OREGON
Department of Land Conservation & Development

Senate Bill 458 Guidance - Part 2

Department of Land Conservation and Development staff previously published guidance on Senate Bill 458 (2021) in July 2021. This guidance document can be found on the DLCD webpage. Since publishing the first SB 458 guidance, department staff have continued to field questions about the implementation of the bill. This Part 2 document includes responses to common implementation questions and further clarifies the department's interpretation of the legislation.

Q1: Can the referee reviewing appeals decide on an appeal without a formal process (e.g., hearing)?

> ***A:*** *The statute indicates that an appeals process is possible but does not elaborate on the exact process by which that occurs. The appeals process gives discretion to the referee to establish the means of the appeal process:*
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> > *ORS 197.375 (3):*
> > *"…the referee may use any procedure for decision-making consistent with the interests of the parties to ensure a fair opportunity to present information and argument. The referee shall provide the local government an opportunity to explain its decision but is not limited to reviewing the local government decision and may consider information not presented to the local government."*

Q2: Can a city require additional drywall between attached units that result from a middle housing land division? This would increase the fire rating and meet the intent of fire separation for structures that are divided by a lot line (i.e., similar to a townhouse) in alignment with Section R302 of the 2021 Oregon Residential Specialty Code.

> ***A:*** *Yes, cities have discretion to make that decision. (Refer to OAR 918-020-030(1)(c) Alternative Approval Process for SFD Conversions).*

Q3: Are ADUs allowed with townhouses (attached rowhouses) through HB 2001? If not, could a jurisdiction allow ADUs with townhouses? I see that new ADUs are not allowed after a SB 458 land division. But could an ADU potentially be split off on to its own lot through SB 458?

> ***A:*** *Because a townhouse is statutorily defined as "middle housing" they are not technically a "single family" dwelling (even though it is a single unit on a single lot). This definition is important because state law also requires that a city allow an ADU in conjunction with a single-family dwelling. Therefore, a city is not required to allow an ADU in conjunction with a townhouse. However, there is nothing in state law that would prevent a city from choosing to allow ADUs on the same lot as a townhouse.*
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> *To the second question related to SB 458 and ADUs - because ADUs are not a middle housing type as defined in HB 2001, an SB 458 expedited middle housing land division is not a reliable legal pathway to divide a lot that has a townhouse/ADU configuration. This interpretation is based on the strictest and most conservative read of the SB 458*

language. However, there is possibly reasonable argument to be made that SB 458 could be the legal land division option for developments that include both a middle housing type and an ADU. Section 2(1) of SB 458: (1) As used in this section, "middle housing land division" means a partition or subdivision of a lot or parcel on which the development of middle housing is allowed under ORS 197.758 (2) or (3)". This argument has yet to be tested.

Additionally, there may also be an opportunity for a city to reconfigure their definitions and zoning standards such that the resulting "ADU" in conjunction with a townhouse becomes the second unit in a "detached duplex." This would eliminate any confusion related to which standards and which land divisions processes the city could apply to such a development.

Q4: SB 458 states that the resulting lots may only have exactly one dwelling after the partition. *"…Exactly one dwelling unit on each resulting lot or parcel, except for lots, parcels or tracts used as common areas…".* Does this mean that a stacked duplex will not be able to add a detached third unit even if it is classified as a detached triplex? Would this also hold true for any existing legacy lot that has stacked units (duplex, triplex, or quadplex) that wishes to add a detached unit? This seems a shame and may ironically drive property owners to undo an existing basement ADU or stacked duplex unit, solely to be able to develop and sell off a detached unit in the rear of their lot.

***A:** Correct, SB 458 does not appear to accommodate dividing lots that have two or more units in a stacked configuration. This forces property owners to either use the traditional land division process to create a brand-new lot on the property (which could then be further divided, through an MHELD to allow for two or more units) or dismantle the existing stacked units - neither of which are perfect solutions.*

Q5: Per section 2(d) "exactly one dwelling unit on each resulting lot or parcel, except for lots, parcels or tracts used as common areas"…does this mean a duplex-quadplex cannot be on one tax lot?

***A:** Not exactly – SB 458 allows a property owner to decide whether they would like to divide their existing lot into smaller lots such that each lot has one dwelling on it. They are not required to do this and could build any middle housing type on just one tax lot. In the first instance where they choose to divide the lot, the property owner is therefore entitled to sell those individual units on individual lots in a "fee-simple" manner. In the situation where the property owner does not choose to divide the lot into smaller lots, the owner may only rent the units or establish a condominium. These are all options to the property owner, and they are not required to choose one particular path.*

Q6: Per section 2 subsection d, does each unit must be on its own tax lot on its own meter?

A: *If the property owner where to decide to invoke SB 458 and divide their existing lot into smaller lots, each resultant lot and individual unit must have its own meters, per the provisions in the bill.*

Q7: SB 458 states that a city can require notice to the owners of record of property as shown on the most recent property tax assessment roll of property located, and to the addresses based on the City's current addressing records within 100 feet of the property that is subject of the notice. (SB 458 and ORS 197.365) Can a city require 250 feet instead of 100 feet? Can a city require a posted noticed (which is what we require for a regular land division)?

A: *ORS 197 offers some guidance here. The statute clearly identifies 100 feet as the distance of the notice. The department cautions cities from requiring any noticing greater than what is in statute. The manner in which the notice is given is less clear. The statute mentions "written notice" to property owners of record which could be interpreted a few ways and could reasonably allow a city to require the notice be posted on site. One note to consider in this decision is that, due to the clear and objective manner of the expedited land division process, the city mustn't consider anecdotal or subjective community context to influence the decision. The city should consider what the benefit is of requiring that the notice be posted on site in this context.*

Q8: Does Section 2(b) related to "separate utilities for each dwelling unit" apply only to duplexes-quadplexes? This does not apply to multiplexes on one tax lot such as an apartment building, etc. (built for rentals)? "Middle housing" only correct?

A: *Yes, you are correct – HB 2001 and SB 458 only regulate "middle housing" defined as duplexes, triplexes, quadplexes, townhouses, and cottage clusters. Apartment buildings or other types of non-middle housing types are not subject to the separate utilities provision, or any other provision for that matter, of HB 2001/SB 458.*

Q9: Can a city require street trees with an expedited land division for middle housing? We currently require it for all residential land divisions.

A: *You can require that the "parent" lot meet the street tree standards that are applied to all other residential development but may not require that "child" lots meet the street tree standards per section (2)(a).*

Q10: A property owner is interested in developing townhouses on a 13,000 sq ft corner lot. Based on density, they could get 8 townhouse lots. Our design standards allow a maximum of 4 consecutive townhouses, but that just means a driveway or spacing between the two groups of townhomes.

They could certainly go through our standard subdivision process to create 8 townhouse lots. But could they also do an SB 458 land division to create the 8 lots (and then submit building permits for each lot)?

A: *There is some flexibility for the city in distinguishing the procedure here. First, it is important to start with the baseline statutory requirements. In this scenario, administrative rule only requires a jurisdiction to allow up to four townhouses (OAR 660-036-0205(4)), but they have the option to accommodate more townhouses, either in their design standards (i.e. greater than 4 units may be attached) or as part of the same lot/site/project (i.e. two or more buildings totaling greater than 4 townhouses on one site). Alternatively, the city could take a stricter interpretation – they only need to allow up to four townhouses on a lot, so if an applicant would like to build eight units, they would need to partition the lot into two "parent" lots first (or as Milwaukie allows – subdivide to eight lots via a standard subdivision process).*

Depending on the interpretation, that would affect how SB 458 applies. If a city opts for a stricter interpretation, the applicant will need to partition to "parent" lots before qualifying for a SB 458 application. If a city would like to reduce procedural hurdles, there is nothing stopping them from enabling an applicant to propose more than 4 townhouses on one lot/site right now. It would still qualify for a middle housing land division.

Some jurisdictions have expressed concern about the upper limit on the number of townhouses or cottages, but the department feels the rules pretty clearly support jurisdictions establishing an upper limit on the number of units allowed for one project, provided the jurisdiction meets the baselines articulated in rule (i.e. up to 4 townhouse units, up to 8 cottage units around one common courtyard).