

To: Planning Board Members
From: Tex Haeuser, Planning Director
Date: August 18, 2016 for Meeting Date of August 23, 2016
Re: **Agenda Item #3—Recommendation to the City Council on Proposed Text Amendments to the Nonconforming Lots Provisions of the Zoning Ordinance**

Introduction

The City Council is seeking a recommendation from the Planning Board on a set of text amendments it developed to the nonconforming lots provisions of the Zoning Ordinance. The Council passed the proposed amendments, with revisions made at first reading, on a 5 – 2 vote (Blake, Fox). The City Council second reading hearing for the amendments is scheduled for September 7th.

The overall issue being considered is a review of the City's policies regarding the construction of homes on grandfathered lots of record lots less than the minimum lot size in area. This issue had been on the Council's list of possible workshops for the last year and a half. A recent Superior Court decision on an appeal of a building permit granted for a home on an undersized lot in Thornton Heights provided an extra dimension to the issue, but the main impetus was a desire on the part of Mayor Blake and Councilor Cohen to have the nonconforming lots policy reviewed comprehensively. The Council will be engaging in this larger discussion over the coming months as well as taking the short-term action represented by the proposed amendments now before the Planning Board.

Notice

Public hearing legal notices for the Planning Board hearing were published in the Portland Press Herald on August 8 and 15, 2016. Notice of the hearing was also posted at City Hall on August 8th.

Review

This submission is being reviewed under Section 27-115 (g) Changes and amendments in Chapter 27 Zoning and for consistency with the City's Comprehensive Plan.

Correcting the Ordinance to Enable Construction on Nonconforming Lots While the Larger Policy Issues are Decided

In order to obtain approval to build a home on a nonconforming lot of record, a number of standards laid out in Sec. 27-304 must be met. In all cases involving building on undeveloped parcels, the current provisions require meeting the space & bulk regulations of the zoning district in which the lot is located, except for the minimum lot area and minimum street frontage requirements. This is a carry-over from 1990, which is the second-to-last time the nonconformance provisions were amended (they were most recently updated in 2007). However, as cited in the Superior Court decision, and as up to now never considered, this means that the **maximum net residential density** and **minimum area per family** standards also have to be met. Note that the Superior Court decision is not final, but any party unhappy with the decision cannot appeal the decision at this time because the court remanded the specific matter to the City, and a remand order is not a final judgment that may be appealed to the Maine Supreme Court.

To understand the difficulty meeting these two additional standards creates, think about the Residential A zoning district. In the “A” zone, the minimum lot size is 12,500 sq. ft., the maximum net residential density is 4 dwelling units per net residential acre, and the minimum area per family is 10,000 sq. ft. There is a rough correlation between these figures. The 12,500 sq. ft. minimum lot size is 29% of an acre. The density limit of 4 units per net residential acre is 25% of an acre. The 10,000 sq. ft. minimum area per family is 23% of an acre. The difference between the numbers appears to be related in part to an expectation that a certain amount of land generally gets deducted—for wetlands, steep slopes, etc.—as part of the net residential acreage calculation, so the density was set to be a bit less than the minimum lot size.

Why in the first place are there the density and per family standards and not just the minimum lot size? These standards became necessary when the City, approximately in the mid-1980's, adopted the cluster housing provisions—Sec. 27-1501 & 1502—in which homes or attached dwelling units are allowed to be grouped in closer proximity than normally permitted to enable the preservation of open space. Clustering was considered acceptable, but the City did not want to allow more units than would otherwise have been allowed. Hence, the density limit.

Now consider that a typical nonconforming lot of, say, 6,500 sq. ft. works out to a residential density of 6.7 dwelling units per acre (43,560÷6,500). So it is virtually impossible not to exceed the density limit of 4.0 dwelling units per acre and the ceiling of 10,000 sq. ft. per family.¹ The attached map of Lots Containing Single-Family Homes provides an overall comparison of actual lot sizes and density versus those required by ordinance.

In order to provide a time-limited correction to this problem while working out the larger nonconforming lot policy issues, the City Council asked Corporation Counsel Sally Daggett to develop the proposed amendments (to which the Councilors made some revisions at the first reading public hearing). As well as the existing exclusion for minimum lot area and street frontage, the amendments:

- add maximum net residential density and minimum area per family as exceptions to meeting the space & bulk requirements of the zone in which the lot is located.
- make explicit that two or more abutting unimproved lots of record in common ownership may be aggregated to form a single larger lot that has 5,000 square feet or more of lot area and 50 feet or more of street frontage without the need for Planning Board review (but still having to meet the standards under 27-304(f)).
- make the changes above applicable to applications that have not received final, unappealed action prior to January 1, 2016.
- require, however, that any application submitted prior to January 1, 2016 that has not received final, unappealed action as of July 25, 2016 has to undergo Planning Board review and must comply with the net residential density and minimum area per family requirements.
- establish that the amendments shall expire one year from the date of enactment, unless the City Council enacts an ordinance providing otherwise.

¹ An exception might be the case of a large developed lot abutting an undeveloped lot of record in the same ownership. If the developed lot was unusually large, then the area of the two lots together might be enough for an undersized vacant lot to be built on and still meet the density standards. Such would be the case of a developed lot of at least 15,780 sq. ft. abutting a 6,000 sq. ft. lot of record in the same ownership. The two together would add up to 21,780 sq. ft., which is half an acre and therefore is sufficient for 2 dwelling units at 4 units per net residential acre. However, it is doubtful any lot combinations of this sort exist in South Portland.

Recommendation

I respectfully recommend adoption of the proposed text amendments to the nonconforming lot provisions of the Zoning Ordinance without the requirement that unresolved applications submitted prior to January 1, 2016 comply with the net residential density and minimum area per family requirements, as follows:

(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) ~~and shall be required to comply with the net residential density and minimum area per family requirements.~~ 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.

The recommendation to remove this portion of the proposed amendments is based on an understanding that previous Councils added the maximum net residential density and minimum area per family standards to the Zoning Ordinance solely to accommodate cluster zoning and without intending that they apply to the nonconforming lot provisions.

Thank you.

Attachments

1. Chapter 27 Amendments re: Nonconforming Lots as Amended at First Reading 8-1-16.
2. Interim City Manager's Position Paper for the August 1, 2016 City Council First Reading of the Nonconforming Lots Amendments.
3. Planning Director Memo to the Council 5-18-16.
4. Map of Lots Containing Single-Family Homes (with a comparison of actual lot sizes and density versus those required by ordinance).
5. Example from Thornton Heights of Current Parcels Compared with the Original Lots of Record.
6. Link to SPC-TV Video of the July 25, 2016 City Council Workshop (Item #1 on the agenda):
<http://vp.telvue.com/preview?id=T00282&video=283817>
7. Link to SPC-TV Video of the August 1, 2016 City Council Meeting (Item #11 on the agenda):
<http://vp.telvue.com/preview?id=T00282&video=284394>