

**South Portland City Council**  
***Position Paper of the Interim City Manager***

***Subject:***

**ORDINANCE #1-16/17. Amending Chapter 27, “Zoning,” regarding Nonconforming Residential Lots. First reading. Passage requires majority vote.**

***Position:***

At the City Council workshop meeting on July 25, 2016, the topic of proposed amendments to the Zoning Ordinance regarding nonconforming residential lots of record was discussed. The Planning Director made a presentation on the topic and presented two potential options: keep the current provision but make some improvements to it, *or* revert to the pre-1990 system of sending property owners with such lots to the Board of Appeals for variances. Many property owners, developers and realtors spoke at the workshop in favor of the current process. There was a discussion of the need for immediate action on changes to remove any uncertainty about current ordinance interpretation generated by a recent Superior Court decision, as well as the need for further discussion at a later date about some of the “bigger picture” policy and process issues related to the development of nonconforming residential lots of record.

At the conclusion of the July 25 workshop meeting, there was a request to bring forward proposed Zoning Ordinance amendments that clarify that the development of nonconforming lots of record pursuant to Sec. 27-304 does not need to comply with current zoning district density requirements and that unimproved nonconforming lots of record may be aggregated for purposes of determining whether the proposed development requires Planning Board review and approval under Sec. 27-304(g). These changes are reflected in the redlined portions of Sec. 27-304(a), (b), (d), (e) and (g)(1) of Ordinance #1-16/17.

The request was made to have these proposed changes apply only to projects that had not been finally acted on by January 1, 2016 and for these proposed changes to expire on their own terms one year from the date of enactment. This applicability date/sunset clause change is reflected in the redlined portions of Sec. 27-304(h) of Ordinance #1-16/17. Projects that were in the early planning stages this past winter or spring (as evidenced by a property owner, developer, realtor or someone else being in touch with the Code Enforcement Officer or Planning Director) will be allowed to take advantage of these amendments. In addition, any other projects that had not been finally acted on by January

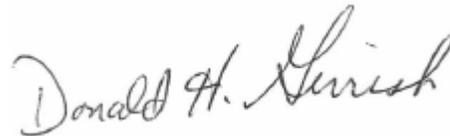
1, 2016 will be allowed to take advantage of these amendments. The parties involved in the recent Superior Court case will still be required to go to the Planning Board for review under Sec. 27-304(g), consistent with the Superior Court's express remand order.

Section 27-304(h) of Ordinance #1-16/17 is currently drafted such that the parties to the Superior Court case **may** take advantage of the maximum net residential density and minimum area per family relaxation changes (see changes to Sec. 27-304(d)), but **may not** take advantage of the aggregation of lot changes (*i.e.*, the parties to the Superior Court litigation cannot aggregate and so must go to the Planning Board for review and approval under Sec. 27-304(g)). There was limited discussion of the City Council's specific intent as relates to how to treat the parties involved in the court case at the workshop, and so if this is not the result intended by the City Council, the issue should be discussed Monday night. The Corporation Counsel will be present to address what the potential consequences are for the City if the City Council does not allow the parties to the court case to take advantage of the maximum net residential density and minimum area per family relaxation changes.

Because the proposed ordinance constitutes an amendment of the Zoning Ordinance, the Planning Board must conduct a public hearing on the ordinance before the City Council takes final action.

***Requested Action:***

Council passage of first reading; referral of the ordinance to the Planning Board so it may conduct its public hearing on the ordinance; and set a date for the City Council's second reading/public hearing and final action on the ordinance.

A handwritten signature in cursive script that reads "Donald H. Gurish". The signature is written in black ink and is positioned above a horizontal line.

Interim City Manager



CITY OF SOUTH PORTLAND

THOMAS E. BLAKE  
Mayor

DON GERRISH  
Interim City Manager

EMILY F. CARRINGTON  
City Clerk

SALLY J. DAGGETT  
Jensen Baird Gardner & Henry

IN CITY COUNCIL

ORDINANCE #1-16/17

**THE COUNCIL** of the City of South Portland hereby ordains that Article III of Chapter 27, "Zoning," of the "Code of Ordinances of the City of South Portland, Maine" be and hereby is amended as follows (deletions are ~~struck through~~; additions are underlined):

District One  
CLAUDE V. Z. MORGAN

District Two  
PATRICIA A. SMITH

District Three  
EBEN C. ROSE

District Four  
LINDA C. COHEN

District Five  
BRAD FOX

At Large  
MAXINE R. BEECHER

At Large  
THOMAS E. BLAKE

CHAPTER 27

ZONING

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ARTICLE III. Nonconformance

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**Sec. 27-304. Nonconforming Residential Lots.**

The following provisions govern the treatment of nonconforming residential lots of record that are described in a deed or subdivision plan recorded in the Cumberland County Registry of Deeds prior to October 21, 2007. These provisions allow for nonconforming lots to be treated as separate lots under certain conditions and to be sold or developed. The provisions allow the development of unimproved nonconforming lots in accordance with the provisions of (f) and (g).

(a) *Separate unimproved nonconforming lots of record.*

An unimproved nonconforming lot of record that is in separate ownership, or is not in common ownership with any abutting lot that has street frontage on the same street, may be developed in accordance with the provisions of (f) without a variance from the Board of Appeals. If the lot has less than five thousand (5,000) square feet of lot area or less than fifty (50) feet of street frontage on a City accepted street, development of the lot must also conform to (g).

Development of the lot must conform to the space and bulk regulations for the zoning district in which it is located except for the minimum lot area, ~~and~~ minimum street frontage, maximum net residential density and minimum area per family requirements unless otherwise specifically provided for in (f) or (g) or a variance is granted by the Board of Appeals.

(b) *Separate developed nonconforming lots of record*

A nonconforming lot of record that is in separate ownership or is not in common ownership with any abutting lot that has street frontage on the same street and that is developed with a principal building may be further developed or redeveloped in accordance with the space and bulk regulations of the zoning district in which it is located except for the minimum lot area, ~~and~~ minimum street frontage, maximum net residential density and minimum area per family requirements.

(c) *Contiguous developed lots of record.*

Two or more contiguous lots of record in common ownership each of which is improved with a principal building shall be considered to be separate lots and may be sold as separate lots even if one or more of the lots is nonconforming. The division of the lots shall conform to the original lot boundaries as described in a recorded deed or subdivision plan unless revised boundaries will make all of the lots less nonconforming with respect to the space and bulk regulations for the zoning district in which it is located. The division of such lots does not require a variance from the Board of Appeals.

(d) *Abutting unimproved lots of record.*

Two or more unimproved abutting lots of record in common ownership each of which has frontage on a City accepted street and is not improved with a principal building may be built on and/or sold as separate lots without a variance from the Board of Appeals, even if one or more of the lots is nonconforming, subject to the provisions of (f) and (g). The division of the lots shall conform to the original lot boundaries as described in a recorded deed or subdivision plan unless revised boundaries will make all of the lots less nonconforming with respect to the space and bulk regulations for the zoning district in which it is located.

Each lot may be developed in accordance with the provisions of (f). If a lot has less than five thousand (5,000) square feet of lot area or less than fifty (50) feet of street frontage on a City accepted street, development of the lot must also conform to (g). Two or more abutting unimproved lots of record in common ownership may be aggregated to form a single larger lot that has five thousand (5,000) square feet or more of lot area and fifty (50) feet or more of street frontage without the need for Planning Board review and approval under (g); however, development of any such aggregated lot shall be in accordance with (f).

Development of the lot (or aggregated lot) must conform to the space and bulk regulations for the zoning district in which it is located except for the minimum lot area, ~~and~~ minimum street frontage, maximum net residential density and minimum area per family requirements unless otherwise specifically provided for in (f) or (g). The Board of Appeals may not grant variances from the space and bulk requirements.

(e) *Unimproved lot(s) of record abutting a developed lot.*

An unimproved nonconforming lot of record that abuts and is in common ownership with a developed lot of record and that has frontage on a City accepted street may be developed and/or sold as a separate lot without a variance from the Board of Appeals subject to the provisions of (f) and (g). The division of the lots shall conform to the original lot boundaries as described in a recorded deed or subdivision plan unless revised boundaries will make all of the lots less nonconforming with respect to the space and bulk regulations for the zoning district in which they are located.

Each unimproved lot may be developed in accordance with the provisions of (f). If a lot has less than five thousand (5,000) square feet of lot area or less than fifty (50) feet of street frontage on a City accepted street, development of the lot must also conform to (g). Two or more abutting unimproved lots of record in common ownership may be aggregated to form a single larger lot that has five thousand (5,000) square feet or more of lot area and fifty (50) feet or more of street frontage without the need for Planning Board review and approval under (g); however, development of any such aggregated lot shall be in accordance with (f). Development of the lot (or aggregated lot) must conform to the space and bulk regulations for the zoning district in which it is located except for the minimum lot area, ~~and~~ minimum street frontage, maximum net residential density and minimum area per family requirements unless otherwise specifically provided for in (f) or (g). The Board of Appeals may not grant variances from the space and bulk requirements.

(f) *Standards for the development of all nonconforming lots of record.*

The development of any unimproved nonconforming lot of record including lots with less than five thousand (5,000) square feet of area must comply with the following unless otherwise specifically provided for in this section:

- (1) The principal building must be a single-family detached dwelling used solely for residential purposes including home occupations;
- (2) Each building on the lot shall not exceed twenty-eight (28) feet in height, the height to be measured, notwithstanding the definition of building height in Sec. 27-201, from the peak or highest point on the roof line;

- (3) Total building coverage shall not exceed twenty-five (25) per cent of the lot;
  - (4) Each building on the lot shall comply with the side setback requirements of the district in which the lot is located, except that in the Residential G District the principal building shall comply with the side yard setback requirements of the Residential A District or shall be a minimum of twelve (12) feet from any existing principal building on an abutting lot, whichever produces the greater side yard setback on the lot;
  - (5) The principal building shall be connected to the public sewer system either directly or via a private sewer which is connected to the public sewer system; and
  - (6) Building site plans submitted pursuant to Sec. 5-58 of the Code shall include a Drainage Plan meeting the requirements of Sec. 27-1536(e), Standards for a Drainage Plan.
  - (7) If the nonconforming lot of record is located within the Shoreland Area Overlay District, including the Shoreland Resource Protection Overlay Subdistrict and the Stream Protection Overlay Subdistricts, the lot must be developed, and all buildings and structures located, in full compliance with the water setback requirements and performance standards of those districts.
  - (8) If the nonconforming lot of record is located within a special flood hazard zone, the lot must be developed, and all buildings and structures located, in full compliance with the requirements of Article IV of Chapter 5 of the Code of Ordinances.
- (g) *Additional requirements for the development of lots of record with less than 5,000 square feet of lot area or less than fifty (50) feet of street frontage.*

If an unimproved, nonconforming lot of record has a lot area of less than five thousand (5,000) square feet or less than fifty (50) feet of street frontage, development of the lot must conform to the following in addition to the requirements of (f):

- (1) Planning Board Approval Required – Development of a lot of record with less than 5,000 square feet of lot area or fifty (50) feet of street frontage may occur only after the proposed development plans are approved by the Planning Board. Two or more abutting unimproved lots of record in common ownership may be aggregated to form a single larger lot that has five thousand (5,000) square feet or more of lot area and fifty (50) feet or more of street frontage without the need for Planning Board review and approval under (g); however, development of any such aggregated lot shall be in accordance with (f).

(2) Approval Standards – The Planning Board shall approve the development of a lot of record with less than 5,000 square feet of lot area or fifty (50) feet of street frontage only if it finds that the proposed design and development of the lot and the buildings and structures on the lot are consistent with the established character of the neighborhood. In determining if the proposed development meets this criterion, the Planning Board must find that the following are met if they are applicable to the location:

(i) If there is a predominate pattern of development in the immediate neighborhood with respect to the relationship of the principal building to the street, the principal building must be located on the lot so that it has a similar relationship to the street as other neighboring principal buildings on the same side of the street. If this requires the building to be closer to the front lot line than the required front yard setback, the building may encroach on the required yard and no variance is required.

(ii) If there is a predominate pattern in the width of buildings in relationship to the width of lots in the immediate neighborhood, the width of the front of the building must be similar to the relationship of neighboring lots on the same side of the street.

(iii) If there is a predominate pattern in the style of the roof and its orientation with respect to the street in the immediate neighborhood, the roof of the building must be similar to the relationship of buildings on neighboring lots on the same side of the street. If the predominant pattern is for the ridgeline of the roof to be perpendicular to the front property line, the portion of the proposed building facing the street must maintain this relationship.

(iv) If there is a predominate pattern in the height of buildings in the immediate neighborhood, the height of the building based upon existing grade must be consistent with the height of the buildings on neighboring lots on the same side of the street. If the predominant pattern is for buildings to have more than one story, the proposed building must have more than one story for the portion of the building facing the street.

(v) The appearance of the wall of the building facing the street must be consistent with buildings on neighboring lots on the same side of the street. If there is a predominant pattern in the immediate neighborhood for these walls to be treated as the front of the building with a front door and windows, the front wall of the proposed building must be treated as the front of the building. If there is a predominant pattern for neighboring buildings to have a front porch, the design of the proposed building must be consistent with this pattern.

(vi) The exterior materials must be visually compatible with adjacent and nearby buildings where a predominate pattern in the exterior materials exists, except where unacceptable materials predominate. This provision shall not be

used to exclude materials that are visually similar to existing materials but are made differently. The determination shall be based upon Sec. 27-1568.H. Materials and Colors.

(vii) At least twenty-five percent (25%) of the area of the lot must be landscaped open space.

(3) Application – The owner of the lot of record or the owner’s agent, or other person with right, title, or interest in the property including a valid purchase and sale agreement must make a written application to the Planning Board requesting approval to develop on a lot with less than 5,000 square feet of lot area or less than fifty (50) feet of street frontage. The application must be made on forms provided by the City. The application must be accompanied by the following documentation:

(i) An existing conditions plan prepared by a land surveyor or other qualified professional licensed in the State of Maine and drawn to scale showing the boundaries of the lot of record, any improvements on the lot including buildings, structures, or paving, the location of buildings and other improvements on the abutting lots, the topography and direction of drainage of the parcel, any existing easements, and the location of all utilities on the lot or in adjacent streets.

(ii) A site plan prepared by a land surveyor or other qualified professional licensed in the State of Maine at the same scale as the existing conditions plan showing the proposed improvements to the lot including buildings, structures, paving, landscaping, easements, and utilities.

(iii) Building plans for the principal building and any accessory buildings including, at a minimum, the first floor plan, and elevations for all sides of the building showing the architectural treatment of the property.

(iv) Perspective drawings or photo simulations showing how the proposed building will appear when seen from the street and how it will fit into the streetscape.

(v) A written and visual analysis of the existing character of the immediate neighborhood within five hundred (500) feet of the parcel that is within the same zone focusing on the factors identified in (2). This should include aerial photos and pictures of the existing lots in the neighborhood.

(vi) A written and visual analysis demonstrating how the proposed development of the lot meets the standards of (2).

(vii) A Drainage Plan meeting the requirements of Sec. 27-1536(e), Standards for a Drainage Plan.

(4) Review Process – The review of an application for the development of a lot with less than 5,000 square feet of lot area or fifty (50) feet of street frontage shall occur as follows:

(i) Prior to submitting an application, the applicant must have a pre-application conference with the Planning and Development Department. No application shall be considered by the Planning Board unless a conference has been held. This meeting is intended to provide the applicant with an understanding of the City's standards and procedures and to allow the applicant to familiarize the staff with the proposed development.

(ii) Upon submission and acceptance of an application, the Planning Staff shall place the item on the Planning Board's agenda for consideration.

(iii) The Planning Director or the Planning Board may request a peer review of the design of the development from an architect or other design professional. This shall occur in accordance with Sec. 27-138.

(iv) The Planning Board must hold a public hearing on the application. The hearing shall be noticed and conducted in accordance with Sec. 27-1425.

(v) In acting on the application, the Planning Board may impose conditions of approval on the development. These conditions must relate to the standards of (2). In all cases the Planning Board shall include a condition requiring that the Certificate of Approval and the Findings of Fact for the development are recorded at the Cumberland County Registry of Deeds.

(vi) The development of the property must comply with the approved application including any conditions of approval. If it is necessary to make modifications to the approved plan prior to or during development, the Planning Director may approve such modifications provided they do not amount to a waiver or substantial alteration of the approved plan including any conditions or requirements set by the Planning Board. Any subsequent modifications to the building or site layout or use may occur only with the approval of an amended application by the Planning Board.

(5) Performance Guarantee – The applicant shall comply with the performance guarantee requirements of Secs. 27-1429, 27-1430 and 27-1431, as appropriate.

(h) [Applicability date and sunset clause.](#)

[Notwithstanding the provisions of 1 M.R.S.A. § 302 or any other law to the contrary, the amendments to this ordinance evidenced by City Council Ordinance #1-16/17, when enacted, shall apply to any applications that have not received](#)

final, unappealed action prior to January 1, 2016, except that any application submitted prior to January 1, 2016 and that has not received final, unappealed action as of July 25, 2016 shall be required to undergo Planning Board review and approval pursuant to Sec. 27-304(g). The amendments to this ordinance evidenced by City Council Ordinance #1-16/17 shall expire one year from the date of enactment, unless the City Council enacts an ordinance providing otherwise.

**Secs. 27-305 – 27-400. Reserved.**

Fiscal Note: Less than \$1,000

Dated: August 1, 2016