

## EXAMPLES OF PROPOSED HB 2001 CODE AMENDMENTS THAT ARE NOT CLEAR AND OBJECTIVE

The Planning Commission is now in the final process to recommend a set of HB 2001 code amendments to the City Council. Yet, “Version 3” of the proposed code still has provisions at the most fundamental level that do not meet the statutory requirement for being “clear and objective.” In LUBA’s remand of the so-called “Clear and Objective” ordinance, LUBA articulated the criterion for a standard to be considered “clear and objective.” What follows in this document are just a few of numerous instances of the proposed code that *do not satisfy LUBA’s criterion* and would therefore be the basis of a future appeal and another remand, if not corrected.

These first examples are definitions of housing types (e.g., “Dwelling, Duplex”) and lot/parcel types (e.g., “Duplex Lot”). Many of the proposed “Middle Housing” standards are specific to the housing type(s) and/or lot type of a development application. Thus, it is essential to have no ambiguity or internal conflicts among the definitions for the distinctive types. For example, it must be perfectly clear which development standards would apply if a four-unit development were proposed. However, in the proposed definitions four dwellings on a lot fit both the definitions of a Fourplex or the definition of two Duplexes. That is precisely the kind of ambiguity that’s inherent in the proposed definitions.

### 1. “Dwelling” definitions.

Current code (not proposed for amendment)

**Dwelling, Accessory.** An interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling.

The proposed code in “Version 3”:

**Dwelling.** A building, or portion thereof, designed and used as a residence for occupancy by a person or persons. This includes both buildings constructed on-site and manufactured homes.

**Dwelling, Single-Unit.** One detached dwelling on a single lot or parcel. A dwelling unit that is part of a duplex, triplex, fourplex, or cottage cluster, whether attached or detached, is not a single-unit dwelling.

**Dwelling, Duplex.** Two dwellings on a single lot or parcel in any configuration. If one of the dwellings on the lot or parcel is an accessory dwelling, the two dwellings on that lot or parcel are not considered a duplex.

**Dwelling, Triplex.** Three dwellings on a lot or parcel in any configuration.

**Dwelling, Fourplex.** Four dwellings on a single lot or parcel in any configuration.

**Dwelling, Cottage Cluster.** A grouping of no fewer than four detached dwellings per acre with a footprint of less than 900 square feet each that includes a common courtyard. Cottage clusters are not fourplexes or multiple-unit dwellings.

What follows are several questions to which an applicant could claim to have no clear answer, based on the code’s text. Consequently, the standard would impermissibly (in LUBA’s words) “allow the city to exercise significant discretion” in how the definitions were applied to a development proposal.

- a. Does the definition of “Dwelling, Single-Unit” mean “**Exactly** one detached dwelling ...” (i.e., one-and-only-one) or “**A** detached dwelling ...” (which could be one of several detached dwellings on the lot)?

If a developer proposed to put two detached dwellings on a single, adequately sized R-1 (PUD), R-2, R-3, or R-4 lot and *not* treat either one as an ADU and not treat the two together as a Duplex:

- i. Would that be permissible?
- ii. What would be the dwelling type for each of these dwellings?

**Discussion:** If the meaning is “*exactly one* detached dwelling,” then there is no definition that fits the second detached dwelling. Accordingly, with the proposed definition, the only sensible meaning would be “*a* detached dwelling.” However, the code lacks any *requirement* for a development application to disambiguate whether an application is for two single-unit dwellings, or a duplex, or a single-unit dwelling and an accessory dwelling.

- iii. Further, how would the definition of a single-unit dwelling (and other proposed definitions) apply to **existing** development? Could two detached dwellings on a single PUD lot – which would have previously been approved as two “Single-Family” dwellings, subsequently be treated as a Duplex?

As far as the proposed code requires, the City could treat both existing and proposed new development of two detached dwellings as any one of the three alternatives, enumerated above.

- b. Would every situation (existing or proposed) that has a particular, multiple number of dwellings on a single lot or parcel (with the exception specified for a Duplex Dwelling) *always* be treated as a “plex”?
  - i. For example, if there are three detached dwellings on a lot as of the present, would they be considered, in all cases, a Triplex? That is what the plain language of the definition states.

It’s essential to understand that, legally, when something fits a definition, that thing *is* what is defined. As in the example of the “Dwelling, Duplex,” the definition (or some other code provision) must explicitly *exclude* housing types (e.g. an Accessory dwelling) that are not intended to be what is being defined. Neither the definition of “Dwelling, Triplex” nor the definition of “Dwelling, Fourplex” has any such exclusion.

With the ambiguities in the “plex” definitions, does the property owner have to file something that denotes a set of three dwellings as a Triplex? If this weren’t required, and all cases were automatically considered a Triplex, these assumed Triplex would be subject to the applicable “Middle Housing” standards. One unintended result would be that numerous existing three-dwelling developments would become “Legal Nonconforming Structures.” EC 9.1230. On the other hand, if the owner must file a declaration of housing type, do the existing dwellings have to conform to the applicable “Middle Housing” standards to be considered a Triplex?

- c. Accessory Dwellings are excluded from the definition of Duplex, but not excluded from the definitions of Single-Unit, Triplex, Fourplex, or Cottage Cluster. Can a new development of three detached dwellings treat one of them as an ADU for standards purposes and then treat the entirety as a Triplex, thus allowing subdivision?
- d. If there are four detached dwellings on a lot, under the code definitions, that development configuration would meet the definitions of *both* “Dwelling, Fourplex” and two “Dwelling, Duplex[es].” There are different code standards for Duplexes and Fourplexes; how would these be resolved?
- e. Three detached, 900 s.f. footprint dwellings on a 3,500 s.f. lot would satisfy the criteria for “no fewer than four detached dwellings per acre.” Thus, they constitute both a Triplex and a “Cottage Cluster,” for which there are different standards. How would this ambiguity be resolved?

There are many more ambiguities in these definitions. A developer could exploit these ambiguities in an application; and, if the City tried to impose what the staff *thinks* “was intended,” the applicant could then fall back on the definitions (and which standards apply) being ambiguous, therefore not “clear and objective.” That would force the City to *not apply* the standards. (Note: However, before that failure would ever happen, an ordinance that included this code would be appealed and remanded.)

There are two fundamental problems that underly these utterly unusable “dwelling” definitions:

- a. Most fundamentally, the attempt to bastardize the definitions of Duplex, Triplex, and Fourplex as “any configuration,” including all the dwellings being detached. That is absurd on its face. Here are the Webster’s Unabridged Dictionary definitions:

*Merriam-Webster’s Unabridged Dictionary*, Merriam-Webster, <https://unabridged.merriam-webster.com/unabridged/---plex>. Accessed 8 Jan. 2022.

**duplex** *noun* : something duplex: such as: a: duplex apartment; b: two-family house

**duplex apartment** *noun* : a suite in an apartment house that includes rooms on two floors

**duplex house** *noun* : two-family house

**two-family house** *noun* : a house divided either vertically and designed for two families living side by side but separated by a party wall or horizontally and designed for two families occupying separate apartments one above the other

**triplex** *noun* : something (as a building or apartment) that is triplex

**triplex** *adjective* : 3a: containing three apartments or dwelling units <triplex buildings>

**fourplex** *noun* : a building that contains four separate apartments

The proposal to treat duplexes, triplexes, and fourplexes as detached dwellings is an Orwellian abuse of the language and common usage. It is all the more egregious within so-called “Middle Housing” standards because multiple detached dwellings are only found in the “Cottage Cluster” or “Cottage Court” housing type in the “Middle Housing” typology. Plexes are *always* described as a single building.

“**The Types** – ... The majority of Missing Middle Housing types have 4-8 units **in a building**, or 4-8 units on a lot **in the case of a cottage court**.” <https://missingmiddlehousing.com/types>

The Bible of “Missing Middle Housing” is the book by the same name, written by Daniel Parolek, the architect who coined the term and set out the foundational concepts. A central theme of the book and the whole “middle” housing concept is that *attached* dwellings in residential buildings with forms that are compatible with single-family, detached housing provide multiple benefits over *detached* dwellings. Small cottages, organized around a courtyard, are the *only* form of detached dwellings considered to be “middle housing.” Here is the definitive excerpt from Parolek’s book:

“Missing Middle Housing units comprise townhomes in structures of fewer than twenty units, plexes, including duplexes, threeplexes, and fourplexes, and all other units **in structures** of fewer than twenty units, called ‘small attached.’” Pages 56-57

In “Chapter 5: Missing Middle Housing Types,” Parolek provides the following definitions (*verbatim*):

- **Duplex Side-By-Side.** This type has two units next to each other with one shared wall.
  - **Duplex Stacked.** This type has two units stacked, with one on the ground floor and the other on top of it.
  - **Triplex Stacked.** This type has a small-to-medium-sized structure that consists of three units stacked on top of each other on consecutive floors.
  - **Fourplex Stacked.** This type has a small-to-medium-sized structure that consists of two units on the ground floor and two units stacked directly above them.
- b. As would be clear to any person even moderately informed about “Middle Housing,” “Duplex,” “Triplex,” “Fourplex,” and “Cottage Clusters” are **housing types**, not **dwelling types**. “Detached Dwelling,” “Cottage,” “Townhouse” – these are dwelling types.

The problem with the staff’s definitions would have been obvious to any competent code writer – How can you have “**a** dwelling” (i.e., Duplex) that comprises “**two** dwellings”? By mistakenly defining *housing* types that comprise multiple dwellings as *dwelling* types, staff as made the proposed code’s flawed approach even more unclear because of the internally inconsistent meaning of “dwelling,” – *i.e.*, in some contexts, a “dwelling” is one unit; but in other contexts, a “dwelling” is multiple units.

There is a simple, obvious, and sensible solution: Following the guidance of Daniel Parolek and other “Middle Housing” experts, define plexes as *attached housing types*, *e.g.*:

**Duplex.** This housing type has exactly two dwellings, neither of which is an Accessory Dwelling, in one building on a single lot or parcel. The two dwellings may either be next to each other with a shared wall, or with one dwelling on the ground floor and the other dwelling on top of it.

**Triplex.** This housing type has exactly three dwellings, none of which is an Accessory Dwelling, in one building on a single lot or parcel.

**Fourplex.** This housing type has exactly four dwellings, none of which is an Accessory Dwelling, in one building on a single lot or parcel.

It would be preferable (and legal), although not essential to fixing the definitions, to conform the Triplex and Fourplex definitions to the actual “middle housing” concepts and define them as “stacked.” That would allow other configurations of three and four dwellings on a lot to remain treated a “Multiple-Unit” housing and have Multiple-Unit standards remain in effect for such developments, instead of deleted as proposed in the proposed code. (The proposed code changes the definition of “Multiple-Unit” housing to FIVE dwellings, instead of the more sensible THREE dwellings in the current code.)

## 2. Lot definitions.

The proposed code in “Version 3”:

**Lot, Duplex.** A lot or parcel that meets the minimum lot area required for the development of a duplex.

**Lot, Triplex.** A lot or parcel that meets the minimum lot area required for the development of a triplex.

**Lot, Fourplex.** A lot or parcel that meets the minimum lot area required for the development a fourplex.

**Lot, Cottage Cluster.**

Here again, the ambiguity should be obvious.

- a. **Duplex lot:** By statute, there is *no* “minimum lot area required for the development of a duplex” because any existing lot that would allow a “detached, single-family dwelling” must allow a duplex. Consequently, a “Duplex Lot” is any lot, any size, that allows a Single-Unit dwelling.
- b. Any lot that meets “the minimum lot area required for the development a fourplex” is, by definition, all of these: Duplex Lot, Triplex Lot, Fourplex Lot, and Cottage Cluster Lot.

The consequences are not academic. The lot standards for Duplex Lot and Triplex Lot are different. The minimum lot frontage and minimum lot width is 20 feet for duplex lots (both interior and corner lots). The minimum lot frontage and minimum lot width is 35 feet for triplex lots (both interior and corner lots). Thus, if (as above) almost any lot can be considered a “Duplex Lot” – whether or not it can also be considered a “Triplex Lot,” and could simply meet the lesser of the two standards.

The problem here is that the proposed code appears to be attempting to address lot standards for creation of new lots (or parcels) by partition or subdivision. But the use of ambiguous definitions unnecessarily creates a problem.

The solution is again simple, obvious, and sensible – in addition to minimum lot area, include other lot standards *for the development of* all “Middle Housing” types, specifically, Lot Frontage Minimum and Lot Width Minimum. Thus, when a property owner wants to develop a lot or parcel, either existing or new, they know what minimums are required. If they’re intending to create new lots, they will choose to propose lot configurations that will enable the housing type they intend to develop.

## 3. Number of plexes allowed per lot.

The proposed code in “Version 3”:

- Waives density maximums for plexes.  
“The maximum residential density requirements in Table 9.2750 do not apply to duplexes, triplexes, fourplexes, or cottage clusters.”
- Has no limit on how many plexes can be on a lot, parcel, or development site.
- Consequently, allows density that is *unlimited*, except for physical constraints based on minimal footprint and lot size.

As shown under (1) above, the definitions of plexes state:

“Two/Three/Four dwellings on a single lot or parcel in any configuration.”

By definition, a lot with eight dwellings constitutes two fourplexes (or four duplexes).

The *only* minimum lot area standard for fourplexes is the following standard:

“A fourplex shall be permitted on any lot or parcel with a lot area that is at least 4,500 square feet.”

Note that the City could plausibly interpret “**a** fourplex” as “**exactly one** fourplex”? But “**a** fourplex” could also be plausibly interpreted as follows: “A proposed fourplex is permitted ...” and that would plausibly mean whether a “proposed fourplex” is the “first” or “second” (etc.) proposed fourplex, it would be permitted.<sup>1</sup>

The allowable Maximum Lot Coverage standard for a fourplex is 75%, which would allow 3,375 s.f. for development

Thus, two buildings, each with four dwellings, could have footprints of at least 1,500 s.f. (allowing for interior setbacks, sidewalks, etc.) or 30' x 50', which would easily accommodate a two-over-two, stacked housing type for each fourplex.

Obviously, it would also be feasible to place three smaller fourplexes on a 4,500 s.f. lot.

**Councilors!** Before you roll your eyes and dismiss this as “ridiculous,” **read the proposed code**. At best, it is “ambiguous”; at worst, it **is** clear and objective and allows virtually an unlimited number of plexes on any lot that meets the minimum lot area.

For the third time, the solution is again simple, obvious, and sensible – limit – **by right** – each lot or parcel to no more than one “Middle Housing” “plex” type (as a single building). As is currently allowed, a PUD could still have any mix and number of housing type(s). Rowhouses are, by definition, one dwelling per lot; and Cottage Clusters have their own constraints. Plexes are the problem.

With that standard, under the current proposal, a 4,500 s.f. lot could have only one Duplex **or** one Triplex **or** one Fourplex. A larger lot could, of course, potentially be divided. For example, under the

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<sup>1</sup> If you find it hard to believe this possibility, go read the ADU appeal by the Homebuilders and the LUBA decision regarding the statutory phrase “reasonable local regulations related to siting ...” Bill Kloos argued an interpretation that was based on the demonstrably *wrong* dictionary definition (i.e., “site” the noun, rather than “siting” the verb-based participle), and the City Attorney didn’t catch it, so a completely invalid interpretation of “related to siting” is now enshrined across the state. (I’m happy to provide the details from *Merriam-Webster’s* if you want the clear evidence.)

current proposal, a 9,000 s.f. lot with adequate frontage and width could be divided into two 4,500 s.f. lots, each of which would allow a fourplex. Correcting this extreme loophole in the “Middle Housing” code would not be a so-called “barrier” to housing. It would simply be sound, professional-quality code that would avoid the potential for extreme abuses of obvious defects in the proposed code.

Note that the foregoing description of the code defect does not in any way imply that 4,500 s.f. is a reasonable and sustainable minimum lot size or that 75% is a reasonable and sustainable maximum for lot coverage for future fourplex infill into dense, close-in neighborhoods. Both proposed standards are absurd “gifts” to investors who will build expensive rentals. In other communications, I and others have explained that the City Council should adopt the minimum deregulation required by the “Middle Housing” OAR. That would be achieved by not changing the current maximum lot coverage of 50% and adopting minimum lot areas of 4,500 s.f. for Triplex development and creation of new lots, and 7,500 s.f. for **Fourplexes** and Cottage Clusters.

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In summary, the information above is just part of the whole story. Like it or not, Councilors must accept that the staff and Planning Commission have gotten “way over their skis.” The evidence in their flawed “product” demonstrates that their zealotry led to overreach and sloppy craftsmanship.

At this late stage of the process, the most effective way for the Council to get the process into a “defensible” place, both legally and with the wishes of the majority of Eugene residents, is to direct the staff to strip the proposal of all deregulations beyond the minimum required. The Council (*not staff*) should also convoke a technical advisory group to review the code for additional defects that need to be corrected. I would be happy to serve on such an advisory group.

Respectfully,

A handwritten signature in black ink that reads "Paul Conte". The signature is written in a cursive, flowing style.

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