HB2138 Strips Away Long-standing Rights of Planned Communities

Planned Communities have been a fixture in Oregon since at least 1946 with the establishment of Cedar Hills in unincorporated Washington County north of Beaverton. HOA governance documents constitute a contract with homeowners to protect property values, enhance safety and promote quality of life by establishing and maintaining the standards for property maintenance, and management of common areas. Planned Communities often restrict the type, size, construction materials, garages, driveways and house color to achieve a general appearance that is attractive to existing and prospective homeowners. Planned communities often allow only single family detached homes, excluding multifamily homes such as duplexes, triplexes, quadplexes and multi-unit apartment buildings.

Because Planned Communities have been able to control the types of allowable housing they are seen as unfairly limiting available housing for those who cannot afford single family detached homes. In 2020, ORS 93.277 was put into law that, while grandfathering in existing Planned Community rules on housing exclusion, disallowed such limitations in new or newly modified HOA documents that restrict housing types. ORS 93.277 states:

> A provision in a recorded instrument affecting real property **is not enforceable** if:
> (1) The provision would allow the development of a single-family dwelling on the real property but would prohibit the development of, or the partitioning or subdividing of lands under ORS 92.031 (Middle housing land division) for:
> (a) Middle housing, as defined in ORS 197.758 (Development of middle housing); or
> (b) An accessory dwelling unit allowed under ORS 197.312 (Limitation on city and county prohibitions) (5); and
> (2) The instrument was executed on or after January 1, 2021.

It seems to make sense that the change in the rule applies to *future* planned communities since a community that includes multiple types of housing must be planned to ensure the full needs of all income levels that might purchase different housing types are met. This includes access to different modes of transportation as well as walk-to shopping, medical facilities, restaurants, schools and jobs. Newer communities such as the Reeds Crossing development in Hillsboro can support multiple housing types *by design* and take into account the full needs of each income level. However, putting a multi-unit dwelling into a community planned in decades past that relies solely on automobiles for transportation means that access to shopping, medical facilities, restaurants, schools and jobs is less likely to meet the needs of those who rent or purchase units in a multi-unit building and cannot rely on automobile transportation.

HB2138 goes further than ORS 93.277 by removing the grandfathering of single family exclusions in planned communities:

> SECTION 7. ORS 93.277 is **amended** to read:
> 93.277. A provision in a recorded instrument affecting real property is **void and unenforceable**, as being against the policy of this state of promoting housing availability and affordability and affirmatively furthering fair housing as defined in ORS 197A.100, if the provision would allow the development of a single-family dwelling on the real property but would prohibit the development of, or the partitioning or subdividing of lands under ORS 92.031
> for:

(1) Middle housing, as defined in ORS 197A.420; or
(2) An accessory dwelling unit allowed under ORS 197A.425.

SECTION 8. ORS 93.277 applies to instruments executed **before, on or after January 1, 2021.**

HB2138 also proposes the following changes to ORS 94.776:

SECTION 9. ORS 94.776 is amended to read:
94.776. (1) A provision in a governing document is **void and unenforceable**, as being against the policy of this state of promoting housing availability and affordability and affirmatively furthering fair housing as defined in ORS 197A.100, to the extent that the provision would prohibit or have the effect of unreasonably restricting the development of, or the dividing of lands under ORS 92.031 for, housing, including accessory dwelling units or middle housing, that is otherwise allowable under the maximum density of the zoning for the land.
(2) Lots or parcels, as those terms are defined in ORS 92.010, that result from the division of land in a planned community are subject to the governing documents of the planned community. Any resulting dwelling units are allocated assessments and voting rights on the same basis as existing units.

SECTION 10. ORS 94.766 applies to governing documents that were adopted **before, on or after January 1, 2020**

HB2138 along with reduced restrictions and streamlined approval processes for Middle Housing, such as the relaxation of Sensitive Natural Area protections and the implementation of the type I approval process with no provisions for notification, or community comment, serves to destroy homeowner associations and their long-standing right of self-governance in the name of increasing the number of available housing units but with the tally of new homes the only metric of success. This single-minded approach to a real housing crisis runs rough-shod over communities that have been here for decades and who provide a voice for communities on local affairs. Further, it ignores the needs of lower income families by not having criteria that would put middle housing in locations that provide access to those without automobiles, multi-modal transportation, and amenities like walkable streets to shopping, entertainment and health facilities.