

July 20, 2022

Planning Commission
City of Cannon Beach
163 E Gower
Canon Beach, OR 97110

**RE: Clear and Objective Standards – ORS 197.307(4)
P 22-01; CU 22-02**

Dear Planning Commission,

This office represents Patrick/Dave LLC, the applicant in the above-referenced partition application. The applicant has requested a 3-lot partition on a 1.1-acre parcel located west of Hemlock Street (the “Project”). During the initial evidentiary hearing before the Planning Commission there was confusion related to the statutory requirements of ORS 197.307(4) and the implications of that state law for this application. The purpose of this letter is to clarify the requirements of ORS 197.304(4) and related statutes and to clearly identify the limited set of clear and objective standards applicable to the application for this Project.

We note at the outset that the applicant provided a narrative that addressed each approval criterion identified by staff as applicable and demonstrated that the Project satisfies the identified criteria. Staff agreed that the Project satisfies each criterion addressed in the application narrative and recommended approval of the Project. However, many of the identified criteria are not clear and/or are not objective. Those standards cannot be applied by the City to this application under the currently applicable state law. Therefore, while we continue to believe that the Project satisfies all standards addressed in the application, through this submittal we object to the application of the criteria identified in Exhibit A, Section II to the Project.¹

I. The Project is Housing to Which ORS 197.307(4) Applies

The subject property is zoned Residential Medium Density (R2), and the Project is a partition to create lots for housing consistent with the zoning designation. The “clear and objective” requirement of ORS 197.307(4), as amended in 2017, provides:

¹ See *Recovery House IV v. City of Eugene*, 150 Or App 382, 384, 946 P2d 342 (1997); *aff’d* 156 Or App 509, 965 P2d 488 (1998) (applicant has the right to submit an application under one set of standards while at the same time challenging whether those standards even apply to the proposed development).

(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*. (emphasis added).

Before it was amended in 2017, the statute only applied to “needed housing” on “buildable land.” However, the statute is no longer limited to needed housing on buildable lands, but instead, by its plain terms, applies to all “development of housing, including needed housing.” The legislature would not have clarified that the term “housing” included “needed housing” if the statute were intended to only apply to needed housing. The Oregon Court of Appeals and the Land Use Board of Appeals have consistently applied the statute to all housing following the legislative amendments. The 2017 amendments also removed the reference to “buildable lands,” and therefore, it applies to all lands.²

Finally, the Court of Appeals and the Land Use Board of Appeals have confirmed on multiple occasions that the statute applies to proposed land divisions of residential land for purposes of housing.³ Therefore, ORS 197.307(4) requires the City to “apply only clear and objective standards, conditions and procedures” to this application for a partition in a residential zone.

II. The sole exception to ORS 197.307(6) does not apply to this partition

There is only one exception⁴ to the clear and objective requirement, found in ORS 197.307(6) and that exception does not apply here. That subsection provides:

(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply *an alternative approval process* for applications and permits *for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics* that are not clear and objective if:

- (a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;
- (b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and
- (c) The approval criteria for the *alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4)* of this section.

ORS 197.307(6) (emphasis added).

² See, *Warren v. Washington County*, 296 Or. App 595, 439 P3d 581, rev den, 365 Or 502, 451 P.3d 988 (2019) (confirming that ORS 197.307(4) no longer refers to “buildable land,” and concluding that “by its terms provides that local government can only regulate the development of housing only through clear and objective standards, conditions, and procedures.”)

³ See e.g., *Warren v. Washington County*; *Nieto v. City of Talent*, __ Or LUBA __ (LUBA No 2020-100, Mar 10, 2021); *Knoell v. City of Bend*, __ Or LUBA __ (LUBA No. 2021-037, Aug 20, 2021).

⁴ See *Group B LLC v. City of Corvallis*, 72 Or LUBA 74 (2015) (slip op at 5), *aff’d* 275 Or App 577 (2015), rev den 359 Or 667 (2016) (noting that subsection (6) is the “sole exception” to the requirement of subsection (4)).

First, the alternative under subsection (6) must be “[i]n addition to,” meaning the applicant must have the “option of proceeding under” an approval process based on clear and objective standards under subsection (4). Second, in this case, there are no alternative land division or development processes that are 1) based in whole or in part on appearance or aesthetics, or 2) authorize density at or above the density level authorized under the requested partition process. For example, allowing just a single dwelling on the existing 1.1-acre lot is not an alternative process based on approval criteria that regulates appearance or aesthetics. Additionally, under the clear and objective land use standards identified in Exhibit A, Section I, the applicant has proposed 3 lots on the existing 1.1-acre lot and each lot satisfies each of the clear and objective land division standards. Therefore, identifying development of a single house as an alternative fails to authorize density at or above the density allowed on the lot through clear and objective land divisions standards. For these reasons, the exemption, by its express terms, does not apply here and cannot be used to avoid the City’s obligation to apply only clear and objective standards, conditions and procedures to the requested residential land division.

III. Clear and Objective Standards Applicable to the Project

The Oregon courts have articulated the requirements for “clear and objective” standards, and recently the Court of Appeals explained that fundamentally the requirement has two parts: (1) the standard, condition, or procedure must be objective, and (2) the standard must be clear.⁵ In other words, in order to apply, a standard must be both clear and objective.

For purposes of the first part of the test, LUBA has explained that “objective” means existing “independent of mind.”⁶ Standards are not objective “if they impose subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.”⁷ To be “clear” under the second part of the test, a standard must be “clear enough for an applicant to know what he must show during the application process,” it must be “easily understood and without obscurity or ambiguity,” and it must not be capable of multiple constructions that support diametrically opposed conclusions.⁸

It is the City’s burden to “demonstrate that the approval standards, conditions and procedures are *capable of being imposed only* in a clear and objective manner.” ORS 197.831 (emphasis added). Furthermore, the standards, conditions, and procedures “must be clear and objective *on the face of the ordinance*.” ORS 227.173(2) (emphasis added).

Exhibit A includes all of the standards identified in the Staff Report as applicable to this land division decision. While the City ultimately bears the burden of demonstrating the standards it imposes on this Project are clear and objective, we have included the limited list of staff report standards that are both clear and objective in Section I of the exhibit. The applicant has clearly demonstrated that each of the Section I standards have or will be satisfied by the proposed partition. We have also identified those

⁵ *Roberts v. City of Cannon Beach*, 316 Ore. App. 305, 311, 504 P.3d 1249 (2021).

⁶ *Nieto v. City of Talent*, ___ Or LUBA ___, ___ (LUBA No 2020-100, Mar 10, 2021) (slip op at 9 n 6).

⁷ *Id.*

⁸ *West Main Townhomes v. City of Medford*, 233 Or App 41, 48, 225, P3d 56 (2009), adh'd to as modified on recons, 234 Or App 343, 228 P3d 607 (2010); *Roberts v. City of Cannon Beach*, ___ Or LUBA ___, ___ (LUBA No 2020-116, July 23, 2021) (slip op at 19), aff'd, 316 Or App 305, 312, 475 P3d 121 (2021) (quoting Nieto); *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74, 83, aff'd, 275 Or App 557, 36 P3d 847 (2015), rev den, 359 Or 667 (2016).

standards that are not objective and/or clear, followed by a brief explanation of why they fail one or both of the required tests for standards that can be applied to the Project. In other words, the standards identified in Exhibit A, Section II -fail on their face to meet the requirements of clear and objective standards and the City cannot meet its burden to demonstrate otherwise.

IV. Request

We ask that you determine that the Project is housing development subject to the requirements of ORS 197.307(4) and, as required by state law, only apply “clear and objective standards, conditions and procedures” to the application. The clear and objective standards applicable in this case are identified in Exhibit A, Section I.

We appreciate your time and attention to this matter.

Best regards,

Renee M. France

cc via email: William Kabeiseman

Exhibit A

I. Clear and Objective Standards Applicable to the Project

The following standards are both clear and objective, and therefore can be applied to this partition application.

16.04.310 Design Standards – Lots

A. Size and Dimensions. The size of parcels or lots to be created by a partition or subdivision shall be determined by the zone in which the property is located and the average slope of the property from which the parcels or lots are to be created. The minimum lot size for parcels and lots created shall be as follows:

Percent of Average Slope	Minimum Lot Size per Dwelling Unit (square feet)
0—14.99	Set by zoning district
15—19.99	10,000
20—29.99	15,000
30—34.99	20,000
35+	40,000

To determine the average slope of a property proposed for subdivision the following formula shall be applied:

$$S = \frac{0.0023 \times L \times L}{A}$$

The dimensions of lots shall not be less than required by the zoning ordinance.

These lot size and dimension standards are clear and objective. The record shows that the average slope for the Property is 6.48% and therefore the R2 minimum lot size of 5,000 square feet applies.

B. Location. All lots shall have a twenty-five-foot frontage on a publicly dedicated street.

This standard is clear and objective as applied to the proposed partition configuration. The Tentative Partition Plan demonstrates that this standard is satisfied.

16.04.330 Design Standards – Trees

No trees shall be removed in the development of the subdivision or partition except those within the designated public rights-of-way and easements for public utilities. All trees on individual building lots shall be retained until such time as plans are submitted for a building permit and approved as to specific locations of building pads, driveways and other aspects of land disturbance. An exception to this standard can be made by the planning commission as part of the subdivision or partition tentative plan, specifying which trees are to be removed and for what purpose.

This subdivision standard is clear and objective as it relates to the timing of tree removal. As required, all trees on individual lots will be retained until tree removal permits and building permits are approved.

16.04.340 Design Standards – Utilities

All utilities shall be placed underground and meet the standards specified by the public works director.

This is a clear and objective standard and the applicant will comply with the utility standards.

17.14.040 Residential Medium Density Standards

A. Lot Size. Lot area shall be at least five thousand square feet, except that construction on lots of less than five thousand square feet is permitted subject to Section 17.82.020. The minimum lot size for a single-family dwelling shall be five thousand square feet. The minimum lot size for all uses, including single-family dwellings, shall be adjusted for average slope using the standards in Section 16.04.310(A).

This numerical lot size requirement is clear and objective, and each of the proposed lots are at least 5,000 square feet.

B. Lot Dimensions.

- 1. Lot Width. Lot width shall be at least forty feet.*
- 2. Lot Depth. Lot depth shall be at least eighty feet.*
- 3. Front Yard. A front yard shall be at least fifteen feet.*
- 4. Side Yard. A side yard shall be at least five feet, except on a corner or through lot the minimum side yard from the street shall be fifteen feet.*
- 5. Rear Yard. A rear yard shall be at least fifteen feet, except on a corner or through lot it shall be a minimum of five feet, except where a rear lot line abuts a street, it shall be a minimum of fifteen feet.*
- 6. Yard Abutting the Ocean Shore. For all lots abutting the ocean shore, any yard abutting the ocean shore shall conform to the requirements of Section 17.42.050(A)(6), Oceanfront setback.*

These lot dimension standards are clear and objective, and the applicant has demonstrated how residential development on each lot can comply with standards 1 through 5. The lot is separated from the ocean shore by Forest Lawn Road and multiple private lots under separate ownership. Because none of the proposed lots abut the ocean shore, standard B.6 is not applicable to this partition or subsequent development on the parcels created.

C. Lot Coverage. The lot coverage for a permitted or conditional use shall not exceed fifty percent.

The lot coverage standard is clear and objective. The standards will be directly applied at the time of development, but the applicant has demonstrated through Table 3 in the application that they will be met based upon lot area in comparison to lot coverage area taking into consideration the building site area and the paved areas.

D. Floor Area Ratio. The floor area ratio for a permitted or conditional use shall not exceed 0.6.

E. Building Height. Maximum height of a structure is twenty-four feet, measured as the vertical distance from the average elevation of existing grade to the highest point of a roof surface of a flat roof, to the top of a mansard roof or to the mean height level between the eaves and the ridge for a pitched roof. The ridge height of a pitched roof shall not exceed twenty-eight feet. Pitched roofs are considered those with a 5-12 pitch or greater.

The FAR and building height standards are clear and objective and compliance will be confirmed at the time of development on each lot.

G. Parking. As required by Section 17.78.020.

The requirement for two off-street parking spaces for single-family dwellings at 17.78.020 is clear and objective and compliance will be evaluated at the time of development on each lot. Additionally, the applicant has demonstrated that two off-street parking spaces can be provided on each lot in compliance with this standard.

17.43.050 Wetlands Overlay Zone - Standards

A. General Standards. Uses and activities in protected wetlands and in wetland buffer areas are subject to the following general standards. Development may also be subject to specific standards in subsequent subsections.

1. Uses and activities in protected wetlands or wetland buffer areas may be approved only after the following list of alternative actions, listed from highest to lowest priority, have been considered:

a. Avoiding the impact altogether by not taking a certain action or parts of an action (this would include, for example, having the use or activity occur entirely on uplands); and

b. Minimizing impacts by limiting the degree or magnitude of action and its implementation (this would include, for example, reducing the size of the structure or improvement so that protected wetlands or wetland buffer areas are not impacted).

As written, this standard is not clear and objective because it requires consideration of actions with no clear standard. However, in this case, the applicant is proposing lots that each have a building envelope, driveway access, and utilities that will avoid impact to wetland and wetland buffer areas altogether, the highest priority action under the standard. Therefore, while the standard itself is not clear and objective, in this case it can only be applied in a way that concludes that the proposed partition and resulting buildable area on each lot satisfies the highest priority action, and therefore the application satisfies the standard.

M. Land Divisions. Subdivisions, replats, partitions, and property line adjustments in protected wetlands, wetland buffer areas, or a wetland lot-of-record are subject to the following standards:

1. Preliminary plat maps for proposed subdivisions, replats and partitions involving protected wetlands or wetland buffer areas must show the wetland-upland boundary, as determined by a wetland delineation prepared by a qualified individual.

This is a clear and objective standard and the applicant has provided the required plat map identifying the wetland boundary.

2. Subdivisions, replats, partitions and property line adjustments for the purpose of creating building sites are permitted subject to the following standards:

a. Each lot created must have at least one thousand square feet of upland available for building coverage, required off-street parking and required access.

b. The building site described in subsection M2a shall not include protected wetlands or wetland buffer areas.

These are clear and objective standards. The Tentative Partition Plan and Table 1 of the application narrative demonstrate that each proposed lot will have at least 1,000 square feet of upland for the identified purposes that does not include the wetland or the wetland buffer.

d. Utility lines, including but not limited to, water lines, sewer lines, and storm water lines shall not be located in protected wetlands or wetland buffer areas, unless there is no alternative to serve lots meeting the standard of subsection M2a.

e. Streets shall not be located in protected wetland or wetland buffer areas.

These standards are clear and objective. The applicant has demonstrated that that they are satisfied with the proposed partition.

II Standards Not Clear and/or Not Objective that are Not Applicable to the Project

The following standards are either not clear or not objective or neither clear nor objective.¹ Each italicized standard is followed by a brief explanation of why it is not applicable to the Project.

16.04.130 Applicable Standards

A. General Development Policies

The following general development policies have been extracted from the Canon Beach Comprehensive Plan, which in turn guides the subdivision standards of the Oregon Municipal Code. By their very nature these general policies are neither clear nor objective. The specific reason that each policy is not clear and/or objective is also provided below. Note that the Staff Report indicated that only policies 2, 7, and 9 apply to this partition. However, the City's arborist identified Policy 15 to support his belief that the application should be denied and other policies were mentioned during the hearing. Therefore, all of the policies are evaluated below.

¹ This list and the list provided under Section I of this Exhibit, generally identify the approval standards addressed in the staff report. However, there are other municipal code provisions identified in the staff report and narrative that are not applicable to the request or are not approval standards, and are therefore not identified in this exhibit. However, if any additional code provisions are identified as applicable approval standards by the public or by the City through this petition process, the applicant reserves the right to provide evidence and arguments related to whether those provisions satisfy the statutory requirement to be clear and objective in order to apply to this decision.

1. General Development Policy 4. The city shall control excavation, grading, and filling in order to: avoid landslides and other geologic hazards; protect adjacent property and structures; provide for appropriate drainage improvements; minimize the extent of vegetation removal; minimize erosion and sedimentation; and protect the aesthetic character of the city.

This general policy directs the City to control excavation, grading and filling, and the City controls those elements of development through development standards and building code requirements. The broad purposes for that control, however, are neither clear nor objective. The goal of avoiding landslides and other geologic hazards does not provide clear direction to what an applicant must demonstrate in the context of a land division. The same is true for protecting adjacent property and structures. What constitutes an “appropriate” drainage improvement is neither clear nor objective. What is appropriate requires a subjective judgement. Similarly, the goal of minimizing vegetation removal and erosion is neither clear nor objective. Whether erosion of vegetation removal has been adequately minimized requires subjective judgement. Finally, the goal of protecting the “aesthetic character” is neither clear nor objective because it requires a subjective analysis to determine what the aesthetic character is and another judgement to determine whether it has been adequately protected.

2. General Development Policy 5. The density of residential development throughout the city shall be based on the capability of the land in terms of its slope, potential for geologic hazard and drainage characteristics. Density limits throughout the city shall generally be:

<i>Net Density Standards</i>	
	<i>Dwellings Per Acre</i>
<i>High (R3), (RM)</i>	<i>15</i>
<i>Duplex or medium (R2), (RMa), (MP), (RAM)</i>	<i>11</i>
<i>Moderate single-family (R1)</i>	<i>8</i>
<i>Low (RL)</i>	<i>4</i>
<i>Very low (RVL)</i>	<i>1</i>

The land capability requirements of general policy 5 are neither clear nor objective. The policy does not clearly define what percentage of slope, what level or type of geologic hazard, nor what type of drainage characteristics affect the capability of the land. Furthermore, the policy does not clearly establish what, if any, reduction in density would be appropriate based upon those factors.

The net density standards themselves are clear and objective. The Property in this case is 1.1 acres and is zoned Medium Density – R2. Therefore, 12 dwellings are permitted on the Property under the net density standards. The applicant is requesting a 3-lot partition that would accommodate 3 dwellings, which is well within the maximum allowed under the net density standard. It is important to note that the number of lots was reduced in this case to just 3 lots in order to satisfy the clear and objective standards related to wetland impacts and buildable lot area identified above. Therefore, the overall policy objectives in this case have been implemented through clear and objective standards. That, however, does not make the broad policy itself clear and objective.

3. General Development Policy 9. To control development in areas with slopes exceeding twenty percent and areas subject to potential geologic hazards so that potential adverse impacts can be minimized.

The policy includes two parts. The first only applies to areas with slopes exceeding 20%. The slopes on the subject Property do not exceed 20%. Even if they did, what is necessary to “control” development for purposes of this policy is neither clear nor objective. Under the second part, determining what constitutes a “potential” geologic hazard, a “potential” adverse impact, and determining what level of minimization is needed, is neither clear nor objective.

4. General Development Policy 10. When site investigations are required in areas of potential landslide hazard, a site specific investigation shall be prepared by a registered geologist. Based on the conclusions of this investigation, an engineered foundation design by a soils engineer may be required by the building official. When site investigations are required in areas of potential coastal erosion hazard, the site specific investigation shall be prepared by a registered geologist with expertise in shoreline processes. Based on the conclusions of this investigation, protective structures designed by a registered civil engineer may be required by the building official. Site investigation reports shall meet the city’s criteria for the content and format for geologic hazard reports.

This policy appears to in part identify what needs to be submitted with an application, and in part dictate structural engineering requirements at the time of development. While it is not clear that the subject Property is in an area of potential landslide hazard, a registered geologist conducted a site-specific investigation and the report for that investigation was submitted with the application. Whether an engineered foundation would be required at the time of building development under this policy alone is neither clear nor objective. Moreover, any future determination that an engineered foundation is needed is a determination for the building official and cannot provide a basis for denial of the requested partition under the plain text of this policy.

5. General Development Policy 11. Site investigations by a qualified soils engineer may be required for the construction or development of property identified by the Soil Conservation Service as containing weak foundation soils. Site reports shall include information on bearing capacity of the soil, adequacy and method of drainage facilities, and the length of fill settlement necessary prior to construction.

This policy is not objective because it states that a site report may be needed, and therefore the determination of whether it is needed for a particular development is subjective. The applicant in this case did submit a geotechnical report prepared by a registered engineer. Even if this policy could be applied, nothing more than preparation and submittal of the report is required by the policy.

6. General Development Policy 12. Site investigations by a registered geologist shall be performed, prior to development, in any area with a slope exceeding twenty percent. Based on the conclusions of this investigation, an engineered foundation design by a soils engineer may be required by the building official.

The subject Property does not contain any area with slopes exceeding 20%. Therefore, while the trigger for site investigations is clear and objective under this policy, the policy is not applicable to this Property.

7. General Development Policy 14. To ensure that development is designed to preserve significant site features such as trees, streams and wetlands.

This policy is neither clear nor objective. The level of preservation contemplated by the policy is ambiguous and thus not clear. Furthermore, whether a specific feature is significant requires a value-laden analysis and is therefore not objective. This policy is implemented in part through the objective wetland impact standards identified above that are satisfied by this application.

8. General Development Policy 15. The city shall regulate the removal of trees in order to preserve the city's aesthetic character, as well as to control problems associated with soil erosion and landslide hazards.

This policy is neither clear nor objective. The policy itself does not clearly set forth the method of regulation. Furthermore, what is needed to preserve the city's aesthetic character is both ambiguous and subjective. Finally, it is not clear what is needed to control soil erosion and landslide hazard problems or where that control would be needed in relation to tree removal.

9. General Development Policy 16. To provide flexibility in regulations governing site design so that developments can be adapted to specific site conditions.

The flexibility called for in this policy is by its very nature vague and subjective.

16.04.310 Design Standards – Lots

C. Lines. Side lot lines shall be substantially at right angles to straight street lines or radius to curved street lines.

The Tentative Partition Plan depicts side lot lines that are either at or very close to right angles or radius to the streets, we note for the record that this standard is not clear as the term “substantially” is ambiguous.

E. Building Envelopes.

1. The planning commission shall have the authority to require the designation of building envelopes on lots or parcels of land where it finds that the designation of building envelopes is necessary for the protection of significant natural resources, such as wetlands, stream corridors or trees. Building envelopes may also be designated to avoid construction in identified geologic hazard areas. The size and shape of the building envelope shall be that which the planning commission determines necessary to protect the identified resource.

2. Where a building envelope is designated, the building envelope shall identify and limit the location of principal and accessory structures, parking areas, and associated site development, excluding roads and driveways, to the building envelope. All the elements of principal structures and accessory structures shall be located within the designated envelope, including building elements such as roof overhangs, bay windows, chimneys, unroofed landings and decks attached to the building.

The applicant has identified building envelopes that comply with the clear and objective standards identified above, and development within those building envelopes would comply with the clear and objective provisions of E.2. However, the building envelope standard at E.1 is neither clear nor objective.

First, what qualifies as a “significant natural resource” is neither quantified nor mapped and therefore, what resources are significant is neither clear nor objective. Furthermore, whether a specific building envelope configuration is “necessary” for the protection of a resource is a discretionary, value-laden decision, and therefore is not objective.

17.14.040 Residential Medium Density Standards

I. Geologic of Soils Engineering Study. As required by 17.50.

The applicant prepared a geotechnical report at the request of the City. The report concluded that any potential geologic hazards can be mitigated during development, and the applicant has met the burden of proof to show construction feasibility. However, the acceptable level to which a hazard must be minimized is not identified by 17.50.040 and these provisions are not clear and objective. Therefore, the City cannot apply the 17.50.040 provisions to deny the requested partition.

17.43.050 Wetlands Overlay Zone - Standards

M. Land Divisions. Subdivisions, replats, partitions, and property line adjustments in protected wetlands, wetland buffer areas, or a wetland lot-of-record are subject to the following standards:

2. Subdivisions, replats, partitions and property line adjustments for the purpose of creating building sites are permitted subject to the following standards:

c. Protected wetlands and wetland buffer areas may be counted towards meeting the base zone’s minimum lot size for each lot, and may be included in front, side and rear yard setbacks as appropriate.

The basic provisions of this standard are clear and objective. However, whether including the wetland for minimum lot size and setback area is “appropriate” is subjective. Therefore, this standard cannot be applied to conclude that the minimum lot size and setback standards have not been satisfied.

17.70.030 Tree Removal and Protection – Additional Requirements

D. The retention of trees shall be considered in the design of partitions, subdivisions or planned developments; placement of roads and utilities shall preserve trees wherever possible. The need to remove trees shall be considered in the review process for partitions, subdivisions or planned developments.

As noted in an earlier submission into the record, this requirement only provides that the retention of trees be considered in the design of partitions. The record shows that the applicants considered tree retention as part of partition design. However, this requirement is neither clear nor objective. The provision further requires that the removal of trees be considered in the review process for partitions. The requirement for the decision makers to consider the removal of trees as part of the review process is neither a clear nor an objective standard. First, it is not clear how that consideration relates to the decision. More importantly, if the requirement were applied to deny or condition the partition it would require a subjective, value-laden decision related to tree removal. Finally, the applicant is not proposing to remove trees for the placement of roads or utilities. However, that element of the provision is not objective because determining whether retention is possible requires subjective analysis.

17.80.110 Conditional Uses—Overall Use Standards

Before a conditional use is approved, findings will be made that the use will comply with the following standards:

A. A demand exists for the use at the proposed location. Several factors which should be considered in determining whether or not this demand exists include: accessibility for users (such as customers and employees), availability of similar existing uses, availability of other appropriately zoned sites, particularly those not requiring conditional use approval, and the desirability of other suitably zoned sites for the use.

This standard requires a consideration and balancing of factors that by its very nature requires a subjective, value-laden analysis and weighing of those factors. This is not an objective standard.

B. The use will not create excessive traffic congestion on nearby streets or overburden the following public facilities and services: water, sewer, storm drainage, electrical service, fire protection and schools.

The applicant has provided evidence into the record demonstrating that the three single-family homes that would be allowed following the requested partition would not create traffic congestion or overburden the identified systems. However, whether the partition would create “excessive” traffic or “overburden” the identified systems requires a subjective analysis, and therefore, it is not an objective standard.

C. The site has an adequate amount of space for any yards, buildings, drives, parking, loading and unloading areas, storage facilities, utilities or other facilities which are required by city ordinances or desired by the applicant.

Whether a site has an “adequate” amount of space for the identified elements of a future development requires a subjective, value-laden analysis. Therefore, this standard is not objective.

D. The topography, soils and other physical characteristics of the site are appropriate for the use. Potential problems due to weak foundation soils will be eliminated or reduced to the extent necessary for avoiding hazardous situations.

This first element of the standard is neither clear nor objective. The term “other physical characteristics” is ambiguous. Furthermore, whether the topography, soil and other characteristics are “appropriate” for the use requires a subjective, value-laden analysis. The second element of the standard is also not clear or objective. The level of reduction needed is not clear. Furthermore, the “extent necessary” requires a subjective analysis and is therefore not an objective standard.

E. An adequate site layout will be used for transportation activities. Consideration should be given to the suitability of any access points, on-site drives, parking, loading and unloading areas, refuse collection and disposal points, sidewalks, bike paths or other transportation facilities required by city ordinances or desired by the applicant. Suitability, in part, should be determined by the potential impact of these facilities on safety, traffic flow and control and emergency vehicle movements.

Whether the site layout is “adequate” is subjective. Furthermore, how the considerations are weighed or evaluated requires a subjective analysis. Finally, the use of the term “in part” creates uncertainty and

ambiguity around the requirements for an adequate or suitable site layout. For these reasons, the standard is neither clear nor objective.

F. The site and building design ensure that the use will be compatible with the surrounding area.

The determination of compatibility of the site design with the surrounding area requires a subjective, value-laden analysis related to impacts on the community. Therefore, the standard is not objective. Furthermore, the terms “compatible” and “surrounding area” are ambiguous. Therefore, the standard is not clear.