PLANNING BOARD REPORT
PORTLAND, MAINE

Amendment to Division 29
Housing Preservation and Replacement Ordinance
City of Portland, Applicant

Submitted to: Portland Planning Board
Public Hearing Date: November 10, 2015

Prepared by: Jeff Levine, Director

I. INTRODUCTION

A public hearing has been scheduled to consider a proposal initiated by City staff and approved by the Housing and Community Development Committee at their meeting on October 14 to amend Division 29 of the Land Use Ordinance relating to housing preservation and replacement.

In addition to legal ads appearing in the November 2, 2015 and November 3, 2015 editions of the Portland Press Herald, notices were sent to the Interested Parties List.

II. STAFF PROPOSAL

Staff is proposing that three changes be made to Division 29:

- Requiring that any replacement units provided off-site be located within the same U.S. Census Block Group as the units removed;
- Adding a three year timeframe to situations where a performance guaranty or letter of credit is held in lieu of replacement units or a payment to the Housing Trust; and
- Adding a definition of “application” so that it is clear when a property owner makes a request for units to be removed.

The first two of these changes were recommended unanimously by the Housing and Community Development Committee of the City Council at their meeting on October 14. The third item is a housekeeping amendment added to this proposed set of amendments by staff.

III. BACKGROUND

The Housing Preservation and Replacement Ordinance was originally adopted in 2002 and last amended in 2011. The ordinance requires that anyone demolishing or otherwise removing housing units, with limited exceptions, replace the units or make a payment in the City’s Housing Trust. That payment is adjusted based on the cost of living, and is currently approximately $64,200 per unit.
The Housing Trust contributions have been a valuable way to produce replacement housing. The Trust is far more flexible than federal sources of funds and provides a tool for the City to support creation of workforce and affordable housing at no direct cost to the City’s general fund. Most recently, the Housing Trust was used to help fund the 65 Munjoy Street project, an eight unit affordable home ownership project.

However, as the housing market has strengthened, there have been fewer units being removed. In addition, since there are housing developments occurring in the City, those wishing to remove units have been seeking to partner with developers of other housing projects to replace the lost units. In theory, that means the ordinance is functioning as planned. However, there is a need to clarify the rules under which units are actual replacements, and not simply housing that may have been developed elsewhere in the city regardless.

There is also a need to bring closure to situations where the City holds performance guaranties in lieu of replacement units or payments to the Housing Trust.

Finally, there is an implementation concern with the existing ordinance. It requires that replacement units not be in the formal development review process before an application is received to remove the units needing replacement. However, the code is unclear as to what that “application” is. Our initial thought is that the term means an application to demolish. We propose clarifying that it means a written intent to demolish so an applicant doesn’t have to prepare the full set of materials for a demolition permit before knowing if there is approval for the replacement units.

IV. Land Use Policy and Comprehensive Plan Considerations

These changes are consistent with the Comprehensive Plan goal that “[t]he existing housing stock will be enhanced and preserved.” They are also consistent with the three purposes of Division 29:

1. To promote and facilitate an adequate supply of housing, particularly affordable housing for all economic groups;
2. To limit the net loss of housing units in the city;
3. To preserve housing in zones where housing is permitted for in the city for all residents in order to promote the health, safety and welfare of its citizens.

These changes will better limit the net loss of housing units in residential zones in the city by ensuring that replacement units are truly related to the units being removed, both geographically and in terms of timing.

V. DRAFT OF PROPOSED AMENDMENT

A draft of the proposed text amendment follows.

VI. SUMMARY

The amendments are summarized in III. Background above.
VII. MOTIONS FOR THE BOARD TO CONSIDER

On the basis of the application, plans, reports and other information submitted by the applicant, findings and recommendations contained in the Planning Board Report for the public hearing on November 10, 2015 and on the basis of the testimony presented at the public hearing, the Planning Board finds that the proposed zoning text amendments [is or is not] consistent with Portland’s Comprehensive Plan and [recommends or does not recommend] adoption of the amendments to the City Council.

ATTACHMENTS

Staff Attachments

1. Memorandum to Housing and Community Development Committee (9/25/15)
2. Memorandum to Housing and Community Development Committee (10/8/15)
PROPOSED DIVISION 29 AMENDMENTS
Sec. 14-483. Housing preservation and replacement.

(a) Purpose. The purpose of these regulations is:

1. To promote and facilitate an adequate supply of housing, particularly affordable housing for all economic groups;

2. To limit the net loss of housing units in the city;

3. To preserve housing in zones where housing is permitted for in the city for all residents in order to promote the health, safety and welfare of its citizens.

(b) Definitions.

Application. Except when specifically defined otherwise, “application” means the first written notification to the Department of Planning & Urban Development of intent to remove dwelling units. This application will expire if not followed up with an application to demolish the units in question within one year.

Dwelling unit. A dwelling unit is one (1) or more rooms with private bath and kitchen facilities comprising an independent self-contained dwelling unit. For purposes of this section only it also includes single family, two-family and multi-family dwellings and any dwelling units in those dwellings, or dwelling units, or rooms that people rent or sleep in within lodging houses, dormitories, shelters and sheltered care group homes.

Loss of dwelling or dwelling unit for purposes of this section means the elimination or conversion to nonresidential use of a dwelling or dwelling units; elimination includes dwelling units lost due to demolition unless the demolition resulted from
accidents outside of the owner’s control, fire, natural disasters, or acts of war.

Original site means the location where the demolition or conversion to non-residential use of dwellings and dwelling units will take place.

(c) Applicability. Except as otherwise provided in this section, this section shall apply to the loss of three or more dwelling units in a five year period, provided that such dwelling units were a legally registered residential use as of July 1, 2002.

Except as otherwise provided in this section, this section shall also apply to proposals that (a) result in the loss of fewer than three (3) dwelling units which were legally registered residential use as of July 1, 2002, and (b) creates surface parking.

Determination of number of the dwelling units within a structure or structures and the number of units lost will be based on records in the Department of Planning and Urban Development indicating the legal, registered use of the property since July 1, 2002 through the time of application. The actual use of the property for purposes of applicability of this section may be rebutted by the owner by proof of documentary evidence including but not limited to photographs, letters, and sworn affidavits. The Planning Authority may conduct its own investigation of the actual use and shall determine the applicability of this section based on the totality of the evidence.

(d) Exemptions.

This section does not apply to:

1. Consolidation, elimination or reconfiguration of one (1) or more dwelling units within an existing structure, as long as all the resulting units remain as dwelling units after such consolidation, elimination or reconfiguration, except as provided by subsection 5 below. Conversion of a dwelling unit to a hotel or motel room shall not qualify for the exemption provided by the paragraph.
The amendments to paragraph (d)(1) approved by the City Council on June 6, 2011 shall have an effective date of April 25, 2011 but not apply to any final determination regarding the applicability of this section made by the Planning Authority prior to April 25, 2011.

2. Proposals that result in a number of units equal to or greater than the number of units lost as determined by the Planning Authority; or

3. Grandfathered dwelling units existing in zones which no longer permit residential uses.

4. Property which has been ordered demolished by the City, pursuant to 17 M.R.S.A. §2851, et seq., as amended, except where it is determined by the Building Authority that the deterioration was caused by neglect or lack of maintenance.

5. Subparagraph 1, above notwithstanding, the conversion to a non-residential use of any dwelling units located on the ground floor of a building within a business zone.

(e) Site plan administrative authorization or approval required. Notwithstanding any other provision of this section, a person who proposes to demolish or to convert to a nonresidential use three or more dwellings or dwelling units in the City, in a zone where such use is otherwise permitted, must first obtain administrative authorization or site plan approval from the City’s Planning Authority or Planning Board pursuant to Sec. 14-521, et. seq.

In addition the requirements of 14-521, et. seq., where this section is applicable, the applicant must also submit a statement certifying the number of dwelling units to be demolished or converted to nonresidential use, as well as a description of the characteristics of each of those units.
(f) Tenant Notification Requirements. Prior to elimination as a result of demolition or conversion to non-residential use, the owner shall:

1. Provide the Planning Authority a list containing the name of each tenant currently residing in the dwelling units to be demolished or converted to non-residential use, as well as verification of compliance with tenant notice requirements of this section.

2. Deliver to each tenant who occupies such a dwelling unit a written notice to vacate the unit. The notice shall either be sent by certified mail, return receipt requested, or served in-hand. The notice will grant the tenant not less than ninety (90) days from the date of receipt of the notice to vacate the unit; and

3. File proof of service of the notice with the Planning Authority.

(g) Housing Replacement Requirements. In addition to the requirements of 14-521, et. seq, the Planning Authority shall require, as a condition of approval, that an owner shall replace any dwelling units that are demolished or converted to non-residential use.

This section may be satisfied in any one of the following ways:

1. Construction of Units. The construction of housing units within a new structure or a new addition either on site or off-site;

2. Residential Conversion. The conversion of a nonresidential building to residential use; or

The applicant may use either of the two methods or a combination of the two to fulfill their replacement requirement.

(h) Replacement Unit Requirement. In addition to the foregoing, all replacement units built pursuant to subsection (g)(1) or (2) above shall:
1. Be located within the City of Portland the same Census Block Group as the parcel from which the units are being removed.

2. Not previously have been on the market as of the date of application.

3. Be situated within a development which has not been a candidate for site plan approval as of the date of the application; and

4. Be comparable in size to the units replaced; for the purpose of this section, “comparable in size” means that the aggregate size of the replacement units will be no less than 80% of the size of the aggregate of the original units.

(i) Contribution to the Housing Trust Fund.

1. The applicant may meet the requirements of this section by depositing $50,000 for each dwelling unit into the City’s Housing Trust Fund in section 14-489.

2. Beginning on January 1, 2004 and annually thereafter, the amount of the contribution shall be adjusted by multiplying this amount originally deposited for each unit by a fraction, the denominator of which shall be the “Consumer Price Index for Urban Wage Earners and Clerical Workers ("CPI-W"),” U.S. City Average, “All Items Index,” as published by the United States Bureau of Labor Statistics (“the Index”) for January 1, 2003 Year, and the numerator of which shall be the Index for the same month in each subsequent year. In the event that the Index is not then in existence, the parties shall use such equivalent price index as is published by any successor governmental agency then in existence; or, if none, then by such nongovernmental agency as may then be publishing an equivalent price index, in lieu of and adjusted to the Index. If the Index shall cease to use 1982-84 equals 100 as the basis of calculation, or if a substantial change is made in the terms or number of items contained in the Index, the Base Index shall be...
adjusted to conform to such change, using such computation thereof, if available, as shall be employed by the United States Department of Labor in computing same. Notwithstanding anything herein to the contrary, contributions made after January 1, 2004 shall not be less than the amount originally required to be deposited pursuant to sub-section (i)(1) for each rooming or dwelling unit.

(j) Performance Guaranty/Letter of Credit. Owners or affiliates must post a performance guaranty in the form of a letter of credit, or other security acceptable to the city attorney in amount equivalent to the amount the applicant would have been required to contribute to the City’s Housing Trust Fund if the applicant had chosen that option pursuant to sub-section g. Such a performance guaranty shall be valid for no more than three years, after which the full amount due shall be provided to the City’s Housing Trust if replacement units satisfying the conditions of this Division 29 do not have Certificates of Occupancy.

(k) Partial waiver of replacement requirements. Any owner who has applied for site plan review for elimination or conversion to non-residential use of dwelling units may apply to the Zoning Board of Appeals for a partial waiver from the housing replacement requirements of this section. Such waiver may be a downward adjustment of up to fifty percent (50%) of the owner’s housing replacement obligation if the owner establishes to the board’s satisfaction that:

1. The proposed development is consistent with the comprehensive plan;

2. The proposed development provides significant value and benefit to the immediate and surrounding neighborhood, including, but not limited to, community enhancement, social benefits or job creation;

3. The applicant demonstrates with objective evidence that the imposition of the requirements of this section would impose such an economic burden upon the project relative to its scope;
that it renders the project impossible to develop; and

4. The requested relief does not constitute a grant of a special privilege inconsistent with the limitations upon similar properties.

The Zoning Board of Appeals must make positive findings on each of the four (4) criteria above in order for any such adjustment to be valid. An applicant aggrieved of a decision of the Zoning Board of Appeals may appeal a decision under this sub-section pursuant to Sec. 14-553 of the City Code.

(l) Effect of Other City Ordinances.

1. Historic Preservation. Nothing in this division shall permit the demolition or conversion to non-residential use, of dwelling units in residential property protected by the Historic Preservation Ordinance (Sections 14-601, et seq.), except as permitted by that ordinance.

2. Conditional Zone. A conditional zone may not be used to circumvent the application of this section. The terms of this section shall apply to any conditional zone which involves dwelling units affected by this section. Notwithstanding the foregoing, nothing herein shall be deemed to prevent the City and the applicant from agreeing to terms which exceed those imposed by this section by means of a conditional zone.

(m) Appeals. Any applicant aggrieved by a decision of the Planning Authority under this section may appeal to the Zoning Board of Appeals within 30 days of that decision.
TO: Councilor Donoghue, Chair  
Members of the Housing and Community Development Committee

FROM: Jeff Levine, Director, Planning & Urban Development Department

DATE: September 25, 2015

SUBJECT: Review of Housing Replacement Ordinance

Staff is seeking clarification from the Committee regarding the intent and purpose of the Housing Replacement Ordinance (HRO).

The HRO was created to limit the net loss of housing units resulting from the demolition of residential property, conversion to non-residential uses and the reduction or consolidation of dwelling units. The ordinance applies to the loss of three or more dwelling units and requires that the unit(s) be replaced or a deposit be made to the City’s Housing Trust Fund for each unit lost.

There are certain instances when exemptions are allowed. This is one of the areas for which staff is seeking clarification. Possible future action may include (1) the creation of enabling regulations that would clarify how the ordinance is applied; (2) a re-write of the ordinance to clarify certain provisions; or (3) take no action.

A copy of the Housing Replacement Ordinance (City Code Section 14-483) is attached.
Memorandum

To: Housing and Community Development Committee
From: Jeff Levine, Director
Date: October 8, 2015
Re: Housing Replacement Ordinance

As per your direction at the October 7 meeting, I have prepared two draft amendments to the Housing Replacement Ordinance (Division 29.) One of these drafts would require replacement units to be on the same parcel as the demolished units. The second draft provides two options for off-site replacement. The first option requires that the replacement units be within a specific distance (1500 feet for the purposes of discussion.) The second option requires the replacement units be within the same Census Block Group as the demolished units. That could potentially be Tract if you felt Block Group was too restrictive. By comparison, the current requirement is simply that the replacement units be within the City of Portland. I also include a Census Block Group map with a scale for reference.

<table>
<thead>
<tr>
<th>Current Language</th>
<th>Draft 1</th>
<th>Draft 2 Option 1</th>
<th>Draft 2 Option 2</th>
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<tbody>
<tr>
<td>Units must be within the City of Portland</td>
<td>Units must be on the same parcel, as defined</td>
<td>Units must be within the same Block Group/Tract</td>
<td>Units must be within 1500 (or other finite amount) feet</td>
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Though this issue didn’t come up in your discussion, I’d also like to propose a timeframe for provision of replacement units. Presently there is no deadline. As a result, we could be asked to hold a Letter of Credit indefinitely while an owner evaluates his/her options. I would recommend a timeframe be added to this option. I’d recommend a starting point for this discussion of an outside limit of three years.
City of Portland
Block Groups > 51% Low Income
Target Area: Bayside Neighborhood