



MEMORANDUM

Senate Bill 458 DRAFT Amendments City of Happy Valley

DATE January 15, 2022
TO Michael Walter, City of Happy Valley
FROM Matt Hastie, Kate Rogers, and Brandon Crawford, Angelo Planning Group

Introduction and Background

In addition to complying with the requirements of HB 2001 and OAR 660-046, the City will need to comply with recent legislation related to land divisions for middle housing (SB 458). Compliance is required during approximately the same timeframe. The bill is a follow-up to House Bill 2001—the bill that legalizes middle housing in many cities throughout the state—and allows lot divisions for middle housing, enabling units to be sold or owned individually. The legislation requires cities to allow land divisions for any HB 2001 middle housing type (duplexes, triplexes, fourplexes, townhomes, and cottage clusters) built in accordance with the cities' middle housing code provisions adopted under ORS 197.758. Accessory dwelling units will not be eligible for land division. The result of such “middle housing land division” will be exactly one dwelling on each resulting lot. However, the bill specifies that “The type of middle housing developed on the original parcel is not altered by a middle housing land division.” For example, a subdivided cottage cluster will not become single detached dwellings—it will remain defined as a cottage cluster for the purpose of applying the development code. This means that cities will not be obligated to allow ADUs on the resulting cottage lots or to allow resulting lots to be further divided. (As another example, a partitioned triplex will not become townhouses—it will remain classified as a triplex.) SB 458 also establishes what conditions cities may impose during review and approval of middle housing land division plans, and prevents homeowner associations or restrictive covenants from prohibiting land divisions. The provisions will take effect at the same time the HB 2001 provisions take effect for Large Cities (July 1, 2022).

This memo includes a summary of considerations and potential implications of SB 458, followed by preliminary proposed amendments based on our understanding of what the legislation requires. The Oregon Department of Land Conservation and Development (DLCD) has provided some information and guidance about these new rules, which largely inform the following summary and associated code amendments. The amendments provided are in addition to recommended HB 2001 amendments and minor SB 458 amendments in another memo.

SB 458 Requirement Summary:

The following sections summarize the types of changes that we believe will or may be needed to the Code for compliance. This summary is based on our work assisting other cities with similar efforts. We expect to continue to solidify our knowledge about needed amendments, which will inform the proposed code amendments as the project proceeds.

What Happy Valley *Must* Require

- **All Middle Housing Types.** SB 458 applies to any lot that allows middle housing under ORS 197.758, including duplexes, triplexes, fourplexes, townhomes, and cottage clusters.
- **Resulting Lots.** The land division must result in exactly one dwelling per lot (i.e., you cannot divide an 8-unit cottage cluster into four individual lots and fifth lot with four units). The only exception is that common areas may be located in a separate lot or shared tract.
- **Utilities.** Separate utilities for each dwelling unit must be provided if a development is to qualify for a middle housing land division.
- **Easements.** Easements are required for:
 - Pedestrian access (e.g., all pedestrian paths in a cottage cluster)
 - Common areas (e.g., common courtyards, community buildings)
 - Driveways and parking areas (if shared)
 - Utilities
- **Building Code.** The proposal must meet the requirements of the building code (Oregon Residential Specialty Code). For example, if an attached duplex is being divided, there must be firewall construction between the two units.
- **Timing.** In a typical land division, the land is divided prior to building permits being reviewed and issued for construction. However, SB 458 does not state that a middle housing land division must occur either before or after the issuance of a building permit. Therefore, land could be divided prior to applying for building permits, after a middle housing development is approved for development, or after it is constructed. SB 458 even allows division of existing middle housing that was developed prior to HB 2001 taking effect—as long as the development meets the City’s adopted middle housing code standards. SB 458 also gives cities the option of allowing concurrent review of building permits and the land division. In all cases, the land division application must include a middle housing development (either proposed or built) that complies with the building code and the City’s middle housing development code.

What Happy Valley may require/allow:

- **Street Frontage Improvements.** SB 458 specifies that cities can require street frontage improvements and right-of-way dedication for newly created lots abutting a street. Land divisions are often a trigger for requiring frontage improvements, whereas infill development on an existing lot may not trigger such improvements. Therefore, under SB 458, frontage improvements and dedications may be required with a middle housing land

division even if those improvements would not be required for a single-lot development.

Recommended

- **Concurrent Review.** As noted above, Happy Valley may allow concurrent review of building permits and a land division for a middle housing development. *Not Recommended*
- **Tentative/Final Plats.** Cities may require that applicants submit tentative and final plats in a manner consistent with their applicable platting standards. *Recommended*
- **Building Permits/Final Plat.** The City may require a developer record the final plat of a MHLD prior to issuing building permits for the structures. *Optional*

What Happy Valley cannot require as part of a middle housing land division:

- **Street Frontage.** Typically, newly created lots are required to have frontage on a public or private street. SB 458 specifies that cities cannot require street frontage for lots created through a middle housing land division (e.g., lots at the rear of the site could only have access to the street via access easement).
- **Parking or Driveway Access to Each Lot.** Cities cannot require that each resulting lot have its own parking space or driveway access. For example, a triplex could have a shared parking area with three spaces; the City cannot preclude the triplex lot from being divided such that two of the resulting lots only have access to the parking area via access easement.
- **Minimum Lot Size or Dimensions.** Cities cannot specify minimum area or dimensions for lots resulting from a middle housing land division.
- **Other Review Criteria.** The City cannot apply any review criteria other than those items specified in SB 458—these include the City’s standards for middle housing development, separate utilities, easements, one dwelling on each lot, and building code compliance.
- **Conditions of Approval.** The City also cannot apply conditions of approval to a middle housing land division other than to ensure consistency with the review criteria, to prohibit further division of resulting lots, and to require that a notation appear on the final plat indicating that the approval was given under the ORS for middle housing land division.

Expedited Land Division Procedure

SB 458 requires cities to apply the expedited land division process to middle housing land divisions. The expedited land division process is outlined in ORS 197.360 to 197.380 and provides an alternative procedure intended to streamline the review of residential land divisions under state law. Currently, land divisions must meet very specific criteria to qualify for an expedited land division. SB 458 extends the same procedure for expedited land divisions so it also applies to middle housing land divisions that meet the standards outlined in the bill. (However, middle housing land divisions and expedited land divisions remain distinct application types.) While typical land use applications must be completed within 120 days (ORS 227.178), an expedited land division must be processed within 63 days unless extended by the City Council (not to exceed 120 days). Some further details about expedited land divisions:

- Submittal requirements are consistent with typical land divisions.
- Notice is given to properties within 100 ft of the site and to applicable neighborhood association(s).
- There is a 14-day comment period.
- A decision must be made within 63 days (unless extended).
- Only the applicant or any person or organization who files written comments may appeal.
- A City-appointed “referee” decides any appeal decision. Often this is a City’s Hearings Official, but cannot be a City employee. The decision of the referee is the final local decision on the middle housing land division application.
- Appeals of the referee’s decision go to the Oregon Court of Appeals.

Considerations and Options

- **Submittal Requirements.** SB 458 does not specify what submittal requirements must be required for a tentative plan or final plat application for a middle housing land division. Since middle housing land divisions could be fairly complicated, it will be important to ensure that staff has all the information needed to evaluate whether they meet all the City’s applicable standards. The City will need to determine what materials applicants will need to submit in order to demonstrate compliance with the building code, development code, utility requirements, etc., and that all necessary easements are provided.
- **Ensuring improvements are constructed as proposed.** If a middle housing land division is requested prior to applying for building permits, it will be important to ensure that all improvements will be constructed as proposed. For example, a large cottage cluster development may include a variety of shared improvements, including a common courtyard, pedestrian paths, shared parking areas, and a community building. Under a typical subdivision, lots are often sold after the land is subdivided, and another developer (or developers) will acquire the lots and construct the units. If cottage cluster lots were to be similarly sold off, how would the City ensure that all the required improvements would actually be constructed? One potential option is to require that improvements be constructed prior to final plat approval (i.e., not allow lots to be finalized and sold until improvements are in place). Another potential option is to require construction of improvements prior to occupancy of any units.
- **Housing Type Definitions.** SB 458 says “The type of middle housing developed on the original parcel is not altered by a middle housing land division.” It may be useful to acknowledge this in the middle housing type definitions. For example, a duplex could be defined as two units on a single lot, or on separate lots if divided pursuant to a middle housing land division.
- **Land Division Procedures.** Our recommendation is to create a new procedure/application type for middle housing land divisions, to be added to the existing Expedited Land Division section (16.61.070 – Special Procedures) of the Happy Valley Code. This would likely have a similar structure as the existing regulations for Preliminary Plat/Final Plat for subdivisions

and partitions, but would include the provisions specified by SB 458. It also may be helpful to incorporate the expedited land division procedures into the code. Currently, if applicants opt into an expedited land division, the City must directly apply the ORS provisions to the application. However, it may be beneficial to incorporate the procedures into the Code itself, given that the expedited procedure may become more prevalent under SB 458.

- **Existing Land Division Procedures.** In addition to the “middle housing land division” path, cities can continue allowing a more standard path for creation of townhomes and cottage clusters that follows the City’s current procedures. Because of the restrictions associated with the SB 458 process, some applicants may prefer the more traditional path; therefore, it may be advantageous to include both options.

Draft Amendments

The following draft amendments include recommended provisions for the City to consider based on what Happy Valley must require, may require, and cannot require, as summarized above. As mentioned, these amendments correspond with the summary section above and are based on our team’s working understanding of the new rules. The recommended amendments are presented in underline and ~~strikeout~~ format. The recommended amendments may be divided between **required** and **optional** amendments. Required and optional amendments are grouped together to help maintain the sequence of the Code provisions.

16.61.070 SPECIAL PROCEDURES

A. Expedited Land Divisions. An expedited land division (“ELD”) shall be defined and may be used as provided under ORS 197.360 through 197.380.

[...]

B. ~~[Reserved for other special procedures, as may be adopted]~~ Middle Housing Land Division. A middle housing land division (“MHL”) is the creation of multiple lots or parcels from a single parent lot on which a middle housing type (duplex, triplex, quadplex, townhouse, cottage cluster) is developed or proposed, which results in an individual lot for each of the middle housing units. The MHL process follows the procedures defined by ORS 197.360(1). The MHL criteria and process is as follows: **Required**

1. Submittal. Applicants may not submit an application for a MHL if permits for middle housing have been submitted to the Building Division and have not been issued. New middle housing permits may not be submitted for sites with an active MHL review until the final plat is recorded. **Optional**- Recommended
2. Approval Criteria. The applicant for a MHL shall demonstrate that the application meets of the following criteria:

- a. Existing Compliance. The middle housing development complies with the Oregon Residential Specialty Code and applicable LDC middle housing regulations. To demonstrate compliance with this criterion, the applicant shall submit **building permits** demonstrating that existing or proposed structures comply with the Oregon Residential Specialty Code and LDC middle housing regulations. **required**
 - b. Separate Utility Connections. Separate utility service connections for public water, sewer, and stormwater will be provided for each dwelling unit. **required**
 - c. Easements. Easements will be provided as necessary for each dwelling unit per 16.63.030.C on the site for:
 - i. Locating, accessing, replacing, and servicing all utilities; **required**
 - ii. Pedestrian access from each dwelling unit to a private or public road; **required**
 - iii. Any common use areas or shared building elements; **required**
 - iv. Any dedicated driveways or parking; **required**
 - v. Any dedicated common area. **required**
 - d. One Dwelling Unit per Lot. Exactly one dwelling unit will be located on each resulting lot or parcel (child lot), except for lots, parcels, or tracts used as common areas, on which no dwelling units will be permitted. **required**
 - e. Comply with Building Code. Buildings or structures on a child lot will comply with applicable Building Code provisions relating to new property lines. **required**
 - f. Notwithstanding the creation of new child lots, structures or building located on the newly created lots will comply with the Oregon Residential Specialty Code. **Required**
 - g. Frontage improvements. Where a resulting child lot abuts a street that does not meet City standards, street frontage improvements will be constructed and, if necessary, additional right-of-way will be dedicated, pursuant LDC 16.63.060(D). **optional- Recommended**
3. Preliminary Plat Submittal. In addition to the items listed in LDC 16.63.060 and 16.61.030.B.2, an application for a MHDL shall include the following: **optional- Recommended**
 - a. A description of the manner in which the proposed division complies with each of the provisions of subsection 2 of this section, including copies of building permits or permit applications and other evidence necessary to demonstrate:
 - i. How buildings or structures on a resulting child lot will comply with applicable building codes provisions related to new property lines; and

- ii. Notwithstanding the creation of new lots, how structures or buildings located on the newly created child lots will comply with the Oregon Residential Specialty Code.
 - b. In addition to the items listed in LDC 16.63.060, copies of a plat showing the following details:
 - i. Separate utility connections for each dwelling unit, demonstrating compliance with approval criterion LDC 16.61.070.B.2.b.
 - ii. Existing or proposed easements necessary for each dwelling unit on the plan, demonstrating compliance with the criterion LDC 16.63.060.C.
 - c. Copies of all required easements in a form approved by the City Attorney.
- 4. Preliminary Plat Conditions of Approval.
 - a. The preliminary plat for a MHLD shall:
 - i. Prohibit further division of the resulting child lots. **Optional- Recommended**
 - ii. Require that a notation appear on the final plat indicating: **Optional- Recommended**
 - The approval was given under ORS Chapter 92.
 - The type of middle housing approved on the subject site and noting that this middle housing type shall not altered by the middle housing land division.
 - Accessory dwelling units are not permitted on child lots resulting from a middle housing land division.
 - b. The City shall not attach conditions of approval that a child lot require driveways, vehicle access, parking, or minimum or maximum street frontage. **Required**

C. Preliminary Plat Procedures for Expedited and Middle Housing Land Division. Unless the applicant requests to use the procedure set forth in LDC 16.63.040, the City shall use the following procedure for an expedited land division (ELD), as described in ORS 197.360, or a middle housing land division (MHLD).

- 1. Completeness Review.
 - a. If the application for an ELD or MHLD is incomplete, the City shall notify the applicant of the missing information within 21 days of receiving an application. The application shall be deemed complete on the date the applicant submits the requested information or refuses in writing to submit it. **Required**
 - b. If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted, approval or denial of the application shall be based upon the

standards and criteria that were applicable at the time the application was first submitted. **Required**

2. Notice of Application.

- a. On receipt of a complete application, written notice shall be provided to owners of property within 100 feet of the entire contiguous site for which the application is made and to any City Council-recognized neighborhood association(s) whose boundaries include the site. Notice shall also be provided to any agency responsible for providing public services or facilities to the subject site. The notification list shall be compiled from the most recent property tax assessment roll. For purposes of appeal to the referee under ORS 197.375, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given. **Required**
- b. The notice shall include the following: **Required**
 - i. The deadline for submitting written comments;
 - ii. A statement of issues that may provide the basis for an appeal to the referee must be raised in writing prior to the expiration of the comment period; and
 - iii. A statement that issues must be raised with sufficient specificity to enable the local government to respond to the issue.
 - iv. The applicable criteria for the decision.
 - v. The place, date, and time that comments are due.
 - vi. A time and place where copies of all evidence submitted by the applicant will be available for review.
 - vii. The street address or other easily understood geographical reference to the subject property.
 - viii. The name and telephone number of a local government contact.
 - ix. A brief summary of the local decision-making process for the land division decision being made.
3. There shall be a minimum 14-day period to allow for submission of written comments prior to the Planning Official's decision. **Required**
4. There shall be no public hearing on the application. **Required**
5. The Planning Official shall make a decision on the application within 63 days of receiving a completed application. **Required**

6. The Planning Official's decision shall be based on applicable elements of the Happy Valley Municipal Code and Comprehensive Plan. An approval may include conditions to ensure that the application meets applicable land use regulations. **Required**
7. Notice of the decision shall be provided to the applicant and to those who received notice under subsection 2 within 63 days of the date of a completed application. The notice of decision shall include:
 - a. A summary statement explaining the determination; and **Required**
 - b. An explanation of appeal rights under ORS 197.375 **Required**
8. Failure to approve or deny application within specified time.
 - a. After seven days' notice to the applicant, the City Council may, at a regularly scheduled public meeting, take action to extend the 63-day time period to a date certain for one or more applications for an expedited land division prior to the expiration of the 63-day period, based on a determination that an unexpected or extraordinary increase in applications makes action within 63 days impracticable. In no case shall an extension be to a date more than 120 days after the application was deemed complete. Upon approval of an extension, the provisions of ORS 197.360 to 197.380, including the mandamus remedy provided by subsection (a), shall remain applicable to the expedited land division, except that the extended period shall be substituted for the 63-day period wherever applicable. **Required**
 - b. The decision to approve or deny an extension under subsection b of this section is not a land use decision or limited land use decision. **Required**
9. A decision may be appealed within 14 days of the mailing of the decision notice by the applicant or a person or organization who file written comments within the time period described in LDC 16.61.070.C.3. The appeal must include the appeal application and a \$300 deposit for costs. **Required**
10. An appeal shall be based solely on one or more of the allegations:
 - a. The decision violates the substantive provisions of the applicable land use regulations; **Required**
 - b. The decision is unconstitutional; **Required**
 - c. The application was not eligible for review under LDC 16.61.070(B) (Middle Housing Land Division) and should be reviewed as a land use decision or limited land use decision. **Required**
 - d. The appellant's substantive rights were substantially prejudiced by a procedural error. **Required**

11. The City shall appoint a referee to decide the appeal decision and the appointed referee shall comply with ORS 197.375(3) through (6) when issuing a decision. The referee may not be a City employee or official. **Required**

D. Final Plat Requirements for Expedited and Middle Housing Land Divisions **Optional-Recommended**

1. Expedited Land Division (ELD) – Final Plan Review Criteria. Approval of a final plat for an ELD shall be consistent with the review criteria for Land Divisions and Property Line Adjustments (LDC 16.63.080).
2. Middle Housing Land Division (MHL) – Final Plan Review Criteria. Approval of a final plat for a MHL will be granted if the review body finds the applicant has met the following criteria:
 - a. The final plat substantially conforms to the preliminary plat.
 - b. Conditions of approval attached to the preliminary plat have been satisfied.
 - c. All proposed improvements required to satisfy applicable standards of the LDC have been constructed.
3. Final Plat Submittal. An application for an ELD or MHL final plat shall include the items listed in LDC 16.63.080.

Additional Expedited Land Division Amendments (Optional) Recommended

The City has already adopted Code provisions that allow expedited land divisions (per ORS 197.360 through 197.380) in LDC Section 16.61.070. The City may consider minor amendments to this section to elaborate and support the required amendments for middle housing land divisions.

16.61.070 SPECIAL PROCEDURES

A. Expedited Land Divisions. An expedited land division (“ELD”) shall be defined and may be used as provided under ORS 197.360 through 197.380.

1. Selection. An applicant who wishes to use an ELD procedure for a partition, subdivision or planned development instead of the regular procedure type assigned to it, must request the use of the ELD in writing at the time the application is filed, or the right to use it is waived.
2. Review Procedure and approval criteria. All applications for expedited land divisions shall comply with ORS 197.360 through 197.380, and the Happy Valley Comprehensive Plan, zoning designation, and submittal requirements in 16.61.030.B.2.
 - a. For an ELD to be considered for a townhome, duplex, triplex, quadplex or cottage development, the proposed division must demonstrate how it complies with the following:

i. The parent lot is zoned for residential use and is within the urban growth boundary.

ii. The parent lot is solely for the purpose of residential use, including recreational or open space uses accessory to residential use.

b. The land division will not provide for dwellings or accessory buildings to be located on land that is within the following overlay zones:

i. Steep Slopes Development Overlay Zone (LDC 16.32)

ii. Historic Properties Overlay Zone (LDC 16.33)

iii. Natural Resources Overlay Zone (LDC 16.34)

iv. Flood Management Overlay Zone (LDC 16.35)

c. The land division satisfies minimum street or other right-of-way connectivity standards established by the City's Transportation System Plan, Engineering Design Manual, and the Land Development Code.

d. The land division will result in development that either;

v. Creates enough lots or parcels to allow building residential units at 80 percent or more of the maximum net density permitted by the zoning designation of the site; or

vi. All dwellings will be sold or rented to households with incomes below 120 percent of the median family income for Clackamas County. A copy of a deed restriction or other legal mechanism approved by the Director shall be submitted.

3. Appeal Procedure. An appeal of an ELD shall follow the procedures described in 16.61.070.C.9 through 11 above. Where the City has not otherwise appointed a hearings officer (referee) for such appeals, and the City Attorney is a Contractor (not a City employee), the City Attorney shall serve as the referee for ELD appeals.