Proposed Amendments to City of Portland, Code of Ordinances, Chapter 14, LAND USE, Article III, Zoning, Section 14-47. Definitions.

Submitted by Sheridan CER, LLC, 5/7/2014

PROPOSED TEXT AMENDMENT

Sec. 14-47. Definitions.

The following words shall be defined as set forth below for use in this article. Definitions set forth in the building code of the city shall apply to words not herein defined: [this is unchanged from current text]

Proposal to amend the definition of Lot as follows:

Lot: For purposes of this Article III (Zoning), ~~Eexcept when reference is made herein to a lot of record~~, a lot is a single ~~tract~~ unit of land located within a single block which at the time of filing for a building permit or certificate of occupancy is designated by its owner or developer as a unit ~~tract~~ to be used, developed, or built upon ~~as a unit~~ under single ownership or control. For purposes of this Article III, and notwithstanding Section 14-433, lots that are contiguous and in common ownership shall not merge and shall be considered as individual lots for purposes of this Article III, unless otherwise designated by their owner or developer. If the designation or creation of the lot will constitute a subdivision as defined in 14-493, then the requirements of Article IV (Subdivision) shall apply.

Proposal to insert a new definition of Lot of record as follows:

Lot of record: A unit of land separately described as having unique boundaries, whether (1) defined by reference to abutters, metes and bounds, a tax map, or otherwise in a recorded deed of conveyance, or (2) designated as a numbered lot on a recorded land plan which received such municipal approval, if any, as was required at the time of recording, and, in either case, recorded in the Cumberland County Registry of Deeds by June 5, 1957, or by such later date as may be required for a lot of record or as may be specified as a required date of existence in an applicable ordinance in this Article III-. A lot of record shall retain that status even if (1) the owner proposes to combine adjacent land with the lot of record or (2) an owner of two contiguous lots of record opts to adjust the shared property line in designating the boundaries of each unit to be used, developed, or built upon under single ownership or control so long as, in either case, none of the lots involved become less conforming with respect to the minimum lot size or other applicable dimensional requirements of this Article III.

Original text shown in black, not underlined.
Deletions from original text shown as ~~strikeouts.~~
New text shown in red and underlined.

EXPLANATION OF PROPOSED AMENDMENT

These proposed amendments do not address or change the minimum requirements (e.g. lot size, setbacks, etc.) for a lot to be buildable. They merely clarify the definition of what constitutes a lot for purposes of the zoning ordinance. And they add a new definition of a "lot of record", a term that is used throughout the zoning ordinance but not defined in that ordinance. Using these clarifications of lot and lot or record, the City and applicants will then look to the rest of the zoning ordinance (existing or as it may be amended in the future) to determine whether the lot can be developed.

Statement of the Problem:

There is a need for this amendment for three reasons: (1) the existing language fosters a certain amount of confusion between the zoning ordinance and the subdivision ordinance; (2) the City's current interpretation that certain lots under common ownership merge into one lot treats similarly situated property very differently depending merely upon the identity of the owner of adjacent land; and (3) the current merger interpretation is contrary to the City's housing policy and sustainability goals.

The Zoning Ordinance is currently being interpreted by at least some City employees to require the "merger" of two adjacent lots owned by the same person or entity unless the developed lot is a legally conforming lot under the current zoning ordinance. A majority of the lots in the City, particularly those in the earlier-developed R-5 and R-6 zones, fail to conform to the existing minimum lot size because current minimum lot sizes are typically larger than the historic pattern of development.

Under current interpretation, if one individual owns two adjacent lots, one developed and one vacant, it is probably going to be impermissible to develop the vacant lot as a separate lot because it is highly likely that the developed lot fails to meet the current minimum lot size. However, if that vacant lot were owned by any other individual, it might be eligible for development under other zoning provisions.

For example, under Section 14-433, even though the R-6 minimum lot size is 4,500 square feet, a lot of 3,000 square feet, *if not owned by someone who also owns an adjacent parcel*, may be developed if it can meet applicable yard dimensions.

Similarly, due to the existence of the word "lot" in the R-6 small residential lot development provisions of Section 14-139(b), the City's current interpretation is that vacant lots which could otherwise be developed under the small lot provisions may not be developed *if the vacant lot is adjacent to a nonconforming developed lot owned by the same person.*

Eliminate Confusion Between Zoning and Subdivision:

It is difficult to determine precisely how the merger provision got read into the zoning ordinance definition of a lot. However, it is not necessary to fully determine its genesis in order to fix it.

Zoning Ordinance Section 14-47 states that its definitions apply only to the zoning ordinance (Article III). It appears that confusion is being created by the use of the word "tract" within the definition of lot. "Tract" is not defined anywhere in the zoning ordinance. However, "tract" is defined in Article IV, Subdivisions, to mean "all contiguous land in the same ownership" (Article IV. Subdivisions, Sec. 14-493. Definitions.).

But the Land Use Code states that Article IV, and by extension the definitions contained within it, are only intended to govern subdivision of land (Sec. 14-492). Subdivision is a term of art derived from state statute, meaning the division of a lot, tract or parcel of land into three (3) or more lots . . . within any five-year period." (Sec, 14-493) There are a complex series of inclusions and exceptions to apply in calculating whether a proposed division of land or structure constitutes a subdivision. Considering all land in the same ownership to be one tract for purposes of determining whether it has been divided into 3 or more lots makes sense in the context of subdivision law. However, there is no justification for reading the subdivision concept of merger into the zoning ordinance, which regulates what development can occur on non-subdivisions of one or two lots. It is clear that definitions contained in Article IV, Subdivisions, should not somehow be read into the division of a piece of land into at most two lots.

The proposed amendment removes the word "tract" from the zoning ordinance definition of "lot." It clarifies that this definition is for Article III, Zoning only. It further states that no lots in common ownership shall automatically be considered to have merged; the owner may request that two lots be considered to have merged into one lot that will be developed under single control, but merger will not be imposed by the City. Finally, it clarifies that if any designation or creation of a lot does meet the definition of a subdivision (3 or more lots within any 5 year period), it will be subject to the additional requirements of Article IV, Subdivision.

Treat Similarly Situated Lots Equally:

The current interpretation of the zoning ordinance distinguishes between two identical parcels of land based upon whether the owner of any adjacent land is the same individual or entity. It puts a premium upon owners being savvy enough to acquire adjacent parcels under different names, such as acquiring one developed parcel in the name of one spouse, and acquiring the second vacant parcel in the name of the other spouse. In that case, the vacant parcel may be developable. But if the spouses bought both parcels in both names, if the developed parcel is nonconforming as to lot size, then they suddenly, and probably without warning, have acquired a side yard rather than a developable parcel.

There is no provision in the Zoning Ordinance which clearly puts City landowners on notice of the very significant consequences that may accrue depending upon how they take title to adjacent parcels of land. There is no merger provision, *per se*. Section 14-433 comes at it in backwards fashion by excluding from its relief provisions lots which are "held in separate and distinct ownership from adjacent lots." And to the extent that the word "tract" in the definition of "lot" is applied to impose merger, that is even more obscure.

The April 4, 2014 memorandum from Planning Staff to the Housing & Community Development Committee on the work in progress on proposed R-6/R-7 dimensional requirements and related amendments states one of the goals is to reduce certain dimensional requirements to make it possible to replicate the historic pattern of development. It also says it proposes "to eliminate the so-called 'lot merger rule' which requires contiguous lots of record under common ownership to be treated as a single lot."

The proposed amendment is entirely consistent and compatible with developing R-6/R-7 package of amendments. However, it is different because it gets at the definitional heart of the problem by separating the Article III Zoning provisions from the Article IV Subdivision provisions. The "so-called lot merger rule" lives in the definition of lot, not merely in 14-433.

The proposed amendment would get rid of any distinction based upon the ownership of adjacent land by eliminating the Section 14-433 exclusion and by amending the definition of "lot." This is a simple change which can easily be made now, without requiring owners to wait for the entire R-6/R-7 amendment process of developing the final recommendation, getting neighborhood feedback, and going through the Planning Board and City Council workshop and public hearing process. Owners will have the option of going forward with a development applications now, under existing lot size and dimensional requirements, or waiting until the possibly more favorable package of R-6/R-7 amendments are finalized.

The effect of the amendment would merely be to treat identical lots the same, regardless of the adjacent ownership pattern. This amendment would make no substantive change in dimensional requirements. It would merely mean that if a lot could be developed under existing zoning by an owner who held no contiguous or adjacent land, it could now also be developed in the same way by an owner who happened to own contiguous or adjacent land.

Make the Zoning Ordinance Consistent with the City's Housing Policy and Sustainability Goals:

In the early years of zoning, there was typically a goal of phasing out non-conforming uses and lots that had developed prior to adoption of any zoning ordinance. Frequently cities administered the zoning so as to get rid of undesirable uses and undersized lots which had been established prior to the adoption of larger minimum lot sizes. Unlike some other zoning ordinances, Portland's zoning ordinance does not have a specific merger provision. While the overlay of merger concepts into the zoning ordinance is not unusual, Portland's ordinance is notable for lack of clarity on the matter.

But even if an effort to phase out non-conforming lots was a goal after adoption of zoning in Portland in the mid-20th century, the City has gradually reversed itself on that position with regard to residential lot size. Over the last 15 years, Portland's Planning Department has explored various ways to amend the zoning to make it possible for developers to erect in-fill housing on a scale which is compatible with the historic, pre-zoning pattern of small lot, high density development. The R-6 and R-5 small lot development amendments and the development

of the R-7 zone are examples of this trend. Similarly, in 2002, the housing component of the comprehensive plan embraced as a goal accommodation of more housing in the City to achieve and maintain a 25% share of Cumberland County's population. Among the strategies adopted to achieve this goal were to increase the amount of higher density housing in strategic locations and to "encourage development on vacant lots along accepted city streets." (Housing: Sustaining Portland's Future, Policy #5, Infill Development, p. 20, 2002) The goal of increasing housing density in the urban core, particularly as a way to provide viable transit alternatives to single occupancy vehicles, was again endorsed as a goal in 2009. (Sustainable Portland, p. 25, September 24, 2009).

The proposed amendments, by eliminating any distinction between vacant lots based solely upon the identity of owners of contiguous land, makes the City's zoning policy consistent with its comprehensive plan by encouraging more housing. It would not disqualify an owner of a vacant lot who also own a contiguous, developed non-conforming lot from trying to meet the standards of either 14-433 or applicable small lot provisions. Similarly, it would encourage a scale of construction compatible with the historic pattern of platted lots. This is a much better alternative for our urban fabric than forcing a merger of lots, which may have unintended consequences. It might encourage demolition of existing structures to clear the lot for construction of a large monolithic building, or result in the awkward connection of major new construction with an existing building to create one joined structure, as would be allowed by current zoning.

Lots of Record Amendment

The proposed lot of record amendment merely provides a definition because there is currently no definition in the zoning ordinance. It allows lots to qualify as lots of record either by virtue of being uniquely described in a recorded deed of conveyance, or being platted on a subdivision plan which had the necessary municipal approvals, if any, which would have been required as of the date of recording. The proposed amendment refers both to a lot of record as of a specified date or a lot which was in existence as of a specific date because both forms of reference are used in the current zoning ordinance. The last part of the definition clarifies that there is some flexibility in designating the boundaries of the lot which is to be developed under single ownership or control while still retaining the lot of record classification. It allows the lot which qualifies as a lot of record to be expanded by the owner to include with that lot adjacent land in designating the unit to be used, developed, or built upon under single ownership or control. Similarly it allows the owner of two contiguous lots of record to adjust the shared boundary line between the two and then develop them as separate lots so long as neither lot becomes less conforming with respect to minimum lot size or other applicable dimensional requirements. This allows for reasonable adjustment of boundaries within adjacent parcels under the same ownership rather than rather than requiring the more complicated and convoluted use of easements and/or licenses to reach essentially the same result.