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March 18, 2019

Representative Alissa Keny-Guyer, Chair
House Committee on Human Services and Housing
900 Court St NE, HR E
Salem, OR 97301

RE: Proposed HB 2001 -10 amendments

Dear Chair Keny-Guyer and Members of the Committee:

Thank you for the opportunity to comment on the proposed -10 amendments to HB 2001. The City of Portland shares the commitment expressed in HB 2001 to encourage development of a range of housing types, including middle housing. The City's stated this commitment through our recently adopted and state-acknowledged *2035 Comprehensive Plan,* which includes the policies addressing innovative housing types, housing choice, and development of middle housing. These policies are consistent with the purpose and intent of HB 2001. The City is acting to implement these comprehensive plan policies through its proposed Residential Infill Project (RIP). RIP has entailed over three years of community discussions and deliberations to change Portland's zoning code to allow duplexes, triplexes and four-plexes on most lots in our single-dwelling zones. These changes will be considered by City Council later this year.

The City respectfully offers the following comments on specific provisions of the proposed -10 amendments:

System Development Charges (SDCs) (Section 6) – The proposed SDC provision in Section 6 continues to raise significant concerns for the ability of the City of Portland to ensure fair, timely, and efficient payment of charges for the impact of development on public infrastructure. The City respectfully urges the Committee to strike Section 6 from the bill. The City of Portland permitting system is currently designed to charge SDC fees at building permit issuance. The proposed restriction on local governments requiring payment as a condition of "issuance of occupancy permit for each dwelling" and not "prior to completion of construction"

raise policy as well as technical concerns. The provision would mean (like the bill as introduced) local governments no longer have leverage to ensure timely payment in the development process, instead having to rely upon a lien placed on the property. This would necessitate designing and implementing a new collection process and would require additional staff and legal costs to recover SDC charges on an ongoing basis. The proposed provision could also result in the SDC being passed onto to unsuspecting buyers if the property is transferred before the lien is recorded. The City currently offers builders an option to voluntarily enter an agreement for payment deferral (currently set at 6, 9, or 12 months depending on the project valuation, and subject to interest). The City routinely grants such requests. Moreover, as written the proposed provision deviates from statutes that authorize SDCs to state that a local government "shall" (rather than "may"). This phrasing would prohibit a local government from considering requests by middle housing developers to waive SDCs. The reference to "occupancy permit" should be "certificate of occupancy." The language also appears to presume that "completion of construction" always occurs prior to issuance of a certificate of occupancy. However, construction activities can occur after a certificate of occupancy is issued, meaning the proposed language would still prohibit a certificate of occupancy serving as leverage toward payment of an SDC.

Section 6 remains flawed and unnecessary and should be deleted from the bill. Short of that, we request that local governments retain authority to devise or adapt deferral programs for payment that are not necessarily tied to issuance of certificate of occupancy (such as deferral for a fixed increment of time or until the applicant requests an initial inspection) and that ensure fair, timely, and efficient collection of fees.

Timeline and Accountability (Section 3) – The Oregon land use system has never had automatic implementation imposed by LCDC on local jurisdictions for failure to act, raising serious concerns about state pre-emption and home rule authority. We urge the Committee to reconsider this approach and instead explore other types of sanctions for enforcement. The direct application of a model code will be difficult given that each jurisdiction has its own unique approach to zoning. The direct application of the model code will also require translation to fit the local process, which in turn will be subject to litigation. Local adoption by December 2021 will continue to be a challenge, especially given that a model code may not be available until December 2020. Also, Section 2(3) is inclusive of Section 2(2), which means all cities with a population over 10,000 need to allow duplexes on all lots that allow for detached single-family houses. According to Section 3(1), this change must occur by December 2020, which means larger jurisdictions will need to amend their zoning codes twice in two years to comply with this legislation. Note: As written, Section 2(3) only applies to cities and does not apply to unincorporated areas within UGBs.

Applicable Zones (Section 2(2)) – The reference to "areas zoned to allow detached single-family dwellings" is too broad. Many of Portland's multi-dwelling zones and mixed-use commercial

zones allow detached single-family dwellings to avoid creating non-conforming development. The proposed language would apply to these zones and could create a conflict with minimum density standards. We suggest that the reference be revised to reflect the language in ORS 195.300(25):

"zoning that has as its primary purpose detached single-family residential use."

The "primary purpose" reference shifts the focus to single-family residential zones and away from multi-family and mixed use zones that already allow for higher-density housing types.

The proposed amendments do not address the need for cities and counties to retain local authority to address critical site-specific issues such as: sites with Goal 5 and 7 resource protections (floodplains, riparian areas, steep slopes, historic areas, etc.); whether to allow more density on sites that are far from transit or commercial services (e.g., should there be more units in parts of the West Hills where there are no sidewalks and limited transit service); and minimum lot size to accommodate infill development. We urge the Committee to include provisions that explicitly reserve cities' authority to address such considerations. For example, Portland's RF (Residential Farm/Forest) has a maximum density of 1 unit per 2 acres and applies to areas that do not have adequate services. HB 2001 needs to include provisions that allow local jurisdictions the ability to regulate based on significant Goal 5 (natural resources) and Goal 7 (natural hazards) and well as adequate infrastructure (Goal 11 public facilities). An alternative is to apply the middle housing mandate to residential zones that allow for more than 4 units per acre (10,000 square foot lots).

Siting and Design Regulations (Section 2(5)) – Though the proposed amendments no longer includes the vague undefined term "reasonable local regulations" in the bill as introduced, the introduction of the phrase "discourage ... middle housing through unreasonable costs or delay" is also vague and problematic. How does a city demonstrate that it is not "discouraging" development by imposing any sort of regulation? All regulations have a cost; what is an unreasonable cost? City of Portland regulations limit street facing garages in certain situations, which some developers would argue (in court) discourages development. In a large city with different submarkets, development economics work better in some parts of town rather than others. If a regulation like a building size limit makes one housing type not financially feasible in one part of town – is that discouraging development?

The reference in Section 2(5) to "at least one middle housing type on each lot or parcel" is also problematic; the subsection should apply to middle housing regulations generally, not to individual lots or parcels. Section 2(3) already requires "development of a duplex on each lot that allows for the development of a detached single-family dwelling," so it would be appropriate to delete "allow at least one middle housing type on each lot or parcel and the

regulations" in Section 2(5). If that language is not deleted in Section 2(5), then "that allows for the development of a single family dwelling" should at least be added after "each lot or parcel."

Competing Land Use Goals (Sections 2 and 3) – The proposed amendments do not address the inherent conflict with other statewide planning goals. The bill should clearly state the Legislature's priorities. For example, as currently written, Statewide Planning Goal 12's implementing administrative rule OAR 660-012-0060 would require those cities amending their land use regulations to make allowances for development of middle housing to also simultaneously evaluate and accommodate the potential impact of the increased density on the transportation system. Our experience with the Residential Infill Project shows that that these zoning changes could change growth patterns that could make it difficult to meet mobility standards, especially on state highways, such as Powell Boulevard. Without an exemption from the administrative rule, jurisdictions may be unable to comply with the proposed legislation. The bill should clarify that the local legislative process to increase middle housing does not require cities to conduct an analysis under OAR 660-012-0060. Similarly, this bill should expressly provide the flexibility for local jurisdictions to omit certain areas in order to comply with Goal 5 (Natural Resources), Goal 7 (Natural Hazards), and Goal 11 (Public Facilities).

Building Codes (Section 4) – The City recommends Section 4 of HB 2001 as introduced be revised to address concerns about significant issues, regarding fire, life and safety requirements and ADA access. The rulemaking process described in HB 2663 has more appropriate language and should be incorporated into this bill:

> The Department of Consumer and Business Services shall conduct a review of the state building code for the purpose of identifying code provisions that unnecessarily prohibit, restrict or create disincentives for the production of middle housing.
>
> The department shall complete the review required by this section no later than one year after the effective date of this 2019 Act. No later than 90 days after completing the review, the department shall initiate rulemaking for the purpose of amending or repealing state building code provisions identified during the review as unnecessarily prohibiting, restricting or creating disincentives for middle housing.

As part of the code review and rulemaking, BCD should include:

- 13D sprinkler systems for triplexes and quadplexes, if the structure is not more than three stories above grade or larger than 6,000 square feet and does not contain any room over 400 square feet
- Type C visitability requirements as outlined in the International Code Council (ICC) A117.1 (2009)
- The provisions of the OSSC regarding accessibility

- Factors, such as fire separation distance, construction type, and area of wall openings

These changes will provide a more cost-effective means of producing housing units. Effectively integrating visitability requirements into new development to produce age-friendly housing, which is a priority for many communities, not to mention putting Oregon on the national stage for thinking beyond the front step.

Land Use Appeals (Section 2(7)) – We continue to be concerned by the proposal that a middle housing developer is entitled to attorney fees if the developer prevails at the Land Use Board of Appeals (LUBA), regardless of the basis of prevailing. Under existing law, the prevailing party is already entitled to seek attorney fees at LUBA. ORS 197.830(15)(b) allows LUBA to award reasonable attorney fees to the prevailing party when LUBA finds that the other party presented a position without probable cause to believe the position was well-founded in law or factually supported information. Moreover, ORS 197.835(10)(b) already requires LUBA to award attorney fees if LUBA reverses the local government's decision for making a decision outside the range of discretion allowed. LUBA did exactly that when a city failed to apply standards that were clear and objective.[1] There is no standard in the proposed provision as to when attorney fees are allowed.

Governing Documents (Section 9) – As written, this provision is vague and confusing. The term "governing document" could be construed to include a document, plan or policy adopted by a local jurisdiction, statutes describing corporate documents, as well as US Code describing governing documents adopted by Tribes. To avoid these problems, the reference should be clarified to specifically address "declarations, bylaws, CC&RS or other recorded governing documents."

The City of Portland supports the goal of encouraging middle housing and hopes to work with the Committee and stakeholders on these issues moving forward. Thank you for your consideration.

Sincerely,

Joe Zehnder
Interim Director

[1] *Walters v. City of Eugene*, LUBA No. 2016-024.