

A-Engrossed
Senate Bill 458

Ordered by the Senate April 12
Including Senate Amendments dated April 12

Sponsored by Senators FREDERICK, KNOPP; Senators GOLDEN, HANSELL, KENNEMER, PATTERSON (at the request of Habitat for Humanity) (Pre-session filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Allows land division to separate dwelling units for new middle housing allowed in cities. **Applies to divisions permitted on or after July 1, 2022.**

Prohibits homeowners associations or restrictive covenants from forbidding partition. Delays applicability of limits on private middle housing restrictions.

A BILL FOR AN ACT

1
2 Relating to land division for residential development; creating new provisions; and amending ORS
3 93.277, 94.775, 94.776, 197.365, 197.370, 197.375 and 197.380.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. Section 2 of this 2021 Act is added to and made a part of ORS 92.010 to 92.192.**

6 **SECTION 2. (1) As used in this section, "middle housing land division" means a partition**
7 **or subdivision of a lot or parcel on which the development of middle housing is allowed under**
8 **ORS 197.758 (2) or (3).**

9 **(2) A city or county shall approve a tentative plan for a middle housing land division if**
10 **the application includes:**

11 **(a) A proposal for development of middle housing in compliance with the Oregon resi-**
12 **dential specialty code and land use regulations applicable to the original lot or parcel allowed**
13 **under ORS 197.758 (5);**

14 **(b) Separate utilities for each dwelling unit;**

15 **(c) Proposed easements necessary for each dwelling unit on the plan for:**

16 **(A) Locating, accessing, replacing and servicing all utilities;**

17 **(B) Pedestrian access from each dwelling unit to a private or public road;**

18 **(C) Any common use areas or shared building elements;**

19 **(D) Any dedicated driveways or parking; and**

20 **(E) Any dedicated common area;**

21 **(d) Exactly one dwelling unit on each resulting lot or parcel, except for lots, parcels or**
22 **tracts used as common areas; and**

23 **(e) Evidence demonstrating how buildings or structures on a resulting lot or parcel will**
24 **comply with applicable building codes provisions relating to new property lines and,**
25 **notwithstanding the creation of new lots or parcels, how structures or buildings located on**
26 **the newly created lots or parcels will comply with the Oregon residential specialty code.**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 (3) A city or county may add conditions to the approval of a tentative plan for a middle
2 housing land division to:

3 (a) Prohibit the further division of the resulting lots or parcels.

4 (b) Require that a notation appear on the final plat indicating that the approval was given
5 under this section.

6 (4) In reviewing an application for a middle housing land division, a city or county:

7 (a) Shall apply the procedures under ORS 197.360 to 197.380.

8 (b) May require street frontage improvements where a resulting lot or parcel abuts the
9 street consistent with land use regulations implementing ORS 197.758.

10 (c) May not subject an application to approval criteria except as provided in this section,
11 including that a lot or parcel require driveways, vehicle access, parking or minimum or
12 maximum street frontage.

13 (d) May not subject the application to procedures, ordinances or regulations adopted un-
14 der ORS 92.044 or 92.046 that are inconsistent with this section or ORS 197.360 to 197.380.

15 (e) May allow the submission of an application for a middle housing land division at the
16 same time as the submission of an application for building permits for the middle housing.

17 (f) May require the dedication of right of way if the original parcel did not previously
18 provide a dedication.

19 (5) The type of middle housing developed on the original parcel is not altered by a middle
20 housing land division.

21 (6) Notwithstanding ORS 197.312 (5), a city or county is not required to allow an acces-
22 sory dwelling unit on a lot or parcel resulting from a middle housing land division.

23 (7) The tentative approval of a middle housing land division is void if and only if a final
24 subdivision or partition plat is not approved within three years of the tentative approval.
25 Nothing in this section or ORS 197.360 to 197.380 prohibits a city or county from requiring a
26 final plat before issuing building permits.

27 **SECTION 2a.** Section 2 of this 2021 Act applies only to a middle housing land division
28 permitted on or after July 1, 2022.

29 **SECTION 3.** ORS 93.277 is amended to read:

30 93.277. A provision in a recorded instrument affecting real property is not enforceable if:

31 (1) The provision would allow the development of a single-family dwelling on the real property
32 but would prohibit the development of, **or the partitioning or subdividing of lands under section**
33 **2 of this 2021 Act for:**

34 (a) Middle housing, as defined in ORS 197.758; or

35 (b) An accessory dwelling unit allowed under ORS 197.312 (5); and

36 (2) The instrument was executed on or after [August 8, 2019] **January 1, 2021.**

37 **SECTION 4.** ORS 94.776 is amended to read:

38 94.776. (1) A provision in a governing document that is adopted or amended on or after [August
39 8, 2019] **January 1, 2020**, is void and unenforceable to the extent that the provision would prohibit
40 or have the effect of unreasonably restricting the development of, **or the dividing of lands under**
41 **section 2 of this 2021 Act for**, housing that is otherwise allowable under the maximum density of
42 the zoning for the land.

43 (2) **Lots or parcels resulting from the division of land in a planned community are subject**
44 **to the governing documents of the planned community and are allocated assessments and**
45 **voting right on the same basis as existing units.**

1 **SECTION 5.** ORS 94.775 is amended to read:

2 94.775. (1) [*Unless the declaration expressly allows the division of lots in a planned community,*]
3 Judicial partition by division of a lot in a planned community is not allowed under ORS 105.205[.],
4 **unless:**

5 **(a) The declaration expressly allows the division of lots in a planned community; or**

6 **(b) The lot may be divided under ORS 94.776.**

7 **(2)** The lot may be partitioned by sale and division of the proceeds under ORS 105.245.

8 [(2)] **(3)** The restriction specified in subsection (1) of this section does not apply if the home-
9 owners association has removed the property from the provisions of the declaration.

10 **SECTION 6.** ORS 197.365 is amended to read:

11 197.365. Unless the applicant requests to use the procedure set forth in a comprehensive plan
12 and land use regulations, a local government shall use the following procedure for an expedited land
13 division, as described in ORS 197.360, **or a middle housing land division under section 2 of this**
14 **2021 Act:**

15 (1)(a) If the application for [*expedited*] a land division is incomplete, the local government shall
16 notify the applicant of exactly what information is missing within 21 days of receipt of the applica-
17 tion and allow the applicant to submit the missing information. For purposes of computation of time
18 under this section, the application shall be deemed complete on the date the applicant submits the
19 requested information or refuses in writing to submit it.

20 (b) If the application was complete when first submitted or the applicant submits the requested
21 additional information within 180 days of the date the application was first submitted, approval or
22 denial of the application shall be based upon the standards and criteria that were applicable at the
23 time the application was first submitted.

24 (2) The local government shall provide written notice of the receipt of the completed application
25 for [*an expedited*] a land division to any state agency, local government or special district respon-
26 sible for providing public facilities or services to the development and to owners of property within
27 100 feet of the entire contiguous site for which the application is made. The notification list shall
28 be compiled from the most recent property tax assessment roll. For purposes of appeal to the referee
29 under ORS 197.375, this requirement shall be deemed met when the local government can provide
30 an affidavit or other certification that such notice was given. Notice shall also be provided to any
31 neighborhood or community planning organization recognized by the governing body and whose
32 boundaries include the site.

33 (3) The notice required under subsection (2) of this section shall:

34 (a) State:

35 (A) The deadline for submitting written comments;

36 (B) That issues that may provide the basis for an appeal to the referee must be raised in writing
37 prior to the expiration of the comment period; and

38 (C) That issues must be raised with sufficient specificity to enable the local government to re-
39 spond to the issue.

40 (b) Set forth, by commonly used citation, the applicable criteria for the decision.

41 (c) Set forth the street address or other easily understood geographical reference to the subject
42 property.

43 (d) State the place, date and time that comments are due.

44 (e) State a time and place where copies of all evidence submitted by the applicant will be
45 available for review.

1 (f) Include the name and telephone number of a local government contact person.

2 (g) Briefly summarize the local decision-making process for the [expedited] land division decision
3 being made.

4 (4) After notice under subsections (2) and (3) of this section, the local government shall:

5 (a) Provide a 14-day period for submission of written comments prior to the decision.

6 (b) Make a decision to approve or deny the application within 63 days of receiving a completed
7 application, based on whether it satisfies the substantive requirements of the [local government's]
8 **applicable** land use regulations. An approval may include conditions to ensure that the application
9 meets the applicable land use regulations. For applications subject to this section, the local gov-
10 ernment:

11 (A) Shall not hold a hearing on the application; and

12 (B) Shall issue a written determination of compliance or noncompliance with applicable land use
13 regulations that includes a summary statement explaining the determination. The summary state-
14 ment may be in any form reasonably intended to communicate the local government's basis for the
15 determination.

16 (c) Provide notice of the decision to the applicant and to those who received notice under sub-
17 section (2) of this section within 63 days of the date of a completed application. The notice of deci-
18 sion shall include:

19 (A) The summary statement described in paragraph (b)(B) of this subsection; and

20 (B) An explanation of appeal rights under ORS 197.375.

21 **SECTION 7.** ORS 197.370 is amended to read:

22 197.370. (1) Except as provided in subsection (2) of this section, if the local government does not
23 make a decision on an expedited land division **or a middle housing land division, as defined in**
24 **section 2 of this 2021 Act**, within 63 days after the application is deemed complete, the applicant
25 may apply in the circuit court for the county in which the application was filed for a writ of
26 mandamus to compel the local government to issue the approval. The writ shall be issued unless the
27 local government shows that the approval would violate a substantive provision of the applicable
28 land use regulations or the requirements of ORS 197.360 **or section 2 of this 2021 Act**. A decision
29 of the circuit court under this section may be appealed only to the Court of Appeals.

30 (2) After seven days' notice to the applicant, the governing body of the local government may,
31 at a regularly scheduled public meeting, take action to extend the 63-day time period to a date
32 certain for one or more applications for an expedited land division **or a middle housing land di-**
33 **vision** prior to the expiration of the 63-day period, based on a determination that an unexpected or
34 extraordinary increase in applications makes action within 63 days impracticable. In no case shall
35 an extension be to a date more than 120 days after the application was deemed complete. Upon ap-
36 proval of an extension, the provisions of ORS 197.360 to 197.380 **and section 2 of this 2021 Act**,
37 including the mandamus remedy provided by subsection (1) of this section, shall remain applicable
38 to the [expedited] land division, except that the extended period shall be substituted for the 63-day
39 period wherever applicable.

40 (3) The decision to approve or not approve an extension under subsection (2) of this section is
41 not a land use decision or limited land use decision.

42 **SECTION 8.** ORS 197.375 is amended to read:

43 197.375. (1) An appeal of a decision made under ORS 197.360 and 197.365 **or under ORS 197.365**
44 **and section 2 of this 2021 Act** shall be made as follows:

45 (a) An appeal must be filed with the local government within 14 days of mailing of the notice

1 of the decision under ORS 197.365 (4)[,] and shall be accompanied by a \$300 deposit for costs.

2 (b) A decision may be appealed by:

3 (A) The applicant; or

4 (B) Any person or organization who files written comments in the time period established under
5 ORS 197.365.

6 (c) An appeal shall be based solely on allegations:

7 (A) Of violation of the substantive provisions of the applicable land use regulations;

8 (B) Of unconstitutionality of the decision;

9 (C) That the application is not eligible for review under ORS 197.360 to 197.380 **or section 2**
10 **of this 2021 Act** and should be reviewed as a land use decision or limited land use decision; or

11 (D) That the parties' substantive rights have been substantially prejudiced by an error in pro-
12 cedure by the local government.

13 (2) The local government shall appoint a referee to decide the appeal of a decision made under
14 [ORS 197.360 and 197.365] **this section**. The referee [shall] **may** not be an employee or official of
15 the local government. However, a local government that has designated a hearings officer under
16 ORS 215.406 or 227.165 may designate the hearings officer as the referee for appeals of a decision
17 made under ORS 197.360 and 197.365.

18 (3) Within seven days of being appointed to decide the appeal, the referee shall notify the ap-
19 plicant, the local government, the appellant if other than the applicant, any person or organization
20 entitled to notice under ORS 197.365 (2) that provided written comments to the local government
21 and all providers of public facilities and services entitled to notice under ORS 197.365 (2) and advise
22 them of the manner in which they may participate in the appeal. A person or organization that
23 provided written comments to the local government but did not file an appeal under subsection (1)
24 of this section may participate only with respect to the issues raised in the written comments sub-
25 mitted by that person or organization. The referee may use any procedure for decision-making con-
26 sistent with the interests of the parties to ensure a fair opportunity to present information and
27 argument. The referee shall provide the local government an opportunity to explain its decision, but
28 is not limited to reviewing the local government decision and may consider information not pre-
29 sented to the local government.

30 (4)(a) The referee shall apply the substantive requirements of the [local government's] **applicable**
31 land use regulations and ORS 197.360 **or section 2 of this 2021 Act**. If the referee determines that
32 the application does not qualify as an expedited land division [as described in ORS 197.360] **or a**
33 **middle housing land division, as defined in section 2 of this 2021 Act**, the referee shall remand
34 the application for consideration as a land use decision or limited land use decision. In all other
35 cases, the referee shall seek to identify means by which the application can satisfy the applicable
36 requirements.

37 (b) **For an expedited land use division**, the referee may not reduce the density of the land di-
38 vision application.

39 (c) The referee shall make a written decision approving or denying the application or approving
40 it with conditions designed to ensure that the application satisfies the land use regulations, within
41 42 days of the filing of an appeal. The referee may not remand the application to the local govern-
42 ment for any reason other than as set forth in this subsection.

43 (5) Unless the governing body of the local government finds exigent circumstances, a referee
44 who fails to issue a written decision within 42 days of the filing of an appeal shall receive no com-
45 pensation for service as referee in the appeal.

1 (6) Notwithstanding any other provision of law, the referee shall order the local government to
2 refund the deposit for costs to an appellant who materially improves his or her position from the
3 decision of the local government. The referee shall assess the cost of the appeal in excess of the
4 deposit for costs, up to a maximum of \$500, including the deposit paid under subsection (1) of this
5 section, against an appellant who does not materially improve his or her position from the decision
6 of the local government. The local government shall pay the portion of the costs of the appeal not
7 assessed against the appellant. The costs of the appeal include the compensation paid the referee
8 and costs incurred by the local government, but not the costs of other parties.

9 (7) The Land Use Board of Appeals does not have jurisdiction to consider any decisions, aspects
10 of decisions or actions made under ORS 197.360 to 197.380 **or section 2 of this 2021 Act.**

11 (8) Any party to a proceeding before a referee under this section may seek judicial review of
12 the referee's decision in the manner provided for review of final orders of the Land Use Board of
13 Appeals under ORS 197.850 and 197.855. The Court of Appeals shall review decisions of the referee
14 in the same manner as provided for review of final orders of the Land Use Board of Appeals in those
15 statutes. However, notwithstanding ORS 197.850 (9) or any other provision of law, the court shall
16 reverse or remand the decision only if the court finds:

17 (a) That the decision does not concern an expedited land division as described in ORS 197.360
18 **or middle housing land division as defined in section 2 of this 2021 Act** and the appellant raised
19 this issue in proceedings before the referee;

20 (b) That there is a basis to vacate the decision as described in ORS 36.705 (1)(a) to (d), or a basis
21 for modification or correction of an award as described in ORS 36.710; or

22 (c) That the decision is unconstitutional.

23 **SECTION 9.** ORS 197.380 is amended to read:

24 197.380. Each city and county shall establish [*an application fee*] **application fees** for an expe-
25 dited land division **and a middle housing land division, as defined in section 2 of this 2021**
26 **Act.** The [*fee shall*] **fees must** be set at a level calculated to recover the estimated full cost of
27 processing an application, including the cost of appeals to the referee under ORS 197.375, based on
28 the estimated average cost of such applications. Within one year of establishing [*the fee required*] **a**
29 **fee** under this section, the city or county shall review and revise the fee, if necessary, to reflect
30 actual experience in processing applications under ORS 197.360 to 197.380 **and section 2 of this**
31 **2021 Act.**

32