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Via Electronic Mail
Cannon Beach Planning Commission
c/o Mr. Jeff Adams
Community Development Director
City of Cannon Beach
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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 Mrs. Roberts in the above-captioned matter. Please accept this letter as their final written argument for the record of this appeal.

The original application narrative, supporting evidence, and appeal materials for the Roberts' home application are lengthy and extensive. *See*, Record C02 through C08; A01 through A17. That evidence demonstrates that the proposed house satisfies all of the City's applicable development requirements. Staff contends one standard has not been met. While the appeal of the Planning Director's initial decision focused on that single issue – the application of the City's "Ocean Setback" standard – the issues raised by opponents in the *de novo* proceedings are extensive. Applicants have responded to each issue raised by the City and opponents either during the public hearing or in the post-hearing submittals. To repeat those arguments here would be unnecessarily repetitive.

Applicants rather incorporate their previous responses herein and point out that not addressing any particular issue here, does not mean that the Applicants concede such argument. Instead, Applicants rely on their previous responses and the application materials submitted in the record[1] to refute those matters. Here in this final argument, Applicants focus on those issues

[1] For example, in response to the multiple claims that the subject property is an unstable slide risk area (*see*, e.g., Exhibit D34), Applicants refer to the extensive geotechnical analysis and geotechnical engineering work conducted for the subject property and surrounding area conducted by Warren Krager C.E.G., Don Rondema, MS, PE, GE from Geotech Solutions, Inc., and Earth Engineers, Inc. *See*, Record C02A, C02B (Application materials). The results of their tests, analysis and designs is that it is safe to build the proposed house at this location in the manner Applicants have requested.

they believe are the key ones before the Planning Commission and those opponent arguments that warrant direct response.

To summarize the Roberts' main 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 application before the Planning Commission is a permit and the relevant provisions of ORS Chapter 227 apply.

2. Legislative amendments to the state statutes in 2019 make Ocean Avenue available for residential development and the Roberts' property no longer is a "lot abutting the ocean shore." Consequently, the oceanfront setback line (OSL) does not apply to the Roberts' property.

3. Even if the Planning Commission concludes that the subject property is a "lot abutting the ocean shore," state law prohibits the City from applying the OSL to the Roberts' proposed home because the OSL is not a clear and objective standard on its face, as required.

4. The Roberts have submitted evidence in the record that demonstrates that the proposal complies with all mandatory development requirements in the "Oceanfront Management Overlay Zone" and elsewhere in the code.

5. Denial of the application on the grounds it does not comply with the OSL will represent an unconstitutional taking of the Roberts' property.

6. Haystack Rock LLC's proposed "findings" of denial must be rejected. They articulate no plausible or defensible position for the City and request, among other things, the City to process any future applications regarding the subject property in a manner that violates the City's acknowledged code, as well as state law.

Each of the above points is developed below under separate headings. The arguments presented draw upon and further develop arguments presented previously and rely upon evidence in the record, citing specific materials as appropriate. The arguments also address positions taken by various parties to the proceeding, again citing specific parties where appropriate.

Ultimately, Mr. and Mrs. Roberts have demonstrated that their proposed home complies with all applicable approval criteria. The Planning Commission should approve their dwelling application as submitted.

1. State law precludes the City from reducing the density of Roberts' proposed housing development, to include its floor area. The Planning Commission should approve the application.

Throughout this proceeding, Applicants have argued that, for any of several reasons, the City cannot apply its Oceanfront Setback regulations to the proposal or, if the City applies the provision in a manner that is consistent with state statutes, the proposal is consistent with the

code provision. The first three argument headings address different aspects of the Applicants' position.

This first argument addresses the fact that state statutes generally prevent the City from reducing the maximum density (*i.e.* the maximum floor area) allowed by the City code of a housing development proposal below the 3,000 sq. ft. maximum allowed in the RL zone. To summarize the relevant facts: Applicants have proposed a 2,712 sq. ft. home on a 5,394 sq. ft. lot that abuts two platted rights of way. City staff admit that the application of the OSL at CBMC 17.42.050(A)(6) significantly reduces the floor area of the Roberts' proposed home. At maximum, under staff's (and some opponents') interpretation, a 1,399 square foot, two-story house with 699.5 square feet per floor is the most that could be built on the subject property. Moreover, depending on whether the Roberts' lot is a "corner lot" (which it is, but some opponents dispute this), the City's interpretation of the OSL could reduce the maximum floor area to as little as 388 square feet per floor. A06 (Applicants' power point presentation, slides 1, 11-13). If Haystack Rock LLC has their way, no home whatsoever should ever be established on the Roberts' residential subdivision lot. However, state statutes prohibit the City from reducing a proposed housing development to a floor area that is below the maximum allowed under the City's adopted land use regulations. No matter if the reduction is to 1,399 sq. ft. or 388 sq. ft per floor, the application of the OSL impermissibly reduces the density of the Roberts' lot well below the 3,000 sq. ft. floor area allowed by the City Code.

Because opponents have raised numerous issues related to the interpretation of state statutes, such as whether the application is for a "permit" or whether a key standard only applies to conditions of approval, the discussion below will walk through fundamental legal principles, the relevant state statutes, the legislative history of key provisions, and how those statutes influence what provisions the City can apply and/or how they may be applied.

State Statutes Apply Directly

This issue concerning state statutes is both relevant and significant because, as Applicants explain in earlier submissions, state statutes apply directly to local land use regulations. *McKay Valley Creek Ass'n v. Washington County,* 122 Or App 28, 32, 857 P2d 184 (1993) ("Whatever its own legislation may provide, the county's land use decisions, pertaining to nonconforming uses as well as all other matters, must comply with applicable state statutory requirements."); *Kenagy v. Benton County*, 115 Or App 271, 844 P2d 206 (1992). ORS 197.646(1) requires local governments to amend their land use regulations to comply with, among other things, newly adopted state statutes.[2] ORS 197.646(3) goes on to provide that when a local government does

[2] The relevant portions of ORS 197.646 provide:

> "(1) *A local government shall amend its acknowledged comprehensive plan or acknowledged regional framework plan and land use regulations* implementing either plan by a self-initiated post-acknowledgment process under ORS 197.610 to 197.625 *to comply with a new requirement in land use statutes*, statewide land use planning goals or rules implementing the statutes or the goals.

not comply with subsection (1), "the new requirements apply directly to the local governments land use decisions."

The Oregon Court of Appeals has explained that where a state statute, state goal or state rule is amended that requires a city to amend its land use standards, the state standard is to be applied directly to land use decisions until the local code is brought into compliance with the state standard. *DLCD v. Lincoln County*, 144 Or App 9, 13, 925 P2d 135 (1996). The court subsequently explained that the requirements of ORS 197.646 are clear and "It therefore makes no practical difference whether or not the [local government] immediately incorporates the new law into its code. The newly enacted statute is applicable *** regardless of the speed with which the [local government] complies with ORS 197.646(1)." *Keicher v. Clackamas County*, 175 Or App 633, 640, 29 P3d 1155 (2001); *see also*, *Multi/Tech Engineering Services, Inc. v. Josephine County*, 37 Or LUBA 314, 321-23 (1999) (where a county fails to implement a statute, and the existing code is inconsistent with the statute, the county cannot apply those inconsistent code provisions to approve or deny an application).

Even if a local government amends its code in an effort to comply with the requirements of a statute, if there remains a conflict between an applicable standard in a state statute and an applicable local standard, the statutory standard controls. *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992).

The Roberts' application is for a statutory "permit."

The main statute that limits the City's authority in this proceeding is in ORS 227.175 "Application for permit or zone change", which is further discussed below under the next subheading. Opponents argue that ORS 227.175 does not apply here because the application is not for a "permit." Opponents are incorrect. ORS 227.160(2) defines" permit" to mean the "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation."

The City does not have a definition of the term "development." Instead we look solely to ORS 227.215 to decide whether the Roberts' housing development proposal is "development." ORS 227.215(1) is entitled "Regulation of development," and provides:

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* * * * *

(3) *When a local government does not adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan, as required by subsection (1) of this section, the new requirements apply directly to the local government's land use decisions*. The failure to adopt amendments to an acknowledged comprehensive plan, an acknowledged regional framework plan or land use regulations implementing either plan required by subsection (1) of this section is a basis for initiation of enforcement action pursuant to ORS 197.319 to 197.335." (Emphasis supplied.)

"As used in this section, "development" means a building or ***, making a material change in the use or appearance of a structure or land, ***."

Applicants' proposed house is unquestionably "development" as that term is used in ORS 227.215.

That statute goes on to segregate "development" into one of three different procedural categories, as follows:

"(3) A development ordinance may provide for:

(a) Development for which a permit is granted as of right on compliance with the terms of the ordinance;

(b) Development for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173;

(c) Development which need not be under a development permit but shall comply with the ordinance[.]" ORS 227.215(3).

As processed by the City, this application falls within the ORS 227.215(3)(b) procedural category. LUBA has held that permits processed pursuant to ORS 227.215(3)(b) are statutory "permits" as defined by ORS 227.160(2). *Tirumali v. City of Portland* (*Tirumali III*), 41 Or LUBA 231, 242 (2002). ORS 227.173, the standard that distinguishes development processed under ORS 227.215(3)(b) from those permits processed under (3)(a) or (c), expressly imposes requirements on how ORS 197.307 is to be applied. In this regard, ORS 227.173(2) provides, "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standard must be clear and objective on the face of the ordinance."

Furthermore, ORS 197.307 now applies to all types of housing, including such housing as the Roberts' propose. ORS 197.307 imposes a range of requirements for the review and approval of all "housing." This application is an application for "housing" within an urban growth boundary and falls plainly within the ambit of ORS 197.307. In turn, ORS 227.173 provides requirements for how ORS 197.307 is to be applied. Consequently, this application is an ORS 227.215(3)(b) type of statutory "permit."

Moreover, the City and opponents all take the position that the City has the discretion to deny the Roberts' application under the City's land use code. In this regard, the moment the Planning Director removed the application from the building permit process and subjected it to additional land use review, imposed a condition of approval in a decision separate from the building code, and afforded an opportunity for local appeal with a *de novo* hearing, the resulting decision is an ORS 227.215(3)(b) and ORS 227.160 permit. In other words, the decision to approve or deny the application will involve the exercise of discretion that approves or denies "proposed development of land." The standards to which the Roberts' dwelling is being subjected are certainly not limited to regulating the physical characteristics of the Roberts'

proposed house. That means that the decision here will approve or deny a statutory permit – under ORS 227.215(3)(b) and ORS 227.160(2).

Opponents have argued generally, without any analysis of the relevant statutes, that the application is not for a statutory "permit" as defined by ORS 227.160(2).

To explore the permit issue further, ORS 227.160(2) also provides that a "permit" does not include certain types of decisions. The only one potentially relevant here is a "limited land use decision." ORS 227.160(2)(a) provides that a "permit" does not include:

"A limited land use decision as defined in ORS 197.015."

ORS 197.015(12) provides, in relevant part:

"(12) 'Limited land use decision':

(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:

(A) The approval or denial of a tentative subdivision or partition plan, as described in ORS 92.040 (1).

(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.

(b) Does not mean a final decision made by a local government pertaining to a site within an urban growth boundary that concerns approval or denial of a final subdivision or partition plat or that determines whether a final subdivision or partition plat substantially conforms to the tentative subdivision or partition plan."

The application for the Roberts' home does not involve a subdivision or partition, consequently ORS 197.015(a)(A) and (b) are not applicable.

Nor will the City's decision here satisfy the definition of an ORS 197.015(12)(a)(B) "limited land use decision." Approval or denial of the Roberts' application is not being based solely on regulation of the physical characteristics of their proposed home. The extensive geotechnical, OSL, and other reviews that the application has been subjected to, exclude the City's resulting decision from being characterized as a "limited land use decision." Simply put, those issues have nothing to do with the house's physical characteristics.

Opponents have argued that the application cannot be a "permit" because it was not reviewed under "permit" procedures, which they argue require notice and a hearing on the initial review of the application. Again, opponents are incorrect.

ORS 227.175(10) expressly addresses applications for a "permit" for which there is no required initial hearing. ORS 227.175(10)(a)(A) provides:

> "The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal."

ORS 227.175(10) is lengthy, but its remaining provisions go on to discuss the requirements for the notice of decision, who is entitled to notice, the appeal rights, that a *de novo* hearing is required, permitted hearing fees, and the issues that may be raised. Furthermore, the provisions of ORS 227.175(10) mirror the procedures the City followed in processing the Roberts' application and appeal. So far as the Applicants can ascertain, the City has been processing this application consistently with ORS 227.175(10).

In summary, opponents' arguments that the Roberts' application is not an application for a statutory "permit" do not have merit. The statutory provisions of ORS 227.175, including the prohibition on the reduction of the Roberts' floor area, apply to the Roberts' application.

State statutes prohibits cities from reducing the density (floor area) of housing development authorized under its land use regulations.

At issue is ORS 227.175(4), which provides, in relevant part:

> "(4)(c) A city may not condition an application for a housing development on a reduction in density if:
>
> (A) The density applied for is at or below the authorized density level under the local land use regulations; and
>
> (B) At least 75 percent of the floor area applied for is reserved for housing.
>
> * * * * *
>
> (e) Notwithstanding paragraphs (c) and (d) of this subsection, a city may condition an application for a housing development on a reduction in density or height only if the reduction is necessary to resolve a health, safety or habitability issue or to comply with a protective measure adopted pursuant to a statewide land use planning goal. Notwithstanding ORS 197.350, the city must adopt findings supported by substantial evidence demonstrating the necessity of the reduction.
>
> (f) As used in this subsection:

(A) "Authorized density level" means the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations.

"*****

(C) "Habitability" means being in compliance with the applicable provisions of the state building code under ORS Chapter 455 and the rules adopted thereunder."

To summarize: ORS 227.175(4)(c) provides that the City may not "condition" an application for a housing development that would reduce its "density" so long as the "density" applied for is at or below the authorized "density" in the city code. ORS 227.175(4)(f)(A) further explains that "authorized density" includes the maximum floor area permitted under the local code. For the City of Cannon Beach, the Applicants' 5,394 square foot lot is entitled to a 3,000 square foot "floor area." CBMC 17.10.040(D). As a consequence, Applicants are entitled to a 2,712 sq. ft. home, which they specifically requested because it is below the authorized 3,000 sq. ft. maximum floor area.

Applicants further note that the City can only require a reduction in density if it is "necessary to resolve a health, safety or habitability issue." The entirety of the evidence in the record, all prepared by licensed experts in their respective fields, objectively demonstrates that there are no such health, safety or habitability issues related to the floor area of the proposed use. In fact, opponents do not seriously contend otherwise. The Roberts' lot is fully buildable and is on the same active landslide upon which the "Haystack Rock LLC" and other opponents dwellings are situated. Opponents make a feeble attempt to argue to the contrary, but their contentions lack so much as a scintilla of evidence to support their claims. Furthermore, ORS 227.175(4)(e) places the burden on the City to demonstrate the necessity of any such reduction in density. The City cannot meet that requirement without substantial evidence to support that conclusion, which does not exist and can't exist.

Opponents argue that ORS 227.175(4)(c) does not apply to this proceeding because, they contend, the statute only applies for "conditions of approval" and that the City can simply deny the application and escape the statute's terms. Again, opponents are incorrect.

The plain language of the statute does not support opponent's position. The express language used in ORS 227.175(4)(c) is: "A city may not *condition an application* for a housing development * * *." "Conditioning" an approval includes making the approval contingent upon any change not applied for the applicant. The statute does not say "condition an approval" or "impose conditions of approval" as opponents would have it. Opponents' position impermissibly inserts words that the Oregon Legislature has omitted, which is contrary to ORS 174.010's mandate not to insert words that have been omitted or to omit what has been inserted.[3]

[3] ORS 174.010 provides:

"In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has

The plain language of ORS 227.175(4)(c) states "condition an application." What does that mean?

Dictionaries provide a useful starting point for identifying the intended meaning of a word used in a statute. *Steele v. Employment Department*, 143 Or App 105, 113-14, 923 P2d 1252 (1996), *aff'd*, 328 Or 292, 974 P2d 207 (1999). The relevant Webster's dictionary definition for the transitive verb "condition" is "to adapt, modify, or mold so as to conform to an environing culture." The statute's use of the term "application" plainly means the application submitted. The plain language and dictionary meanings of those terms suggest the statute concerns the standards that are imposed on an application that may modify or mold it to be consistent with city's developed environment.

With that understanding of the relevant terms, ORS 227.175(4)(c) provides that the city may not impose standards on an application for housing that would reduce either the number of residential uses authorized or the size of a residential unit below the maximums authorized under the local land use regulations – *i.e*., reduce the density of residential development.

This interpretation of the express language used is supported by the context of the provision. A fundamental principle of statutory construction[4] is that the use of the same term throughout a statute indicates that the term has the same meaning throughout the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993); *see also*, *Owens v. Maass,* 323 Or 430, 434, 918 P2d 808 (1996) (context includes other provisions of the same statute, the session laws, and related statutes).

In this instance, ORS 227.175(4)(a) operates to resolve any doubts about the meaning of subsection (c) by further indicating how to determine what "conditions" apply to an application. ORS 227.175(4)(a) expressly provides, "The approval may include such conditions as are *authorized by ORS 227.215* or any city legislation."

When one turns to ORS 227.215, one finds it speaks only about cities adopting ordinances and that development ordinances may require development to comply with the ordinances.[5] Those ordinances are the approval criteria and standards that apply to applications. ORS 227.215 speaks nothing about "conditions of approval."

> been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

[4] LUBA and the courts owe no deference to the City on issues of state law. *Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241(1992).

[5] ORS 227.215 provides, in its entirety:

> "**227.215 Regulation of development.** (1) As used in this section, "development" means a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and

Furthermore, while ORS 227.175(4)(a) includes the additional language "or any city legislation," that language can only expand upon the reference to ORS 227.215. It may well be that the "city legislation" also includes provisions to allow the imposition of conditions of approval in addition to applying the standards and criteria adopted pursuant to ORS 227.215. In such instances, ORS 227.175(4)(c) requires that neither the standards and criteria nor any conditions of approval may result in a reduction in density. However, that "city legislation" cannot exempt the standards and criteria for proposed development required under ORS 227.215 from the restrictions against reducing residential density imposed under ORS 227.175(4)(c).

Additionally, a review of ORS Chapter 227 reveals that the term "condition an application" is used only in ORS 227.175(4)(c), (d) and (e) and nowhere else in the chapter. Likewise, the term "condition an application" is not found at all in the other relevant land use chapter, ORS Chapter 197. This suggests that the meaning "condition an application" has a specific meaning intended by the legislature which is examined in the following subsection that addresses the legislative history of the language at issue.

One final point worth noting is that the term "conditions of approval" is used in ORS 227.179 and under several provisions in ORS Chapter 197. This suggests that these two terms – "conditions of approval" and "condition an application" – mean different things. *Century Properties, LLC v. City of Corvallis*, 207 Or App 8, 13, 139 P3d 990 (2006) ("Ordinarily, we assume that, when the legislature employs different terms in a statute, the legislature intended those terms to have independent significance." (citing *State v. Glaspey*, 337 Or 558, 564-65, 100 P3d 730 (2004)); *State v. Newell*, 238 Or App 385, 392, 242 P3d 709 (2010) ("If the legislature uses different terms in statutes, we generally will assume 'that the legislature intends different meanings' for those terms." (quoting *Dept. of Transportation v. Stallcup*, 341 Or 93, 101, 138 P3d 9 (2006)). "Condition an application" cannot mean only "condition of approval" as opponents contend.

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subdivisions as provided in ORS 92.010 to 92.285, and creating or terminating a right of access.

(2) A city may plan and otherwise encourage and regulate the development of land. A city may adopt an ordinance requiring that whatever land development is undertaken in the city comply with the requirements of the ordinance and be undertaken only in compliance with the terms of a development permit.

(3) A development ordinance may provide for:

(a) Development for which a permit is granted as of right on compliance with the terms of the ordinance;

(b) Development for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173;

(c) Development which need not be under a development permit but shall comply with the ordinance;***"

(d) Development which is exempt from the ordinance.

(4) The ordinance may divide the city into districts and apply to all or part of the city."

Legislative history supports Applicants' interpretation.

The purpose of statutory construction is to discern the intent of the legislature. ORS 174.020;[6] *PGE v. Bureau of Labor and Industries*, 317 Or at 610. Decisionmakers may review legislative history proffered by parties during the first step of statutory construction after the examination of the text and context of a statute. ORS 174.020(1)(b); *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). Here, the Applicants submitted legislative history concerning the ORS 227.175 standard that prohibits the City from reducing the density of the Roberts' lot.

The ORS 227.175 minimum density standard provisions were first introduced in the 2017 legislative session through the adoption of Senate Bill 1051/HB 2007[7] (2017), which was amended in 2019 through the enactment of HB 2003 (2019). *See*, Record A03, A16, A17.

In 2017, the ORS 227.175(3)(c) language adopted by the legislature did not include the term "condition" and instead provided:

> "A city may not reduce the density of an application for housing development if: * * *." A16 (SB 1051, p. 5).

Speaker of the House Tina Kotek, the primary sponsor of the bill, provided the following explanation for the density requirement:

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[6] ORS 174.020 provides:

> "(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.
>
> (b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.
>
> (2) When a general provision and a particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.
>
> (3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."

[7] The adoption of the ORS 227.175 density requirements in 2017 was through the "gut and stuff" process where the development of the bill's language and the deliberations were conducted as part of HB 2007 proceedings, but the language was subsequently inserted late in the legislative session into SB 1051 after that bill's provisions had been removed, to allow for final passage of the statutory language. Consequently, the record shows materials that reference HB 2007 as well as SB 1051.

"It requires local jurisdictions to let developers build housing with density that is permitted in the local zoning code unless doing so poses a risk to health, safety or habitability." A16 (p. 17).

The staff summary for HB2007 provided the following as well:

"Section 11: Limits on reducing permitted outright density & establishing historical districts

"Local jurisdiction may not require applicant to reduce density unless for health, safety, or habitability reason

"1) If the density of a lot is permitted in local zoning code, the local jurisdiction may not require developer to reduce density of application unless for a health, safety, or habitability reason." A16 (p. 18).

One of the supporters of the bill, Oregon Locus, spoke, among other things, to the minimum density requirements. Oregon Locus explained:

"Second, it ensures that when a City goes through its legislative planning process and maps each property with an entitled height and density that design review cannot undo that public process and reduce the number of housing units that are allowed on that site." A16 (p. 21).

Finally, speaking to the effect of the density requirement, House Representative Duane Stark stated:

"If it's zoned for an amount and it's approved by the statewide planning system for an amount, then it should be developed at that amount." A16 (p. 22).

The legislative history comments and analysis provided as part of Record A16 also establish that several factors were driving this move towards taking away obstacles for the development of housing in Oregon. This includes the need to catch up to the current housing shortage, the fact that the state was only building one third of the number of houses needed to meet the housing needs at all levels of affordability (low to high end housing), that housing shortages at the upper income levels also adversely affect the housing rental market at the low end of the spectrum, and that there are significant barriers – both procedural and substantive – that increase the cost and ability to produce sufficient housing. *See*, e.g., A16 (p. 20 (Oregon Locus); p. 24 (Oregon Housing Alliance quoting 1000 Friends of Oregon).

The legislative history of the 2017 density requirement makes plain the legislature's intent to prohibit local governments from restrictively regulating and otherwise diminishing the size or density of residential development on lands included in a city's residential lands inventory at the levels provided for under that city's code. *See also*, *Warren v. Washington County*, 78 Or LUBA 375, 384-86 and (2018), *aff'd* 296 Or App 595, 439 P3d 581 (2019)

(discussing intervenor's/hearings officer's interpretation of legislative intent of SB 1051 and LUBA's agreement with that interpretation).

The legislative history for the 2019 amendments further reinforces that intent.

HB 2003 (2019) also addressed the state's pressing housing problems. Not only did it introduce the statutory provisions authorizing housing on public lands, discussed in the following section, it amended ORS 227.175(4)(c) as a part of a legislative program to strengthen the protections guaranteed to the development of housing that was adopted in 2017. Nothing suggested the intention was anything but that.

In the 2019 legislative session, House Speaker Tina Kotek was again at the forefront of the bill supporting housing in Oregon. While HB 2003's (2019) primary purpose was to "Enhance Local Accountability to Achieve Goal 10 Obligations," several of its provisions were intended to "Address Miscellaneous Local Barriers to Housing Production." A03 (Exhibit 4, p. 9 and 10). One of the provisions to address a local barrier to housing production involved the ORS 227.175(4)(e) language that places the burden of proof onto the city to prove that a density reduction to proposed housing that meets the city code's density standards is necessary for public health, safety, or habitability. A03 (Exhibit 4, p. 10). In other words, the burden was placed on the city to allow housing to be developed at the maximum floor area allowed by the code and if a city wanted to reduce that floor area, then the city was required to prove that the reduction in floor area was necessitated solely for health, safety or habitability reasons.

Legislative counsel's description of the new requirement was:

> "Assigns local government burden of proving on appeal necessity of reduction in density or height in housing development application." A03 (Exhibit 4, p. 11).

In addition to adding the burden shifting provisions to ORS 227.175(4)(e), HB 2003 (2019) made minor amendments to the density and height requirement language provided in ORS 227.175(4)(c), (d) and (e). A17 (p. 17). The change is most readily seen in the enrolled version of the bill, which shows, for example, subsection (c) to read:

> "A county may not [*reduce the density of*] **condition** an application for a housing development **on a reduction in density** if: * * *." A17 (p. 17).

A staff analysis of HB 2003 (2019) explains, under a heading entitled "Barriers to Housing Development (Section 18 to 22):

> **"<u>SECTION 19. Reduction of Density</u>:** Current law prohibits local governments from requiring a density below what is authorized by local land use regulations as a condition of development unless for a health, safety, or habitability reason. A local jurisdiction may also require a reduction of density as a condition of development to comply with a protection measure adopted pursuant to a statewide land use planning goal. Section 19 of House Bill 2003 would require a county to prove that the reduction of density is necessary to resolve a health, safety, or

habitability reason, or to comply with a protective measure adopted pursuant to a statewide land use planning goal.

"<u>SECTION 20. Reduction of Density</u>: Same as Section 19 but for cities." A17 (p. 29).

Two points from the above are worth noting. First, the staff analysis does not indicate that there was any substantive change in meaning to the ORS 227.175(4)(c) density requirement with the 2019 amendments. The change in language was part of a normal statutory housekeeping process to clarify the meaning of the provision. Second, even the staff analysis does not use the language "condition of approval." The analysis instead focuses on the term "development" and to requirements that would lead to "a reduction in density below what is authorized by local land use regulations." A17 (p. 29).

<u>Analysis</u>

As the express language and legislative history for the ORS 227.175(4) language plainly demonstrates, the Oregon Legislature's intent in adopting and amending those provisions was to mandate that cities approve applications for housing development at the authorized density levels – for both the maximum floor area and the maximum number of lots or dwelling units per acre – authorized under local land use regulations. Furthermore, cities are only allowed to reduce the authorized density allowed in the zone in certain circumstances and, when they do, the *city* carries the burden of demonstrating, through findings and substantial evidence, the necessity of the reduction to solve a health, safety or habitability problem. If the *city* claims that a lot is a buildable residential lot, that lot must be allowed to develop at the maximum density allowed in the code under the applicable zone.

Here, the Roberts' property is 5,394 square feet in size and the CBMC authorizes a 3,000 square foot residence on the property. The Roberts have applied for a 2,712 sq ft home. ORS 227.175(4)(c) provides that the City may not condition – through the application of code standards or conditions of approval – the proposed housing development in a manner that reduces the density of the proposal, because the proposed density (floor area ratio) is below the authorized density level of the CBMC for the subject property's zoning. Furthermore, there is no substantial evidence in the record that would enable the City to carry its burden of proving that a reduction in the proposed density is necessary to resolve a health, safety or habitability issue, or to comply with a protective measure adopted pursuant to a statewide land use planning goal.

Opponents admit that the statute, ORS 227.175(4)(c), prohibits the City from reducing the density of housing development. They claim, however, that such prohibition applies only if there is a "floor area ratio" and assert here there is no ratio, just a requirement for a maximum floor area. They are wrong. ORS 227.175(4)(c) and (4)(f) prohibit reducing the Roberts' proposal for their home below the "maximum floor area ratio that is permitted under local land use regulations." CBMC 17.10.040(D) describes the "Floor Area Ratio" of lots of various sizes. Lots the size of the Roberts', have a floor area ratio of three thousand square feet per 5,000 - 6,000 square feet. Smaller lots have a floor area ratio of 0.6. Larger lots of 6,000 square feet or more have a ratio of 0.5. There is no merit to opponents' claim that a ratio of 3,000 square feet

to 5,000-6,000 square feet, is not a ratio when the City's own code expressly characterizes it as a "floor area ratio."

The only development standard that the Planning Director concluded that the Applicant failed to satisfy was CBMC 17.42.050(A)(6) – the OSL. Under the staff's interpretation of that standard,[8] it requires a significant reduction in density on the subject property below that proposed by the Applicants.[9] *See*, A03 (Exhibit 3 (site plan showing staff interpretation of oceanside setback)). State law prohibits such a reduction in density.

The law is clear. Because the OSL in CBMC 17.42.050(A)(6) would reduce the size of a housing development below the authorized floor area level under the local land use regulations, the code is in conflict with state statute and the state statute controls. *Forster v. Polk County*, 115 Or App at 478. The city cannot apply CBMC 17.42.050(A)(6) to deny the Roberts' housing proposal. *Multi/Tech Engineering Services, Inc. v. Josephine County*, 37 Or LUBA at 321-23 (a local government cannot apply code provisions that are inconsistent with state statute to deny or approve an application).

The Planning Commission should conclude that CBMC 17.42.050(A)(6) cannot be applied in a manner requested by staff and, in fact, cannot be applied at all to this application for the proposed housing development, and approve the Roberts' application.

2. Statutory amendments, adopted in 2019, make Ocean Avenue available for residential development and, as a consequence, the Roberts' property is no longer a "lot abutting the ocean shore." The City may no longer apply the OSL to the Roberts property.

While the above section addressed that the City cannot implement the OSL to reduce the density of the Robert's housing proposal below the floor area allowed by the City's land use regulations, this section presents an altogether different argument that is the result of other portions of the 2019 statutory amendments discussed above.

Simply put, the 2019 amendments to ORS Chapter 197 that make all public property, except that inventoried as a park or open space pursuant to a statewide land use planning goal, available for housing development. That means that Ocean Avenue must be viewed as a "buildable lot" and that means that the subject property is not a "lot abutting the oceanshore" and the CBMC 17.42.050(6) OSL cannot be applied to the subject property. The City cannot rely on CBMC 17.42.050(6) to deny the Roberts' housing application.

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[8] In the sections that follow, Applicants posit a plausible interpretation of CBMC 17.42.050(A)(6) that is consistent with ORS 227.175(4)(c).

[9] Haystack Rock LLC's attorney further argues that no residence of any type can be built on the subject property despite being zoned for residential use and the property's inclusion in the city's residential buildable lands inventory. *See*, D39. As noted, that is the ultimate impermissible reduction in density for housing development.

ORS 197.779

The statutory language at issue is provided at ORS 197.779 "Development of housing on public property," which provides:

> "(1) As used in this section, "public property" *means all real property of the state, counties, cities*, incorporated towns or villages, school districts, irrigation districts, drainage districts, ports, water districts, service districts, metropolitan service districts, housing authorities, public universities listed in ORS 352.002 or all other public or municipal corporations in this state.
>
> "(2) Notwithstanding any land use regulation, comprehensive plan, or statewide land use planning goal, *a local government may allow the development of housing on public property provided*:
>
> > "(a) The real property *is not inventoried as a park or open space* as a protective measure *pursuant to a statewide land use planning goal*;
> >
> > "(b) The real property is located within the urban growth boundary;
> >
> > "(c) *The real property is zoned for residential development or adjacent to parcels zoned for residential development*;
> >
> > "*****
>
> "(3) *Notwithstanding any statewide land use planning goal*, a local government may amend its comprehensive plan and land use regulations to allow public property to be used for the purposes described in subsection (2) of this section. [2019 c.640 §15]" (Emphasis supplied.). *See also*, A17 (HB 2003 (2019), Section 15, p. 15).

The express language above is unequivocal – all public property, except for land inventoried as park or open space, that is zoned for residential development or that is adjacent to parcels zoned for residential development, is eligible to be developed for housing, notwithstanding any land use rule that may say otherwise. The unimproved Ocean Ave. right of way is zoned RL (residential) and is public property and, therefore, as a matter of state law, it is available for housing. That means the Roberts' lot is not a "lot abutting the oceanshore," plain and simple.

Relevant Legislative History – HB 2003 (2019)

If there is any doubt about the absolute nature of the plain, express language of ORS 197.779, the legislative history to HB 2003 (2019), puts those doubts to rest.

The staff analysis for HB 2003 (2019) explained, under the heading "AFFORDABLE HOUSING BY-RIGHT ON PUBLIC PROPERTY":

> "**SECTION 13. Affordable Housing By-Right:** Makes affordable housing a by-right allowable use on public property if the property is not preserved as open space or parks, is located within the urban growth boundary (UGB), and is zoned for or surrounded by parcels zoned for residential development. At least 50 percent of the units must be affordable to households making equal to or less than 60 percent of median for a period of 60 years." A17 (p. 28).
>
> The legislative counsel summary of HB 2003 was even more direct in its summary:
>
> "Allows development or rezoning of public property in urban growth boundaries for affordable housing if compatible with surrounding zoning." A03 (Exhibit 4, p. 11).

The significant change that the plain language of the "housing on public property" provision represented and the vast range of public land types that would now qualify for housing under the provision if adopted did not go unnoticed by various parties. The record contains several examples of parties objecting to the broad scope of the housing on public lands language.

The Oregon Chapter of the American Planning Association (OAPA) argued that the legislature should carefully consider what types of public property were appropriate to be developed with housing. A03 (Exhibit 4, p. 2). The OAPA argued that "surplus park land may be in a great location for additional housing; **surplus ODOT right of way may** [be] in a poor location for the development of additional housing." *Id.* (Emphasis supplied.) However, the Oregon Legislature took the opposite position, allowing housing in undeveloped rights of way and excluding housing only from land inventoried for parks.

The City of Corvallis argued that the language "completely overruns local control ***and doesn't take into account that the public property was likely acquired for some purpose***." A03 (Exhibit 4, p. 4, emphasis supplied). The city was correct, the statue does control over conflicting provisions and expressly allows housing on public lands where the city may never have envisioned it would be located. However, the legislature chose not to further limit the statutory language's effect as the City of Corvallis requested. Likewise, the League of Oregon Cities was concerned that the public lands housing provision was "written too broadly and could significantly impact local government land use planning and preservation for vital public infrastructure." A03 (Exhibit 4, p. 14). Again, the legislature chose not to change the draft language to accommodate the League's concerns.

Despite all of the objections to the scope of public lands included by the proposed statutory language and the horror story arguments of what opponents claimed would flow from the adoption of HB 2003 (2019), the legislature concluded that the only type of otherwise qualifying public lands that would be exempted from the statutory provisions are public lands inventoried as a park or open space pursuant to a statewide planning goal. Significant to this

proceeding, the legislature did not exclude undeveloped rights of ways from ORS 197.779, despite the fact that the OAPA argued that right of way should be excluded.

After reviewing the text and context of ORS 197.779, as well as its legislative history, the only conclusion that can be reached is that, as a result of the 2019 legislative enactment, Ocean Avenue is now a buildable unit of land that is available for residential development. Furthermore, because Ocean Avenue is between the subject property and the ocean shore, the subject property is no longer a "lot[] abutting the oceanshore." Consequently, the oceanfront setback provisions of CBMC 17.42.050 do not apply to the subject property and so cannot be applied to deny the application. The application of CBMC 17.42.050 to the subject property is contrary to the express language of the CBMC and is grounds for reversal.

Responses to Arguments Raised

Staff and opponents have raised various arguments as to why they believe CBMC 17.42.050 continues to apply to the subject property. None have merit.

The most fundamental argument presented by parties is that Ocean Avenue is not a "lot," but instead is a right-of-way, and therefore cannot separate the subject property from the oceanshore. Consequently, the argument goes, CBMC 17.42.050 applies to the subject property.

That is a shell game worth exploring for a moment. CBMC 17.04.315 defines "lot" to mean "a plot, parcel, or tract of land." The CBMC does not define any of those other words. Webster's dictionary defines a "plot" as a measured piece of land and a "parcel" as a "tract or plot of land." State statutes define a "lot" as a unit of land created by the subdivision process and a "parcel" as a unit of land created by the partitioning process. *See*, ORS 92.010(4) and (6) respectively. "Tract of land" is a broad term of art used to generally describe a unit of land without any specific dimensional or other characteristics. ORS 553.010 provides the following definition for Oregon's water districts: "(4) "Land" or "tract of land" means real property, together with improvements thereon, whether publicly or privately owned, within a district." Again, a broad and somewhat generic term for a piece of property.

Ocean Avenue was created through the subdivision process and is, legally, a lot under ORS Chapter 92. Given the CBMC's more broad definition of the term "lot," Ocean Avenue is also likely a "plot" as well as a "tract of land," given it is a precisely defined area of land by the subdivision plat. Staff and opponents cannot get around the fact that Ocean Avenue is located on some type of lot or parcel and the relevant code and statutory provisions are broad enough to include the Ocean Avenue right-of-way as a lot or parcel that abuts the oceanshore.

In any event, the biggest problem for staff and opponents is that, regardless of how they try to avoid the CBMC 17.42.050 applicability requirement – that its provisions apply to only lots that abut the oceanshore – the statutory language of ORS 197.779 expressly allows for the development of housing on Ocean Avenue and that means Ocean Avenue is a buildable lot that abuts the oceanshore. That means the subject property does not abut the oceanshore. ORS 197.779(1) states that it includes "all real property of the state, * * * [and] cities[.]" The statute does not care whether the "real property" is identified as a lot, plot, tract, right-of-way, or any

other description of a unit of land. The statute applies to "all real property." Furthermore, participants to the statute's enactment encouraged the legislature to exclude "rights-of-way" from the statute. The legislature did not do so. The only exclusions are for public land inventoried for parks or open space use by the comprehensive plan and code – Ocean Avenue is not such a property.

Opponent's next argument is that Ocean Avenue is not a "buildable lot", that the City has never interpreted CBMC 17.42.050 to have an undeveloped right of way "separate" a lot from the ocean shore, and that the City has applied that interpretation in the past. C01 (p. 7). Regardless of the merits of such an argument before 2019, after the 2019 enactment of ORS 197.779, such a position is contrary to the statute and cannot be applied. *Forster v. Polk County*, 115 Or App at 478; *Multi/Tech Engineering Services, Inc. v. Josephine County*, 37 Or LUBA at 321-23. Simply because the City may have historically concluded that public rights-of-way were not buildable lots before the enactment of ORS 197.779, does not mean that position today does not conflict with the statute.

Also, to the extent staff or other parties seek to rely on the statutory requirements for "buildable lots," that language has been removed from the housing statutes for the express purpose of preventing local governments from playing a name game in an effort to prevent housing to be built on property that is planned and zoned for residential development within the UGB. *See*, *Warren v. Washington County*, 78 Or LUBA 375, 379-87 (2018), *aff'd* 296 Or App 595, 439 P3d 581, 598-601 (2019) (discussing 2017 amendments and significance of removal of reference to "buildable land" from ORS 197.307(4)); *Jones v. General Motors Corp.*, 325 Or 404, 414-15, 939 P2d 608 (1997) (material changes in statutory language create material changes in meaning).

The above response also applies to the argument that Ocean Avenue is not "available" for residential use. C01 (p. 9). The fact of the matter is that because Ocean Avenue is zoned for residential use and/or is adjacent to properties zoned for residential use, ORS 197.779 makes Ocean Avenue available for housing development.

The final argument used to argue against the fact that Ocean Avenue can be developed is that the land is "dedicated" to a particular use and the "city is without power to change the use of that property without the consent of the dedicator." C01 (p. 9). The staff report cites three cases in support of this argument. When scrutinized, that argument falls apart. Simply put, the staff report's position and cited cases pertain to dedications to government entities for a very specific purpose and only that purpose. The rules for dedications in conjunction with subdivisions and partitions are different.

ORS Chapter 92 governs subdivisions and partitions. Ocean Avenue and Nenana Avenue were created by subdivision. C02A (application, exhibit 13_S Tolovana Park Subdivision Plat); C01 (p. 11, showing Tax Assessor's map with Tolovana Park subdivision notation). ORS 92.090(3) provides, in relevant part:

"No plat of a proposed subdivision or partition shall be approved unless:

> "(a) Streets and roads for public use are dedicated *without any reservation or restriction other than reversionary rights upon vacation of any such street* or road and easements for public or private utilities."

Plainly put, unlike the cases cited by the staff report (which are addressed below), a subdivision dedication for a public right of way is made without any reservation or restriction, and that the only restriction that can be demanded by a property owner is a reversionary right.

The relevant language of the Tolovana Park Subdivision plat states:

> "I hereby dedicate to the public for its use as thoroughfares forever, the streets and the avenues herein." C02A (exhibit 13_S Tolovana Park Subdivision Plat).

There is no language in the plat that expressly reserves any reversionary rights on the dedication, even though state statute allows it.

Furthermore, ORS 271.160 expressly provides for vacating a street or avenue for the purposes of dedicating the use for a different purpose.[10] State statute also allows a city governing body to initiate a vacation proceeding on its own motion.[11] Contrary to staff's and opponents' assertions otherwise, state statute gives the City the power and authority to rededicate Ocean Avenue for affordable housing use pursuant to ORS 197.779, ORS Chapter 92 and ORS Chapter 271.

The cases cited by the staff report are inapposite. Those cases involve common law dedications, not statutory dedications involving a subdivision or partition. Those cases also concern situations where land is dedicated or donated to the city for *a specific public purpose*. While they do stand for the position generally asserted by staff for such common law dedications, they do not apply to statutory dedications related to subdivisions. The specific use dedication aspect of the cases is readily apparent.

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[10] ORS 271.160 provides:

> "**Vacations for purposes of rededication.** No street shall be vacated upon the petition of any person when it is proposed to replat or rededicate all or part of any street in lieu of the original unless such petition is accompanied by a plat showing the proposed manner of replatting or rededicating. If the proposed manner of replatting or rededicating or any modification thereof which may subsequently be made meets with the approval of the city governing body, it shall require a suitable guarantee to be given for the carrying out of such replatting or rededication or may make any vacation conditional or to take effect only upon the consummation of such replatting or rededication."

[11] ORS 271.130 provides, in relevant part:

> "**Vacation on city governing body's own motion; appeal.** (1) The city governing body may initiate vacation proceedings authorized by ORS 271.080 and make such vacation without a petition or consent of property owners."

In *Raley v. Umatilla County*, 15 Or 172, 13 P 890 (1887), the plaintiffs had delivered a deed to Umatilla county with a clause that provided that the land would be "used for educational purposes and upon which a college or institution of learning was to be built on the land." Petitioner sued to take back title because the county had delayed in doing anything with the property. The trial court dismissed the case, and the Supreme Court affirmed that decision on the grounds that until the county actually allows an unauthorized use on the property, the county cannot be said to have violated the condition on the donating deed.

In *City of Klamath Falls v. Flitcraft*, 7 Or App 330, 490 P2d 515 (1971), the deed involved a 1925 corporate gift of land to the city for the purposes of constructing a public library. In 1929, the city constructed a library on the property in compliance with the conditions of the deed, but eventually the library ceased services at that location in 1969 and the building stood vacant. *Id.* at 332. The court held that the deed was a "fee simple on a special limitation" (also known as a fee simple determinable), because the dedication used the specific words "so long as". *Id.* at 334. The court ultimately held that the descendants of the donating corporation had acquired all rights to the property once the city violated the limitation and stopped using the building for a public library.

Finally, in *Hyland v. City of Eugene*, 179 Or 567, 572-73, 173 P2d 464 (1946), the Oregon Supreme Court held that when a city is deeded land expressly for use as a public park, the city became a trustee to carry out the terms of the dedication, and does not have the power to sell or lease the property for purposes foreign to the dedication. The Court held that the city could not convert the park to housing for WWII veterans and their families. *Id*.

In all of the above cases, a deed for land was granted to the city containing express language that limited the use of the donated land for a specific purpose. While the legal proposition asserted in the staff report is correct for the situations presented in the cited cases, it is not a generally applicable rule and certainly does not apply to instances where roads and avenues are dedicated via a recorded subdivision plat that contains no reversionary language in the plat or any other recorded document.

Based upon the above, the Planning Commission should conclude that the development of housing on public property provisions of HB 2003 (2019), subsequently enacted at ORS 197.779, now make Ocean Avenue a buildable lot, that the subject property is no longer a "lot abutting the ocean shore," and that CBMC 17.42.050(A)(6) does not apply to the application on appeal. The Planning Commission should approve the application.

3. Even if the Planning Commission wants to apply the Oceanfront Setback Line to this application, state law prohibits the city from applying the OSL, as interpreted by staff and opponents, to the Roberts' proposed home because, among other things, the OSL provisions do not constitute clear and objective standards.

The Planning Commission can and should approve the application for either or both of the reasons provided above. However, even if the Planning Commission still decides it wants to apply the CBMC's oceanfront setback provisions to the application, state law prohibits the

Planning Commission from doing so because the standards do not comply with statutory requirements that approval standards for proposed housing developments be clear and objective.

Applicable Legal Framework

As discussed above, SB 1051/HB 2007 (2017) made extensive amendments to ORS Chapters 197 and 227 for the purpose of promoting housing in the state. As relevant here, the Oregon Legislature amended certain provisions that formerly applied only to "needed housing" as that term is defined in ORS 197.303 to now apply to *all* housing. The City cannot escape the effect of those amendments and the current statutory requirements.

ORS 197.307(4) now provides:

> "Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing."[12]

Note that SB 1051/HB 2007 (2017), also removed the requirement that the housing be on "buildable land" from the language of ORS 197.307.[13]

ORS 227.172(2) further addresses the requirements of ORS 197.307, and provides:

> "When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards *must be clear and objective on the face of the ordinance*." (Emphasis supplied.)

When a standard would otherwise apply to an application but the standard is not clear and objective as required under ORS 197.307(4), the local government is simply not allowed to apply that standard. *See*, *e.g*., *Walter v. City of Eugene,* 73 Or LUBA 356, *aff'd* 281 Or App 461 (2016) (city not allowed to apply ambiguous 19-lot rule); *Group B, LLC v. City of Corvallis*, 72

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[12] ORS 197.307(6) provides for an alternative approval process for residential development that allows for the application of standards that are not clear and objective so long as certain other conditions are met to include: "The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section[.]" The City has not adopted such an alternative approval track for housing and this provision does not apply.

[13] The enrolled version of ORS 197.307 provided, in relevant part:

> "(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of **housing, including** needed housing [*on buildable land described in subsection (3) of this section*]. The standards, conditions and procedures:
>
> * * * * *." (new language in **Bold**; language to be removed is in *Italics* contained within brackets).

Or LUBA 74 (2015), *aff'd* 275 Or App 557, 366 P3d 847 (2015), *rev den* 359 Or 667 (2016) (standard that could be reasonably interpreted in two ways that would lead to different results is not a "clear and objective" standard and cannot be applied to the application). *See also Tirumali v. City of Portland* (*Tirumali II*), 169 Or App 241, 7 P3d 761 (2000) (if an ordinance can be interpreted in more than one plausible way, then it is not clear and objective).

The court of appeals has explained in numerous cases, that there may be multiple plausible interpretations of local ordinances. *1000 Friends of Oregon v. Linn County*, 306 Or App 432 (2020) ("Although the county's interpretation of these provisions is by no means the only reasonable interpretation of them, or even necessarily the strongest one, it is one that plausibly accounts for the [local ordinance provisions'] text and context."); *Nicita v. City of Oregon City*, 286 Or App 659, 665, 399 P3d 1087, *rev. den.*, 362 Or 300, 408 P3d 1080 (2017) (" '[T]he existence of a stronger or more logical interpretation' does not render a 'weaker or less logical interpretation "implausible."' " (quoting *Siegert v. Crook County*, 246 Or App 500, 509, 266 P3d 170 (2011))); *Restore Oregon v. City of Portland*, 301 Or App 769 458 P.3d 703 (2020) (The "existence of a stronger or more logical interpretation does not render a weaker or less logical interpretation 'implausible.' " (quoting *Mark Latham Excavation, Inc. v. Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012))). While the Roberts' believe their interpretation of the OSL is the best and most plausible one, the fact that multiple parties argue for other interpretations and assert their interpretation to be the most plausible, demonstrates that the disputed provisions are not clear and objective.

In this regard, various parties have proffered different case-law descriptions of what constitutes a clear and objective standard. The two cases cited immediately above provide two of the simplest ways of determining whether standards are clear and objective:

(1) Is the standard ambiguous such that it needs to be explained? *Walter v. City of Eugene*. If so, it is not clear and objective.

(2) Can the standard be plausibly interpreted in two ways that will lead to different results? *Group B, LLC v. City of Corvallis; Tirumali v. City of Portland* (*Tirumali II*), 169 Or App 241 (2000). If so, it is not clear and objective.

OCA asserts that the holding in *Shelter Res. Inc. v. City of Cannon Beach*, 27 Or LUBA 229 (1994), means the City can ignore the 2017 and 2019 amendments to Oregon's housing laws. OCA is wrong. The 2017 and 2019 amendments legislatively overrule *Shelter Resources* and similar cases, by expressly removing the limitation that clear and objective standards apply only to larger cities. The requirement for clear and objective housing now applies to cities of *all sizes, including the City of Cannon Beach*, and includes the new requirement that the City carry the burden to demonstrate that its standards are clear and objective on their face. The requirement that the standards applied to the Roberts' application be only clear and objective on their face, applies to the City.

In summary, the City can only apply clear and objective standards to an application for housing, to include the Roberts' application. Furthermore, this standard must be clear and objective on its face. If a standard in the City's code is ambiguous or is capable of two or more

plausible interpretations, that standard is not clear and objective. State law is unequivocal that the City is prohibited from applying a standard like the OSL that is not clear and objective, to the Roberts' application for housing.

Applicants explain below several reasons why CBMC 17.41.050(A)(6) is not clear and objective and so, as a matter of state law, it may not be applied to the Roberts application to establish their home.

There are multiple plausible interpretations for how to determine the "average" setback in the case where there is only a single dwelling that constitutes an "affected building" under the City's code.

CBMC 17.42.050(A)(6) provides the standards for the City's oceanfront setback, as well as detailed requirements for the process used to determine the setback line for a parcel. To the untrained eye it might seem as if the determination process is clear and objective, a closer inspection reveals that it is not clear and objective.

The opponents argue that the ambiguity Applicants raise is one of Applicants' making and that the process for determining the setback line is "obviously" clear and objective. However, one need only look to the original Court of Appeals decision in *Tirumali* to see the flaw in that argument. *Tirumali v. City of Portland* (*Tirumali II*), 169 Or App 241, 7 P3d 761 (2000). There, the question was whether the City of Portland's detailed provisions about how to measure a building's height were clear and objective. LUBA thought they were, but the Court of Appeals disagreed, explaining that terms such as "finished surface," "grade" and any other number of terms undefined by the code (and even one term that was defined by the code), were unclear and in need of further interpretation. The court held that the disputed code provision was not clear and objective. *Id.* at 245-47. The Court of Appeals' final point in *Tirumali II* is instructive:

> "[I]t is almost axiomatic that the more extensive and complicated the standards are, the greater the opportunity for ambiguity becomes." *Id.* at 247.

Turning to the code provisions at issue. CBMC 17.42.050(A)(6) uses the term "buildings," in the plural, throughout its requirements[14] and even when it uses the term "building" in the singular, it uses the term in a manner that suggests that there are other buildings that are being considered.[15] This begs the question whether the approach to calculating the oceanfront setback line was ever intended to be applied when there was only one "affected

[14] *See*, e.g., CBMC 17.42.050(A)(6)(c)(i) ("Determine the affected buildings, * * *."); (d) (If there are no buildings identified * * *.).

[15] *See*, e.g., CBMC 17.42.050(A)(6)(c)(ii) ("Determine the setback from the Oregon Coordinate Line for each building identified * * *."); (e) ("Where a building identified by either subsection * * *.).

building."[16] The language suggests that the average setback was to be calculated using multiple buildings, consistent with the plain language understanding of what constitutes an "average."

Nothing in the language of the CBMC suggests that the first dwelling in a swath of undeveloped lots gets to establish the setback for which all other dwellings must equal or exceed because that single setback establishes the "average."

Staff and opponents have interpreted CBMC 17.42.050(A)(6) to conclude that the so-called average derived from a single residence constitutes the oceanfront setback line for all other parcels. Under that interpretation, the Applicants' home is severely restricted in size to well below that allowed by the CBMC for its zoning and size.

Applicants challenge that interpretation of the code language and suggest that, where there is only one "building," there can be no "average" and so the basic, 15' ocean setback is the most that applies. The Roberts' proposed home easily meets the minimum 15' setback.

Another plausible interpretation of the City provision when there is just one building 200' north and south of a proposed new home, is that the "average" is determined by the required ocean yard setback line (15 feet) on the undeveloped lot 200' to the south and the oceanfront setback from the affected building to the north. Applicants calculated that setback and submitted a site plan showing the resulting "average." A14 (Applicant's October 29, 2020 submittal, Exhibit 6). That site plan demonstrates that the Roberts' home as they propose it, satisfies that oceanfront setback average.

Likewise, one could plausibly interpret the CBMC in instances where there is a solitary affected building within 200' north and south of a subject property to require the oceanfront setback for the solitary building to be averaged with a 15 foot ocean yard setback for each of the lots within the 200' area north and south. Such an average moves the oceanfront setback westward given the higher number of 15-foot setbacks that would be averaged. The Roberts' lot would meet this interpretation too.

The point of the above analysis is that, given that CBMC 17.42.050 does not contemplate the possibility that there is only one (or no) house within a 400-foot plus stretch of beach front (a reasonable omission given that there are so few such areas within the city's limits), the application of CBMC 17.42.050 requires interpretation in its implementation to figure out how to apply the code language in a single "affected building" context. As it turns out, that results in multiple plausible interpretations. And, as the Court of Appeals held in *Tirumali II*, any such interpretation in the application of the code means the code provision is not clear and objective.

[16] The "affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines." CBMC 17.42.050(A)(6)(c)(i).

The use of the CBMC 17.04.320 as interpreted by staff in the application of CBMC 17.45.050(A)(6) is not clear and objective.

Staff and opponents make an argument that CBMC 17.04.320 defines "lot abutting the oceanshore" to argue that the subject property is a lot abutting the oceanshore to which CBMC 17.45.050(A)(6) applies.

CBMC 17.04.320 defines "lot abutting the oceanshore" as:

> "a lot which abuts the Oregon Coordinate Line or a lot where there is no buildable lot between it and the Oregon Coordinate Line."

Staff then argues that Ocean Avenue is not a buildable lot.

As discussed in the previous section, that interpretation is not tenable given the adoption of ORS 197.779 in 2019. Applicants will not repeat the detailed arguments as to why ORS 197.779, which provides that "all real property" owned by the state, city or any other public or municipal corporations in the state is deemed as a matter of law to be suitable for affordable housing. In plain terms, Ocean Avenue is a site suitable for affordable housing, is zoned for residential use (RL) and is a buildable lot. Staff and opponents' position otherwise is wrong as a matter of law.

Further, the fact that staff and opponents assert that a state statute does not control whether Ocean Avenue is a buildable lot, means that the application of the code provision requires interpretation and/or the exercise of policy judgment in its application. Consequently CBMC 17.42.050(A)(6) is not clear and objective on its face as required by ORS 227.173(2).

Moreover, as demonstrated in the Applicants' Exhibit 8 dated November 5, 2020, the City has consistently determined that when a lot abuts a right of way, they do not "abut the oceanshore":

> Methodology Assumption: Based on the City explanation, all of these lots in the Elk Creek Park Subdivision have been allowed to not be considered oceanfront because a "platted street" is located between lots and the oceanfront. Because these lots in *Elk Creek Park Subdivision* front on *Ocean Avenue*, a platted street, they are not considered "oceanfront" when they are evaluated for development.

> Methodology Assumption: It appears that these lots have not been considered "oceanfront" because a street is located between these lots and the oceanfront. Because these lots in *Tolovana Park Subdivision* front on *Ocean Avenue*, a platted street, they are not considered "oceanfront" when they are evaluated for development. Tax Lot 600, Tolovana Park Block 1, Lot 13 is the only lot in *Tolovana Park Subdivision* that fronts on *Ocean Avenue* that would be required to have an Oceanfront Setback Survey if such a decision were applied.

The City does not deny this. The City instead claims that it has applied the OSL to certain properties – those "properties fronting on Ocean Avenue between W. Harrison and W.

Adams Streets." For starters, there is no evidence to support that statement in the record. Moreover, even if that were an accurate statement, it does not change the fact that the City has taken the position in numerous cases that the OSL does not apply when property abuts a right of way, as here. What the City apparently claims in this case, is that its code can be applied differently to the Roberts, because the Roberts' lot abuts Ocean Avenue which is now an undeveloped right of way. But there is no principled justification for treating the Roberts' differently than other lots abutting rights of way merely because the Roberts lot abuts an undeveloped platted right of way and others abut developed or partly developed rights of way. The City's position is especially troubling because Nenana Avenue is partly developed with an access that served the Roberts' property when a house was situated on it until the 1980s.

Finally, if a principled justification could be plausibly written by the City attorney for treating the Roberts' differently than others, that means that there are multiple plausible interpretations of the City's code about whether the Roberts' lot should not be considered a lot that abuts the ocean shore, as in other instances in the City. That is enough to demonstrate as a matter of law, that the City's OSL is not clear and objective and may not be applied to the Roberts' proposed home.

The Oregon Coordinate Line is not clear and objective.

Staff and parties have argued that the Oregon Coordinate Line is clear and objective and is defined by ORS 390.770 *et seq* and caselaw. They are wrong. The term "Oregon Coordinate Line" is undefined. The City's code does not mention or point to ORS 390.770 and ORS 390.770 does not even call itself the "Oregon Coordinate Line."

Instead, the City's code says:

> "(6) Oceanfront Setback. For all *lots abutting the oceanshore*, the ocean yard shall be determined by the oceanfront setback line.
>
> > "(a) Determine the setback from the *Oregon Coordinate Line* for each building identified in subsection (A)(6)(c)(i) of this section." CBMC 17.42.050(A)(6)(a) (Emphases supplied.)

From the face of the City's code it is not possible to know what the Oregon Coordinate Line is. A person might do research in Oregon statutes and cases to figure out what they think that the *state* might mean by the use of the term "Oregon Coordinate Line." But, even then, what the *City* means is not evident. The City references the "Oregon Coordinate Line" in the context of working out a setback for lots abutting the "ocean shore." Plausibly that could lead a person to state law definitions of "Ocean Shore." ORS 390.605(2) says the "ocean shore" is determined either by the ORS 390.770 "Vegetation Line" "or the line of established upland vegetation, whichever is further inland." No one knows where the latter is; rather the "line of established vegetation" is a subjective, value laden judgment that is not clear and objective in anyone's imagination.

Oregon Coast Alliance argues that the Oregon Coordinate Line is "the western boundary of all lots abutting the ocean shore." That is not how the City or other opponents interpret the

"Oregon Coordinate Line." The lawyer for the "Haystack Rock LLC" claims the "Oregon Coordinate Line" is established in cases. He is also wrong. There are two LUBA cases and two court of appeals cases that mention the "Oregon Coordinate Line". In *Beta Trust v. Cannon Beach*, 33 Or LUBA 576, n 2 (1997), it is mentioned in a footnote: "There is no dispute that *** the grading would occur west of the Oregon Coordinate Line." That mention does not tell anyone what the "Oregon Coordinate Line" is or where it is. In *Save Oregon's Cape Kiwanda v. Tillamook County*, 40 Or LUBA 143, *aff'd* 177 Or App 347 (2001), the "Coordinate Line" is mentioned but it is not defined as the corporate opponent here wants; rather the court explained that the Oregon Coordinate Line is "the boundary line between public and private ownership of Oregon beaches." Finally, opponents' citation to *State Highway Comm'n v. Bauman*, 16 Or App 275 (1974) is similarly unhelpful. It refers to the "vegetation line or coordinate line established by and described in ORS 390.605 et. seq." ORS 390.605 refers to the "Ocean Shore" and says it is either the "statutory vegetation line as described by ORS 390.770 or the line of established vegetation, whichever is farther inland." That case like the rest, provides no roadmap to what the City means by the use of the term "Oregon Coordinate Line" and it is certainly not evident on its face. None of the cited cases say the "Oregon Coordinate Line" is the statutory vegetation line in ORS 390.770. And, as noted and most important, there is nothing that makes the reference to the "Oregon Coordinate Line" in the *City's code*, clear and objective *on its face*.

Furthermore, CBMC 17.42.050 does not simply state that the statutory Oregon Coordinate Line is the line by which oceanfront setbacks are calculated. CBMC 17.42.050(A)(6)(i) allows the building official to require a greater oceanfront setback where "information in a geologic site investigation report indicates a greater setback is required to protect the building from erosion hazard." That too is not a clear and objective standard. What type of analysis is required and what is the trigger for "indicating a greater setback is required"? How does one determine how much further back the setback line must be? The answers to those questions are not clear on the face of the code provision and require interpretation of the code. That is not clear and objective.

Also, as noted above, the Oregon Coast Alliance argues that the Oregon Coordinate Line is "the western boundary of all lots abutting the ocean shore." However, if as staff vigorously argues, Ocean Avenue is not a lot, the question becomes where the Oregon Coordinate Line is given those competing interpretations. Even the opponents cannot agree on what the allegedly "clear and objective" Oregon Coordinate Line is. A standard that is subject to multiple interpretations in its application is not clear and objective. *Group B, LLC*; *Tirumali*.

CBMC 17.42.050(A)(6) is not a clear and objective standard by its terms or on its face. Because the standard is not clear and objective, the city cannot apply CBMC 17.42.050(A)(6) to this application for the development of housing. ORS 197.307(4); *Walter v. City of Eugene; Group B, LLC v. City of Corvallis.*

As an aside, Applicants' interpretation above of how one calculates the "average" setback when there only one affected building – taking the average of the building's setback and the minimum 15' oceanfront setback – appears to remedy the issue raised under heading number 1 above. That is, it interprets the City code in a manner consistent with the state statute such that the application of CBMC 17.42.050(A)(6) does not reduce the size of a proposed housing

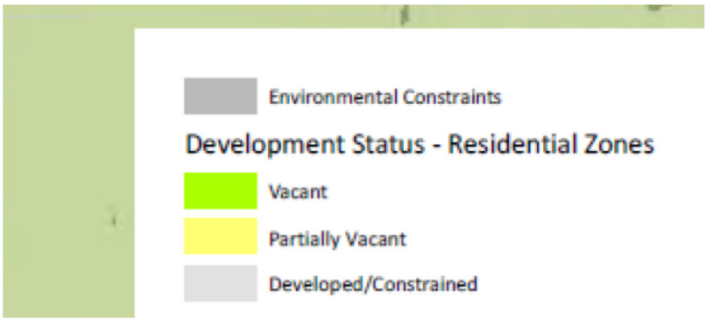
development that is consistent with the density level authorized under the local land use regulations. Under that interpretation, CBMC 17.42.050(A)(6) could be said to be consistent with the requirements of ORS 227.175(4)(c)(A). The code provision would still have a "clear and objective" problem under ORS 197.307(4) and ORS 227.173(2), but such an interpretation would lead to approval of the application.

The determination of qualifying buildings subject to the OSL cannot be ascertained under clear and objective standards

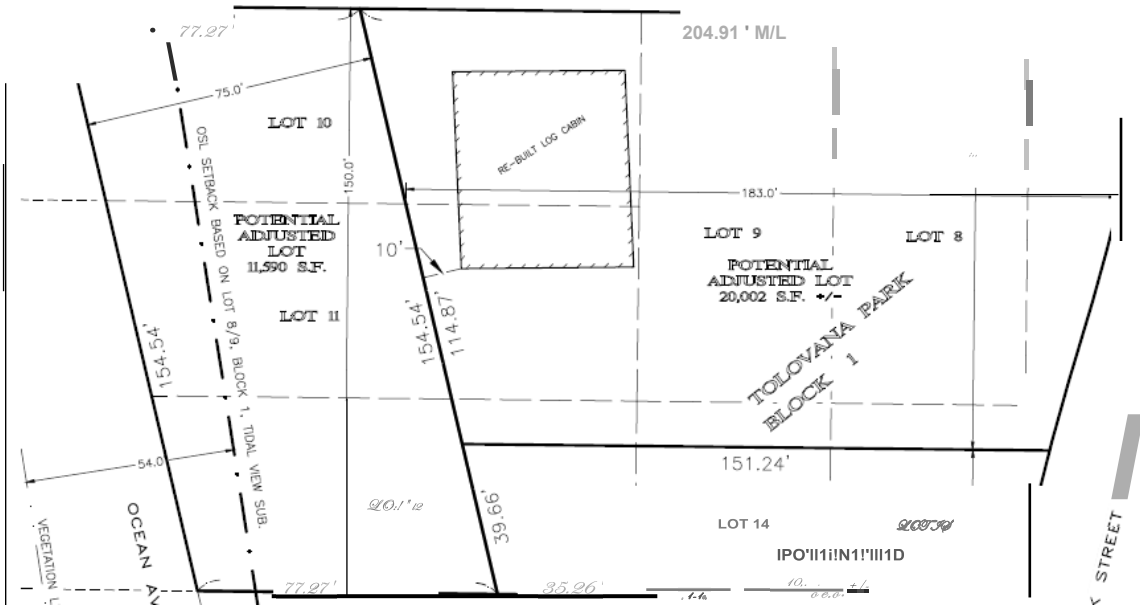
Identifying the "buildings" that must be counted in the OSS exercise – "residential or commercial structures", but not "accessory structures," that are situated either north or south of the Roberts' property within a distance of 200,' is not itself clear and objective and is not guided by clear and objective standards.

The only possible residential or commercial structure within 200' is a 4,180 sq. ft. luxury "cabin" to the north, ostensibly owned by the "Neupert Beach House Trust" ("Cabin"). However, the only "residential or commercial structures" that are counted in the OSS's ocean "averaging" exercise, are "buildings on lots abutting the oceanshore." CBMC 17.42.050(A)(6)(a). The issue then for the "Cabin," is the same as for Roberts' – if there is a "lot" as defined (tract – Ocean Ave.), that separates the "Cabin" from the ocean, then the "Cabin" is not to be counted in the OSL "averaging" exercise. Just as the Roberts' property is separated from the ocean by platted Ocean Avenue public right-of-way, so is the "Cabin" which means neither are a "lot abutting the oceanshore. That in turn means that the only ocean setback that applies to the Roberts' is the 15' setback and the Roberts' comply with that setback, as everyone knows.

Moreover, the property on which the "Cabin" sits is oversized, and the City's buildable lands inventory characterizes that property as "partially vacant" and eligible for the establishment of houses at the rate of 4.4 homes per acre:



There is an 11,590 sq. ft. fully developable "plot" of land that separates the "Cabin" from the ocean:



A "plot" is defined in the City code as a "lot." So, if there is a "plot" that separates the "Cabin" from the ocean, then the "Cabin" is not on a "lot abutting the oceanshore." A plot indeed does separate the "Cabin" from the ocean, as is plain from the above. We note that the term "plot" itself is undefined by the City, but the term is clearly intended to be something different from a parcel or tract of land. Black's Law Dictionary defines "plot" as "[a] measured piece of land." There is a "measured piece of land" that separates the "Cabin" from the ocean.

Consistent with the fact that a "plot" separates the "Cabin" from the ocean, the City also uses the term "plot" in CBMC 17.040.020(D)(1) to describe an "*** area of land to be developed ***." The City's BLI clearly contemplates that this area of land shown on the City's BLI as "partially vacant" and capable of delivering 4.4 houses per acre, will be developed.

It appears that the "Cabin" sits on portions of TLs 8900 and 4900, which are owned by the Neupert Beach House Trust. The "Cabin" also sits on an area of land composed of .8 acres, owned by a separate entity "Haystack Rock LLC" (TL 500). Accordingly, TL 500 contains a "measured piece of land" that is wholly developable to the west of the "Cabin", as depicted above. That means it is a plot. That means the "Cabin" is not situated on a "lot abutting the oceanshore." The City and opponents assert otherwise, but that merely demonstrates that the OSL standard is not clear and objective.

We further point out that the term "lot abutting the oceanshore" excludes subdivision lots. While unintuitive, the City code's express definition of "lot" includes parcels, plots, and tracts of land, but says nothing about including lots created by subdivision. This basic dissonance further underscores that the City's OSL scheme is not a clear and objective standard and that it is plausible, if not express, that neither the Roberts' lot (which was created by a platted subdivision) and the property upon which the "Cabin" sits (ditto – created by subdivision plat), is a "lot" as the City defines the term, providing an additional reason why the Roberts' home is not subject to the OSL.

4. Evidence in the record demonstrates that the proposal complies with all applicable standards in the "Oceanfront Management Overlay Zone" and elsewhere in the code.

"Haystack Rock LLC" raises a litany of "standards" that it claims the application materials do not demonstrate compliance with in its October 20, 2020 submittal (D15); and October 29, 2020 submittal (D39). The October 20 submittal does not identify any applicable standards, but rather resorts to making bald unsupported assertions. In the October 29 submittal, the company lists a variety of standards with no accompanying argument about why it thinks they apply.

Haystack Rock LLC's October 20, 2020 submittal lists Traffic (A. Dangerous New S-Curves Intersection); Trees (B. Unpermitted City and Private Tree Removal); Geotechnical (E. Inadequate Geotechnical Analysis); Setback Requirements (G. Violating Setback Requirements); Wetlands (F. Missing Wetland Delineation and Protection); and Public Access Issues (B. Unpermitted City and Private Tree Removal; C. Private Use of Right-of-Way; D. Preventing Access from Abutting Lots; and I. Prohibited New Street Improvements in Oceanfront Overlay). Each is addressed in turn below.

Traffic

There is no applicable standard that makes traffic a relevant consideration to the approval of the Roberts' home. The Roberts' have a property right of access using the abutting Nenana Ave., right of way, which they will improve as the City requires. The Applicants have had several traffic studies prepared in the development of this application and in response to City staff inquiries. *See*, e.g., A12 (Clemow Associates, LLC, Nenana Avenue Sight Distance Analysis). The Clemow Associates' analysis addressed a range of transportation issues such as: access and roadway characteristics, roadway speeds, sight distances, road safety and additional considerations. A12 (p. 1). While the analysis recommends potential turn restrictions or specific signage, it concludes that, "with the detailed design elements being contemplated as part of this project, it is anticipated the proposed Nenana access will operate safely and efficiently." A12 (p. 5-6). There is no evidence in the record that supports Haystack Rock LLC's allegation that "The vertical and horizontal curves at the proposed intersection make it too dangerous to allow." D15 (p. 15). We note that Haystack Rock LLC's own access at Pacific and S Hemlocks has a truly dangerous intersection, but that fact does not seem to bother this opposing company.

Trees

Haystack Rock LLC contends that Applicants are proposing unpermitted city and private tree removal. D15 (p. 15). That allegation is simply false. Applicants have submitted tree removal applications for both their private property (C02A, 7_CB_Private Property Tree Removal Permit Application) and for the right-of-way (C02A, 10_PW_ROW Permit Application Tree Removal). Those applications rely on tree surveys and arborists reports. *See*, e.g., C02A (21_ET Arborist CBMC 17.70 Development Recommendations; 22_ET Arborist CBMC 17.70 Final Plan Review; 22_ET PLS White Tree Survey) and A15 (Tree Removal Plan). The Applicants home requires remove 6 immature trees (four alder, one of which is dead, and two

pines), to develop their home. That evidence demonstrates that any tree removal will be consistent with the city's tree standards under CBMC 17.70.

Geotechnical

Haystack Rock LLC contends that the geotechnical analysis prepared by Geotechnical Solutions, Inc. for the Applicants is inadequate. However, they present no contrary evidence and simply argues that simply because the consultant used by Applicant previously worked for the City, the City should hire "a new geotechnical consultant" to assess the risks posed by the development. That insulting assertion is not an argument or evidence that refutes the extensive geotechnical and engineering evidence in the record. *See*, e.g., C02A (Exhibit 25) and C02B (Exhibits 26-40). Applicants' experts also prepared a detailed analysis "S-Curves Landslide Investigation and Stabilization" analysis (A09), submitted a document that addressed the alleged inadequacy of the evidence in the record and listing the principal geotechnical engineer's credentials (A13), and responded to issues raised concerning horizontal drains and oceanfront stability and the purpose of the stability pile system in applicants' November 5, 2020 filing (November 5 Exhibit 1). The evidence submitted by Applicants' experts have been responsive to the City's engineering staff as well as to public comments and have been comprehensive in their field work and analysis. That is evidence a reasonable person would rely upon. There is no basis supporting Haystack Rock LLC's claims that the Applicants' geotechnical analysis is inadequate.

Setback Requirements

In an effort perhaps to shrink the footprint of the proposed dwelling as much as possible by arguing that the north border setback should be 15 feet, Haystack Rock LLC opens a can of worms. The evidence in the record plainly shows that rights-of-way front two sides (the south and west sides) of the property, thereby making it a corner lot. That conclusion was reached by the architect of the project, who has designed multiple projects within the city, based on the express language of the CBMC. If, indeed, the CBMC can be read in the manner Haystack Rock LLC contends, that means the CBMC is not clear and objective and, pursuant to ORS 197.307(4) and as argued above, the setback standards cannot be applied to this application for housing. If the CBMC allows for the discretion in how the setback will be determined, then that is further support that the decision is unquestionably a statutory permit and Haystack Rock LLC's "not-a-permit" arguments are refuted by their own conflicting positions.

The proposed setbacks are consistent with those required by the CBMC. City staff have agreed with Applicants' Architect, Jay Raskin's reading and application of the CBMC. The Planning Commission should reject opponents' arguments that the proposed setbacks are inadequate.

Wetlands

As noted in the Applicants' October 29, 2020 response to issues raised, Haystack Rock LLC asserts with no support that the Roberts' dwelling is proposed to be located on jurisdictional wetlands. That corporate opponent is wrong. There are no delineated or inventoried wetlands

anywhere near the Roberts' property. There is a seasonal stream in the area which is *on the Haystack Rock LLC property* (No "49" on the image below) but it is quite clearly not on the Roberts property, as is established in the City planning documents:

The comprehensive geotechnical analysis conducted for the application would have revealed any jurisdictional wetlands and did not do so. Mr. Rondema found no wetlands on the property, which he underscored in his submittals in the record for this matter. There are simply no jurisdictional wetlands where the Roberts' dwelling will be located and no reason to think otherwise. There are similarly no wetlands in the public right of way according to the city's inventory shown on the image above. Haystack Rock LLC is simply grasping at straws making unsupported allegations. That corporate opponent provides no basis for denial of the Roberts' housing permit application.

Public Right of Way

The October 20, 2020 and November 5 letters from Haystack Rock LLC make several allegations concerning the development of Nenana Avenue. Several points in response are worth making.

First, as explained at the public hearing, the issue on appeal concerns the development of the Applicants' property. There is no applicable standard or criteria about the Nenana Ave. right of way improvements, and the City is not permitted to apply inapplicable standards. ORS 227.173(3) and ORS 225.175(10). The improvements the City will require to Nenana Ave. right of way are not before the planning commission. The Applicants have prepared materials and submitted the ROW improvement applications to be reviewed by the City Public Works Director. They will be reviewed consistent with the City's established standards, whether concerning tree removal or the improving the right-of-way. That is an entirely separate process that cannot and should not be shoe-horned into this appeal. The Public Works Director is charged with approving an improvement to Nenana Avenue and the Planning Commission should not interfere with her performance of those duties.

Second, Applicants have a property right to access Nenana Avenue that the City may not deprive them of. *State ex rel. Dept. of Transp. v. Alderwoods*, 358 Or 501, 511, 517, 366 P3d 316 (2015). See also *Willamette Iron Works v. Oregon, R. & Nav. Co.,* 26 Or 224, 37 P 1016 (1894); *McQuaid v. Portland & V R'y Co.,* 18 Or 237, 22 P 899 (1889); *Brand v. Multnomah County*, 38 Or 79, 60 P 390, 62 P 209 (1900); *Barrett v. Union Bridge Co*., 117 Or 220, 243 P 93 (1926). Any argument that Applicants' should be deprived of access to and the right to use Nenana Avenue, is contrary to established state law and would be contrary to state statutory law and constitutional law and would deprive the Roberts family of their property right of access, without just compensation.

Furthermore, opponents' arguments that Nenana Avenue cannot be developed because streets are not an allowed use in the Oceanfront Management Overlay Zone (OMOZ), are simply not true. The standards they rely upon do not apply to the Roberts' property. The standards Haystack Rock LLC hopes the City will apply, apply only to "beaches, active dunes and foredunes that are conditionally stable but subject to wave overtopping or ocean undercutting, and interdune areas subject to ocean flooding." That does not include the Roberts' property, or the Nenana Ave right of way; rather the subject property is a regular residential lot with a right to access an abutting platted public right of way and the right of way is similarly not a beach or a dune of any type. There is no standard whatsoever in the OMOZ that prohibits improving a right of way or that prohibits the Roberts from developing their home. In fact, because Nenana Ave., has previously been developed, even if it were on a beach or dune (it is not), it is possible to characterize its improvement as a "repair" which is expressly allowed on such features in the OMOZ. CBMC 17.42.030(A)(3).

Third, denying the Roberts' the right to access Nenana Avenue would constitute a taking that deprives the Roberts all reasonable use of their property. Again, the *Alderwoods* decision cited above is instructive. That Court recognized the current state of the law – government deprivation of a right to access adjacent public roads is the deprivation of a property right that may not be taken without just compensation. 358 Or at 526. In that case the Court found a taking had not occurred, but only because "reasonable access to the abutting property remain[ed]." *Id.* In that case, the property had access to another existing roadway. Here, there is no other existing roadway the Applicants can access. Any deprivation of the Roberts' right to access and improve Nenana Avenue will constitute a compensable taking. *Id.*

Fourth, if the City's right-of-way standards apply, then they apply to regulate the development of housing and, so must be clear and objective as a matter of state law. Haystack Rock LLC argues that the following standards in CBMC 12.36.030(B), must be applied to approve or deny this application for housing:

> "The following criteria shall be considered as part of the process of reviewing an application for a permit:
> "1. Maintains public safety;
> "2. Maintains adequate access for public use of the street right-of-way;
> "3. Maintains or improves the general appearance of the area;
> "4. Does not adversely affect the drainage or cause erosion of the adjacent property.

"All of these criteria must be met in order for the public works department to issue a permit."

First, none of those standards are clear and objective and so none can be applied.

Second, regardless, even if they applied, the Applicants have demonstrated that they are met. Specifically, the Applicants' traffic engineer has established that the improvement of Nenana Avenue maintains public safety in a manner that is consistent with City standards. Further, there is nothing to suggest that the public will be foreclosed from "adequate access for public use" of Nenana Avenue." Rather, the only evidence in the record is that Nenana Avenue will continue to be available for public use, including the rights of the Roberts' to use it. It will simply be safer and consistent with City standards, when the public, including the Roberts', do so. Moreover, improving Nenana Avenue to City standards maintains the "general appearance of the area." The "general appearance of the area" is a residential area with a variety of roads that serve the area's residential development. It can hardly be inconsistent with this standard to improve Nenana Avenue in a manner that is consistent with City standards. Finally, the evidence in the record demonstrates that the Nenana Road improvement will include all required drainage facilities as a part of its design and will be established in a manner that is protective of the existing City dewatering piping the City has installed for erosion control in the area.

Haystack Rock LLC's right-of-way arguments presented in the October 20, 2020 and November 5, 2020 submittals provide no basis upon which to deny Applicants' application to develop their home.

Haystack Rock LLC' October 29, 2020 submittal generally cites standards they believe "the applicant has not and cannot show compliance with the other provisions of the Oceanfront Overlay Zone[.]" and lists multiple standards that it claims are not met. D39 (p. 7).

The problem with their argument is that most of those standards do not apply, by their express terms. Further, the corporate opponent fails to explain in any way how any of those standards are relevant or why it would not be possible for a proposal to satisfy those requirements. The corporate opponent also fails to explain why the evidence in the record that demonstrates compliance with the standards that are relevant, is insufficient. It is a plate of noodles thrown against the wall hoping that something will stick. Nothing does. Each cited standard is addressed below.

CBMC 17.42.030(C) applies to rights of way "that consist of the beach, active dunes, or other foredunes * * * that are subject to wave overtopping or ocean undercutting, or interdune areas that are subject to ocean flooding * * * * *." The adjacent right of way is on none of the features described; the standard does not apply. Regardless, even if it did apply, as noted above, because the Nenana right of way has previously been developed, its improvement could plausibly constitute a "repair" expressly allowed under CBMC 17.42.030(A)(3). And to the extent that the City disagrees, then that demonstrates that the standard is not clear and objective and cannot be applied in any case.

CBMC 17.42.030 (E) and (F) are simply provisions that allow certain uses subject to design review and conditional use review respectively. Establishing the Roberts' proposed home, requests none of the uses subject to these provisions. Consequently, they are not relevant to and do not constitute approval criteria for the application.

CBMC 17.42.040(A) also applies only to "beach, 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." The subject property is not any of those. CBMC 17.42.040(A) does not apply.

CBMC 17.42.040(C) also applies only to beach, 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. The subject property is none of these and this standard does not apply.

CBMC 17.42.060(A)(1) does not apply as anyone who reads it would know. The proposal is for a house and it is not on land that is on the "shoreline" or on any type of dune. This standard and CBMC 17.80.230 it references, are not applicable.

CBMC 17.42.060(7) concerns whether proposed development will "result in the drawdown of the groundwater supply[.]" The Roberts' proposed home will be on city water and will not draw from groundwater. Relying upon City water does not "drawdown the groundwater supply," and Haystack Rock LLC's assertion to the contrary is absurd, not to mention wholly unsupported. The proposal is consistent with this standard.

CBMC 17.10.40(G) concerns the number of off-street parking spaces required by Section 17.78.020. The evidence in the record demonstrates that the application provides two off-street parking spaces and satisfies this standard. Haystack Rock LLC also cites CBMC 17.78.010 but fails to explain their problem under this standard, and what it is, is not evident. The Roberts have demonstrated that all applicable parking standards have been met. There is no basis for Haystack Rock LLC's claims that the applicant cannot show compliance with these requirements.

Last, CBMC 17.42.060(A)(9) authorizes certain structures to be permitted in the ocean yard, subject to specified CBMC provisions. The one authorized structure that is contained in the proposal, a deck, fully complies with the projection requirements of CBMC 17.90.070(E). Exhibit 3 to the Appeal Statement, the site plan, shows that the deck's closest distance to any property line is five feet, which more than satisfies the two feet minimum requirement of the code standard. The evidence in the record establishes that this standard has been satisfied.

The extensive (and costly) evidence in the record demonstrates that the Applicants have carried their burden of demonstrating compliance with all applicable CBMC standards, despite the assertions otherwise by Haystack Rock LLC and other opponents. There simply is no credible evidence in the record that weighs against the wealth of professional studies and analysis conducted by Applicants' consultants in designing Applicants' home and preparing the

application. The Applicants have carried their burden of proof and claims to the contrary are unavailing.

5. Other Opponent Claims

Some opponents have described the subject property as an untouched vegetated area, with one going so far as to describe the property as "pristine wilderness area." *See*, D14 (Ritter e-mail, dated 10/20/20). The evidence in the record clearly establishes that the Roberts' home replaces a dwelling that had previously been on the subject property for over 50 years and was there into the 1980s. That is hardly pristine wilderness. Opponents' exaggerations are refuted by the record and have no link to any approval criteria for the Roberts' proposed home.

Other opponents have argued that the site is unsafe to develop, without specifying why or how they reach that conclusion. All Applicants can do to respond to such amorphous claims is that the extensive geotechnical analysis and the detailed engineering plans demonstrate that the site is suitable for the proposed development – what owner would want their home to be unnecessarily at risk? Also, as discussed above, the extensive traffic analysis demonstrates that ingress and egress to and from the property will be safe as designed and proposed. As for pedestrian safety walking along South Hemlock Street, that is a present situation on a roadway the Applicants have no control over and that is not caused by and will not be exacerbated by the proposed development. It is not a basis upon which the application can be denied.

Opponents' arguments that the proposal does not comply with the Oceanfront Management Overlay Zone's development requirements as well as with the other development standards contained in the CBMC are without merit. They provide the Planning Commission no basis upon which to deny the application.

5. Denial of the application on the grounds that it does not comply with the OSL will represent an unconstitutional taking of the Roberts' property.

Denying the Roberts' their right to establish their home with access to Nenana Avenue results in an unconstitutional taking of their property. The parties below quibble about whether the taking is a total wipe out of the Roberts' property, leaving it with only "token" value ala *Lucas* and *Palazzolo* or results in so significant a diminution in the value of the property as to require the public to pay for the asserted benefits of the regulation which works such diminution.

There can be no reasonable dispute that a city regulation that demands a lot valued at nearly a million dollars be foreclosed from development at all or that it be developed only with a home composed of 600 to 1399 sq. ft., causes either a wipe out or a substantial diminution in the value of that lot. The subject $1 million lot has value only if it can be developed with a reasonable house. Demanding the only house that can be built on a $1 million lot, as one with nothing more than "tear down" value, does not leave the $1 million lot with much value.

The City should also not take solace in the fact that there have been recent residential property sales in the City where the buyer purchased lots that that were improved with very small dwellings. The Applicants submitted expert evidence that the dwelling on these lots are

considered "teardowns," and that the real value in those lots was the fact that they remain buildable and could in fact support larger dwellings. *See*, A29 (Letter from Bryan Cavaness, General Counsel for Stafford Development Co.). This fact is borne out by the evidence Applicants submitted: the value of oceanfront lots in Cannon Beach is rising much more rapidly that the value of the improvements built on those lots. A18-A24. Moreover, Cannon Beach has also seen numerous examples where developers are buying improved lots, tearing down the older homes, and then replacing them with larger, more modern homes. *Id.* This fact demonstrates that older and smaller homes themselves have little, if any, economic value; and that the value in those oceanfront properties lies in the land value inherent in a buildable lot. The new dwellings placed on lots now are invariably maximized to the allowable building footprint of the lot, which is a further indication that the older, smaller, cottage-style homes are not valued by new home purchasers. For these reasons, the opponents' evidence does not say anything about the investment backed expectations of landowners who purchase the lots, except that the intrinsic value of the lot is tied to the ability to develop a reasonable size home, which in Cannon Beach is 2,000-7,000 sq. ft.

Haystack Rock LLC is also wrong to argue that Mr. Roberts "knowingly bought an unbuildable lot." *ee*, D39 (p. 2). As an initial matter, evidence of today's lot prices in the price of $626,000 to $1,750,000 are not relevant to a 2001 purchase price, since oceanfront lots have more than doubled in that time period. A18-A24. Second, the primary development constraint on TL 600 is the steepness of the ROW access. While there are engineering solutions for that issue, the resultant development and engineering costs explain any reduced purchase price realized on that lot. Moreover, the fact that the lot sits on a historical and active landslide (as to many homes nearby including Haystack Rock LLC's) demands additional engineering solutions that would result in further adjustment of the purchase price. Haystack Rock simply reads too much into the evidence: the Roberts' lot most certainly is "buildable," and Haystack Rock offers no legal reason why the lot would be unbuildable in law or fact. There is no evidence against the unavoidable fact that when the Roberts' purchased their lot, they had every expectation of being able to construct a reasonably sized home – consistent with what they propose now – upon it.

The City should not delude itself that a judge or jury would find the interpretation and application of the OSL here – which provides nothing but a private benefit to the adjoining corporate landowner – to get a constitutional hall pass.

Before the Applicants can file a taking claim in federal court, they must give the city the opportunity to apply their regulations in a way that does not result in an unconstitutional taking. The Roberts' are giving the City that chance.

6. Haystack Rock LLC's proposed "findings" of denial must be rejected.

Haystack Rock LLC submitted "findings" that demands any future applications for the subject property undergo quasi-judicial notice and hearing procedures regardless of whether the city code requires them. This the city cannot do. ORS 197.175(2)(d)[17] obligates cities with

[17] ORS 197.175(2) provides, in relevant part:

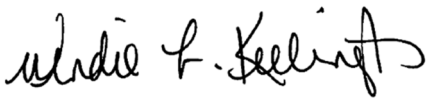
acknowledged comprehensive plans and land use regulations to make land use decisions and limited land use decisions in compliance with those plans and regulations. That requirement applies to procedural requirements as well as to approval standards and criteria.

Furthermore, the City code specifies the particular procedural requirements for each application type. Following an ad-hoc procedure based upon the request of a particular property owner is inconsistent with the code and violates state and federal constitutional principles against arbitrary and capricious decision making.

The planning commission should reject Neupert's proposed "findings" and the city should continue to process applications as specified in its adopted and acknowledged land use regulations.

The planning commission should approve the Roberts dwelling as it was submitted. Thank you for your consideration.

Very truly yours,



Wendie L. Kellington

WLK: wlk
CC: Clients

"Pursuant to ORS chapters 195, 196 and 197, each city and county in this state shall:

* * * *

(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations[.]"