household sizes;
- (b) Household demographics in terms of age, gender, race or other established demographic category;
- (c) Household incomes;
- (d) Vacancy rates; and
- (e) Housing costs.

59. OR. REV. STAT. 197.312(5) *amended by* 2019 Or. Laws ch. 639 § 7. See note 37 *supra* and accompanying text.

60. Not discussed here is the temptation to the landowner to improve her situation financially by using the accessory dwelling unit as a short-term rental. See Edward Sullivan, *Reconsidering the Land Use and Taxation Impacts of One Aspect of the “Sharing Economy” in the United States*, 40 ZONING & PLAN. L. REP. No.7 (2017).

annual reports by all local governments of cities with a population of over 10,000.⁶¹

4. Requiring the Director of the Department of Consumer and Business Services to adopt and amend as necessary rules to provide for a Low-Rise Residential Dwelling Code that contains all requirements, including structural design provisions, related to the construction of residential dwellings three stories or less above grade and to establish uniform standards for a municipality to allow alternate approval of construction related to conversions of single-family dwellings into no more than four residential dwelling units built to the Low-Rise Residential Dwelling Code and to report to the next legislative session on these activities.⁶²

5. Finally, the legislation invalidates homeowner association covenants after the effective date of the legislation to the extent that they would prohibit or unreasonably restrict the development of housing that is otherwise allowable under the maximum density of the zoning for the land⁶³ or any real property instrument executed after the effective date of the legislation allowing a single family dwelling but otherwise prohibit the array of alternative dwellings provided for in the same.⁶⁴

The second piece of legislation in 2019 is “HB 2003,”⁶⁵ which establishes a potential process for collecting data and evaluating local efforts to meet shelter needs through a twenty year “Regional Housing Needs Analysis” (RHNA) prepared by HCS with assistance from other state agencies to develop a methodology for

61. 2018 Or. Laws ch. 47 § 1(4) *amended by* 2019 Or. Laws ch. 639 § 13 (The amendment added accessory dwelling units, regulated affordable accessory dwelling units, “middle housing units” defined in § 2, and regulated affordable units of such “middle housing.”).

62. 2019 Or. Laws ch. 639 §§ 9–10. The purpose of these provisions is set out in § 10(1):

It is the policy of the State of Oregon to reduce to the extent practicable administrative and permitting costs and barriers to the construction of middle housing, as defined in section 2 of this 2019 Act, while maintaining safety, public health and the general welfare with respect to construction and occupancy.

63. *Id.* § 12.

64. *Id.* § 13. Aside from the two prohibitions on covenants under § 12 and 13, most of the remainder of the act are effective on January 1, 2021.

65. 2019 Or. Laws ch. 640 § 1.

calculating certain housing data for an identified region.⁶⁶ These methodologies must classify housing by:

- (a) Housing type, including attached and detached single-family housing, multifamily housing and manufactured dwellings or mobile homes; and
- (b) Affordability, by housing that is affordable to households with high, moderate, low and very low incomes.⁶⁷

The data must then be used to conduct the RHNA, and each city and Metro is obliged to estimate existing housing stock, conduct a housing shortage analysis, estimate the housing necessary to accommodate growth,⁶⁸ and make a report to the 2021 legislature by March 1, 2021, summarizing the findings.⁶⁹ On that date, DLCDC must also submit a report in the light of the RHNA evaluating, among other things, whether the RHNA and housing shortage analyses “could appropriately allocate” the housing shortages among local governments in the region, how those analyses compare to existing assessments of housing need and capacity required by law, how those analyses relate to obligations under current statewide planning goals, rules, and statutes relating to housing, whether the regional boundaries should be changed, other ways the analyses could be improved, and whether the

66. These other agencies are DLCDC and the Department of Administrative Services. *Id.* § 1(2). That methodology must be based upon:

- (a) 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 based on:
 - (A) Trends in density and in the average mix of housing types of urban residential development;
 - (B) Demographic and population trends;
 - (C) Economic trends and cycles; and
 - (D) Equitable distribution of publicly supported housing within a region.
- (b) An estimate of existing housing stock of each city and Metro.
- (c) A housing shortage analysis for each city and Metro.
- (d) An estimate of the number of housing units necessary to accommodate anticipated population growth over the next 20 years for each city and Metro.

Id.

67. *Id.* § 1(3). “High,” “moderate,” “low,” and “very low” income households are defined with respect to area median income as established by the US Department of Housing and Urban Development—120%, between 80% to 120%, between 50 and 80% and below 50%. *Id.* § 1(1). This subsection also defines “existing housing stock” as housing actually constructed and “housing shortage” as the difference between that housing needed and existing housing stock. *Id.*

68. 2019 Or. Laws ch. 640 § 1(4).

69. *Id.* § 2(1).

existing or improved RHNA “could serve as an acceptable methodology statewide for land use planning relating to housing.”⁷⁰

Nevertheless, the legislation does have numerous permanent provisions, among which is an obligation for cities of 10,000 or more to adopt a “housing production strategy” (HPS) to set out specific actions that the city will undertake to address its housing needs identified under state law.⁷¹ The legislation also contains multiple factors a city must consider in formulating its HPS including current actions, barriers, and market conditions and a schedule for actions.⁷² The HPS must also be sent to DLCD for review and to other participants in developing the HPS.⁷³ DLCD must approve subject to further review and action or remand the HPS.⁷⁴ LCDC, with consultation by HCS, is given authority to establish criteria to review and identify cities with a population over 10,000 that have not implemented an HPS or achieved production of needed housing.⁷⁵ DLCD is authorized to undertake various

70. *Id.* § 2(2). These reports have been presented to the 2021 Oregon legislature, which has directed OHCS and DLCD to present it with a final legislative package on the newly-renamed Oregon Housing Needs Analysis and included an increased appropriation of \$1,306,912 to DLCD for the 2021–23 biennium for a study and recommendations to formulate the package. 2021 OR. LAWS Ch. 669 § 136.

71. *Id.* § 4. These actions may include, but are not limited to:

- (a) The reduction of financial and regulatory impediments to developing needed housing, including removing or easing approval standards or procedures for needed housing at higher densities or that is affordable;
- (b) The creation of financial and regulatory incentives for development of needed housing, including creating incentives for needed housing at higher densities or that is affordable; and
- (c) The development of a plan to access resources available at local, regional, state and national levels to increase the availability and affordability of needed housing.

Id. § 4(2). The timing of the HPS is dependent on LCDC action or the completion of a housing capacity analysis under state law. *Id.* § 4(1).

72. 2019 Or. Laws ch. 640 § 4(3).

73. *Id.* § 5(1).

74. *Id.* § 5(6). Section 5(7) relating to DLCD action on the HPS, as well as § 4(5), relating to local formulation of the same, is “final” under the legislation and not subject to further appeal or review. *Id.* §§ 4(5), 5(7). However, it is doubtful that these actions are immune from judicial review in some form, such as through the extraordinary remedies such as mandamus, declaratory judgment, or injunctions.

75. *Id.* § 6(1). These criteria may include considerations of the city’s unmet housing need in proportion to its population; percentage of “severely rent burdened” households; adoption of an HPS or actions pursuant thereto; recent housing development; and other relevant factors. *Id.* § 6(2).

efforts to prioritize its actions with regard to those cities, including petitioning for an enforcement order against a recalcitrant city.⁷⁶

The legislation has a host of revisions to existing laws to facilitate fair housing, including:

1. Requiring LCDC adoption of a rule to create a schedule of local governments in cities of 10,000 or more, and Metro, to demonstrate they have sufficient buildable lands;⁷⁷
2. Requiring that at any legislative review of a plan involving an urban growth boundary requiring application of a goal relating to buildable lands for housing, or any periodic review, or other review that must be scheduled every six or eight years, the local government must show that its plans provide “sufficient buildable lands within its urban growth boundary * * * to accommodate housing needs for 20 years”;⁷⁸
3. Providing that, in addition to previous obligations that a city of over 10,000 determine its estimated 20-year housing needs, review its available buildable lands in its urban growth boundary to meet those needs, and adopt measures to accommodate those needs, Metro is now authorized to make that allocation among cities with a population over 10,000 within the region;⁷⁹
4. Providing for, under certain circumstances, the use of public property for publicly-assisted housing.⁸⁰

76. 2019 Or. Laws ch. 640 § 6(3). Significantly, sections 11 and 12 of the legislation amend existing statutes relating to enforcement orders to include failure to make “satisfactory progress” in taking actions under its HPS. *See id.* § 12(13).

77. 2019 Or. Laws ch. 640. The rules cannot set a deadline earlier than two years following adoption of HPS rules and related amendments under this legislation. 2019 Or. Laws ch. 640 § 7.

78. *Id.* § 8. 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 take action on Buildable Land Inventories (BLIs), without having to use the time-consuming and politically fraught use of the enforcement order. Section 10 make similar changes to accommodate the changes made in § 8. Or. Laws ch. 640 § 10.

79. *Id.* § 9. In addition, this section requires those cities to take steps at least once every six years, as LCDC may provide by schedule, “to demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for the next 20 years” as required by law. *Id.* § 9(e).

80. *Id.* § 15. A feature of this availability is the assurance through a covenant that lasts at least 60 years that at least 50 percent of the residential units is affordable to households with incomes equal to or less than 60 percent of the area median income. *Id.*

IV. RULEMAKING TO IMPLEMENT THE 2019 LEGISLATION

Aside from the obligations relating to changes to construction codes by the Director of the Department of Consumer and Business Services discussed above,⁸¹ the 2019 legislation requires LCDC to “fill in the details” of several important new programs, including adopting model ordinances dealing with new required housing types in single family zones,⁸² allowing for an infrastructure time-based extension to the application of the model ordinance,⁸³ adopting a schedule for the demonstration of sufficient buildable lands under HB 2003 and existing law,⁸⁴ and changing any existing administrative rules that contain existing requirements affected by the legislation.⁸⁵ That work is ongoing.

V. THE FUTURE

While the 2019 legislation for affordable housing has been enacted, that is hardly the end of the story. What the legislature giveth, the legislature may take away — by repeal or amendments to the legislation, by legislative inaction (especially with respect to the RHNA), by insufficient appropriations or other actions. The legislation also requires certain administrative actions, such as the adoption of model codes for those local governments that have not adopted codes to authorize additional housing in zones that allow for single family detached houses, the use of an infrastructure-based time extension to forestall these requirements, the preparation and action upon RHNAs, schedules for review of housing obligations, and other matters.⁸⁶ These rules may be frustrated by legislative or administrative action and have limits that may be determined by the courts as well. Finally, there are other limits — the Covid 19 crisis, the elections process, and the deep revenue shortfalls brought about by the Covid emergency.

At this juncture in the summer of 2020, it appears that the legislation is safe and that the implementing rules will be adopted. Whether the legislation and rules will cause more housing to be built is unknown. Oregon’s proposals are bold and unique and may well be a template for like-minded policymakers.⁸⁷ In any

81. *See supra* note 61 and accompanying text.

82. 2019 Or. Laws ch. 639 §§ 3(2)–(3).

83. *Id.* § 4(6).

84. 2019 Or. Laws ch. 640 § 7.

85. The ongoing codification process involves OAR 660, Div. 008, Interpretation of Goal 10 Housing and Div. 046, Middle Housing in Medium and Large Cities.

86. HB 2001 provides for follow-up by way of administrative rules and actions under OR REV. STAT. §§ 197.296, .303., and .758. HB 2003 requires such follow-up under OR REV. STAT. §§ 197.291, .293, .296, .299, and .303.

87. California, another state facing a steep housing shortfall, has difficulty in passing legislation to require denser housing near transit. Liam Dillon & Taryn Luna, *California Bill to Dramatically Increase Home Building Fails for the Third Year in a Row*, LOS ANGELES TIMES (January 30, 2020),

event, Oregon has ventured well beyond the talking stage to find ways to improve its housing picture.

<https://www.latimes.com/california/story/2020-01-29/high-profile-california-housing-bill-to-allow-mid-rise-apartments-near-transit-falls-short>. California's troubles may arise from a combination of a political attachment to home rule and the predominance of power among older white homeowners and remedied by a more vigorous state participation in land use planning and regulation. See Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HAST. L. J. 79 (2019).