



MEMORANDUM

To: The Honorable Mayor and City Commission
From: Carrie Richter, Deputy City Attorney
Laura Terway, AICP, Community Development Director
Re: Lot Averaging
Date: December 4, 2017

Chapter 16.12.050 of the Oregon City Municipal Code (OCMC) allows subdivisions to include lots that are up to 20% smaller than the minimum lot size, provided the average size of all of the lots within the subdivision meet the minimum lot area identified in the underlying zone. For example, lots within the “R-10” Single-Family Dwelling District could contain lots which are 8,000 square feet, provided the average of all of the lots (excluding tracts dedicated to non-residential uses) was at least 10,000 square feet. Note that though the lot sizes may vary, all lots are required to comply with the minimum lot width and depth of the zoning designation.

The lot averaging provision was first adopted in mid-2004. At the time it allowed a 10% reduction in lot size. A minor amendment was adopted later that same year to specify the zoning designation which could utilize lot averaging. In 2008, the code language was altered to increase the lot size reduction to 20%. The full text of these provisions is set forth in Exhibit 1.

Allowing lot area averaging achieves a number of objectives. First, it allows greater flexibility for development. Because development occurs within space constrained by property boundaries, environmental protections, street layouts, and natural resources, the ability to utilize smaller lot sizes in some areas allows for a more efficient use of land. Second, it allows for the prioritization of street connections, which are drawn before lot dimensions are finalized. Last, it results in a variety of lot sizes. This is identified as a priority in the Comprehensive Plan under Goal 10.1. Lastly, the resulting smaller lot sizes may result in lower priced homes which is identified as a priority in the Comprehensive Plan Policy 10.1.4 and Goal 10.2.

The City has recently received a number of concerns about the lot averaging provision, including:

- The code does not limit the number of lots that are smaller than the minimum lot size,
- Excessively large lots with building limitations are used to skew the average;
- There is no prohibition for placing the smaller lots adjacent to neighboring properties;
- The 20% reduction is significant; and
- The standard is allowed outright and is not discretionary.

As a Type II, non-discretionary standard, lot averaging has been used widely since its adoption, although a comprehensive review of its impact has not been considered. At the time of adoption, the City also removed a planned unit development (PUD) process which allowed for greater variety of lot sizes and housing types through a Type III Planning Commission review. Though there is very limited discussion in the minutes of the adoption process, the lot averaging provision allowed for limited flexibility through “clear and objective” standards in a streamlined review process, which resulted in greater certainty for applicants and neighbors.

Amending the Language

A few options are available if the City Commission is interested in amending the provision. Note that none of the options will have any effect on applications that have already been filed with the city. ORS 227.178(3)(a) provides that approval or denial of an application must be based upon the standards and criteria that were applicable at the time that the application was first submitted.

Any amendments to the code will require a public review process that includes City Commission review. If the amendments reduce the ability for property owners to develop property, notice is required to be mailed to all property owners within the urban growth boundary. In addition, notice must be provided to the Department of Land Conservation and Development 35 days prior to the first hearing. OAR 660-018-0022 allows for a shorter period in cases where “emergency circumstances beyond the control of the local government require expedited review.” Failure to comply with these requirements could come in the form of challenges at federal or state court, or at LUBA.

It is unclear the extent to which changing or eliminating the lot averaging provisions could affect the City’s supply of lands available for housing as required by Goal 10 of the Comprehensive Plan and Statewide Planning Goals. The number of units is calculated based on the land area less the land dedicated to streets, environmentally sensitive areas, open space tracts, or land which does not allow for the construction of a home. The resulting number is then divided by the minimum lot size in the zoning designation to provide a maximum number of lots within the development.

For example, an 115,000 square foot property may have 15,000 square feet of right-of-way, leaving 100,000 square feet of net developable area. If the land division was in the “R-10” Single-Family Dwelling District, it would yield 10 lots.

The concern is that physical constraints due to street locations or natural hazards may limit the ability to site each of the 10 lots in a manner which complies with the dimensional standards of the zoning designation. Thus, allowing lot averaging with 20% reduction may increase our housing capacity within the City. It is likely that elimination of the lot averaging provision could result in fewer lots within the City and less housing diversity, which is in conflict with Comprehensive Plan policies that encourage efficient development of housing and a diversity of housing types.

The Fair Housing Act prohibits housing discrimination, or housing that has the effect of treating groups differently based on race, religion, sex, and familial status and disability. This applies even when it is race-neutral or not discriminatory in its intention. The City Commission must consider the effects of amending the language, particularly if the result would be the production of fewer units. If we do not have an updated housing inventory identifying that we have sufficient housing supply or capacity of buildable lands needed to accommodate current and future residences, it could lead to legal challenges. Staff is working with Clackamas County on a county-wide housing inventory which could update our last plan completed in 2002, though it is unknown at this time what it will reveal.

As a result, Staff does not recommend eliminating the lot averaging requirements. Instead, to the extent that the City Commission agrees an amendment is necessary, limitations may be placed on the use of lot averaging so that it does not restrict the lot layout flexibility to any greater degree than necessary to resolve the identified concerns. Potential options to a *targeted amendment* to the language limiting lot averaging include:

- Limiting the number of lots which can be below the minimum lot size, for example 50%;
- Reducing lot sizes by 10% instead of 20%; or
- Not allowing lots on the perimeter of the subdivision to be smaller than the minimum lot size.

City Commission Options

Code Amendment through a Legislative Amendment Procedure

Should the Commission decide that a code amendment is necessary, a Legislative amendment to the OCMC would be subject to a series of hearings before the Planning and City Commission where the public would be given an opportunity for comment. Any such code amendment would have to be evaluated for compliance with the Statewide Planning Goals and the City's Comprehensive Plan. This process could include a variety of public outreach opportunities. Any such code amendment is anticipated to take approximately 6 months and would take effect upon adoption of an ordinance.

Interim Emergency Ordinance

The City could adopt an ordinance suspending application of OCMC 16.10.050 on an immediate but temporary basis, with instructions to staff to commence work on a formal, permanent amendment as soon as possible. The City Commission would need to provide adequate justification as to why an emergency ordinance is needed. This temporary ordinance could remain in place until a properly adopted code amendment replaces it.

Do Nothing

The last options could be to retain the existing language.

Conclusion

Staff requests the City Commission provide direction to the Planning Division regarding the lot averaging standards. Staff is ready to support the Commission by providing additional research, pursuing code amendments or answering questions.

EXHIBITS

1. History of the Provision
2. Comprehensive Plan
3. 2002 Housing Inventory