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Cannon Beach Planning Commission and
Mr. Jeffrey Adams
City of Cannon Beach
Post Office Box 368
163 E. Gower Avenue
Cannon Beach, Oregon 97110

Subject: Responsive Evidence and Argument Regarding Appeal¹ by Stanley and
Rebecca Roberts (the "Appeal") of Development Permit for Tax
Lot 51031AA00600 (the "Property")

Dear Commissioners and Mr. Adams:

Thank you again for your time and attention at the October Planning Commission meeting. As shown by the over 40 comments in opposition thus far, this proposed development is strongly opposed in the Cannon Beach community for significant legal and public policy reasons. This letter responds to several assertions made by applicants in their October 29, 2020, submittals. In summary, the Planning Commission should deny the proposed development because it:

- fails to comply with the Oceanfront Setback;
- fails to comply with other criteria in the Oceanfront Management Overlay;
- relies on an unsafe new intersection in the Hemlock S-curves;
- fails to meet applicants' burden to minimize known hazards to an acceptable level;
- relies on a private road that is admittedly "ugly" and not permitted; and

¹ While we refer to the Robertses' "Appeal" in this submittal, the applicants actually filed three appeals (AA 20-02, AA 20-03, and AA 20-04). This comment is made for and shall be submitted into the record of each of these three appeals. Please include this letter in the record for these appeals.

- degrades the historic and natural setting of the Oswald West Cabin and Haystack Rock.

I. The City is not required to approve a 3,000-square-foot house here.

In its October 29, 2020, letter, applicants' law firm asserts that "[s]tate law does not allow the city to reduce the floor area of the housing development the Roberts' propose for their residential lot." This is wrong. ORS 227.1765(4)(f) defines "authorized density level" as "the maximum number of lots or dwelling units or the maximum *floor area ratio* that is permitted under local land use regulations." Application of the Oceanfront Setback does not impact the authorized density level on this site. Applicants request one home. The Oceanfront Setback only impacts where that home is built, not the density or number of homes allowed on the site. CBMC 17.10.040(D) states that "the maximum gross floor area for a permitted or conditional use on a lot of more than five thousand square feet, but less than six thousand square feet is 3,000 square feet." This is a gross maximum floor area, not a floor area ratio tied to density.

II. The Oceanfront Setback applies.

In its October 29, 2020, letter, applicants' law firm continues and expands its argument that the City should not apply its Oceanfront Setback and Oceanfront Management Overlay ("OM") Zone to applicants' oceanfront lot. The analysis in the staff report and the October 20, 2020, letter from Miller Nash Graham & Dunn LLP is more than sufficient for the Planning Commission to reject this argument. Applicants' extension of this argument that the Oceanfront Setback applies only to a "parcel" and that the City should interpret the word "parcel" in its code to exclude their property is equally erroneous. In adopting its code, the City clearly intended to apply the Oceanfront Setback to all properties, without differentiating between lots, parcels, tracts, plots, or other terms that might have intentional separate meanings under the codes of different cities.

III. The proposed road is subject to land use review.

This statement should not need explanation, but applicants' most recent submittal argues that the proposed road is not subject to land use review. This is wrong under state law and local code. A development permit is required for "the construction, enlargement, alteration, repair, moving, improvement, removal, conversion or demolition of any structure or building which requires a building permit pursuant to either the State of Oregon, One and Two Family Dwelling Code, or the State of Oregon,

Structural Specialty Code." CBMC 17.92.010. Clearly, a building permit is required for the proposed bridge/Nenana improvement. Similarly, CBMC 17.62.030.A.1 requires a development permit "to clear, grade, excavate or fill land" within 100 feet of a stream and/or involving an area over 250 square feet. There is a mapped stream on the Oswald West Cabin property within 100 feet of applicants' development proposals on their parcel and on unimproved Nenana, triggering the development/grading permit requirement of CBMC 17.62.030.A.1. Both of applicants' house and road applications propose grading within 100 feet of the stream and developing over 250 square feet. The Code calls for notice to abutting owners for the grading proposed on the parcel and in Nenana, compliant with CBMC 17.88.010.6.

Further, state law requires land use review of the proposed road improvements in Nenana. The OM Zone at CBMC 17.42.020 to CBMC 17.42.060 applies various clear and objective and quasi-judicial approval criteria to development within the OM Zone. ORS 227.160(2) requires a public hearing for a local jurisdiction making a decision applying such land use criteria under ORS 227.175(3). Similarly, appropriate public notice is required under ORS 197.763(2).

IV. The proposed intersection is unsafe.

The recently submitted September 12, 2020, traffic study provided by Clemow Associates, LLC (the "Clemow Report"), begins to show exactly how unsafe the proposed Hemlock/Nenana intersection in the S-curves would be. The report assumes an 85th percentile speed of 19 miles per hour for northbound Hemlock traffic and bases its safety and stopping-distance conclusions on this 19-mile-per hour figure. Using this percentile is too low, as 15 percent of drivers go faster than 19 miles per hour. The traffic study data by All Traffic Data Services appended to the Clemow Report shows seven northbound drivers traveling in the 25-27-mile-per hour range between 7 a.m. and 11 a.m. on the morning of September 3, 2020.

The proposed intersection fails as shown in Table 2 on page 3 of the Clemow Report. The intersection is not recommended for northbound Hemlock traffic turning left onto the new road because there is insufficient sight distance to stop, even using the 85th percentile. A northbound driver trying to turn left, but stopped because of oncoming traffic, is at risk of getting rear-ended because drivers coming behind them at the 95th percentile speed cannot stop in time.

Even using the 85th percentile speed, the report notes that an oncoming driver would not be able to stop in time once a second car is stopped behind the car

trying to turn. Clemow Report, Table 2, at footnote 3. The northbound turn from Nenana onto Hemlock does not meet sight distance standards as noted in footnote 1 of Table 2, and the southbound turn from Nenana onto Hemlock would likely force the turning vehicle into northbound oncoming traffic. Clemow Report, Table 2, at footnote 2.

The City need not and should not accept this deficient intersection proposal.

V. The Applicants do not have a right to build a bridge on—or otherwise improve—Nenana Avenue.

Applicants' law firm claims in its September 29, 2020, letter to Karen La Bonte ("Access Letter") that "the law is clear that the City may not deny the Roberts' access to Nenana." (Access Letter at 2.)

While this may be true to a certain extent, the point is a *non sequitur* because at no time has the City denied or proposed to deny the Applicants reasonable access across Nenana Avenue. In the applications at issue, the Applicants are not requesting access to Nenana, but rather permission to construct a bridge on a street—which will exclusively serve their property. The Applicants do not have a right to do so.

In fact, the Applicants have no right to the improvement of Nenana Avenue as a vehicular roadway at all. Oregon law could not be clearer that cities have unilateral discretion in determining whether to improve public right-of-way or leave it in a state of nature. *Prosch v. City of La Grande*, 14 Or App 546, 549-50, 514 P2d 351 (1973) ("The mere fact that a street has been dedicated by a developer to the public in a plat accepted for filing by a city planning commission itself imposes no duty upon the city to open that street."); *Hendrickson v. City of Astoria*, 127 Or 1, 7, 270 P 924 (1928) ("The city was not required to improve the street or sidewalk on Flavel street, or any portion of it. It had the legal right to leave the street in a state of nature * * *"); *LDS Dev., LLC v. City of Eugene*, 280 Or App 611, 620-21, 382 P3d 576 (2016) ("Nor does the city's acceptance of the dedications in the development concomitantly create an obligation that it construct planned improvements upon the dedications.").

Owners of properties adjacent to unimproved streets have a limited right of use of the right-of-way. An owner may only use the public land in a reasonable manner that "is not inconsistent" with the current or potential future use of the right-of-way. *Prosch*, 14 Or App at 552; *Killam v. Multnomah Cty.*, 137 Or 562, 566, 4 P2d 323

(1931) (use of unimproved road limited to that which is "not inconsistent with the right of the municipality to open and improve the street" at a later time.).

Under this settled law, it cannot reasonably be argued that the Applicants have an entitlement to build a private access drive over the public Nenana Avenue. The Applicants do not seek a reasonable use consistent with public interests or abutting property owners like Haystack Rock, LLC, but propose to construct a private bridge that (a) does not reasonably allow for connection to other adjacent lots or Ocean Avenue, (b) eliminates future use of the right-of-way for beach access (e.g., a new foot path), and (c) creates a dangerous intersection with South Hemlock Street.²

VI. In fact, approving the Applicants' application for a private driveway/bridge over Nenana Avenue would violate Oregon law.

The City cannot allow Nenana Avenue to be used for the Applicants' private driveway/bridge. As Oregon courts have repeatedly recognized, "[w]hen dedicated land is accepted, the governing body of a county or municipality becomes the trustee for the public to assure that the land is used for the dedicated purpose or purposes." *Douglas Cty. v. Umpqua Valley Grange, Inc.*, 45 Or App 739, 743, 609 P2d 415 (1980). "A city has no legal right to surrender its platted streets to private persons, but on the contrary has a duty to remove public nuisances therefrom." *City of Molalla v. Coover*, 192 Or 233, 252, 235 P2d 142 (1951).

This rule is absolute. It does not matter if the municipality has declined to improve or use the land. *Umpqua Valley Grange*, 45 Or App at 742-44 (1980) (holding that nonuse is immaterial). Further, public ownership cannot be lost by acts or statements of public officials. *Coover*, 192 Or at 252 (stating that "courts have frequently cautioned that the doctrine of equitable estoppel should be applied in street cases only in exceptional instances of extraordinary hardship.").³

² An owner not only has no right, but is in fact barred under Oregon law from using common law access rights to create a public hazard. *McGowan v. City of Burns*, 172 Or 63, 75-76, 137 P2d 994 (1943) ("It is manifest, however, that an abutting property owner, in the exercise of the rights just noted, must not render the street dangerous for travel.")

³ The only manner in which public streets can be used for private interests is through a formal vacation process under Oregon statute and City code. ORS 271.080 et al; *Martin v. Klamath Cty.*, 39 Or App 455, 460, 592 P2d 1037 (1979) (holding that termination of public ownership is only possible through official vacation proceedings). Vacation is not possible here, however, because state law requires permission from the other adjacent landowners, ORS 271.190, and local ordinance requires a valid *public* purpose

In this case, Nenana Avenue was dedicated to the City as part of the 1908 subdivision plat for Tolovana Park⁴, and the City cannot permit use of this street for anything other than a *public* thoroughfare. This point was identified by City Manager Bruce St. Denis in his September 3, 2020, letter to Mr. Roberts, where he stated:

"It does not appear that the elevation at the western-most point of the proposed roadway allows for an extension that would allow the owner of the parcel to the south (currently the city) to achieve vehicular access, to the property now or in the future. It is also not clear that the property to the east of your property can access the road either.

"Our expectation is that when the city approves a party to construct a roadway in a city right of way the design does not preclude adjacent property owners from access to their property from the road or its' future extension. * * *

"The city feels strongly that eventual access to those properties must be a part of the approved design of Nenana Avenue."

On September 15, 2020, the applicants' engineer provided a letter attempting to excuse the Applicants' and the City's noncompliance with Oregon law. But this letter only served to further demonstrate the violation, stating "[t]his roadway is being specifically developed to access Tax Lot 600" and that access to other lots will only be possible by installation of "additional piers and beams" and that the "concrete barriers will need removing."

Allowing applicants' proposed bridge in the public right of way would be misuse of public lands for the interest of a single private party and would be a violation of Oregon law.

and lack of adverse effects on adjacent properties, CBMC 12.32.030. Further, vacation would not advance the Robertses' request because ownership of the vacated street would be held in common with other adjacent owners. ORS 271.140.

⁴ The plat states that the developer "hereby dedicate[s] to the public for its use as thoroughfares forever, the streets and the avenues therein."

https://delta.co.clatsop.or.us/surveys/Subdivisions_by_Name_All/Tolovana%20Park%20B03%20P70.jpg

VII. Allowing the Applicants to improve Nenana Avenue would also violate City code.

Pursuant to their inherent and total authority over public streets within their jurisdiction,⁵ the City has adopted CBMC Chapter 12.36 to regulate improvements on public rights-of-way.

Before making any improvement to a public street right-of-way, an owner must obtain a permit, which can only be granted if four distinct criteria are satisfied. CBMC 12.36.030(B) states:

"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."

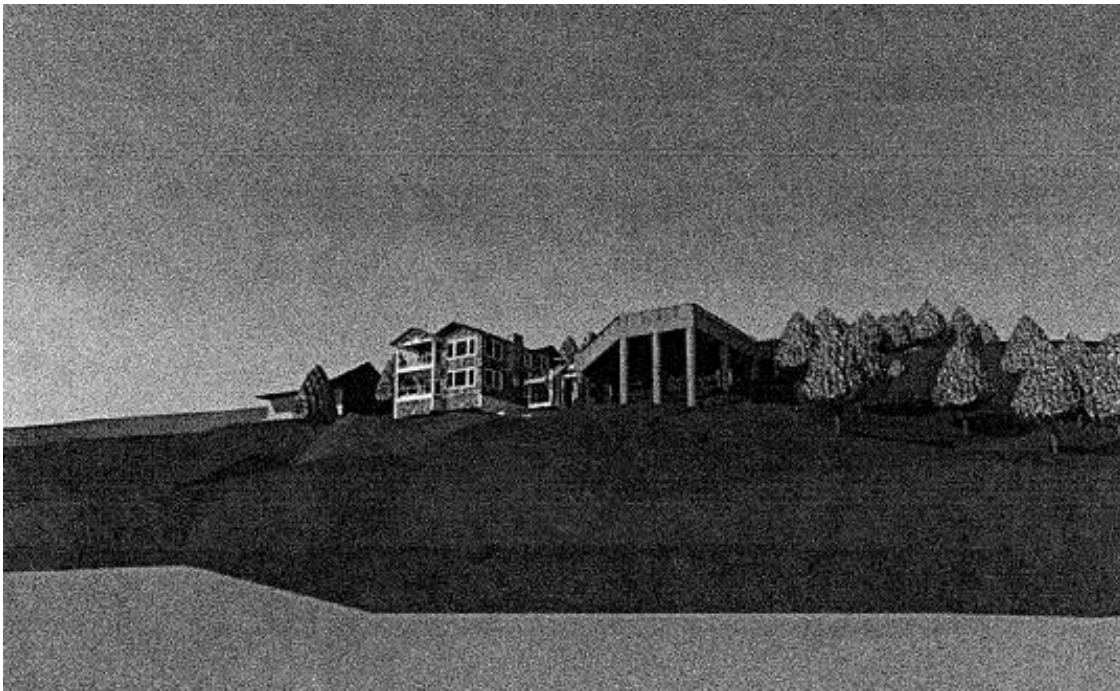
The private driveway/bridge proposed by the Applicants violates at least three of these criteria. First, as outlined in the Access Letter, the proposed bridge cannot comply with several road standards. Although the City may have discretion in other contexts to adjust technical requirements, it is not allowed here. There can be no question that adding the proposed pullout in the middle of the Hemlock Street S-curves will degrade, not "maintain," public safety. The traffic study discussed above documents several of the unsafe turn movements proposed.

As discussed above, the proposed private bridge also violates Criterion 2 because it blocks future use of the right-of-way for public access. Because of safety concerns, it is true that the City has not—and should not—construct a street on Nenana Avenue. But there are many homes in the area that could be served by the creation of a

⁵ CBMC 12.36.014 ("The city has jurisdiction and exercises regulatory control over all public rights-of-way within the city under the authority of the city Charter and state law."); CBMC 12.36.016 ("The city has jurisdiction and exercises regulatory control over each public right-of-way whether the city has a fee, easement, or other legal interest in the right-of-way."); *Prosch*, 14 Or App at 546.

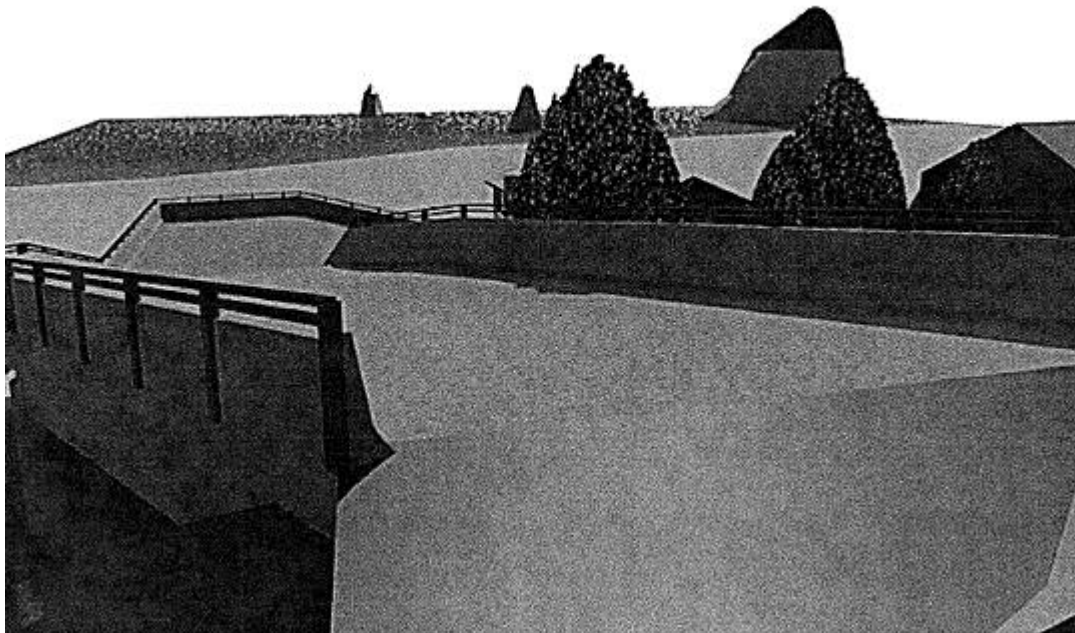
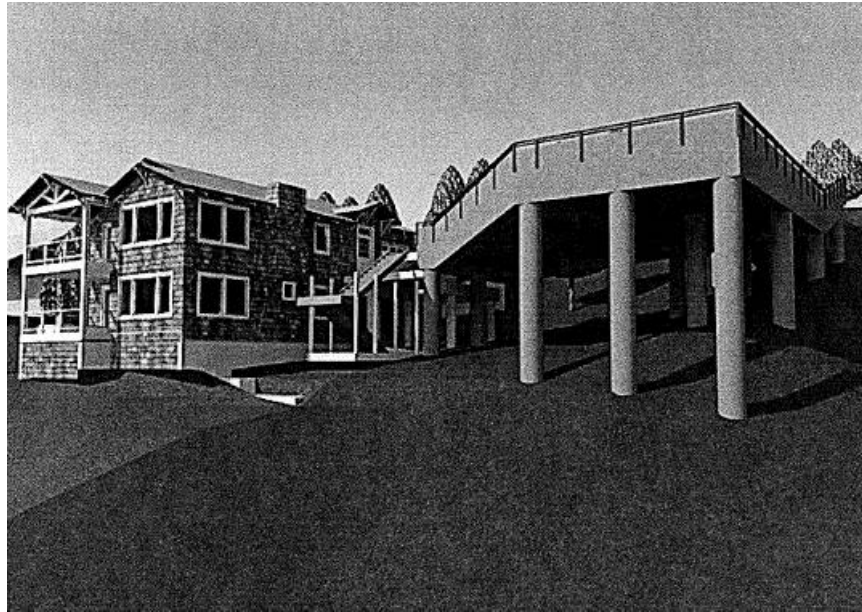
public walkway down to the beach. The installation of stairs and/or a path with north-south switchbacks is an entirely reasonable use of Nenana Avenue that would benefit the public, rather than just the Applicants. It is irrelevant that such an improvement is not in the foreseeable plans or current intentions of the City. All that matters is that Nenana Avenue could be used for such access in the future.

Finally, and, to put it mildly, the proposed private bridge is in violation of Criterion 3 (that the improvement maintains or improves the general appearance of the area). From the renderings taken from the traffic study submitted by the Applicants, you can see why even the applicant Stan Roberts has called the proposed structure "ugly" during public testimony:⁶



⁶ <https://www.ci.cannon-beach.or.us/pc/page/planning-commission-meeting-76>

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Oregon law leaves no doubt that the Applicants have no right to improve Nenana Avenue in the manner in which they propose. While they have a limited right to

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use the *unimproved* right-of-way, this use cannot be inconsistent with the public's interests. Allowing the Applicants to dedicate public land to the construction of a private eyesore that serves only their interests is a violation of state law and City code.

The proposed bridge in Nenana Avenue does not comply with the applicable City code and state law standards.

VIII. Applicants have not minimized geotechnical risk to acceptable levels.

The most recent submittal from applicants' geotechnical consultant argues that the City should permit the development because it has studied the S-curves geotechnical data extensively. CBMC 17.50.040(A)(3) puts the burden of proof on applicants to provide engineering reports "which will eliminate the hazard, or will minimize the hazard to an acceptable level." Applicants have provided no report showing that the hazard has been eliminated. If anything, the subject proposal jeopardizes stability by giving abutting owners a reason to remove the dewatering pipes that have created the conditional stability to mitigate the hazard to a degree. Applicants propose residential development on a landslide that is conditionally stable, at best, when applicants have no means or right to maintain the dewatering system that stabilizes the landslide. This is not an acceptable level of risk for residential development, so the City should deny the proposal.

IX. Conclusion.

The Oceanfront Setback is a simple code provision that applies to the Property because it abuts the ocean shore. Applicants have known all along that the Property was unbuildable. No law requires the City to approve unsafe development.

Accordingly, we request that the Planning Commission deny applicants' challenge to the application of the Oceanfront Setback and deny applicants' proposal outright for its various unsafe components.

Very truly yours,



William L. Rasmussen