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Via Electronic Mail
Cannon Beach Planning Commission
c/o Mr. Jeff Adams
Community Development Director
City of Cannon Beach
163 E. Gower St.
Cannon Beach, OR 97110
adams@ci.cannon-beach.or.us

RE: AA20-02, 03 & 04, Appeal by Stanley and Rebecca Roberts of an administrative decision to approve, with conditions, a development permit DP#20-04

Dear Members of the Planning Commission:

This firm represents the Applicants/Appellants, Mr., and Ms. Roberts in the above captioned matter. Please include this letter and its attachments in the record of this appeal. To summarize the Roberts' points:

1. State law does not allow the city to reduce the floor area of the housing development the Roberts' propose for their residential lot. The challenged condition and the staff proposed denial both violate that state law because they reduce the density from the maximum allowed of 3,000 sq. ft. to either 1,399 (if corner lot setback rules apply), or to 900 sq. ft. (if corner lot setback rules do not apply). That is before you subtract out the required parking and stairs for their home which reduces the floor area of the Roberts home to 600 sq. ft. if the OSL is applied. State law prohibiting this reduction in floor area applies directly and may not be ignored by the city. The city has converted what should be a straightforward building permit approval into a statutory permit by demanding the Roberts' apply the OSL.

2. State law prohibits the city from applying the OSL to the Roberts' proposed home because it is not clear and objective. As the court of appeals' explained in *Tirumali v. City of Portland*, 169 Or App 241, 246-47 (2000), where a local code is susceptible of two different plausible interpretations, it is not clear and objective. In *Tirumali*, whether a proposed home conformed to the city's height limits was decided by interpreting the term "finished surface," and the word "grade". The court held that because the term "finished surface" was susceptible to at least two plausible interpretations it was not clear and objective. Several different components of the OSL are capable of at least two plausible interpretations. Therefore, the OSL may not be applied. Whether an interpretation is plausible does not require that it be viewed by the city or opponents as the best interpretation – rather it need only be a plausible one. *Siporin v. City of Medford*, 349 Or 247 (2010); ORS 197.829.

3. There is a plausible interpretation of the city's code that the OSL does not apply to the Roberts' property or it can be applied in a way that compels approval of the Roberts' home as they propose it. Either way, the standard is not clear and objective, as required, and cannot be applied to the Roberts' proposed home:

a. Neither Roberts' lot nor the Neuperts' lot are a "lot abutting the oceanshore" because both are separated from the ocean by a "buildable lot" and the Neupert's lot is additionally separated from the oceanshore by a buildable lot that is a "plot." Moreover, neither the Roberts' nor the Neupert's property are a "lot" at all, because the term "lot" is defined in the city code to exclude lots created by a subdivision. Rather, the term "lot" is expressly limited to plots, parcels, and tract of land." Further support for the premise that neither the Roberts lot nor the Neupert's lot is subject to the city OSL, is the fact that the point of beginning for CBMC 17.42.050(A)(6)(c) is "The oceanfront setback line for a *parcel* is determined as follows ***." (Emphasis supplied.) The only definition of "parcel" is in state law and that state law definition refers to a unit of land created by partition. The Roberts' lot was created by a platted subdivision. Accordingly, it is not a "lot" subject to the city's OSL.

b. The Oregon Coordinate Line is undefined. It could plausibly be viewed as referring to either the "statutory vegetation line" or the "line of established vegetation." The latter is wholly subjective and value laden to ascertain, and the fact that the city code reference to the "Oregon Coordinate Line" could be either, means it is not clear and objective.

c. The use of the term "average" in the context of the OSL standard plausibly, if not expressly, refers to more than one data point. "Calculate the average of the *setbacks* of each of the *buildings* identified in [this section]." (Emphases supplied.) The standard is expressly in the plural, not the singular. Accordingly, a proper interpretation of the OSL is that it does not apply when there is only one building to use in the calculation, as is the case here. If the OSL is to be applied, however, the plausible way to give effect to all parts of the city's OSL "averaging" standard, is to take the Neupert building data point and average it with the minimum 15' setback (CBMC 17.42.050(A)(6)(h)), that applies to the south of the Roberts' property. Doing so leads to approval of the Roberts' dwelling because, as is shown in the record, the Roberts' dwelling exactly as they propose it, meets that standard.

4. Nothing in the city code or anywhere else prohibits the improving the Nenana access to serve the Roberts' property. As any lawyer ought to know, the Roberts' have a property right of access which the city may not deprive them of. Opponents' arguments that improving the Nenana public right of way to enable access to the Roberts' property is not an allowed use in the "Oceanfront Management Overlay Zone," are silly. There is no zone in the entire city that makes road improvements a listed permitted or conditional uses. But the city as a matter of law must and in fact does routinely approve road improvement projects throughout the city. Nothing in any city code section prohibits improving the Nenana Road right of way. It is important to note that the Roberts' property is not considered "beaches, active dunes, or other foredunes which are conditionally stable and that are subject to wave overtopping or ocean undercutting, or

interdune areas that are subject to ocean flooding.” Rather, the Roberts’ property is a plain vanilla, residential lot with a right of access to an abutting platted public right of way.

5. Neupert’s lawyer’s “findings” of denial ought to be rejected as they articulate no plausible or defensible position for the city. In addition to its other legal errors, its ask that the city demand any application that the Roberts might submit for anything be subject to quasi-judicial notice and hearing procedures regarding of whether the city code requires the same: (1) violates the city’s own code, (2) violates state law that requires any citizen’s applications be considered based on the standards and criteria in the city’s code, not some made up process a discourteous neighbor prefers, and (3) state and federal constitutional principles against arbitrary and capricious decision making.

6. Neupert’s lawyer is mistaken in characterizing the Roberts lot as other than a corner lot. The Roberts’ lot is a corner lot – it is surrounded on two sides by the dedicated Ocean Ave right of way and the dedicated Nenana right of way. CBMC 17.04.330 (“‘Corner lot’ means a lot abutting on any two streets, other than an alley at their intersections.”) CBMC **17.04.535 Street** (“‘Street’ means the entire width between the right-of-way lines of every way for vehicular and pedestrian traffic and includes the terms ‘road,’ ‘highway,’ ‘lane,’ ‘place,’ ‘avenue,’ ‘alley’ and other similar designations.”)

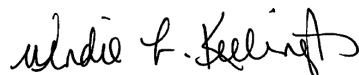
7. Neupert’s lawyer is wrong to assert that the Roberts’ dwelling will be situated on jurisdictional wetlands. The Roberts’ dwelling will not be situated on any jurisdictional wetlands.

8. Neuperts’ lawyer makes a number of remarkable assertions regarding the improvement of the Nenana Road right of way. However, the improvement of Nenana is not before the planning commission. Moreover, the public works director, not the planning director or planning commission is charged with approving the improvement to Nenana Road. She has made no decision that is pending before you concerning that road improvement project.

9. Neupert’s lawyer is mistaken about trees on the Roberts’ property. The proposal fully complies with the city tree ordinance.

The Roberts dwelling should be approved as it was submitted. Thank you for your consideration.

Very truly yours,



Wendie L. Kellington

WLK:wlk
Attachments:

- Exhibit 1. Geotech Ltrs/Reports
- Exhibit 2. LaBonte Submittal (access)
- Exhibit 3. City BLI
- Exhibit 4. Clemow Sept 12, 2020 Report
- Exhibit 5. Rondema Testimony Summary and CV
- Exhibit 6. Jay Raskin Graphic
- Exhibit 7. Tree Plan
- Exhibit 8. Additional legislative history (2017)

CC: Clients