

West Coast planning frameworks for middle housing

TO: Representative Jessica Bateman
FROM: Joe Tovar, FAICP, Middle Housing Technical Team
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SUBJECT: Oregon, California, and Washington statutory frameworks for middle housing

Research request

In a July 2022 meeting Representative Jessica Bateman asked Commerce for a brief comparison of state laws in Washington, Oregon, and California which address local government implementation of statewide housing policy, and accountability for results. This memo summarizes those statutory frameworks with a focus on middle housing types as described in Section 189 of ESSB 5693 (the 2022 supplemental budget) as: “Duplexes, triplexes, fourplexes, fiveplexes, sixplexes, townhouses, courtyard apartments, cottage housing, and stacked flats.”

STATUTORY PLANNING FRAMEWORKS FOR HOUSING

Oregon

Statewide housing goal or plan

The policy foundation for land use planning in Oregon are nineteen statewide land use planning goals. State law requires each city and county to adopt a comprehensive plan and the zoning and subdivision ordinances needed to put the plan into effect. Oregon’s Statewide Housing Goal 10¹ is very detailed and provides significant direction to local governments. It states in part:

“To provide for the housing needs of citizens of the state: Buildable 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 . . .

Needed housing units – means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government’s acknowledged comprehensive plan, “needed housing units” also includes government-assisted housing. For cities having populations larger than 2,500 people and counties having populations larger than 15,000 people, “needed housing units” also includes (but is not limited to) attached and detached single-family housing, multiple-family housing, and manufactured homes, whether occupied by owners or renters.”

Roles of state agencies and local governments in planning for housing

The Oregon state agencies involved in the administration, interpretation, and enforcement of Oregon's planning laws are:

- The **Land Conservation and Development Commission (LCDC)**, adopts state land-use goals and reviews adopted amendments to city and county comprehensive plans for consistency with Oregon's planning goals, including Housing Goal 10. When LCDC **approves** a local government plan, the plan is said to be **acknowledged** and becomes the controlling document for land use in that community. LCDC also has authority to adopt administrative rules, which are not simply advisory (as in Washington state), but have the force of law.
- The **Department of Land Conservation and Development (DLCD)**, the state's administrative planning agency that provides staff support to LCDC and technical assistance to local governments. DLCD is responsible for reviewing state agencies' coordination plans to assure that its rules and programs affecting land use comply with the state goals and the acknowledged city and county plans and land use regulations. Final versions are submitted to LCDC for certification.
- **State agencies** are required to prepare a coordination program to assure that its rules and programs affecting land use comply with the state goals and the acknowledged city and county plans and land use regulations.
- The **Land Use Board of Appeals (LUBA)**, is a specialized land use court that hears and adjudicates appeals of both legislative and permit land use decisions.
- **County and city governments** are required to adopt comprehensive plans that comply with state planning goals and to implement those plans through locally adopted zoning and subdivision ordinances. The responsibility for planning for and permitting housing development resides with local governments, subject to state requirements.
- **Special purpose districts** are required to comply with acknowledged local government plans.

Legislation addressing middle housing

Oregon **House Bill 2001**² was adopted in July of 2019, and required cities with a population greater than 10,000, or within the Portland Metro region, to allow duplexes on lands zoned for single-family dwellings within the urban growth boundary. It also required Metro counties and cities with populations greater than 25,000 to allow middle housing in lands zoned for residential uses within the urban growth boundary. HB 2001 defines middle housing as: "duplexes, triplexes, quadplexes, cottage clusters, and townhouses." The bill further defines each housing type and provides other direction about how local governments may apply regulations.

- **Cottage clusters** are defined as "groupings of no fewer than four detached housing units per acre with a footprint of less than 900 square feet each and that include a common courtyard".
- **Townhouses** are defined as "dwelling units constructed in a row of two 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."
- Local governments may regulate the siting and design of middle housing ". . . provided that the regulations do not, individually or collectively, discourage the development of all middle housing types permitted in the area through unreasonable costs or delay."
- HB 2001 also directed LCDC to prepare model ordinances for medium- and large-sized cities to serve as minimum compliance standards.

Accountability in planning for housing

- **Middle housing:** Under HB 2001 Section 3(b)(3), a municipality that failed to comply within the allotted timeframe for implementation “shall directly apply the model ordinance.” All of the cities required to adopt HB 2001-compliant ordinances by June 30, 2022, met the deadline. Only two cities opted to simply adopt one of the model ordinances. While some borrowed principles or standards from the model ordinances, all jurisdictions found a way to craft ordinances that both met the state mandate and fit local circumstances.
- **Compliant comprehensive plan:** If LCDC does not approve local government comprehensive plans for failure to comply with state requirements the local government may not use it as a basis for land use decisions unless and until it is subsequently revised and found by LCDC to be compliant with state law.

California

Statewide housing goal or plan

California has a Statewide Housing Plan³ that describes a vision of “ensuring that every Californian has a safe, stable, and affordable home.” Every eight years, the state sets a target for the number of homes needed for each income level to meet the housing needs of all Californians. Each local government must plan for enough housing to meet the housing target.

The Statewide Housing Plan provides guidance on housing policy but acknowledges that the housing crisis cannot be solved overnight and that no one solution or plan can. Rather, the plan advocates for implementation of a variety of innovative strategies to boost housing production and address homelessness.

Roles of state agencies and local governments in planning for housing

- **The California Department of Housing and Community Development (HCD)**⁴ maintains the Statewide Housing Plan, provides technical assistance to local governments, certifies local housing elements maintains housing databases, and enforces state housing laws.
- **Cities and counties** have responsibility for planning for and permitting housing development subject to state requirements.

Legislation addressing middle housing

Although it does not use the term “middle housing”, California **Senate Bill 9**⁵ adopted in September 2021, facilitates the creation of up to four housing units in the lot area typically used for one single-family home. It does so by requiring approval by certain local governments of housing developments with no more than two primary units in a single-family zone, the subdivision of a parcel in a single-family zone into two parcels, or both. SB 9 contains eligibility criteria addressing environmental site constraints (e.g., wetlands, wildfire risk, etc.), anti-displacement measures for renters and low-income households, and the protection of historic structures and districts.

An application made under SB 9 must be processed ministerially, without discretionary review or a hearing. The reviewing official ensures that the proposed development meets all the applicable **objective standards** for the proposed action but uses no personal or subjective judgment in reaching a decision. Such reviews often use a checklist and simply compare the application

materials (e.g., site plan, project description, etc.) with the objective standards for development, subdivision standards, and design, if applicable.

The local government may apply standards such as building setbacks, height maximums, minimum lot depths, roof pitch, eave projections, and facade details, provided that those standards would not physically preclude two primary units (i.e., one or two) on the subject parcel or, in the case of a lot split, up to two primary units on each of the resulting parcels. The jurisdiction must allow each primary unit to be at least 800 square feet in size.

SB 330 limits the ability of local governments to restrict development. Certain cities are prohibited from taking certain zoning-related actions, including downzoning certain parcels, imposing development moratoria, and imposing design review standards that are not objective.

Accountability in planning for housing

- **California’s Housing and Community Development Department** holds local governments accountable for meeting their housing element commitments and complying with state housing laws. Violations of these laws may lead to consequences including revocation of housing element certification and/or referral to the California Office of the Attorney General.
- **Senate Bill 9 – up to four units on one lot:** HCD does not have authority to directly enforce SB 9, although violations of SB 9 may concurrently violate other housing laws where HCD does have enforcement authority.
- **Progress reports:** Every April, cities and counties must submit progress reports for the prior year, showing whether they are on-track to meet their housing needs. Progress is measured by how many permits they issued at various income levels. If annual progress reports show that sufficient numbers of housing are not being developed at needed income levels to meet the targets set by the state, HCD initiates outreach to the local government to determine appropriate remedial action and a schedule.

Washington

Statewide housing goals or plans

The Washington Housing Policy Act⁶, provides:

“It is the goal of the state of Washington to coordinate, encourage, and direct, when necessary, the efforts of the public and private sectors of the state and to cooperate and participate, when necessary, in the attainment of a decent home in a healthy, safe environment for every resident of the state. The legislature declares that attainment of that goal is a state priority.”

The Growth Management Act (GMA) contains a housing goal at RCW 36.70A.020(4), which applies to cities and counties that are “fully planning” under the GMA. This housing goal was significantly amended by E2SHB 1220⁷ in 2021 as follows:

“(4) Housing. (~~Encourage the availability of affordable~~) Plan for and accommodate housing affordable to all economic segments of the population of this state, promote a variety of residential densities and housing types and encourage preservation of existing housing stock.”

The Legislature explicitly replaced the passive verb “encourage” with the active verbs “plan for and accommodate.” This revision conveys that local governments are no longer to simply *encourage* housing affordable to all, but rather to **take action**.

Commerce is in the process of preparing technical guidance to define the specific level and form of accountability that E2SBH 1220 creates for local governments. This may include reviewing local development standards, permit processes, and the types of housing allowed, at what affordability levels that housing might be developed, and the incentives or subsidies that may be needed to facilitate housing variety, attainability, and affordability.

E2SHB 1220 also made significant updates to how jurisdictions are to plan for housing in the housing element of their comprehensive plans. Commerce is now developing guidance for communities to meet the new housing goal and updated requirements for housing elements in RCW 36.70A.070(2). This includes:

- Projected housing needs for all economic segments of the population (moderate, low, very low and extremely low income, and special needs housing such as permanent supportive housing and emergency housing). Projections will be provided at the county level, with recommendations for sub-allocation to cities, towns and the county, and must be incorporated into local planning efforts.
- Guidance on how to make adequate provisions for existing and projected housing needs for all economic segments of the population, including how to assess zoning regulations to allow and encourage housing to meet the projected housing needs in each income level.
- Provisions for moderate density housing options within an urban growth area including but not limited to duplexes, triplexes, and townhomes.
- Examining racially disparate impacts, displacement and exclusion in housing policies and regulations, and recommended policies to address them.

Roles of Washington state agencies, region, counties, and cities in planning for housing

Agencies involved in the administration, interpretation, and enforcement of Washington's planning laws are:

- **Department of Commerce** (Commerce) is the state agency that administers planning grants to local governments and provides technical assistance to implement the GMA. Commerce prepares guidance and administrative rules about how to interpret and meet GMA duties but has no formal role in certifying local plans. If gubernatorial permission is granted, Commerce may file a petition with the Growth Management Hearings Board for review of a local government GMA action.
- **Growth Management Hearings Board (GMHB)**, receives petitions for review of adopted comprehensive plans, development regulations, or amendments thereto, and must provide a decision within 180 days. A GMHB decision may be appealed to superior court. A finding of a local government's non-compliance with the GMA may result in the loss of certain state grant funds.
- **Cities and counties** have authority to adopt comprehensive plans and implement them through land use regulations, capital projects, and programs. 29 of the state's 39 counties, and the cities within them, are required to adopt comprehensive plans and regulations that comply with the goals and requirements of the Growth Management Act (GMA). Appeals of permit or subdivision decisions are generally to the local government's hearings examiner and/or legislative body. Appeals of those decisions may be taken to superior court.

- **State agencies** are nominally required by the GMA to comply with city and county plans and regulations. However, state agencies are not required to plan under the GMA nor is there no mechanism to require their compliance with local plans because the GMHB has no jurisdiction over the actions of state agencies.

In the Puget Sound region, the GMA requires the adoption of multi-county planning policies (MPPs) to address “the need for affordable housing, such as housing for all economic segments of the population and parameters for its distribution.” RCW 36.70A.210(7)(e). MPPs were adopted by the Puget Sound Regional Council (PSRC). In February of 2022, PSRC adopted a “Regional Housing Strategy”⁸ to further guide the periodic update of the comprehensive plans and development regulations of the region’s four counties and eighty-two cities due by December of 2024. It provides in part:

“Increase zoning that allows for moderate density “missing middle” housing to increase opportunities for townhomes and multiple units in neighborhoods with infrastructure, services, and amenities Reform single-family zoning to increase opportunities for small lots, zero-lot line, accessory dwelling units, cottage homes, and up to six units per lot that serve a wider range of households, including singles, couples, seniors, and smaller families.” Regional Housing Strategy, pages 6-7.

Legislation addressing middle housing

In recent years, Washington’s Legislature considered several bills to attempt to address the worsening housing crisis in this state. Passed in 2019, **E2SHB 1923**⁹ provided \$5 million in state grants for cities who volunteered to prepare Housing Action Plans (HAPs) designed to increase residential building capacity. Almost all of the forty communities developing a HAP were able to complete their work. Several HAPs considered middle housing as an option, however, E2SHB 1923 did not require any specific amendments to plans or codes, and very few took such action. A large barrier was the local political climate. Some perceived such regulations allowing middle housing types as a challenge to neighborhood character.

As noted above, E2SHB 1220 adopted in the 2021 session, created several duties for GMA planning cities and counties with respect to planning for housing.

Accountability in planning for housing

- A local plan or regulation is presumed to be valid upon adoption and does not require certification from Commerce. However, GMA does provide that a Regional Transportation Planning Organization must certify the transportation element of a city or county comprehensive plan for consistency with the regional transportation plan. A plan or regulation may be appealed to the Growth Management Hearings Board by any party that has standing. To burden of proof is on the appellant to overcome the presumption of validity of a local government action. To overcome that presumption, the Board must be persuaded that the local government action was clearly erroneous.

If the GMHB determines noncompliance it may remand that action to the local government for corrective action and review by the Board at a subsequent compliance hearing. If the Board determines that the noncompliant local action would substantially interfere with the fulfillment of one or more GMA goals, the Board may invalidate the local action so that it is not in effect during the period of remand.

- GMHB decisions do not constitute binding precedent on local governments other than those that were party to the case in question. A GMHB decision is not settled law with broad application unless it is subsequently reviewed and upheld by an Appeals Court or the Supreme Court.
- Any party with standing may appeal a GMHB decision to Superior Court. Some GMA cases have taken many years to reach final appellate resolution on the meaning of certain requirements of the GMA.

Summary: similarities and differences among these statutory frameworks

- **Local governments generally have authority for making land use decisions, unless there is a specific requirement in state law.** The planning frameworks of these three states are among the most detailed and progressive in the country. Whether embodied in an adopted state plan or goal, each framework shares as a priority the same compelling state interest - the need to plan for and meet the housing needs of its population. Each state relies on its local governments to translate and refine that compelling state interest into regional strategies, comprehensive plans, and zoning regulations.
- **Housing decisions are extremely controversial at the local level.** The basic structure of these state land use laws, and the relationship between state and local governments, was established decades ago. In recent years, the worsening housing crisis has prompted these legislatures to begin to realign the balance between compelling state interests and local control. This has generated considerable debate with cities associations in these states.
- **Washington’s system relies on specific requirements, not just planning goals, to provide direction to local government.** While both Oregon and Washington have adopted a “planning goal” to address Housing, Oregon’s goals are more detailed and substantive than Washington’s. For example, Oregon’s Housing Goal 10 is two pages long, while Washington’s Housing Goal is one sentence long. Washington’s approach relies on specific statutory requirements, rather than an aspirational goal, to provide substantive direction to local governments. Most of these requirements address comprehensive plans, rather than development regulations.
- **Both HB 2001 in Oregon and SB 9 in California required specific and unambiguous amendments to local government land use regulations, not their comprehensive plans.** In contrast, the studies funded by E2SHB 1923 and the comprehensive plan amendments directed by E2SHB 1220 did not require any amendments to local land use regulations. Under Washington’s land use framework neither comprehensive plans¹⁰ nor housing action plans directly control the use and development of land. In Washington such controls are the exclusive province of development regulations¹¹ such as zoning and subdivision ordinances. To achieve near-term and specific local government actions enabling middle housing or lot splits, future Washington legislation would need to address the authority and requirements for local government development regulations, not comprehensive plans.
- **Commerce’s administrative rules are do not require substantive outcomes.** Unlike Oregon’s administrative rules, Commerce’s rules are advisory, not binding. While this results in greater

local discretion, which local governments prefer, it lacks the predictability and equity of Oregon's approach. The administrative rules of several Washington state agencies, including the Departments of Ecology and Fish and Wildlife, do have similar binding effect to Oregon's LCDC Housing Rules. To give Commerce's administrative rules the authority to require substantive local government outcomes would require statutory change to GMA.

- **Compared to Oregon, Washington's system for determining local government accountability with GMA goals and requirements is unpredictable, uneven, and lengthy.** The Growth Management Hearings Board is somewhat analogous to Oregon's LUBA, except that the GMHB Standard of Review is more deferential to local decisions than is LUBA's. Because GMHB decisions are binding only on the parties to a case, it is possible that one city's regulation could be overturned by a successful appeal to the GMHB while an identical regulation in another city remains in force. As noted above, Washington's appellate process means that it can take many years to reach a final judicial determination of the meaning and effect of GMA provisions.

Oregon and California lessons to increase supply, attainability, and choice

- The goal of meeting the housing needs of all state residents is a compelling state interest.
- Absolute local control precludes meeting that goal because taking meaningful action to enable growth of any form or density is locally unpopular.
- To overcome local preclusion of actions needed to increase housing supply, attainability and choice, it was necessary to amend state law to compel local government actions that otherwise would not be taken. (OR and CA)
- Local regulatory processes for approving middle housing or lot splits must be ministerial, meaning that they do not require a public hearing or the application of subjective judgments by an administrator (OR and CA)
- To make ministerial review fair, effective and manageable requires the adoption and application of clear and objective development and design standards (OR and CA)
- To hasten implementation of middle housing/lot splits necessitated exempting those actions from appeals. (OR and CA)
- To measure overall success in addressing housing needs statewide requires that housing targets be established for local governments and progress reported. (OR and CA)
- The state should provide continuing technical assistance to local governments as they implement the law (OR and CA)
- Revisions to the planning framework sought to right-size requirements to circumstances and capacities of different communities, meaning that more rigorous requirements are appropriate for larger or faster growing cities and counties, less so for others. (OR)
- It was important for the state to provide models, enforcement, and consequences for non-performance (OR)
- The state was able to achieve relatively quick results by providing clear legislative direction in statute and relying on state agency administrative rules for details (OR)

¹Oregon Planning Goal 10 link: <https://www.oregon.gov/lcd/OP/Documents/goal10.pdf>

²Oregon House Bill 2001 link:

<https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureDocument/HB2001><https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureDocument/HB2001>

³California Statewide Housing Plan link:

<https://storymaps.arcgis.com/stories/94729ab1648d43b1811c1698a748c136>

⁴ California Department of Housing and Community Development link: <https://www.hcd.ca.gov/about-hcd>

⁵ California Senate Bill 9 link:

https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9

⁶ The Washington Policy Act link: <https://app.leg.wa.gov/rcw/default.aspx?cite=43.185b&full=true#43.185B.007>

⁷ Washington E2SHB 1220 link: <https://lawfilesexternal.wa.gov/biennium/2021-22/Pdf/Bills/House%20Passed%20Legislature/1220-S2.PL.pdf?q=20220821100747>

⁸ Puget Sound Regional Council *Regional Housing Strategy* link: https://www.psrc.org/sites/default/files/2022-04/regional_housing_strategy_2021_finalized_2022.pdf

⁹ Washington E2SHB 1923 link: <https://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/House%20Passed%20Legislature/1923-S2.PL.pdf?q=20220826145624>

¹⁰ **The GMA** definition of a comprehensive plan provides: "*Comprehensive land use plan,*" "*comprehensive plan,*" or "*plan*" means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter." RCW 36.70A.030(5).

¹¹ **The GMA** definition of development regulations provides: "*Development regulations*" or "*regulation*" means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW **36.70B.020**, even though the decision may be expressed in a resolution or ordinance of the legislative body of the county or city." RCW 36.70A.030(8).