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## Introduction

- The Roberts seek to establish their:
  - 2,712 sq. ft. home
  - On a completely lawful 5,394 lot
  - That abuts a platted street right of way
  - In a platted residential subdivision
  - On land zoned residential
  - Where their home is a use permitted outright
  - They have been paying property taxes reflecting the value of their lot as a wholly developable residential lot
  - Just like everyone else, they expect to be able to establish their home

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2

## What is at Issue

- **The only issue** before the planning commission is whether the planning director was wrong to deny the Roberts' home for the sole reason that the house does not comply with the city's OSL
- **What is not at issue** is whether the Roberts' have a right to establish their home on their residential zoned lot. They have that right.
- **What is not at issue** is whether the Roberts' have a right of access to use Nenana Ave. They have that right.
- **What is not at issue** is how the city permits improvement of the Nenana Rd. right of way
- **What is not at issue** is whether immature trees in the Nenana right of way are removed in the manner of the clear cutting that was done by the next-door neighbors

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## The Problem

The only issue is the application of the City Ocean Setback Line (OSL) to the Roberts' home

The law is clear: **if the OSL is unlawful,** it **may not be applied.**

The **OSL is unlawful** as applied to the Roberts' lot

⇒ It violates **state housing laws**

⇒ It violates **federal unconstitutional takings** law

And the only person benefitted by that illegal act, is the next-door neighbor. That is why they sent out a flier telling tales; seeking to conscript citizens to advocate for their luxury interests

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## The Roberts' Dwelling Must be Approved

The legal arguments to deny the Roberts' right to their home, so the single next-door neighbor can keep their expansive view – a view that is shared by no one else in the city - do not hold water:

City/Neupert lawyer: denial vs a condition demanding compliance with the OSL, gets the city off the constitutional hook -

**Wrong:**

"The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so." *Koontz v. St. Johns River Water Dist.*, (2013)

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5

## City/Neupert Lawyer Arguments do not Hold Water No. 2

City/Neupert lawyer: no problem, its fine to wipe out the Roberts' property rights because the OSL was around when they brought their property

**Wrong:**

A taking claim against the city: "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

"Unreasonable enactments "do not become less so through passage of time or title. *** Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

"the State Supreme Court erred *** in ruling that acquisition of title after the effective date of the regulations barred the takings claims." *Palazzolo v. Rhode Island*, (2001)

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## City/Neupert Lawyer Arguments do not Hold Water No. 3

City: "any investment backed expectations should have included development consistent with the [OSL]."

Neupert lawyer: "there is no taking *** because the Oceanfront Setback rule applied to the Property when they purchased the Property, and thus was a part of the Robertses' investment backed expectations."

**Wrong:**

"The 'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional." *Palazzolo v. Rhode Island*, Scalia, concurring

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## City/Neupert Lawyer Arguments do not Hold Water No. 4

City/Neupert lawyer arguments 'you bought your property with an unlawful restriction – so you are stuck with it', are :

"rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit to the thief." *Palazzolo v. Rhode Island*, Scalia, concurring

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## City/Neupert Lawyer Arguments do not Hold Water No. 5

City/Neupert lawyer: 'we have to apply the OSL, because it is in the code.'

**Wrong**:

"the city cannot evade the requirement that it demonstrate that the impacts of a particular proposal substantially impede a legitimate governmental interest so as to permit the denial of a permit outright, simply by defining approval criteria that do not take into account a proposal's impacts." *Hill v. City of Portland*, (2018).

**Many, many cases hold that unlawful laws can't be applied** – whether a code works an unconstitutional taking, Jim Crow, school segregation, or ones that forbid a retired couple from building their home on a residential lot where their home is permitted outright.

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9

## We know and so do the lawyers in the room, that the city has authority and I think the responsibility not to apply the OSL here

- The OSL :
- Works an unconstitutional taking of the Roberts' property

AND

- Violates state housing laws
- And for what?
- Applying the OSL here serves only the private luxury interest of a neighbor

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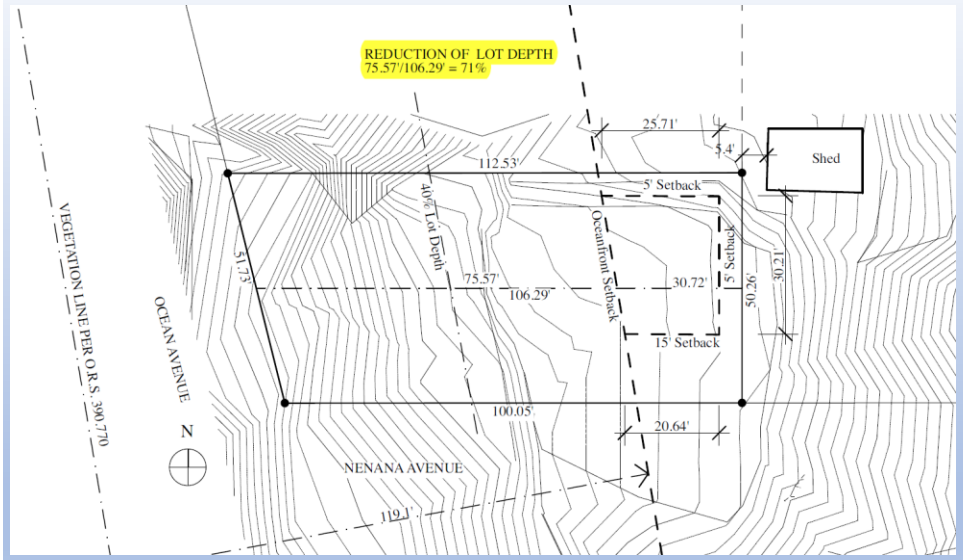
The OSL is a wipeout

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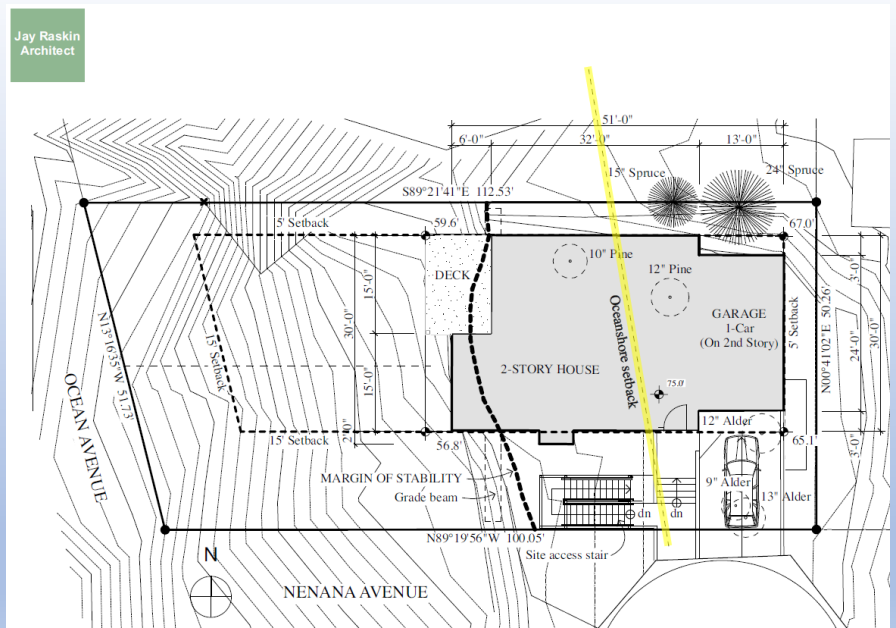
Jay Raskin Architect

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# Let them eat cake….

City asserts: "The median home size in Cannon Beach is 1,498 sq. ft. A 1,399 sq. ft. residence would place this residence in the 45th percentile of home size in Cannon Beach and so the Oceanfront Setback does not eliminate all value from the property ***."

**Wrong.**

City wipeout if the OSL is applied and if the lot is not viewed as a corner lot = 450 sq ft per level. No more. If this goes to litigation, the city will not be able to support a claim that a there are lots of 2 story houses with 450 sq. ft per level.

And that is without parking – with two parking spaces =388 sq. ft.

That leaves inadequate room for building code compliant stairs and any kitchen or bathroom

We think the lot is a corner lot- even so no reasonable home can be constructed.

City is liable for a taking regardless of whether the wipeout of a residential lot allows a token dwelling or no dwelling

"a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." *Palazzolo*

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13

# Tall Tales – Neupert's lawyers

Shameful, untruthful fearmongering in a pandemic

**To Our Neighbors and Local Community:**

PLEASE TELL THE PLANNING COMMISSION TO NOT:

- Remove city trees too enable this project,
- Create a dangerous intersection in the Hemlock S-Curves,
- Permit a nonconforming street/driveway/bridge in unimproved Nenana Avenue,
- Ignore its ocean shore setback rules,
- Diminish the historically significant Oswald-West cabin, and
- Diminish the natural setting of Haystack Rock

The City should say no to this dangerous proposal. The City has substantial discretion in how its streets are used and should not bend and break its rules to enable the destruction of this cherished place.

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14

# Myths: advanced by their lawyers:

- Diminish the historically significant Oswald-West cabin, and

Does not diminish anything about the Oswald cabin.

They will still have unprecedented open space and views enjoyed by no one else.

What is really going on - Neupert's enjoy the Roberts' property as Neupert-entitled open space.


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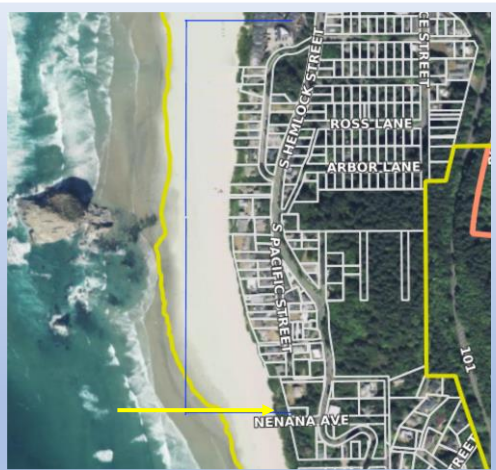
# Myths advanced by their lawyers:

- Diminish the natural setting of Haystack Rock

The Roberts' home is no different than the existing 27 beachfront houses equidistant from Haystack Rock to Roberts' lot.

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


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City of Cannon Beach (1967) https://www.ci.cannon-beach.or.us/gis/page/historic-aerial-photos

17

17

# Myth unobstructed "natural" view

Always was a house on property and a driveway – until 1980s

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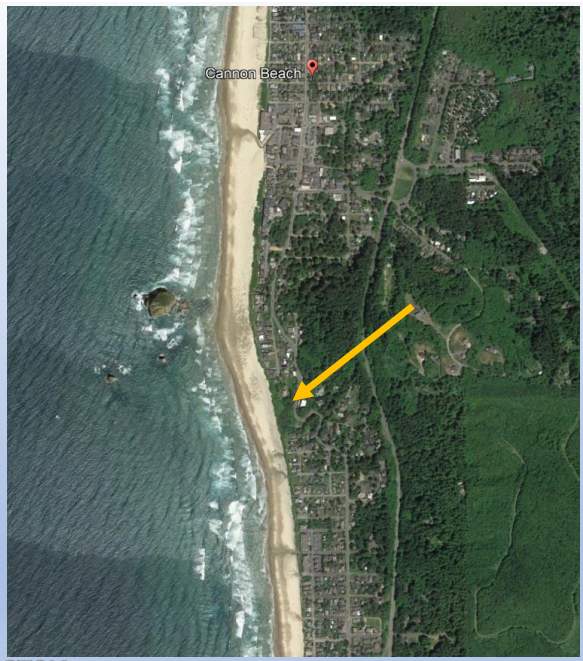
Roberts' home is not an unreasonable intrusion on the Neupert's.

Neupert's have more than anyone

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19

## **Myth** advanced by opponent lawyers: "Roberts' lot is unbuildable"

WRONG

There had always been a house on the lot, and it is clearly a "buildable lot."

Prev. house could not have been problem since Neupert predecessors originally gave the Roberts' lot to their builder who built his own home

Roberts' lot has been taxed as buildable

It is buildable

It only becomes unbuildable if the city applies OSL

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## Myth advanced by Neupert's lawyers:

- Remove city trees too enable this project,

- No "city" trees will be removed.
- Trees to be removed for the Roberts' home, **are on the Roberts' property**.
- Necessary tree removal is 100% consistent with city ordinances and the minimum necessary for the Roberts to have their home

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## Myth: The Roberts will cut down mature trees

- The Roberts trees being removed are immature, not mature
- Trees removed in the Nenana right of way are up to the city and irrelevant to this appeal
- People in the city remove trees; there is nothing special about the Roberts' proposal

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# For example, Neuperts have been removing trees as they wish

**2014** **2016**


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23

# Myth: Opponent lawyer claim

- Create a dangerous intersection in the Hemlock S-Curves,
  - The approval of the Roberts' home has nothing to do with how the city decides to improve Nenana Ave.
  - The intersection will meet all city standards and be as safe or safer than other intersections serving far more than one home – two traffic studies establish this fact

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Many intersections with less sight distance, serving many properties, and no accidents

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# City Code Will Authorize the City to Approve Improvements to Nenana

CBMC 12.34.050(C):

"*** On hillside streets, deviations from the horizontal and vertical AASHTO standards may be allowed at the discretion of the Director providing that:

1. A reasonable attempt has been made to conform with the standards;
2. Deviation from AASHTO standard is minimized.

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# Myth

- Permit a nonconforming street/driveway/bridge in unimproved Nenana Avenue,

Nenana Ave improvement is not at issue

Regardless, it will be approved by the city under applicable city standard.

Just like everyone else's home and access on a hillside.

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## Denial is Unlawful as Matter of State Law (and it is wishful wrong thinking that state housing law does not apply – it does)

- 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).
- There is no difference between an unlawful condition and an unlawful denial – it is unlawful for the city to demand a reduction in density. City cannot defend a denial.
- State law defines "authorized density level" as "the maximum floor area" allowed by city code. ORS 227.175(4)(f).
- Applying the OSL demands the reduction in FAR below the maximum allowed by the city code.

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## Denial Demands the reduction in density – reduces the floor area

- 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 somewhere between 50-70+%.
  - 3,000 sq. ft. → Less than 1,399 sq. ft. and if not a corner lot to 900 sq. ft. or to 776 sq. ft.
- That demands an unlawful reduction in density ORS 227.175(4)(c)
- City cannot defend doing a denial decision.

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29

## No Reason to Violate Federal Constitutional or State Housing Law

- State and federal law require not applying OSL, and
- Importantly: approval will harm no one; the Roberts dwelling as proposed impairs no one's view of the ocean;
- OSL has no other purpose. Geotech will tell you that city claim that applying the OSL to the Roberts' mitigates hazards is wrong.
- In fact the OSL cannot mitigate hazards because it is completely arbitrary based on where some other owner put their house.
- There are houses just over 200' away that are closer to the ocean.

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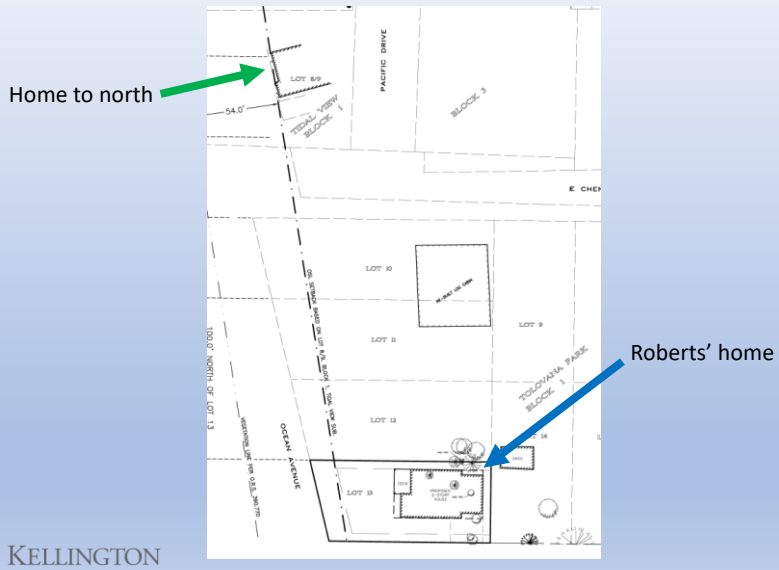
## Roberts' home is proposed to be situated significantly eastward of home just over 200' to north

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Roberts' property from beach

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Jay Raskin Architect

2 WEST ELEVATION 10/7/20

PROPOSED ROBERTS HOUSE NENANA STREET CANNON BEACH 1/8" = 1'-0"

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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

33

33

## Architectural Depiction of Roberts' Proposed Home in Place – hardly a "luxury home."

34

34

Oswald cabin and house further north of Roberts' property

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36

## The OSL is Unlawful

- Application of OSL reduces buildable area of Roberts' lot by more 71%
- No reasonable home can be built at all
- State and federal law requires the OSL not be applied.

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37

## Clear and Objective and Unreasonable Processes

- The standards have to be clear and objective on their face.
- The fact that you have to point to four appellate cases to figure out what the Oregon Coordinate Line is, is a strong indication it is not clear and objective on its face.
- Surveyors think they know what the city means, that is not the test

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38

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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39

Where Standards Are Not "Clear and Objective"

- The city acknowledges it could mean either the "Statutory Vegetation Line" or the "Line of Established Vegetation."
- It does not pass the straight face test to say those are clear and objective on their face.

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# Wrong legal premises

- Clear and objective requirements apply only to "buildable land."
- Wrong:

"Nothing *** suggests that the requirement that local governments regulate housing development only through "clear and objective" standards applies only to housing development on "buildable land.

Reading that provision to apply only to housing that is developed on buildable land would impermissibly insert a limitation on the provision's scope, in violation of ORS 174.010." *Warren v. Washington County* (2019).

Regardless, the Roberts' lot is on the city's buildable lands inventory.

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41

# The city should err on the side of housing

Why would the city want to make a residential lot unbuildable?

Why wouldn't the city want to honor its residential zoning?

Following the staff recommendation reflects a blind eye to the city's housing needs that will cause the need to expand UGBS, lead to sprawl, tear downs, and more unaffordable housing.

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42

## Removal of OSL Demand 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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43

## 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" now – now he does not deny he made the representation.
- The PD's own diametrically opposed interpretations on the same lot establishes ambiguity of OSS → not "clear and objective."

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44

# Examples of why OSL not clear and objective

- As stated in Roberts' appeal include:
- Oregon Coordinate Line?
- Plot?
- Average?

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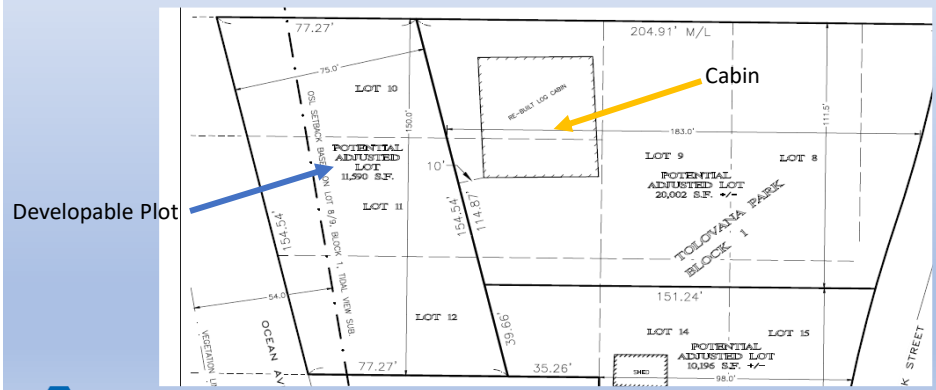
## "Buildings" Subject to OSS Cannot be Ascertained, Not "Clear and Objective"

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

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47

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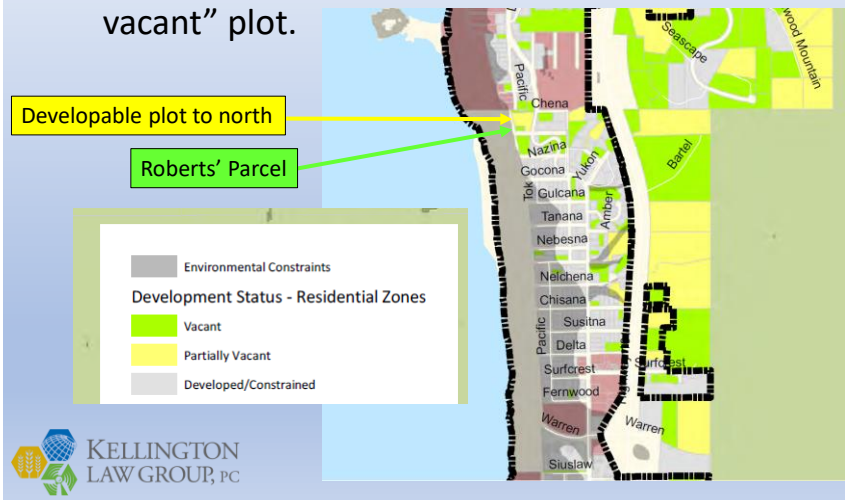
## "Buildings" Subject to OSS Cannot be Ascertained, Not "Clear and Objective," cont.

- Cabin is situated on "oversized" and "partially vacant" plot.

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## "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. **It is not clear and objective.**
- You can have a group of one. You can also take a single value and divide it by one. **The number you would get is the number you started with and is not an average.**
- To call that number an average is a stretch at best. To say this averaging exercise is clear and not subjective is ridiculous.

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# Summary

- OSL must be removed; this is the city's chance to do the right thing:
- No difference between denial or condition

"The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so." *Koontz v. St. Johns River Water Dist.*, (2013)

- When the City applied the OSL to the property does not matter:

A taking claim against the city: "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.

"Unreasonable enactments "do not become less so through passage of time or title. *** Future generations, too, have a right to challenge unreasonable limitations on the use and value of land. *Palazzolo v. Rhode Island*, (2001)

- Denial is a total wipeout and leaves only a token interest. That is an unconstitutional taking that the city cannot defend.
- Trying to defend denial serves nothing but a single private interest.
- The Roberts' request you stand for housing and approve their application.
- Thank you for your time and consideration.

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51

51