



Wendie L. Kellington  
P.O. Box 159  
Lake Oswego OR 97034

Phone (503) 636-0069  
Mobile (503) 804-0535  
Email: [wk@klgpc.com](mailto:wk@klgpc.com)

August 25, 2020

Via Electronic Mail  
Mr. Jeff Adams  
City of Cannon Beach, Planning Director  
163 E Gower  
PO Box 368  
Cannon Beach, OR 97110

RE: City of Cannon Beach Building Permit Application for Roberts Dwelling, Tolovana Park Block 1 Lot 13, a Residentially Zoned Lot

Dear Mr. Adams:

This firm represents Stan and Rebecca Roberts who seek a building permit and a development permit to establish a residence on their residentially zoned land. A residence is permitted outright on their property. They meet all clear and objective standards. This letter responds to your letter dated August 11, 2020, in which you gave the Roberts' the opportunity to explain why it is that the City's oceanfront setback expressed in CBMC 17.42.050(A)(6), does not apply. This is that response.

### **Roberts' Lot is not a "Lot Abutting the Oceanshore"**

The simple reason that the Roberts lot need not apply the City's oceanfront setback, is that their property is not a "lot abutting the oceanshore". The predicate for the application of the City's oceanfront setback is that their property must be a "lot abutting the oceanshore." The term "lot abutting the oceanshore" to which the oceanfront setback only applies, is defined to mean a lot that abuts the "Oregon Coordinate Line" or a "lot where there is no buildable lot between it and the Oregon Coordinate Line." The Roberts' lot does not abut the Oregon Coordinate Line and there is a "buildable lot" between their lot and the Oregon Coordinate Line.

To explain. The Roberts lot fronts on (abuts) Ocean Ave, a platted public street, dedicated to the public. Tate platted public street meets the City definition of "lot".<sup>1</sup> Ocean Ave., is the lot that abuts the Oregon Coordinate Line and the Roberts' property is directly east of Ocean Ave. There can't be two lots abutting the ocean shore – rather there is one that actually does (Ocean Ave.), and one directly behind it to the east (Roberts' lot).

Second, even if there can be two "oceanfront lots" on the same vertical plane (a stretch to say the least), Ocean Ave., is "buildable." The City has no definition of that term, but "buildable" is defined in the Merriam-Webster dictionary as "suitable for building." In turn, the

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<sup>1</sup> "Lot" means a plot, parcel or tract of land." At a minimum, Ocean Ave. is a "tract of land."

City code defines “building” as a “structure built for the support \*\*\* of persons, animals or property of any kind.” The code defines the term “structure” as “an assemblage of materials extending above the surface of the ground and permanently affixed or attached \*\*\*”. The definition of structure excludes “minor incidental improvements.” Ocean Ave. is capable of being built with a structure (road surface which is above the ground), that would support, pedestrian and vehicles. A road is certainly not a “minor incidental improvement” to real property. Moreover, Ocean Ave., is zoned residential and is undeniably “public property”. As a result, it could be developed with housing. ORS 197.779; 197.522(2); 227.175(b)(B).

This is consistent with architect Jay Raskin’s understanding of the City’s application of the CBMC 17.42.050(A)(6) ocean setback. See attached Declaration of Jay Raskin.

Consistent with the fact that lots abutting Ocean Ave. are not “lots abutting the oceanshore,” is also evident from your opinion to that effect a few months ago. Specifically, in a meeting with several other individuals in attendance, and before the Roberts’ invested a half million dollars to design their home and to perform the significant engineering for the improved road access to serve the home, you advised Ms. Pearson that because the Roberts’ property abutted Ocean Ave., it was not subject to the ocean setback. The project proceeded under that foundational representation.

With all due respect, there is no reason for the City to interpret its code to the contrary now.

### **The Cabin Does Not Count Under CBMC 17.42.050(A)(6), in Any Event**

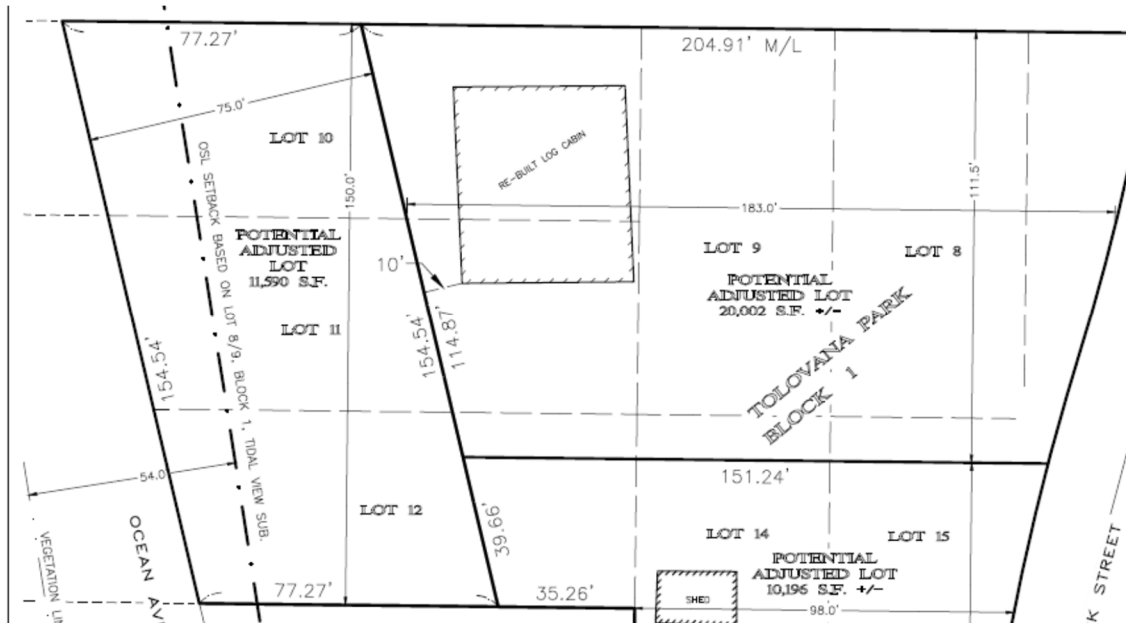
We note that even if oceanfront averaging per CBMC 17.42.050(A)(6) were undertaken, CBMC 17.42.050(A)(6)’s ocean setback provisions would not change the proposed location of the Roberts’ home. This is because there is no qualifying “residential or commercial structure” either north or south of it, within 200’. The only “residential or commercial structures” either north or south of the Roberts’ property within a distance of 200,’ is a cabin ostensibly owned by the Neupert Beach House Trust (Cabin). However, the only “residential or commercial structures” that are counted in the ocean averaging are “buildings on lots abutting the oceanshore.” CBMC 17.42.050(A)(6)(a). The Cabin is not a “lot abutting the oceanshore” because a buildable “plot” separates it from the Oregon Coordinate Line. A “plot” is defined in the City code as a “lot”. Therefore, because a “plot” is defined as a lot, if a “plot” separates the Cabin from the Oregon Coordinate Line, then the Cabin is not counted in the ocean averaging exercise established by CBMC 17.42.050(A)(6)(a).

The term “plot” 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 Oregon Coordinate Line.<sup>2</sup> It appears that the Cabin sits on portions of TLs 8900, 4900 which is owned

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<sup>2</sup> The City also uses the term “plot” in CBMC 17.040.020(D)(1) to describe an “\*\*\* area of land to be developed \*\*\*.”

by “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). TL 500 contains a “measured piece of land” that is wholly developable to the west of the Cabin, as depicted below:



The Buildable Lands Inventory (BLI) for the City presumes RL land will deliver 4.4 houses per acre. The above referenced property owned by Haystack Rock LLC is zoned RL and the BLI characterizes it as “partially vacant.”



This means the BLI anticipates that it will be developed with more housing. Consistently, TL 500 owned by Haystack Rock LLC, is well-above the 10,000 general lot size for the RL zone. Accordingly, there is a measurable area (*i.e.* a “plot”), on TL 500 that is buildable under existing zoning, as confirmed by the BLI, for at least two (2), perhaps three (3)

new dwellings. The City is prohibited from denying an application for housing on this TL 500 land. ORS 227.175(2); *Warren v. Washington County*, 76 Or LUBA 375 (2018), *aff'd* 296 Or App 595; *rev den* 365 Or 502 (2019). As a result, there is a “plot” (a lot), that is “buildable” (“buildable lot”), that separates the Cabin from the Oregon Coordinate Line and, so, it is tautological that the Cabin is not counted in any ocean averaging per the express requirements of CBMC 17.42.050(A)(6).

### **CBMC 17.42.050(A)(6) May not be Applied Because it is not Clear and Objective**

Another point bears mentioning. As is evident from the dialogue about its meaning, CBMC 17.42.050(A)(6) is not “clear and objective.” Accordingly, the City is foreclosed from applying it to the Roberts’ applications for a development and building permit which is for “needed housing,” in any event. ORS 197.307(4); 227.173(2); *Warren v. Washington County*, *supra*. The City is only authorized to apply “clear and objective” standards to the Roberts’ applications for their home. *Id.* The CBMC 17.42.050(A)(6) regulations are not “clear and objective” on their face – particularly with regard to the term “buildable lot.” *Id.* The City carries the burden to establish the standards that it applies to the proposed dwelling are “clear and objective” on their face, and the City cannot do so here. ORS 197.831. The net result is that because the building permit and development application for the Roberts’ residence complies with clear and objective standards, they must be approved, without the application of CBMC 17.42.050(A)(6)<sup>3</sup>. ORS 227.173(2); *Warren v. Washington County*, *supra*.

### **The Application of CBMC 17.42.050(A)(6) Discourages Needed Housing Through Unreasonable Cost and Delay**

Because the City may only apply clear and objective standards to the Roberts’ application to establish their dwelling (a use permitted outright on their residentially zoned land), we do not understand the characterization of your correspondence that it is a “completeness” determination, per ORS 227.178, or the suggestion that if you end up deciding the ocean setback applies, that an appeal is to the planning commission. ORS 227.178 does not apply to building permit decisions issued under clear and objective standards<sup>4</sup>, or decisions that do not require the exercise of discretion<sup>5</sup> or to road decisions like the right of way permit, sought here.<sup>6</sup> The ocean setback cannot be applied because it is not “clear and objective.” If the application of the ocean setback causes this application for needed housing to be converted to a land use or limited land use decision, then it unreasonably adds cost and delay that would otherwise not occur and that is wholly inappropriate. Under such an interpretation, the application of the CBMC

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<sup>3</sup> That will result in the same 15’ setback that applies to lots that abut a street that is the ocean setback default setback. Compare CBMC 17.10.040(B) with CBMC 17.42.050(A)(6)(h).

<sup>4</sup> ORS 197.015(10)(b)(B).

<sup>5</sup> ORS 197.015(10)(b)(A). Because the dwelling is a use permitted outright and is required to be approved under clear and objective standards, neither of the applications for the dwelling’s building permit nor development permit are “limited land use decisions”, because there are no discretionary standards that may be lawfully applied. Consistently, I am advised that the latter is your interpretation of the applicable processes in this situation. ORS 197.015(12)(a)(B).

<sup>6</sup> ORS 197.015(10)(b)(D).

17.42.050(A)(6) ocean setback improperly discourages the development of needed housing, because it significantly adds unreasonable cost and delay in having to debate its application and meaning, so much so that there is a risk of losing the building season. ORS 197.307(4)(b).

Further, the invitation in your correspondence to apply for a setback reduction, has the same problems of adding unreasonable cost and delay to this application for a building permit for needed housing.

In all, state law prohibits the application of the CBMC 17.42.050(A)(6) ocean setback and we respectfully request that you observe these important state laws. For any or all of the reasons expressed in this letter, we request that you not apply the ocean setback in CBMC 17.42.050(A)(6) on the basis that it is neither required by its express terms nor appropriate under state law.

### **Constitutional Problems**

Finally, if the City were to demand that the CBMC 17.42.050(A)(6) ocean setback be applied to the Roberts' property using the Cabin as the structure for which averaging applies as you suggest, that would result in an unconstitutional confiscation of the Roberts property serving only to establish a private viewshed for the Cabin. Such would result in the Roberts' property being incapable of development with any reasonable home that is (1) consistent with the property's zoning, (2) consistent with the level of expense required for the property's development to comply with other City standards and (3) consistent with its significant taxable value for which the City has enjoyed appreciable taxes. The purpose of imposing such harm on the Roberts' property to establish essentially a private viewshed for the "Cabin" on the Roberts' property, simply cannot be squared with constitutional precedents.

Thus, while the Cabin is composed of 4180 sq. ft. , it is unclear whether, under the imposition of a private viewshed restriction under CBMC 17.42.050(A)(6), the Roberts' could squeeze in any reasonable dwelling at all, and they would certainly not be able to have one of any reasonable size or a garage or even the two-parking spots they need. Thus, the application of the ocean setback is the equivalent of the City taking all economically beneficial use of the Roberts' property. Moreover, because the Haystack Rock LLC owners have a "buildable lot" in front of the Cabin, they would be treated unequally and free to develop their property with two or three more dwellings of a size of their choosing<sup>7</sup>, closer to the Oregon Coordinate Line – resulting in a serious Fourteenth Amendment equal protection problem, among other issues.

Moreover, under *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), it is difficult to see what legitimate state interest the establishment of a private viewshed over the Roberts' property for the enjoyment of the Cabin owners, substantially advances. After all, it was simply a choice made by the Cabin owners to establish their dwelling where it is. The Roberts had no right to influence that choice, that under one (erroneous) interpretation of CBMC 17.42.050(A)(6),

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<sup>7</sup> The City would be prohibited as a matter of state law from denying such an application under Oregon's needed housing rules.

results in devastating impacts to their rights to establish a dwelling on their property. Under the City's ocean setback rules (assuming the Cabin is a lot abutting the ocean shore, which is an erroneous conclusion per the above), the Cabin owners could have established the Cabin 65' further west, more in line with the next nearest dwelling to the north. They chose the location where the Cabin now sits, apparently not especially concerned about a viewshed (at the time) featuring the neighbors' house to the north. That they made the choice to establish the Cabin where they did, presumably for beneficial tax reasons, can have no legitimate bearing on the Roberts' property rights.

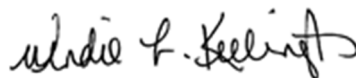
Any demand for a viewshed exaction across the Roberts' property or a denial of the Roberts' dwelling for failing to provide a particular view for the Cabin<sup>8</sup>, would violate the Fifth Amendment unconstitutional taking principles established by the U.S. Supreme Court in *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (permit denial due to property owner's unwillingness to give away property is unconstitutional), *Nollan California Coastal Comm'n.*, 483 US 825 (1987) (such a demand would lack essential nexus to any legitimate governmental purpose) and *Dolan v. City of Tigard*, 512 US 374 (1994) (no proportionality between the impacts of the Roberts house as proposed and a demand for a viewshed easement for the Cabin). As a result, the City should not adopt an interpretation of its code that applies the ocean setback. See *Hill v. City of Portland*, 293 Or App 283 (2018) (regardless of whether required by a city code, if the resulting exactions are unconstitutional, the code may not be applied to require them).

These constitutional concerns are additional good reasons why the CBMC 17.42.050(A)(6) ocean setback should not be applied to the Robert's development and building permit applications.

We look forward to the City's prompt approval of the Roberts' development and building per applications for their home and to working with you moving forward. We are rapidly losing the building season, and so swift processing is critical. Please feel free to let me know if you have any other questions.

Thank you for this opportunity to comment.

Very truly yours,



Wendie L. Kellington

WLK:ks

Enclosure

Cc: Stan Roberts

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<sup>8</sup> In this regard, the Roberts dwelling has only a negligible effect on the Cabin's view, in fact. The Cabin will retain sweeping views of the Pacific Ocean if CBMC 17.42.050(A)(6) is not applied (the proper result based upon the City's code and state law). This reality further calls into question the application of CBMC 17.42.050(A)(6), to the Roberts' property.

Kevin Patrick  
Jay Raskin  
Sabrina Pearson  
William K. Kabeiseman

1                               BEFORE THE CITY OF CANNON BEACH  
2                               DEPARTMENT OF COMMUNITY DEVELOPMENT

In the Matter of an Application for a       )  
Building Permit for the Roberts            ) Declaration of Jay Raskin  
Residence Located at Tolvana Park,       )  
Block 1 Lot 13, 5N 10W 31AA, Tax        )  
Lot 600   )

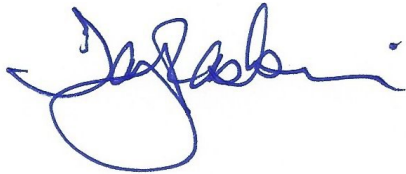
3               I, Jay Raskin, am over the age of 18 and am competent to testify and make  
4 this declaration from my own personal knowledge. I hereby declare as follows:

- 5           1. I am an architect and owner of Jay Raskin Architect. I have been licensed as  
6           an architect in Oregon for 28 years.
- 7           2. I have designed structures throughout Oregon including numerous projects  
8           at the Oregon Coast, including in the City of Cannon Beach.
- 9           3. I am familiar with the City of Cannon Beach “ocean setback” regulatory  
10          program reflected in the City’s code at CBMC 17.24.050(6). It is my  
11          understanding that the City of Cannon Beach has determined that a lot which  
12          abuts a platted street, and not the Oregon Coordinate Line, is not considered  
13          a “lot abutting the oceanshore”, and so the City’s ocean setback regulatory  
14          program does not apply to such lots that abut a platted street and not the  
15          Oregon Coordinate Line.
- 16          4. It has been my understanding that the City of Cannon Beach considers  
17          platted streets to be “buildable” if a street has been constructed upon such  
18          platted street.
- 19          5. My understanding reflected in Paragraphs 3 and 4 above, appears to be  
20          reflected on the City’s GIS system, which shows that from W. Harrison St.  
21          to W. Adams St., on Ocean Ave., homes were built after 1987 (the date I  
22          understand the City’s existing ocean setback regulatory program started),  
23          that appear to have a 15-foot setback from the platted Ocean Ave., rather  
24          than an oceanfront average, which 15-feet reflects the basic front and rear  
25          yard setback and street setback the City requires when the ocean setback  
26          does not apply.



1 I hereby declare that the above statement is true to the best of my knowledge  
2 and belief and that I understand that the above statements are made for use as  
3 evidence in an administrative or judicial proceeding and are subject to penalty for  
4 perjury.

5 DATED this 17th day of August, 2020.



6  
7 Jay Raskin