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## Introduction

- Roberts family were Oregon pioneers (the first arrived by covered wagon in 1846), family still has farm in Sweet Home and homestead in Benton County. Stan graduated from OSU, became an actuary, family has long vacationed at Cannon Beach.
- Stan and brother purchased a then-vacant lot in 2001 to build a shared family home; a previous home had been on this site for 50 years but was demolished after slide damage; can still see part of a foundation and the old driveway down from Hemlock.
- Contacted the current owners of Oswald/West cabin in 2018 and offered to buy lots to the east to enable further distance from the cabin and also offered to rebuild historic outbuilding (now derelict). They declined, so the Roberts proceeded to design a home to fit Cannon Beach standards.



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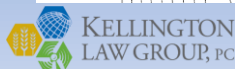
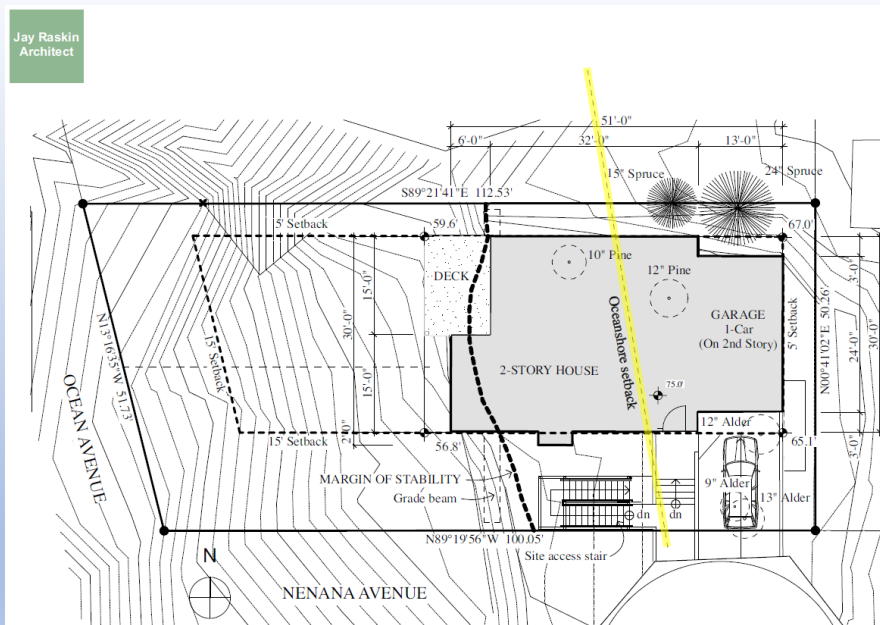
## Appeal of Development Permit Decision #20-04 (AA #20-02, 3 & 4)

- The Roberts applied for a modest 2,712 sq. ft. home on a 5,394 sq. ft. lot zoned residential which is listed as buildable on the city buildable land inventory.
- The home they sought was effectively denied per "Condition 2."
- Condition 2 tells the Roberts to submit and comply with an ocean setback survey for their property or apply for a setback reduction.
- Condition 2 effectively DENIES Roberts' application; DENIES any reasonable dwelling on lot.



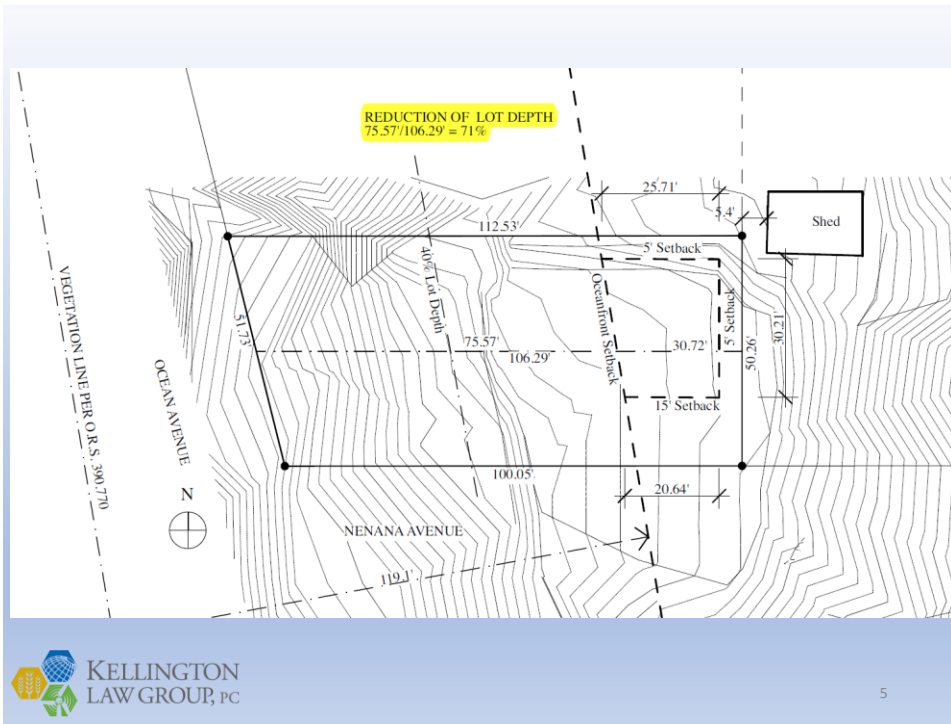
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## Condition 2 Unlawful as Matter of State Law

- City may not “condition an application” for housing on a “reduction in density” where “density applied for” is “at or below the authorized density level” in city’s code.

ORS 227.175(4)(c).

- State law defines “authorized density level” as “the maximum floor area” allowed by city code. ORS 227.175(4)(f).
- Condition 2 unlawfully conditions the Roberts application for their home on a reduction in density.

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## Condition 2 Unlawful as Matter of State Law

- Maximum floor area allowed under city code for 5,000-6,000 sq. ft. lots “shall not exceed 3,000 sq. ft.” CBMC 17.10.040(D)
- Application of OSS to Roberts’ property reduces maximum floor area by more than **50%**.
  - 3,000 sq. ft. → Less than 1,399 sq. ft.
- Condition 2 violates State Law ORS 227.175(4)(c)
- We are asking the Planning Commission to remove Condition 2



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## No Reason to Violate State Housing Law

- Removing Condition 2 complies with state law, and
- Importantly: this will harm no one; the Roberts dwelling as proposed impairs no one’s view:



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Roberts' home does not impair anyone's ocean views



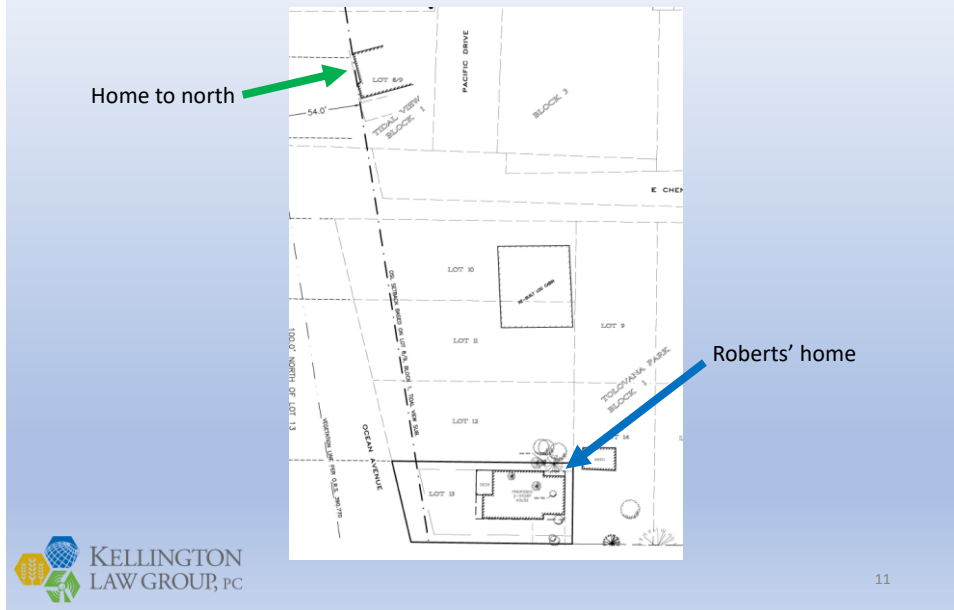
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Roberts' home replaces dwelling that had previously been on the property for 50+ years

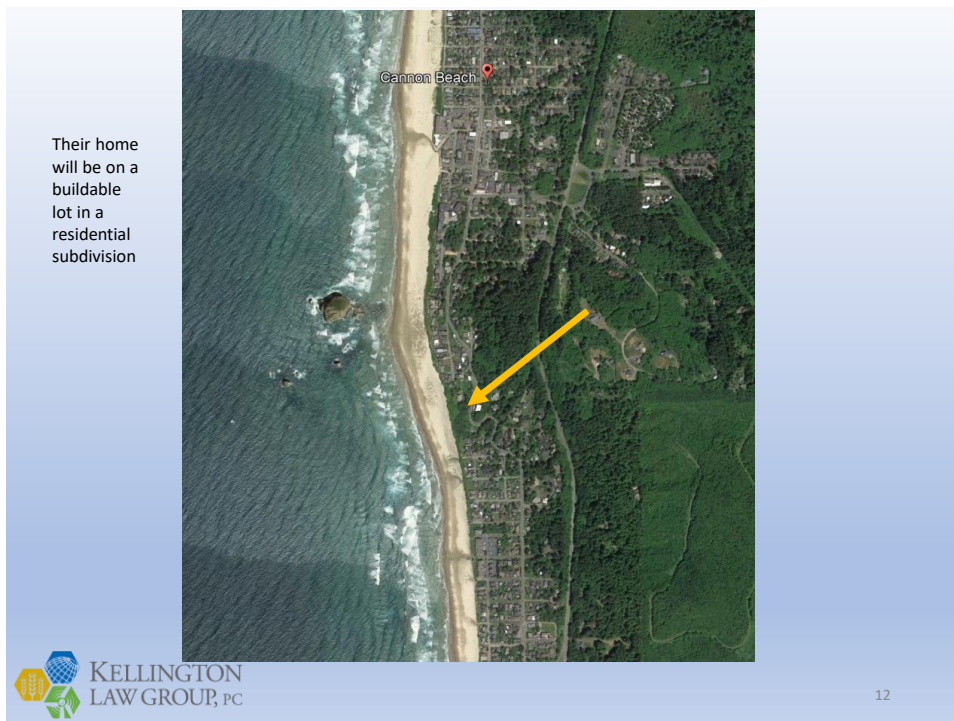


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Roberts' home is proposed to be situated significantly eastward of home just over 200' to north



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Roberts' property from beach



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Jay Raskin  
Architect



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## WEST ELEVATION

PROPOSED ROBERTS HOUSE NENANA STREET CANNON BEACH

10/7/20

1/8" = 1'-0"



The Roberts home is modest and designed in a pleasing Cannon Beach style. Allowing homes to be built on residential lots, takes away "tear down" pressure elsewhere

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## Architectural Depiction of Roberts' Proposed Home in Place



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Oswald cabin and house further north of Roberts' property



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## Condition 2 is Unlawful

- Application of OSS reduces buildable area of Roberts' lot by 71%
- No reasonable home can be built at all
- State law requires Condition 2 be removed.

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## Condition 2 Unlawful as Matter of State Law

- Other state law standards also prohibit the application of Condition 2 – which is a denial of the Roberts’ application ORS 197.307(4) and ORS 227.173(2)
- Requires standards, conditions and procedures be “clear and objective”
- And requires approval processes not add unreasonable cost and delay



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## Where Standards Are Not “Clear and Objective”

- Two circumstances:
  - If condition or standard involves subjective, value-laden analyses to mitigate impacts, it is unlawful
  - If condition or standard is ambiguous such as can be interpreted to support two diametrically opposed conclusions, it is unlawful.



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ORS 227.175(4)(b)(A), 197.307(4) and 227.173(2)

- The denial of the homes Roberts' applied for and imposition of Condition 2 is unlawful under state law.
- Condition 2 is not a clear and objective condition and is not based upon the application of clear and objective standards
- It has also improperly added unreasonable cost and delay to the Roberts' home.



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ORS 227.175(4)(b)(A), 197.307(4) and 227.173(2)

- No exceptions
- **City has burden** of establishing that the decision's standards, conditions and processes are capable of being imposed only in a clear and objective manner. ORS 197.831.
- **City fails to carry that burden**



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## City's OSS is Not Clear and Objective and Can't be Applied to the Roberts' Home

- OSS applies to “lots abutting the oceanshore”.
  - City code: “Lot abutting the oceanshore” means either:
    - A lot that abuts the “Oregon Coordinate Line”, *OR*
    - A “lot where there is no buildable lot between it and the Oregon Coordinate Line.” CBMC 17.04.320.
- City code OSS requires homes on lots “abutting the oceanshore” be setback a distance that is the “average” of the setbacks of “structures” also on “lots abutting the oceanshore” that are north and south, a distance of up to 200’.
- All these city code terms are ambiguous → Not “clear and objective” and it violates state law to apply them.



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## City's Previous Acknowledgment is Evidence OSS is not Clear and Objective

- Several months ago, PD told Roberts' planning consultant that because property Roberts' property abutted Ocean Ave., it was not subject to the OSS.
- Roberts' relied on that advice & invested a half million dollars+ to design home and perform required engineering work.
- Director reinterpreted meaning of “buildable lot” in challenged decision.
- The PD's own diametrically opposed interpretations on the same lot establishes ambiguity of OSS → not “clear and objective.”
- Condition 2 requiring application of OSS must be removed because the city OSS is not “clear and objective,” but rather capable of many interpretations.
- City can't carry its burden to prove otherwise.



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## “Oregon Coordinate Line” Not “Clear and Objective”

- Undefined in dictionary or any administrative rule
- State law defines “ocean shore” as “the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 *or the line of established upland shore vegetation, whichever is farther inland.*” ORS 390.605(2)  
(Emphasis supplied.)
- Is the term “oceanshore” in city OSS one of these?  
Who knows?



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## “Oregon Coordinate Line” Not “Clear and Objective”

- Ascertaining “line of established upland shore vegetation” requires value-laden judgment
  - What makes vegetation “established” or not?
  - Where is the “line”?
- Subject to any number of plausible meanings = Ambiguous = Not “clear and objective”
- The City OSS may not be applied & Cond 2 must be removed.



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## “Buildable Lot” Not “Clear and Objective”

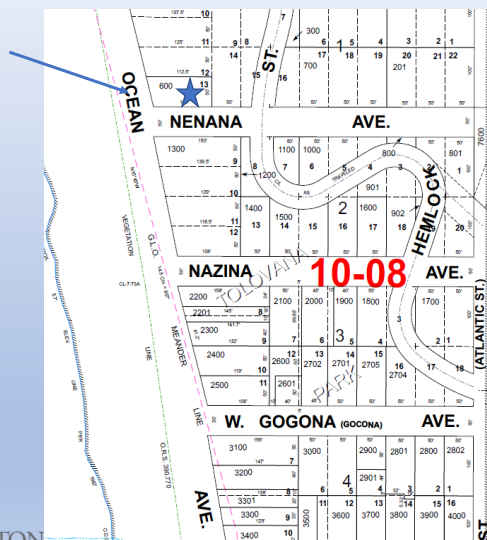
- What is a “lot” abutting the oceanshore? Also ambiguous.
- “Lot abutting the oceanshore” in city code is defined as “a lot where there is no *buildable lot* between it and the Oregon Coordinate Line.”
- Ocean Ave. is between Roberts’ lot and ocean
- Ocean Ave. meets city definition of “lot” – “a plot, parcel or *tract of land*.”



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## “Buildable Lot” Not “Clear and Objective”



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## “Buildable Lot” Not “Clear and Objective”

- Ocean Ave is “buildable” under **state law**
- ORS 197.779(2) allows “public property” to be developed with housing so long as property is not “inventoried as a park or open space”, is located within the UGB, and is “zoned for residential development.”
- Ocean Ave. is “public property”, within UGB and zoned residential (RL)



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## “Buildable Lot” Not “Clear and Objective”

- Ocean Ave. is also “buildable” under city’s own code definitions.
- Dictionary defines “buildable” as “suitable for building.”
- City code defines “building” as a “structure built for the support \*\*\* of persons, animals or property of any kind.” CBMC 17.04.085.
- City code defines “structure” as “an assemblage of materials extending above the surface of the ground and permanently affixed or attached \*\*\*”. CBMC 17.04.540.



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## “Buildable Lot” Not “Clear and Objective”

- Decision says Ocean Ave. is not a “lot” because CBMC 17.42 uses terms “lots or rights-of-way”
- But CBMC 17.42.030(A)(3) says that existing streets may be maintained on “lots or rights-of-way”
- Takes you back to question – What is a “lot”?
- Disclarity over whether Ocean Ave. is a “lot” illustrates ambiguity of term “lot” → Not “clear and objective”



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## “Buildable Lot” Not “Clear and Objective”

- Ocean Ave. is capable of being built with a “structure” (road, above ground) that would support pedestrians and vehicles.
- That means it is “buildable.”
- City’s contrary position that Ocean Ave. is not a “buildable lot” shows term is ambiguous → open to more than one plausible interpretation



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## “Buildings” Subject to OSS Cannot be Ascertained, Not “Clear and Objective”

- OSS determination requires identifying “residential or commercial structures”, on lots abutting the oceanshore, 200’ north or south of the Roberts’ property. CBMC 17.42.050(A)(6).
- Only structure within 200’ is Oswald Cabin, but, like Roberts’, the cabin is separated from ocean by Ocean Ave, so Cabin is also not on “lot abutting the oceanshore”
- ALSO....



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## “Buildings” Subject to OSS Cannot be Ascertained, Not “Clear and Objective”

- Cabin is further separated from ocean by a “plot”
- “Plot” is defined in city’s code as a “lot”

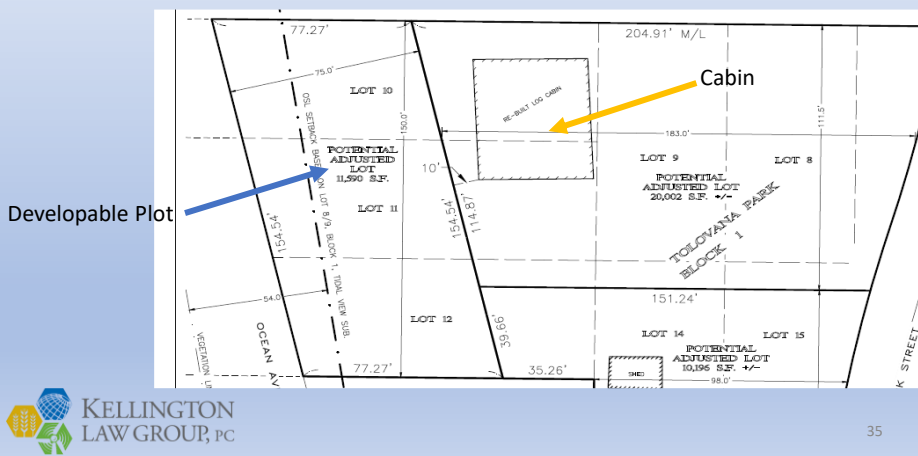


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## “Buildings” Subject to OSS Cannot be Ascertained, Not “Clear and Objective”

- 11,590 sq. ft. developable “plot” separates Cabin from ocean



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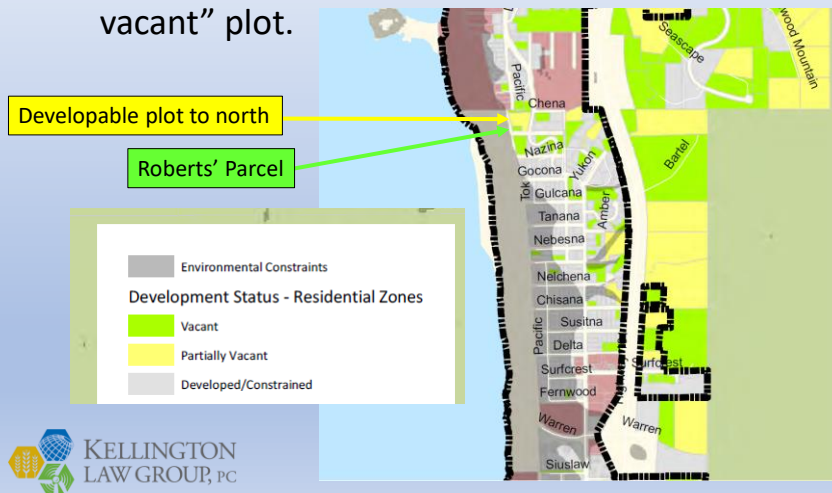
## “Buildings” Subject to OSS Cannot be Ascertained, Not “Clear and Objective,” cont.

- If a plot separates the Cabin from the ocean, then the Cabin is not on a “lot abutting the oceanshore”.
- This is what the city code says.
- Black’s law dictionary: “Plot” is “[a] measured piece of land.”
- CBMC 17.040.020(D)(1): Term “plot” to describe an “\*\*\* area of land to be developed \*\*\*.”
- BLI contemplates this plot will be developed.

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## “Buildings” Subject to OSS Cannot be Ascertained, Not “Clear and Objective,” cont.

- Cabin is situated on “oversized” and “partially vacant” plot.



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## “Buildings” Subject to OSS Cannot be Ascertained, Not “Clear and Objective”

- City disagreement establishes ambiguity of “buildings” subject to OSS → Not “clear and objective”

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## “Average” Not “Clear and Objective”

- OSS is determined by calculating the “average of the setbacks of each of the buildings” on land that abuts the oceanshore.
- Term “Average” is undefined, but contemplates more than one data point to consider
- Dictionary definition: “a single value (such as a mean, mode, or median) that summarizes or represents the general significance of a set of unequal values.”
- City use of only one data point (the Cabin) means there is no “average.”
- “Average” is ambiguous, not “clear and objective” and the OSS may not be applied and Cond 2 must be removed.



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## Condition 2 Not “Clear and Objective”

- Condition 2 requires Roberts’ to resubmit application in conformity with OSS or obtain approval of “setback reduction”.
- Condition 2 is not “clear and objective” by directing Roberts’ to obtain approval for a value-laden “setback reduction.”
- No dispute that the Roberts’ home and indeed no reasonable home can be established on Roberts’ lot if OSS is applied.
- PD Decision effectively requires Roberts’ obtain approval of “setback reduction”.



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## Condition 2 Not “Clear and Objective”

- “Setback reduction” applies subjective standards.
- Setback reduction standards = value-laden judgments:
  - Requires finding that “*significant* views of the oceans, mountains or similar features from nearby properties will not be obstructed any more than would occur if the proposed structure were located as required by the zoning district.” CBMC 17.64.010(4).



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## Condition 2 Not “Clear and Objective”

- Setback adj. standards = value-laden judgments, con’t:
  - Purpose “to provide for a *reasonable amount of privacy*, \*\*\* between adjacent structures. Setback reduction permits *may be granted where the planning commission finds that the above purposes are maintained \*\*\**”. CBMC 17.64.010(4)
  - Standard asks whether setback reduction would protect “*a neighboring property’s views of the ocean, mountains or similar natural features*.” CBMC 17.64.010(4)(b)
  - Requires “[a]ny encroachment into the setback will not *substantially reduce the amount of privacy* which is or would be *enjoyed by an abutting property*.” CBMC 17.64.010(7)
- State law is clear – such standards may not be applied to the Roberts’ request to build their home.
- Cond 2 must be removed.



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## City Procedures Not “Clear and Objective”

- Processes and procedures in city code and in Director’s decision are not “clear and objective,” and so violate state law.
- 3 separate appeals needed to challenge decision
- What process/procedure is city *supposed* to apply?
- What process procedure *has* city applied?
- City has not followed procedures for:
  - Limited land use decisions ORS 197.195;
  - Statutory permits ORS 227.175(10);
  - Other types of land use decisions, generally ORS 197.763;
  - Or for building permit approvals.



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## City has Unreasonably Added Significant Cost/Delays to Construction of the Roberts’ Home

- City may not impose regulations, including procedures that discourage “needed housing” through “unreasonable cost or delay”. ORS 197.304(4)(b)
- Roberts’ home is “needed housing”. ORS 197.303
- City has “discouraged” Roberts’ needed housing, by foreclosing it.
- State law requires that the PC remove Condition 2, and stop further delays and cost adding processes.



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## City has Unreasonably Added Significant Cost/Delays to Construction of the Roberts' Home

- City has unreasonably increased cost of Roberts' needed housing:
  - Forced to hire lawyers and consultants to prepare, pursue and file 3 appeals for a home that is supposed to be permitted outright use of their residentially zoned land.
  - Paid 3 appeal fees.
  - Condition 2 requires Roberts' to hire a surveyor and completely redesign house; *or* seek setback reduction which in turn requires an expensive process and preparation of an evidentiary case.
- "Unreasonable" because:
  - Home is permitted outright;
  - State law makes OSS inapplicable, but decision applies it anyway;
  - City's processes not clear and objective.
- Discourages not only Roberts but also others from developing housing consistent with the Comprehensive Plan in Cannon Beach.



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## Roberts' Property and Oswald Cabin are Not "Lots Abutting the Oceanshore"

- Even if OSS could be applied, you can find that the standard is met:
  - Neither Roberts' lot nor Cabin are a "lot abutting the oceanshore"
  - One structure (Cabin) cannot result in an "average"
- Therefore a default 15' setback should be applied.



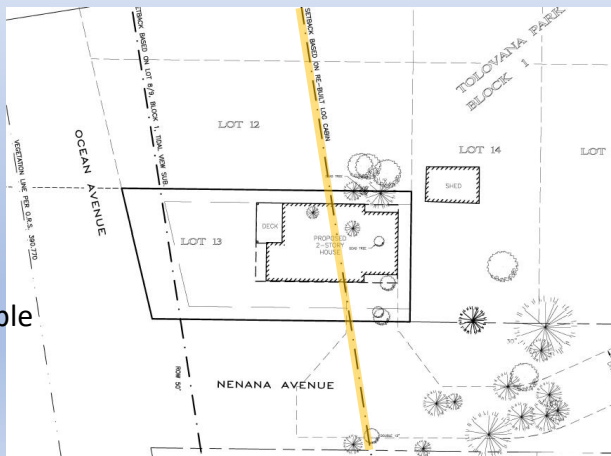
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## Condition 2 is does not Meet Unconstitutional Conditions Tests

- Condition 2 results in a “total wipeout” of the Roberts’ property when single Cabin is used to “average” OSS.

**71% of the  
Roberts’  
property is  
rendered  
undevelopable**



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## Condition 2 is Unconstitutional

- Leaves Roberts property with no economically beneficial use; and
- Substantially interferes with Roberts’ distinct investment-backed expectations to serve a purely private interest (cabin owners who do not wish to see another home near them).
- With no proportionality to the impact of the Roberts’ home (their home has no impact on anyone adequate to justify the draconian outcome of Condition 2).
- And no essential nexus to the objectives of any approval standard



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## Condition 2 is Unconstitutional

- Condition 2 serves no public interest - demanding Roberts' property be set aside for benefit of a single neighbor.
- No legitimate public interest in setting aside 71% Roberts' 5,300 sq. ft. lot solely so that Cabin owners not offended by seeing another person's home.
- Condition 2 fails unconstitutional conditions tests as applied by state and federal courts.



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## Respectfully Request that you Remove Condition 2

- Replaces dwelling in same location where one had previously been on the property for 50+ years.
- The Roberts' dwelling does not impair anyone's ocean views.
- Roberts dwelling is proposed to be situated significantly eastward of dwelling just over 200' to north



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## Removal of Condition 2 is Consistent with State and City Housing Goals

- Easily buildable lots are gone.
- Oregon's land use planning program expects difficult lots to deliver housing – Portland is full of houses on steeper lots.
- If city hopes to avoid tear-downs and sprawl, then the city must not put impossible regulatory burdens in the way of people willing to develop difficult land in the city that is zoned residential.
- Roberts' are building on a single residential lot.
- Roberts' are not tearing down any existing homes or structures.



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## Summary

- OSS does not apply to Roberts' property.
- Decision's Condition 2 is unlawful and must be removed.
- Roberts dwelling is an example of the kind of residential development that the city wishes to and should encourage in order to maintain tight UGBs, avoid sprawl and avoid tear downs.
- Thank you for your time and consideration.
- Questions?



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