Sean T. Malone

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March 1, 2022
Via Email

Cannon Beach City Council
PO Box 368
163 E Gower St
Cannon Beach, OR 97110
planning@ci.cannon-beach.or.us
adams@ci.cannon-beach.or.us

Re: Oregon Coast Alliance testimony regarding Private Driveway Easement (Roberts)

Dear Cannon Beach City Council,

On behalf of Oregon Coast Alliance (ORCA), please accept this letter on the Roberts request for a private driveway easement.

ORCA agrees with other testimony that there is no specific timeline for the proposed easement, and, therefore, the City Council should end its consideration of the proposed easement.

ORCA also agrees with the City attorney's conclusion that the City can deny the easement request for safety reasons. At the very least, the City should wait until the traffic safety report is prepared and submitted by Lancaster Mobley, on behalf of Haystack Rock, LLC, to make such a determination. Notably, the applicant has not supported its own request with a safety report. The City Council cannot grant a request that is premised on safety if the applicant has not carried its burden to establish traffic safety. The applicant has fallen short in this regard, not even offering design details.

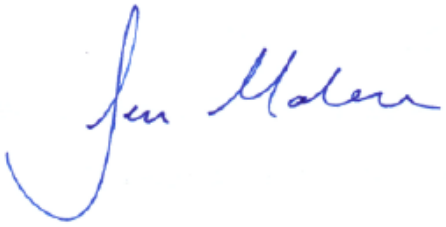
ORCA understands that the settled law on the matter is that there is a general right to access one's property via abutting roads, *see State ex rel. Dep't of Transp. V. Alderwoods, Inc.,* 358 Or 501, 511, 517 (2015), but there is no right to build improvements down an **unimproved** right-of-way to access a nonabutting road, *see Robertson v. City of Turner,* 187 Or App 702, 706 (2003). Whether the applicant proposes to assume all costs of improvements has no bearing on whether to approve a request to allow a public right-of-way to be put to private use. The applicant does not own the underlying land in fee, and, therefore, the applicant has no inherent

right to its request. Simply put, the applicant does not have a right to access Hemlock because the applicants are not abutting property owners and have no right to improve the public right-of-way at issue to provide access. Indeed, a City has no obligation or duty to open a street for private use because the street has been dedicated by a developer. *See Hendrickson v. City of Astoria*, 127 or 1, 7 (1928); *Killiam v. Multnomah County*, 137 or 562, 566 (1931).

Finally, according to its plain language, the dedication of the right-of-way was for the *public's* use as a thoroughfare, and that intent would be frustrated by allowing the request as a *private* easement that proposes to construct improvement to block access to the public. *See Public Int. Council v. City of Lincoln City,* 28 Or App 67, 69 (1977).

For the foregoing reasons, ORCA requests that the City Council deny the request or, in the alternative, continue the hearing indefinitely.

Sincerely,



Sean T. Malone
Attorney for ORCA

Cc:
Client

From: Katie Hillenhagen
To: Jennifer Barrett
Subject: FW: Roberts Easement Hearing.
Date: Tuesday, March 1, 2022 1:32:39 PM
Attachments: image001.png

Katie Hillenhagen
Administrative Assistant – Planning Department
City of Cannon Beach
p: 503.436.8054 | tty: 503.436.8097 | f: 503.436.2050
a: 163 E. Gower St. | PO Box 368 | Cannon Beach, OR 97110
w: www.ci.cannon-beach.or.us | e: hillenhagen@ci.cannon-beach.or.us

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From: Randles, Guy <guy.randles@stoel.com>
Sent: Tuesday, March 1, 2022 1:01 PM
To: Planning Group <cbplanning@ci.cannon-beach.or.us>
Subject: Roberts Easement Hearing.

Here is a quotation from Mr. Roberts which appeared in the November 15, 2021 Daily Astorian:

"Cannon Beach, I will tell you, should be renamed Cannot Beach," he said.

Roberts doesn't think he will win at the appeals court. Perhaps he'll take the matter to the Oregon Supreme Court next. He isn't sure.

What he is sure about, though, is a feeling that his neighbors have more ownership and say over what happens on his property than he does.

Roberts is not interested in building a smaller house to satisfy the city's requirements.

There is a good chance, he thinks, that he'll never be able to build the house he envisioned. If "no" is the final answer, he'll put something else on the property: some kind of homeless shelter, maybe, or, he said, "the most obnoxious art."

Judging from his own comments, Mr. Roberts knows that he has a poor legal position and he cares more about exercising purported property rights than the concerns of his neighbors or the broader Cannon Beach community. The City should not succumb to his vindictive threats. He is obviously not to be trusted to have broader perspective than his own self-interest. He should be held to the strictest of standards and interpretations. I oppose the requested easement.

Guy Randles, 401 Yukon St.

From: barb hinthorne
To: Lolly Champion; Bruce St. Denis; Nancy McCarthy; Brandon Ogilvie; Sam Steidel; Robin Risley; Mike Benefield; Jennifer Barrett; Jeffrey Adams; Karen La Bonte
Subject: Re: Anita Dueber"s letter of opposition to allowing easement for the Roberts
Date: Tuesday, March 1, 2022 1:43:18 PM

We agree that the Robert's driveway proposal does not consider the geographical complexity of the site nor the city council's earlier substantial research and subsequent conclusions for NOT permitting this project.

Continued presentations by the Robert's attorneys seem like an attempt to just "wear down the council". Please listen to your constituents and Do NOT allow this degradation to occur.

Respectfully,
Mark and Barb Hinthorne
164 E Madison

Sent from Yahoo Mail for iPhone

On Tuesday, March 1, 2022, 12:41 PM, Lolly Champion <lolly.champ@gmail.com> wrote:

> Please take just a minute to read Anita's well researched points of why the Council should not allow the Roberts, and their cadre of attorneys, be allowed to move forward with an easement allowing the building of the off-ramp to their proposed home site. (pictures are attached below for your viewing.)
>
> **If you agree with Anita's opposition and believe her letter represents reasonable and valid reasons to deny the easement, PLEASE FORWARD THIS EMAIL TO THE CITY AND COUNCIL MEMBERS ABOVE and add your name and address. An easy-peasy way to let the Council know your agreement that the proposed ramp should not disgrace the landscape of Cannon Beach. pLEASE DO IT TODAY! THE COUNCIL MEETING IS THIS EVENING...TIME IS OF THE ESSENCE.**
>
> Thank Anita for your great letter and thank you to all of you who will take a moment and step up to show support for opposing. - lolly
>
> From: **Anita Dueber** <atrain.ad@gmail.com>
> Date: Mon, Feb 28, 2022 at 8:44 PM
> Subject: Robert's Driveway Easement
> To: <steidel@ci.cannon-beach.or.us>, <benefield@ci.cannon-beach.or.us>, <ogilvie@ci.cannon-beach.or.us>, <risley@ci.cannon-beach.or.us>, <nmccarthy@ci.cannon-beach.or.us>, Bruce St. Denis <stdenis@ci.cannon-beach.or.us>
>
> I would like to submit my support of the opposition to allowing the easement for an access driveway to be built on a geologically active landslide for the purpose of constructing a large residential home. For many reasons.
>
> The Attorney for the Robert's cites various Court rulings regarding easement access allowance, and I am not a Land Use lawyer, but those cited rulings seem to pertain to urban and suburban cases, which this case clearly is not about. This particular location is a known geologically fragile area and a natural landscape for observing the Nationally recognized Haystack Rock. Also given the Visual Renderings of the Driveway, it is beyond an eyesore to the Natural beauty enjoyed by all residents as well as visitors to Cannon Beach.
>
> It seems to me, that if the Robert's honestly wanted to be good standing community members, they would acknowledge and understand the dire consequences of their request. And perhaps consider donating the property to become a passive park!
>
> Also, the Neupert Family are well respected long time supporters and residents of Cannon Beach. The fact that the Oswald West log cabin was replicated after the fire that destroyed the original log cabin is a testament to their love of the community and maintaining the historic aesthetics of Cannon Beach. They are to be applauded for not building a Mega Mansion.
>
> To quote a recent comment by a Council member "We work for our constituents". Clearly, the residents of Cannon Beach DO NOT want to see what this easement would produce if approved.
>
> Thank you,
> Anita Dueber

William L. Rasmussen
william.rasmussen@millernash.com
503.205.2308 (direct)

February 28, 2022

VIA EMAIL
CBCOUNCIL@CI.CANNON-BEACH.OR.US
PLANNING@CI.CANNON-BEACH.OR.US
ADAMS@CI.CANNON-BEACH.OR.US

Cannon Beach City Council and
Mr. Jeffrey Adams
City of Cannon Beach
PO Box 368
163 E Gower St
Cannon Beach, OR 97110

Subject: March 1, 2022, Public Hearing Re Private Driveway Easement to Stanley and Rebecca Roberts ("Applicants")

Dear Councilors and Mr. Adams:

Applicants request a private easement to build major structures, without design details or traffic safety assessment, over unimproved Nenana Ave right-of-way (ROW). The City appears to be holding this hearing out of fear of a lawsuit from Applicants. This firm's client, Haystack Rock, LLC ("Haystack"), recently took two steps to help protect the City and the Cannon Beach community from Applicants' threats and unsafe proposal:

1. Haystack asked the Clatsop County Circuit Court to declare that Applicants do not have a property right to build major structures over unimproved Nenana, and to declare that the City can deny such a request unless Applicants demonstrate that the proposal is safe, compliant with code, and in the public's interest. A decision in this action would substantially reduce the risk of Applicants suing the City over access. The City does not have to participate in our declaratory action unless it wants to.

2. Haystack hired a reputable engineering firm, Lancaster Mobley, to prepare a traffic safety assessment for the proposed driveway intersection with Hemlock. Applicants provide no safety study. The steep slope of Nenana, proximity to S-curves, and existing guardrail indicates that the current conceptual proposal includes unsafe elements.

In light of these recent developments and Applicants' pending request for review by the Oregon Supreme Court, we respectfully ask that Council end its consideration of this easement for now, or at a minimum, continue this hearing. The City's own land use counsel agrees that there is no statutory or other requirement compelling a quick decision from the City on the easement. Council need not make a hasty decision.

Council should table this easement debate indefinitely. If it elects to move forward, we respectfully request a continuance under ORS 197.763(4) and CBMC 17.88.100.A.3.d to present additional evidence. Council should at a minimum hear evidence regarding the safety, or lack of safety, related to this conceptual driveway proposal. It should also allow the Oregon Supreme Court to rule on Applicants' petition and the circuit court to rule on whether Applicants even have a protected property right in this matter. Council's discretion in considering this easement depends on the outcome of these matters. A continuance would also reduce the City's risk of litigation and risk from an unsafe proposal.

The major substantive question here is whether Applicants have a property right to build major structures in the unimproved ROW. They have no such private right in public ROW, as explained in my letter to Council dated December 29, 2021 (attached as Exhibit A for convenience). This means that Council has discretion to not consider the easement request, or to deny it for being unsafe, noncompliant with code, or merely against public interest.

The City's land use attorney is less confident on this point, as outlined in his February 25, 2022, memo to Council (the "February 25 Memo"). He only expresses certainty that the City can deny this easement request for safety reasons. Haystack's commissioning of a traffic safety report and circuit court action are intended resolve this uncertainty either way. We expect the traffic safety report to find that Applicants fail to demonstrate a safe design and for the circuit court to find that Council has discretion to deny or not consider this easement request for any number of reasons, including safety, code compliance, and public interest.

On the law, owners have a right to build improvements to access a road abutting their property, but not a right to build improvements down an unimproved ROW (e.g., Nenana) to access a nonabutting road (e.g., Hemlock). Exhibit A contains extensive legal research showing

that Oregon courts have expressly and universally held that the right to access applies only to abutting roads. In other words, a property owner has a right to a driveway opening to an adjacent improved street. There is not a single case in Oregon that says a property owner has the right to build structures in an unimproved ROW to access a nonabutting road.

This is about an alleged right to build improvements, not denial of access. Applicants can take access down Nenana in its current condition, as they and the rest of public always have. Applicants just do not have a property right to build in Nenana in a way that trumps all other public interest in the public ROW.

It is irrelevant that a property owner proposes to independently construct or finance the needed improvements to reach the nonadjacent road. Oregon law is clear that a city has total authority in deciding whether to open ROW or keep it in a state of nature. Property owners adjacent to unimproved ROW have only a limited privilege to use ROW in a manner that is consistent with interests of the public. For steep and unstable Nenana, that means foot access—not a dangerous, unsightly private driveway that will block other public use or use by other owners abutting Nenana.

The City cannot allow public ROW to be put to private use, especially when it does not hold fee title to the underlying land. To get clarity on these key issues and reduce the City's exposure to Applicants' threatened takings lawsuit, Haystack filed a declaratory judgment action (Ex. B) asking the Clatsop County Circuit Court to conclusively decide: (1) whether Applicants have a right to compel improvements in Nenana to the nonabutting Hemlock S-curves; and (2) the scope and nature of the City's authority to deny an easement over Nenana. We hope and expect that the City will not move forward with this easement request until the court has determined whether the City has an obligation or the power to do so. Based on the legal authority set out below, we are confident that the court will conclusively reject Applicants' theories.

There are other reasons Council's review of the easement request needs to be paused. First, even a legitimate right to access Hemlock is superseded by the City's primary duty to protect the health and welfare of the public. This means the City must determine the safety of the

proposed driveway before it can grant the easement request. Applicants, however, have not provided a traffic safety assessment or sufficient materials for the City to ascertain traffic safety. The entirety of the supporting materials provided are a general site plan and photo renderings of a conceptual driveway improvement. In fact, Applicants have not even committed to a specific driveway design, nor does the proposed easement require them to do so prior to its execution. Attached as Exhibit C is a letter from Todd Mobley, P.E., of Lancaster Mobley, demonstrating the insufficiency of Applicants' submittal materials in demonstrating a safe driveway intersection.

For the City to be able to fulfill its responsibilities to the public, Applicants must propose a specific design and provide, at a minimum, driveway and intersection design details, engineering calculations, a traffic impact analysis for the redesigned structure, and a geotechnical analysis.[1]

Below is a summary of the legal authority supporting the conclusions regarding City authority discussed above. More detailed analysis has been provided in our previous comments attached as Exhibit A. We look forward to answering any follow-up questions from you during the public hearing on Tuesday night.

A. Applicants do not have a legal right to build improvements to a nonadjacent street.

In Oregon, property owners have a right to access abutting public roads. *State ex rel. Dep't of Transp. v. Alderwoods (Oregon), Inc.*, 358 Or 501, 511 366 P3d 316 (2015) ("Oregon case law has established that an owner of property abutting a public road has a common-law right of access to its premises by means of the abutting road."). In other words, property owners have the right to a driveway opening between their property and an adjacent public street. There is no property right, however, to build major improvements down unimproved ROW (e.g., Nenana) to reach roads that do not abut a property (e.g., Hemlock).

[1] This component is particularly important because Applicants' on-grade driveway proposal violates the recommendations of their own geotechnical engineers, which state that such a design would exacerbate the active landslide under Nenana Avenue and further endanger the hillside's stability by interfering with the City's critical drainage system.

In the February 25 Memo, the City's land use attorney agrees that the *Alderwoods* opinion is the controlling authority in Oregon for defining the right of access to public streets. On page 4, the February 25 Memo sets out the purported "four points" that can be derived from *Alderwoods*. This summary, however, omits the most critical issue here: the relative location of the property and the public road to be accessed. The Oregon Supreme Court unambiguously answers this question in its own summary of past cases and its holding in *Alderwoods*:

> The above cases demonstrate three governing principles regarding the common-law right of access of a property owner to an abutting public road. First, it is well established that a common-law right of access by property owners attaches to property as an interest in land. Specifically, an abutting property owner holds an easement of access, appurtenant to the abutting land, for the limited purpose of providing a means of ingress and egress to and from the owner's property by means of the abutting public road. Second, the right of access to an abutting road is limited in scope. An abutting property owner does not have an absolute right to access an abutting road at the most direct or convenient location. Rather, the owner has a qualified right that is subject to the government's interest in regulating the safe use of public thoroughfares. Third, the owner's right of access ensures only reasonable access to and from the owner's property by means of the abutting road. Those three principles, in combination, reduce to this central proposition: When governmental action interferes with an abutting landowner's right of access for the purpose of ensuring the safe use of a public road, and the abutting landowner retains reasonable access to its property, no compensable taking of the property owner's right of access occurs." *Alderwoods*, 358 Or at 517 (emphasis added).

This case in no way stands for the proposition that a nonabutting property owner has a right to access a nonabutting road. No such property right has ever been recognized in Oregon. The Supreme Court's repeated use of the word "abutting" does not appear inadvertent.

In fact, it was rejected in the only opinion to address the issue. In *Robertson v. City of Turner*, 187 Or App 702, 706, 69 P3d 738 (2003), the plaintiff property owners argued they had an

inherent right to access their property and that the City of Turner violated this right when it closed a nonabutting bridge that provided the only access to their home. They contended that the "right of access" guarantees not only a driveway opening to an abutting road but also a means to access the general road system though nonabutting roads. Accordingly, the owners claimed they were entitled to compensation for the "taking" of this property right.

The court of appeals emphatically disagreed with plaintiff's theory. It stated that the plaintiffs' arguments turned the foundational purpose of the takings clause on its head. Plaintiffs were not seeking compensation for taking of their private property but demanding that public property be put to their private use.[2] The court stated that the owners' reading of the takings clause "is at best implausible and at worst an affront to the idea that, generally speaking, words have meanings and sentences drafted by competent speakers of the language convey discrete thoughts—not to mention the idea that the interpretation of a constitutional provision should have some connection to its text."

The court of appeals analysis applies equally here. Applicants do not claim that they are being deprived of rights appurtenant to their property—i.e., an easement implied by law for access to an abutting street—but are demanding that a public ROW (Nenana) be put to their private use to build vehicular access structures to a nonabutting street (Hemlock). No such entitlement to unimproved ROW exists, and Applicants' allegations of a taking are baseless.

The City's land use attorney argues in the February 25 Memo, however, that *Robertson* is inapplicable here because the plaintiffs in the case had other options to access the public road system, including taking ownership of the bridge or petitioning the county for a way of necessity. (Feb. 25 Memo at 6.) The lower court in *Robertson* also viewed these facts as important and dismissed the case on ripeness grounds because the plaintiffs had not pursued the latter of these two options before bringing the takings claim. The court of appeals,

[2] 187 Or App at 706 ("Instead of a guarantee 'that no individual should have to pay the entire cost of a benefit that is shared by the general public at large * * * the core of plaintiffs' argument is, in effect, that all of defendant's citizens should bear the cost of providing plaintiffs with a private benefit.'" (internal citations omitted)).

however, expressly rejected that the existence of alternatives was relevant to the outcome of the case, stating:

> If we were to affirm on ripeness, plaintiffs might then seek a way of necessity and thereafter pursue the then-ripe claim. To save plaintiffs that expense and to afford complete relief, we affirm the trial court on a more fundamental ground: Defendant's action in closing the bridge was not an exercise of the eminent domain power to take private property for public use, even if the foreseeable result of the action was that the value of plaintiffs' property was reduced or eliminated. That being the case, no claim for "inverse condemnation" lies. *Robertson*, 187 Or App at 705-06 (emphasis added) (citations omitted).

The February 25 Memo also argues that the *Robertson* opinion, like the *Alderwoods* decision, was predicated on a threat to the "safety of the public." While we agree that public health and safety are critical in determining whether a proposed driveway can be allowed, this was not the dispositive factor in either case. Rather, both focused on the existence of property rights. In *Alderwoods*, the Oregon Supreme Court held that there is not a property right to access an abutting road at a particular location. In *Robertson*, the court of appeals found that there is no right to use public ROW to access a nonabutting road. The *Robertson* opinion makes no reference to public safety in its holding.

Under these cases, Applicants do not have a right to access Hemlock. Applicants are not abutting property owners and have no right to improve the Nenana public ROW to provide access. Given the City's uncertainty on this point, we have filed the circuit court action so the court can declare the parties' rights regarding Nenana without Applicants suing the City for a taking.

B. Applicants may use the unimproved Nenana ROW only to the extent that it does not interfere with the public's interests.

Oregon law is clear that municipalities have an unqualified right to leave ROW in a state of nature. For example in *Prosch v. City of La Grande*, 14 Or App 546, 549, 514 P2d 351 (1973), the

court of appeals stated that "[t]he 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." Likewise, in *Hendrickson v. City of Astoria*, 127 Or 1, 7, 270 P 924 (1928), the Oregon Supreme Court held that "[t]he 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 * * *." Many other cases state the same principle.[3] *Alderwoods*, which related to an owner abutting an improved road, did not purport to upend this settled law.

Owners of property adjacent to undeveloped ROW have a limited right to use ROW in its natural state in a manner that is "not inconsistent with the public's right of use." *Prosch*, 14 Or App at 552. An adjacent owner to unimproved ROW cannot force a city to construct or otherwise open a public street. *Id.*; *Killam v. Multnomah Cty.*, 137 Or 562, 566, 4 P2d 323 (1931) ("A municipal corporation is under no obligation to open a dedicated street until its use is deemed necessary by the common council.") (citation omitted). As definitively set out in *Robertson*, this remains true even if the unimproved ROW is the only route of access available. 187 Or App at 706.

The February 25 Memo contends that the above principles are inapplicable because the cases concerned different fact scenarios. The Memo, however, does not highlight language in these opinions that limits the principles to the particular facts at issue. The Memo also does not cite a single case rebutting the principle that a city has power to govern its ROW by choosing whether it should be improved or remain in a state of nature. Surely at least *one* case would exist if a property owner could override the authority of a municipality and force its private development down an unimproved ROW. Under such a rule, local governments would be powerless to protect wetlands, cultural sites, historical resources, and other sensitive areas if a plat created ROW over them—even if the ROW had been dedicated long ago, prior to the common use of motorized vehicles, such as the Tolovana plat here.[4]

[3] *See* Exhibit A.

[4] For example, if Nenana ROW did not exist, would Applicants have the power to develop Ocean Avenue by simply offering to finance its construction?

Under the unrebutted principles above, Applicants may use Nenana in the same manner as the general public and other adjacent owners—for foot access. They have no right to install elevated vehicular access improvements down unimproved ROW that would not only prevent other public uses, such as a truly at grade multiuse path, but also create serious traffic and geotechnical hazards.

C. Granting a private easement to Applicants is not possible because it would violate the terms of the dedication of Nenana to the public.

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).[5] Nenana was created as part of the 1908 subdivision, Tolovana Park. The plat stated, "I hereby dedicate to the public for its use as thoroughfare forever, the streets and the avenues herein."

Thus, Nenana may only be used for a *public* thoroughfare. *Public Int. Council v. City of Lincoln City*, 28 Or App 67, 69, 558 P2d 1291 (1977) (holding that a city could not construct a sewer-pump station in a dedicated public street ROW where the city does not own the underlying fee title because it would interfere with the use of the street as a public thoroughfare, including access by abutting property owners). Conveying the requested *private* easement for an exclusive right to build a potentially gated private driveway that would physically block access to other abutting lots because of its elevated grade would violate Oregon law.

D. The City is also unable to grant a private easement over Nenana because it does not own the land under Nenana.

Under clear Supreme Court precedent, the rule in Oregon is that "where land has been dedicated or appropriated for a public street, the fee in the street remains in the original owner

[5] *Hyland v. City of Eugene*, 179 Or 567, 572-73, 173 P2d 464 (1946) ("When such a grant has been made by a private owner, the municipality, by accepting the dedication, becomes a trustee to carry out the terms of the grant and it has no power to sell or lease the property for purposes foreign to the dedication. Tiffany on Real Property, 3d Ed., § 1113.").

subject only to the public easement, and, upon the vacation of the street, it reverts to the owner of the abutting premises freed from the easement." *Portland Baseball Club v. City of Portland*, 142 Or 13, 16, 18 P2d 811 (1933).

The February 25 Memo argues that the court of appeals case, *Landis v. Limbaugh*, 282 Or App 284, 385 P3d 1139 (2016), controls whether the City holds fee title to Nenana and that under *Landis*, the City owns the fee under Nenana. Thus, it concludes that the City may grant Applicants a private easement over Nenana for construction. We respectfully disagree and asked the circuit court to also answer this question in our declaratory action.

First, *Landis* does not even apply to the issue before Council. *Landis* and the court of appeals case it relies on concern the interpretation of a deed, not the legal effect of dedicating ROW within a plat. *Landis*, 282 Or App at 297 ("'Our goal in interpreting a writing, including a deed conveying property, is to determine the parties' intent.' *Realvest Corp. v. Lane County*, 196 Or.App. 109, 116, 100 P.3d 1109 (2004).") (internal citations omitted). As set out below, even if *Landis* did concern the operation of a plat, the outcome here would be the same: the Tolovana plat did not convey fee ownership to the City.

The City's claim to fee ownership appears to be a material about-face from the City's position to date regarding the ROW dedicated by the Tolovana plat. Up to this point, the City has taken the correct position that the streets dedicated in the Tolovana plat were dedicated for public ROW use with the fee ownership remaining in abutting landowners. In discussing Ocean Avenue, which intersects Nenana and was dedicated on the same plat, the City told LUBA:

> The difficulty with Petitioners' (the Robertses') argument is that it is contrary to longstanding Oregon law - the Ocean Avenue right-of-way is <u>not 'real property of the City</u>. The Ocean Avenue right-of-way was dedicated by the Tolovana Park plat, which contained a dedication to a specific use: 'I hereby dedicate to the public for its use as thoroughfares forever, the streets and avenues therein.' Rec p 2523. * * * Any other result would result in the state, as well as each and every city and county in the state, being subject to significant takings claims for usurping the <u>rights of the owners of the property underlying dedicated streets</u>." City of Cannon Beach Answering Br., LUBA No 2020-116, at 39-42 (emphasis added) (attached as Exhibit D).

This position is consistent with Oregon law and Haystack's position. It is also consistent with the City's prior treatment of the unimproved ROW on Chena Avenue, also part of the Tolovana plat. In 1993, the City vacated a portion of Chena, and as provided in Ordinance No. 93-07 (attached as Exhibit E), fee title in the vacated Chena "will result in the owners of abutting property receiving the vacated Chena Avenue pursuant to ORS 271.140." Thus, the City has always regarded the owners of property abutting the dedicated rights-of-way in the Tolovana plat as owning the underlying fee.

The Chena vacation ordinance also noted that Chena Avenue was "unsuitable for improvement for vehicular traffic." Chena is the next street north of Nenana on the Tolovana plat, in the same active landslide. Nenana is notably steeper than Chena.

Finally, *Landis*. There, the court of appeals interpreted a deed that granted certain ROW to Lane County to determine whether it conveyed fee or just an easement. This is different from the present situation involving a dedication by plat to the public, decades before the City existed. The *Landis* court stated that the answer to this question must be determined from the application of four factors purportedly set out in *Realvest Corp. v. Lane Cty.*, 196 Or App 109, 112, 100 P3d 1109 (2004).[6] Based on these factors, the court of appeals decided that the deed at issue conveyed title to Lane County, not just an easement.

Application of *Landis* to the present situation does not indicate, for multiple reasons, that the City owns the fee under the ROW. First, the case concerns interpretation of a deed, not the operation of a plat. Second, the opinion does not state or stand for the proposition that conveyance of ROW in a deed to a municipality "in most situations" grants fee title—in fact, the opinion recognizes that many hold just the opposite. Finally, if the case had concerned the operation of a plat, its holding would not be authoritative because it directly contradicts binding precedent of the Oregon Supreme Court, which expressly states that the rule in Oregon is that land dedicated as a public street does not convey fee title, but only creates a public

[6] Contrary to the analysis in *Landis*, the court of appeals in *Realvest Corp.* did not create a four-factor test, or even discuss "factors" at all. The court simply relied on general principles of interpreting a writing to discern the meaning of a deed to Lane County. *Realvest Corp.*, 196 Or App at 116 ("Our goal in interpreting a writing, including a deed conveying property, is to determine the parties' intent.").

easement. *E.g., Portland Baseball Club*, 142 Or at 16; *Miller v. Roy W. Heinrich & Co.*, 257 Or 155, 157-58, 476 P2d 183 (1970);[7] *see also Siegenthaler v. N. Tillamook Cty. Sanitary Auth.*, 26 Or App 611, 613, 553 P2d 1067 (1976).[8]

Even if the four factors in *Landis* were controlling, the language dedicating use of streets "to the public" in the Tolovana Park plat at issue here[9] is entirely dissimilar from the language in the deeds granting ROW property to Washington[10] and Lane County, [11] respectively. As set out in the table below, the dedication in the Tolovana Park plat does not satisfy even one of the identified factors in *Landis*.

[7] Recognizing and providing authority for the "general rule that where land has been dedicated to use as a public street, the fee in the street remains in the dedicator subject to the public easement. When the dedicator sells the land abutting the street, the abutting owners own to the center of the street subject to the public easement. Upon a vacation of the street, the title reverts to the abutting owners free of the easement." (Citations omitted.)

[8] Recognizing Oregon Supreme Court precedent and holding: "[i]ncluded in that plat was a dedication to the county for road purposes of a 100-foot wide strip running roughly parallel to the ocean beach which was designated 'Pacific Boulevard' (see map). By the dedication the county received only an easement for the stated purpose." (citations omitted).

[9] "I hereby dedicate to the public for its use as thoroughfare forever, the streets and the avenues herein."

[10] *Landis*, 282 Or App at 297: "In this case, the 1992 deed to the county was titled, 'dedication deed and temporary construction easement.' The deed states, in part, that the grantors 'being lawfully seized in fee simple * * * do hereby grant to Washington County * * * hereinafter called Grantee and unto Grantee's successors and assigns, for the use of the public as a public way forever, all that certain real property situated in the County of Washington and State of Oregon, shown on [an attached exhibit] and being more particularly described as follows, to-wit: * * *'."

[11] *Realvest Corp.*, 196 Or App. at 116: "For the listed consideration of one dollar, the 1946 warranty deed from Morris and the Chases 'does hereby grant, bargain, sell and convey' to Lane County 'all the following real property * * * described as follows, to wit: *All that portion* of an 80 foot right-of-way * * *. To Have and to Hold, the above described and granted premises unto the said Lane County * * *.' (Emphasis added.)"

***Landis* Factors**	**Tolovana Park Plat**	***Realvest Corp.***	***Landis***
Source of Conveyance Language	Plat	Deed to County	Deed to County
"(1) the conveyance was for the purpose of a public right of way and was granted from private property owners to a public body, rather than between private citizens"	I hereby dedicate to the public. Note: the Tolovana plat dedication was made in 1908, 41 years before Cannon Beach was incorporated in 1949.	"unto the said Lane County"	"grant to Washington County"
"(2) the deed's text used 'inclusive language,' such as 'all that portion'"	the streets and the avenues therein	"All that portion of an 80 foot right-of-way"	"all that certain real property"
"(3) the word 'easement' was absent from the instrument"	"I hereby dedicate to the public for its use"[12]	"does hereby grant, bargain, sell and convey"	"do hereby grant"
"(4) the instrument did not 'otherwise purport to limit the nature of the estate being conveyed, with the possible exception of the use of the words 'right of way.'""	"I hereby dedicate to the public for its use as thoroughfares forever"	"To Have and to Hold, the above described and granted premises unto the said Lane County"	"for the use of the public as a public way forever"

[12] Although the term "easement" is not used in the plat language, the dedication "for its use" is synonymous.

As a final note: had the deed in *Landis* granted "the public" an interest in real property, that grant, unlike a dedication, would be unenforceable because a "grant" to "the public" is too indefinite to be capable of taking title. *Sheldon W. Parks*, The Law of Dedication in Oregon, 20 Or L Rev 111, 114 (1941). *See also Huddleston v. City of Eugene*, 34 Or 343, 352, 55 P 868 (1899) (characterizing as "absurd" the notion that a dedication to the "public" conveys a fee for "'the fee must vest in some one having a legal capacity to take it. It must be a natural or artificial person,--must be some one having a legal entity.'")

Thus, whether under the inapposite standards in *Landis* or the unambiguous Oregon Supreme Court precedent, the City holds only an interest in the nature of an easement over Nenana, whereas the adjacent owners, including Haystack, hold title to the land. Accordingly, the City cannot convey a private construction easement to Applicants because it is a property interest that the City does not possess.

E. Granting the proposed driveway easement would violate the City's primary responsibility to exercise its police powers to protect the health and welfare of the public.

Even if Applicants had a property right to build structures down Hemlock, it would still be subject to the City's primary responsibility to protect the health and welfare of the public. The February 25 Memo acknowledges that, at a minimum, the City can deny motor vehicle access where such access would be unsafe (Feb. 25 Memo at 9). Applicants have not come close to meeting their burden to demonstrate safety on this point. They have not even committed to a particular design of driveway or road in Nenana, much less a safe intersection with Hemlock in the S-curves.

Thus, denying the easement request—even if a right to access nonabutting roads existed under Oregon law—would not require payment of compensation to Applicants. As the court of appeals stated in *Thomas v. State, Dep't of State Police*, "[i]t has been clearly and repeatedly held that legitimate governmental regulations that are aimed at preventing or correcting public hazards, nuisances or unlawful activities cannot give rise to a taking under either constitution." 138 Or App 209, 211, 907 P2d 262 (1995) (citations omitted). In other words, "[e]xercise of the

'police power,' unlike exercise of the 'eminent domain power,' does not require compensation." *Eckles v. State*, 306 Or 380, 398, 760 P2d 846 (1988).

This rule applies equally to regulations concerning the use of land. *Suess Builders Co. v. City of Beaverton*, 294 Or 254, 258-59, 656 P2d 306 (1982) ("Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land."). Even more to the point, "[t]he right of access to and egress from a public street is subject to the public's superior rights and to public regulation." *McGowan v. City of Burns*, 172 Or 63, 75-76, 137 P2d 994 (1943).

As demonstrated by Applicants' own application materials, the construction of the proposed driveway would cause multiple serious dangers to the public, including an unsafe intersection with the Hemlock S-curves, destabilization of the hillside by interfering with the City's critical drainage infrastructure, and acceleration of the active landslide under Nenana by placing substantial weight on its steep slope. Under these circumstances, allowing the proposed driveway would violate the City's most important obligation, i.e., to exercise its police powers to protect the health and safety of its citizens.

Haystack has retained Lancaster Mobley to evaluate the safety of the partially designed conceptual driveway proposed by Applicants. As the letter attached as Exhibit C indicates, Applicants cannot demonstrate that their proposal is safe without providing sufficient design information such as location of proposed guardrails, striping, and grade break applicable to sight distance. Applicants provided this type of information with its prior access proposal, but conspicuously omit it here. Thus, Council should not even entertain an easement request without this information necessary to make a finding of reasonable safety.

F. Conclusion.

The City's concern of a potential lawsuit has led staff to present Council with a limited set of bad options. Such a choice, however, is not required because Applicants do not have a property right to build improvements down Nenana. Even the cautious February 25 Memo acknowledges the City's authority to protect the safety of its citizens in considering the requested easement.

We ask Council to table this matter indefinitely, or at least continue its consideration of this easement request until we can provide a traffic safety assessment, the circuit court answers the questions of City authority, and the Oregon Supreme Court decides Applicants' appeal. Getting this additional information would enable a better decision and reduce risk for the City.

Very truly yours,

William L. Rasmussen

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December 29, 2021

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Cannon Beach City Council
c/o Mr. Bill Kabeiseman
City of Cannon Beach
PO Box 368
163 E Gower St
Cannon Beach, OR 97110

Subject: Applicable Law Governing Demand by Stan and Rebecca Roberts for an Easement to Build a Private Driveway Over the Nenana Avenue Public Right-of-Way

Dear Mr. Kabeiseman, Councilors, and City leaders:

This letter provides legal analysis on the private easement demanded by the Robertses over unimproved Nenana Avenue and is submitted at Mr. Adams request. As set out in detail below, Oregon law is clear that:

- No time limit exists for considering an easement request.
- The City has no obligation to develop, open, or allow improvements on unimproved Nenana Avenue for vehicular access.
- The City, for multiple reasons, cannot lawfully grant a private easement or allow the development of Nenana Avenue as proposed by the Robertses.

We urge Council to table further consideration of the Robertses' private easement requests unless and until a specific request is made with sufficient detail for Council consideration. Such a proposal would that addresses the myriad safety, land use, public works, and related issues raised by staff and the public. We respectfully ask that Council direct staff to demand at least the level of detail provided in the earlier conceptual road documents, including but not limited

to detailed site plans, vegetation plans, geotechnical plans, traffic safety analysis, and the like. Please let us know if you have questions or would like further analysis on any of the legal issues below.

1. The Robertses have not made an actual request to Council for conveyance of an easement.

At the outset, it should also be noted that the Robertses have not made an actual request to Council for conveyance of an easement.

In the summer of 2021, the Robertses submitted what they called a "supplemental" right-of-way permit application. (Ex. 1, at 1.) It proposes a private "driveway" as an alternative to their earlier application to construct an elevated overpass road that served only their property. The application was not for an actual structure, but requested approval of a "driveway concept." (Ex. 2, at 1.) Without legal basis, the application narrative instructed the City to choose between the concept or the elevated road previously requested. The "supplemental application" did not request an easement. It presupposed that an easement would be granted as part of the right-of-way permit process. (Ex. 2, at 1.)

This "supplemental application" is invalid in multiple respects. First, there is no such thing as a "supplemental application" process whereby the City chooses between two entirely different proposals. Nor can an application be based on a mere "concept." Also, while the public works director has limited authority to regulate construction of right-of-way improvements, she has no authority to convey a private property right in public land. If the City believes that it has an interest to grant in Nenana, it must be consistent with the public and Haystack Rock LLC's property interests and only the Council can grant such an interest in city-controlled right of way. ORS 271.300.

The Robertses have not submitted a request to Council for an easement. Even the demands to staff did not include proposed easement terms, such as the fair compensation that is required by state law. ORS 271.310(1). In short, there is currently nothing for Council to consider, other

than an abstract and hypothetical idea.[1] Until the Robertses submit a sufficiently detailed valid request to Council, with proposed compensation, key easement terms, and an explanation of how Council has authority to grant the easement, Council should table this issue.

2. Council has no obligation to consider <u>any</u> request for a private easement, much less a limited timeline in which it must make such a decision.

Even if the Robertses do subsequently submit a valid request for an easement to Council, it has no obligation to act on or even consider the request.

A party that wants to construct improvements on undeveloped right-of-way may file an application with the public works department. Such an application is reviewed by the public works director for compliance with, among other things, the four criteria in CBMC 12.36.030(B) (e.g., maintains public safety, access, and appearance of the area, and does not affect drainage or cause erosion). The proposed street design is also subject to road construction and traffic safety standards. If the right-of-way is within the Oceanfront Management overlay or near sensitive areas, the new road also requires a conditional use permit, among other requirements. CBMC 17.42.030(F)(3).

Conversely, there is no formal process or timeline to request an easement for private improvements on city-controlled property. This is because there is no legal right to such an easement. The grant of an easement for a private road in public right-of-way, if allowed under the law, is entirely within the discretion of Council.[2] A party cannot compel Council to grant or even formally consider an easement proposal. Rather, deliberation on a potential conveyance would be initiated by Council through the standard ordinance process. ORS 271.300; City Charter, ch VIII, § 30. A request for a private property interest in public land is also not a land

[11] The idea is even more abstract and hypothetical given Stan Roberts' recent statement to the *Astorian* that he has no interest in building what he calls a "tiny house" and the Oregon Court of Appeals holding that he may not build his proposed larger house. Article attached.

[2] *Pullen v. Oregon Indus. Dev. Corp.*, 240 Or 583, 586, 402 P2d 240 (1965) ("We assume that the city could have lawfully pursued that course [of selling lots individually]. But that is not to say that the city can be compelled to.").

use decision subject to land use laws.[3] Accordingly, Council has no obligation to act on or consider any request by the Robertses for an easement to build a private road. It certainly has no time frame in which it must act if it does consider granting a private easement.

3. The Robertses do not have a right of access to S. Hemlock Street or any other non-abutting improved road.

Underlying the Robertses' demand to staff for an easement is an argument that the City must enable vehicular access improvements to their property. This premise, however, is patently wrong.

Oregon law could not be clearer that the right of access is limited to improved roads abutting a property. In other words, Oregon law provides that owners have a right to a driveway opening from their property to an abutting adjacent built road. The Oregon Supreme Court provided a thorough explanation of this right in *State ex rel. Dep't of Transp. v. Alderwoods (Oregon), Inc.*, 358 Or 501, 366 P3d 316 (2015), in which it wrote:

- "Oregon case law has established that an owner of property abutting a public road has a common-law right of access to its premises by means of the abutting road." *Alderwoods*, 358 Or at 511 (emphasis added).
- "The nature of an abutting landowner's common-law right of access has been described as an easement appurtenant to the abutting land." *Id*. (emphasis added).
- "Applying those principles to an abutting property owner's right of access, such an easement may be properly understood to be an interest in land for the benefit of the abutting landowner and for the specific, limited purpose of providing access to and from the abutting public road." *Id.* at 512 (emphasis added).
- "Specifically, an abutting property owner holds an easement of access, appurtenant to the abutting land, for the limited purpose of providing a means of ingress and egress to

[3] *In the Matter of City of Prineville's Decision*, 49 Or App 385, 389-90, 619 P2d 940 (1980) ("In any event, we do not agree with petitioners that the city's decision to sell the property is in itself a land use action.").

MILLER NASH LLP

> and from the owner's property by means of the abutting public road." *Id.* at 517 (emphasis added).

This summary by the Court is consistent with every other Oregon case on the issue—all clearly stating that the common-law right of access is for a driveway opening to abutting roads.[4] This is an entirely different situation than that of the Robertses, with property abutting an unimproved right-of-way, who want to build vehicular access improvements through that unimproved right-of-way to access a non-abutting road in the Hemlock Street right-of-way.

An expansion of this limited right of access to include non-abutting roads was unequivocally rejected by the Oregon Court of Appeals in is *Robertson v. City of Turner*, 187 Or App 702, 706, 69 P3d 738 (2003). In this case, the plaintiffs claimed they had a common-law right to access their property from a non-abutting road. They argued that the City of Turner had violated this right when it closed a bridge that provided the only access to their home. Thus, plaintiffs claimed they were entitled to compensation for the city's unconstitutional "taking" of this property right.

The court of appeals emphatically rejected plaintiff's theory. The court stated that the plaintiffs were not seeking compensation for a right recognized under Oregon law but were demanding that public property (i.e., the right-of-way and bridge) be put to their private use.[5] The court stated that this reading of the takings clause "is at best implausible and at worst an affront to the idea that, generally speaking, words have meanings and sentences drafted by competent

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[4] *E.g., Curran v. State ex rel. Dep't of Transp.*, 151 Or App 781, 785, 951 P2d 183 (1997) ("a property owner has a common-law right of access to his or her property from an abutting public road * * *.") (emphasis added); *City of Salem v. Merritt Truax, Inc.*, 70 Or App 138, 140, 688 P2d 120 (1984) ("An owner of land abutting a street has a common law right to access to his property from the road.") (emphasis added); *Oregon Inv. Co. v. Schrunk*, 242 Or 63, 69, 408 P2d 89 (1965) ("[A]n abutting proprietor's right to the use of the street in front of his premises as a means of ingress and egress is a property right[.]") (emphasis added); *Boese v. City of Salem*, 40 Or App 381, 383, 595 P2d 822 (1979) ("The owner of land abutting a street has a common law right of access to his property from the road.") (emphasis added).

[5] 187 Or App at 706 ("Instead of a guarantee "that no individual should have to pay the entire cost of a benefit that is shared by the general public at large[,] the core of plaintiffs' argument is, in effect, that all of defendant's citizens should bear the cost of providing plaintiffs with a private benefit.").

speakers of the language convey discrete thoughts—not to mention the idea that the interpretation of a constitutional provision should have some connection to its text." *Id*.

It is important to note that this holding was not limited to the facts in the case. The trial court had issued summary judgment because it found that other access to the property might exist, plaintiffs had not exhausted those possibilities, and thus, the case was not "ripe." 187 Or App at 705. The court of appeals, however, declined to review this narrow issue. It stated:

> If we were to affirm on ripeness, plaintiffs might then seek a way of necessity and thereafter pursue the then-ripe claim. To save plaintiffs that expense and to afford complete relief, we affirm the trial court on a more fundamental ground: Defendant's action in closing the bridge was not an exercise of the eminent domain power to take private property for public use, even if the foreseeable result of the action was that the value of plaintiffs' property was reduced or eliminated. That being the case, no claim for 'inverse condemnation' lies." 187 Or App at 705-06 (citation omitted).

In short, the court of appeals based its holding on the simple point that property owners do not have a recognizable right to compel the opening of public right-of-way to allow access from a property to a non-abutting road—even if no other access exists.

Also relevant here, the court of appeals held that even if such a right existed for access to non-abutting roads, the plaintiffs would still not have a valid takings claim because the closing of the bridge was for safety reasons and thus an exercise of the city's police powers. *Id.* at 707.[6] The

[6] The court of appeals observed that Oregon law unequivocally establishes that "the exercise of government's authority to promote the health and safety of the populace—what is commonly referred to as exercise of the 'police power' * * * are not compensable takings of 'private property for public use' under Article I, section 18." (Citing *Hughes v. State of Oregon,* 314 Or 1, 34, 838 P2d 1018 (1992); *Eckles v. State of Oregon,* 306 Or 380, 398, 760 P2d 846 (1988), *appeal dismissed,* 490 US 1032, 109 S Ct 1928, 104 L Ed 2d 400 (1989); *Suess Builders v. City of Beaverton,* 294 Or 254, 258-59, 656 P2d 306 (1982); *Anthony v. Veatch,* 189 Or 462, 494, 220 P2d 493 (1950); *City of Portland v. Meyer,* 32 Or [368]371, 52 P 21 (1898); *Thomas v. Dept. of State Police,* 138 Or App 209, 211, 907 P2d 262 (1995)).

court recognized that this "general rule applies even when the government action completely destroys the property on which it exercises its "police power."" *Id.* at 707-08.[7]

The Robertses' attorneys have provided no legal authority to contradict the clear law above—because none exists. There is simply no legal basis for their theory that they are entitled to vehicular improvements through unimproved Nenana Avenue to the non-abutting S. Hemlock Street. And even if such a right existed, the City would be entitled to deny such access to protect the public welfare (i.e., avoid a dangerous intersection on the Hemlock S-curves, not exacerbate an active landslide, protect the City's dewatering system, honor the comprehensive plan, etc.).

4. The City has no obligation to develop, open, or allow vehicular improvement in unimproved Nenana Avenue.

Oregon law is equally clear that municipalities have an unqualified right to leave right-of-way in a state of nature. For example in *Prosch v. City of La Grande*, 14 Or App 546, 549, 514 P2d 351 (1973), the court of appeals stated that "[t]he 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." Likewise, in *Hendrickson v. City of Astoria*, 127 Or 1, 7, 270 P 924 (1928), the Oregon Supreme Court held that "[t]he 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 * * *." Many other cases state the same principle.[8]

This unfettered discretion exists even when the proposed improvements would be privately funded. Owners of property adjacent to undeveloped right-of-way have a limited right to use the right-of-way in its natural state in a manner that is "not inconsistent with the public's right

[7] *Citing Shaffer v. City of Winston* 33 Or App 391, 394, 576 P2d 823 (1978); *State ex rel. Shrunk v. Metz,* 125 Or App 405, 413, 867 P2d 503 (1993).

[8] *E.g.*, *LDS Dev., LLC v. City of Eugene*, 280 Or App 611, 620, 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."); *Barton v. City of Portland*, 74 Or 75, 79, 144 P 1146 (1914), *overruled on other grounds by City of Molalla v. Coover*, 192 Or 233, 235 P2d 142 (1951) ("A municipal corporation is under no obligation to open a dedicated street until its use is deemed necessary by the common council.").

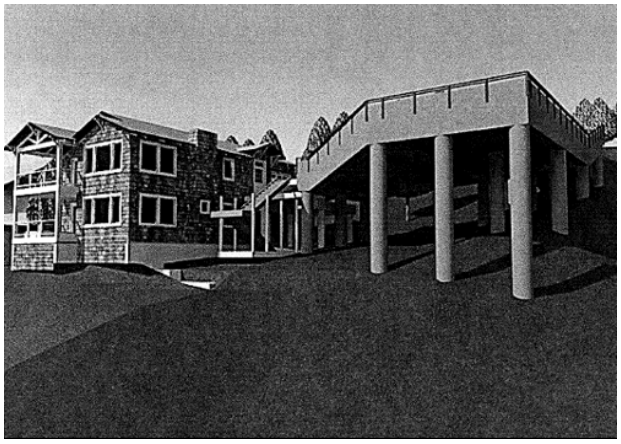
of use." *Prosch*, 14 Or App at 552. An adjacent owner to unimproved right-of-way cannot force a city to construct or otherwise open a public street. *Id.*; *Killam v. Multnomah Cty.*, 137 Or 562, 566, 4 P2d 323 (1931) ("A municipal corporation is under no obligation to open a dedicated street until its use is deemed necessary by the common council.") (citation omitted). As definitively set out in *Robertson v. City of Turner*, this remains true even if the unimproved right-of-way is the only route of access available. 187 Or App at 706. The Robertses have a limited right to access unimproved Nenana, but no right to install vehicular access improvements in unimproved Nenana.

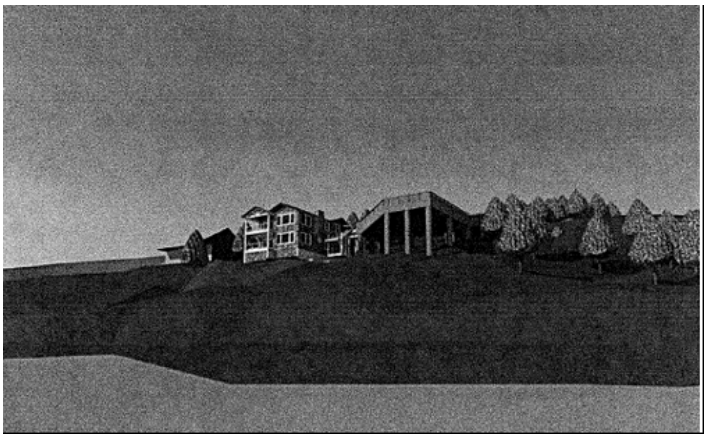
5. In fact, the City cannot lawfully grant a private easement or allow the development of Nenana Avenue as proposed by the Robertses.

The Robertses' "supplemental application" requesting approval of a "driveway concept" is their ill-conceived plan to purportedly avoid the application of road, safety, and design standards. The Robertses' "supplemental application" states that the driveway will need to be "steeper than a public road at approximately 35% grade." (Ex. 1, at 2) The narrative for the application claims this is allowed because "[a] driveway need not comply with the public road standards." This premise, however, is wrong. Road, safety, and design standards apply to all road improvements—private or public—on public right-of-way.[9] This is plainly stated as a standard condition of approval (no. 4) on the right-of-way permit application form.

The Robertses are correct, however, that their original proposal (shown below) to construct essentially an overpass bridge to their property is not approvable.

[9] CBMC 12.34.010 states that the road standards apply to "all street improvements within the jurisdiction of the city of Cannon Beach * * *." This code does not exempt private streets or "driveways" running over public right-of-way. Rather, it defines the "roads" subject to the standards broadly as the "portion or portions of the right-of-way used for vehicular traffic and includes area three feet behind the curb or three feet beyond the edge of the shoulder. Streets and roads are synonymous. (Ord. 19-4 § 1)." CBMC 12.34.020.





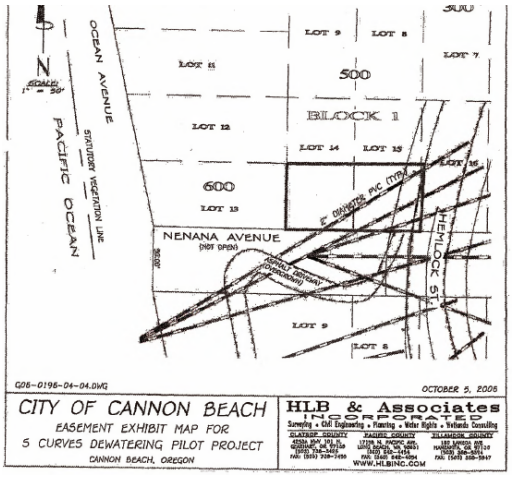
As numerous public comments in opposition to this blight highlighted, the proposed structure could not possibly be approved because (1) it does not comply with even one of the public safety, access, and appearance standards in CBMC 12.36.030(B), (2) the new intersection on the Hemlock S-curves would be extremely dangerous, (3) the structure is not allowed because it provides dedicated access to the Robertses' property while blocking access to adjacent properties and the public beach, and (4) it also violates the City's Oceanfront Setback requirements.

The Robertses' alternative plan for a private driveway, however, is equally flawed and cannot meet the applicable code standards either. Moreover, even if the Robertses could avoid the imposition of road, safety, and design standards by building a "private driveway," the City is legally prohibited from granting an easement or otherwise allowing this improvement for multiple reasons outlined below.

a. The grant of the private easement would violate state law.

To start, state law prohibits the conveyance of an easement in property controlled by a city unless it determines that the land is "not needed for public use" now or in the future. ORS 271.310(1). Obviously, Nenana Avenue does not satisfy this criterion. First, Nenana Avenue is currently occupied by a dewatering system that is critical to the stability of the adjacent hillside. Nenana Avenue and surrounding properties sit on an "active complex landslide" that is bisected by two active scarps. To stabilize the steep slope, the City built a dewatering system in 2007 with 19 subsurface horizontal drains under and around the Nenana Avenue right-of-way

in order to lower groundwater within the S-curve landslide mass. The location of these drains is shown in the now-expired easement granted by Haystack Rock to the City for the installation of some of the drains across its property:



The Robertses' own geotechnical engineers explained the critical nature of maintaining the system in their reports for the Robertses' related land use applications. For example, Warren Krager wrote in his July 16, 2020, geotechnical analysis that "[t]he critical aspect of maintaining subsurface drains to maintain only incipient slope stability of the S-Curve landslide cannot be overemphasized. The landslide toe drains need to be inspected and cleaned annually to maintain only modest stability margin of the S-Curve landslide during static, non-seismic design conditions."[10] In this context, the City should not grant the requested easement so that the City can access, maintain, and supplement the dewatering system without complications from the proposed private driveway.

Further, the Nenana Avenue right-of-way is effectively part of the City's Inspiration Point land to the immediate south. This land is a preserved greenspace that was purchased in 1999 by the City with half of the funds coming from private donations.[11] The minutes from the Council meeting authorizing the purchase state the "intent of the volunteers in acquiring the land with

[10] *See* Ex. 3, at 3.

[11] Of note, the City, with help from private citizens, acquired Inspiration Point as a greenspace for $250,000, which is materially more than the Robertses paid for their lot

the city [was] to provide for a pedestrian walk-up from the beach with scattered benches along the oceanfront[,]" with the remainder being "left wild."[12] This private-public partnership to preserve the adjacent land in its natural state, except for pedestrian public access to the beach, unequivocally demonstrates the public's current interest in preservation of Nenana Avenue as greenspace, as well as future use for *public* non-vehicular pathways/trails.

Finally, maintaining Nenana Avenue in its natural state avoids exacerbation of the large, active landslide it sits on. According to the Robertses' geotechnical engineers, the placement of a driveway structure directly on the steep hillside—as proposed in the Robertses' "supplemental application"—would be unsafe because it would destabilize the underlying landslide.[13]

No plausible argument can be made that Nenana Avenue is not needed for public use. Accordingly, the City cannot grant a property right in Nenana Avenue—especially one that would directly undermine its public use—under the limitations of ORS 271.310(1).

b. The City holds the right-of-way in trust, and the easement would violate the terms of its conveyance and purpose.

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).[14] "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. *See Umpqua Valley Grange*, 45 Or App at 742-44 (holding that nonuse is immaterial).

[12] The August 3, 1999, minutes are attached as Exhibit 2.

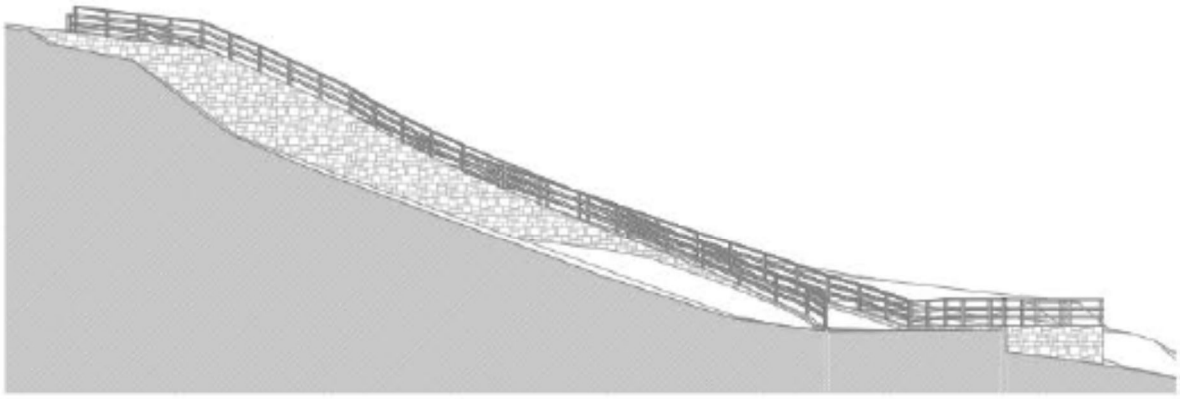
[13] *See* Geotechnical Investigation Report, Earth Engineers, June 30, 2020, Ex. 4, at 3.

[14] *Hyland v. City of Eugene*, 179 Or 567, 572-73, 173 P2d 464 (1946) ("When such a grant has been made by a private owner, the municipality, by accepting the dedication, becomes a trustee to carry out the terms of the grant and it has no power to sell or lease the property for purposes foreign to the dedication. Tiffany on Real Property, 3d Ed., § 1113.").

In this case, Nenana Avenue was dedicated to the public as part of the 1908 subdivision plat for Tolovana Park,[15] and the City cannot permit use of this street for anything other than *public* access. In *Public Int. Council v. City of Lincoln City*, 28 Or App 67, 69, 558 P2d 1291 (1977), the Oregon Court of Appeals ruled that a city could not construct a sewer-pump station in a dedicated public street right-of-way where the city does not own the underlying fee title because it would interfere with the use of the street as a public thoroughfare, including access by abutting property owners. Conveying the requested easement for an exclusive—actually gated—private driveway that would block access to other abutting lots and the public thoroughfare would violate Oregon law.

Similarly, the conceptual elevated driveway would illegally block access from other lots abutting unimproved Nenana. For example, Haystack Rock LLC owns Lot 14 abutting Nenana, as shown on the dewatering map above. The elevated driveway proposes an approximately 10' high wall for the length of Lot 14's frontage with Nenana. Nenana is Lot 14's only frontage on a public right of way. A mapped stream exists near the northern boundary of Lot 14, blocking access to the North. The proposal blocks Lot 14's only frontage to abutting right of way, as illustrated in the north facing elevation of the conceptual renderings:

[15] The 1908 plat states that the developer "hereby dedicate[s] to the public for its use as thoroughfares forever, the streets and the avenues therein."



NORTH ELEVATION

c. The requested easement exceeds the City's own rights in the Nenana Avenue right-of-way.

"In this state the rule is that, where land has been dedicated or appropriated for a public street, the fee in the street remains in the original owner subject only to the public easement * * *." *Portland Baseball Club v. City of Portland*, 142 Or 13, 16, 18 P2d 811 (1933) (citing *Huddleston v. City of Eugene*, 34 Or 343, 55 P 868 (1899)); *Kurtz v. Southern Pacific Co.*, 80 Or 213, 155 P 367 (1916), 156 P 794 (1916)). Thus, as an owner of two lots abutting Nenana Avenue, Haystack Rock owns some of the land proposed for the easement—the City may not convey a property interest in property that Haystack Rock owns.

6. If the Robertses want to construct an improvement on Nenana Avenue, they need to submit new applications that meet code standards.

It is clear that the original elevated overpass road originally proposed by the Robertses cannot satisfy the applicable state and local standards. But their plan to avoid these standards by obtaining an easement to build a private driveway over public right-of-way is also flawed in both its premise and feasibility—a driveway is still subject to all road standards and the conveyance is prohibited by several rules of law.

It is not the City's job to try to solve around myriad development constraints that were known when the Robertses bought their property.

The City has no obligation to provide the Robertses with access to the non-abutting Hemlock Street. If the Robertses still desire to improve Nenana Avenue, it is their responsibility to submit new applications for a redesigned road that meets all applicable standards. These standards include the criteria for right-of-way improvements in CBMC 12.36.030(B) and the standards for issuance of a conditional use permit because the road is within an Oceanfront Management overlay. The City should not and cannot waive applicable standards just because the Robertses bought a lot subject to substantial known development constraints.

Accordingly, we respectfully ask Council to decline to spend further time discussing the unlawful easement demanded by the Robertses unless and until a specific and fully documented application is made. The City's responsibility is to protect the interests of the community, not individual developers. Thank you for your time in reviewing this legal analysis. Please let us know if you have any questions or would like further information on any of the issues above.

Very truly yours,

William L. Rasmussen

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLATSOP

HAYSTACK ROCK, LLC, a Delaware limited liability company, Plaintiff, v. REBECCA ROBERTS, an individual; STANLEY ROBERTS, an individual; and CITY OF CANNON BEACH, a municipality, Defendants.	Case No. 22CV07199 COMPLAINT FOR DECLARATORY RELIEF NOT SUBJECT TO MANDATORY ARBITRATION Fee Authority: ORS 21.135(1), (2)(f) Filing Fee: $281

For its complaint for a declaratory judgment, plaintiff alleges as follows:

PARTIES

1.

Plaintiff Haystack Rock, LLC, is now and at all relevant times was a duly organized Delaware limited liability company with its principal place of business in Oregon ("Haystack").

2.

Defendant City of Cannon Beach is now and at all relevant times was an Oregon municipality (the "City").

3.

Defendants Rebecca Roberts and Stanley Roberts, on information and belief, are residents of the state of Washington (the "Robertses") and are married to each other. To the

extent necessary, their marital community is a defendant along with each of the Robertses individually.

CLAIM FOR DECLARATORY RELIEF

4.

Haystack owns real property in Cannon Beach at 1981 Pacific Drive on which is located the reconstructed Oswald West summer beach cabin (the "Cabin"). The original Cabin was built in or around 1913 by former Oregon governor Oswald West but was destroyed in 1991 by an arson fire. The predecessors to Haystack faithfully rebuilt the Cabin, which is on the National Register of Historic Places. The Cabin fronts the ocean shore a few hundred yards south of Haystack Rock.

5.

The Cabin property is comprised of Lots 8, 9, 10, 11, 12, 14, and 15, as depicted (and outlined in green) in the Tolovana Park plat (the "Plat"), attached as Exhibit A. Lots 14 and 15 abut unimproved Nenana Avenue on the north ("Nenana"). As reflected on the Plat, Nenana was dedicated "to the public for its use as a thoroughfare forever." The Plat reflects that the dedication was accepted on May 1, 1908, by Clatsop County. That dedication is binding on the City and owners of real property abutting Nenana.

6.

The Robertses own Lot 13 (outlined in red in the attached Exhibit A), which abuts Nenana on its north side. The relative positions of Lot 13, the Cabin property, and Nenana are shown on the attached Exhibit B.

7.

Nenana is an unimproved right-of-way (ROW) that runs west from the ocean shore to its intersection with Hemlock Street to the east. The ROW traverses very steep and historically unstable land below what is known as the S-curves on Hemlock.

8.

The Robertses have applied to the City for permission to build a residence on Lot 13.

9.

The Robertses request a private construction easement from the City to build a large, elevated driveway in the unimproved Nenana ROW to improve vehicular access to Lot 13 from Hemlock. In its current unimproved state, the ROW does not allow regular vehicular access, but does allow for pedestrian use by the Robertses, the public, and members of Haystack. The proposed elevated driveway would prevent alterative public uses of the ROW, such as an at-grade, multiuse path.

10.

The Robertses have threatened the City with a takings lawsuit if the City does not grant the requested easement, claiming to have a property right to construct an elevated driveway down the unimproved ROW.

11.

The City is preparing to grant an easement to the Robertses for no consideration. The Robertses intend to accept the easement and then seek regulatory approval from the City to improve the ROW with a driveway that, as depicted on driveway plans submitted to the City, will serve only Lot 13 and will physically block access to the ROW from abutting lots owned by Haystack and by the public. In the opinion of Haystack, the driveway will create a safety hazard where it intersects Hemlock and runs the risk of destabilizing the S-curves and wreaking havoc on Hemlock.

12.

Haystack objects to the grant of the easement by the City on many grounds made in written submissions to the City and at public meetings of City Council. As relevant here, those grounds include the following:

a. The City has no legal right or authority to grant the requested private construction easement, which is an interest in real property;

b. the City is not the fee owner underlying the Nenana ROW;

c. Haystack, through its ownership of Lots 14 and 15, owns the fee underlying the northern half of the ROW abutting Lots 14 and 15, and Haystack does not consent to the grant of an easement; and

d. The City holds the ROW in trust, for use by the public as a thoroughfare. The proposed private easement will allow private use by the Robertses and will deny both the public and Haystack, whose property abuts the ROW, the ability to use the ROW as a thoroughfare.

13.

Based on a February 25, 2022, memorandum from land use counsel, the City believes that it must allow the Robertses to build structures in the ROW to improve vehicular access to Lot 13 (provided certain other municipal code provisions are satisfied) rather than be left in a state of nature or preserved for higher and better future public uses.

14.

A concrete controversy exists among the Robertses, Haystack, and the City over the obligation or ability of the City to grant the easement to develop the Nenana ROW with an elevated private driveway benefitting only the Robertses and depriving the public and Haystack of their rights to use the ROW as a public thoroughfare.

15.

Under the authority of ORS Chapter 28, the Court should enter a judgment declaring the respective rights and obligations of the parties that: (a) the Robertses have no property right to construct elevated access structures in unimproved Nenana, (b) the City has authority to deny the Robertses' easement request for failure to adequately demonstrate safety, code compliance, or that it is in the public's interest, (c) the City may not grant the proposed private easement to the Robertses, and (d) the ROW may not be used other than as a public thoroughfare.

WHEREFORE, Haystack prays for judgment declaring the respective rights and obligations of the parties that:

1. The Robertses do not have a property right to build elevated driveway improvements down the unimproved Nenana ROW;

2. The City has authority to deny the requested easement to the extent the Robertses fail to demonstrate that the proposed driveway is safe, compliant with City code, and in the public's interest;

3. The City may not grant the Robertses' requested easement; and

4. The ROW may not be used other than as a public thoroughfare. Haystack further prays for such other relief as the Court deems just and equitable and for its costs and disbursements incurred herein.

DATED this 28th day of February, 2022.

MILLER NASH LLP

s/ William L. Rasmussen

William L. Rasmussen, OSB No. 064782
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Phone: 503.224.5858
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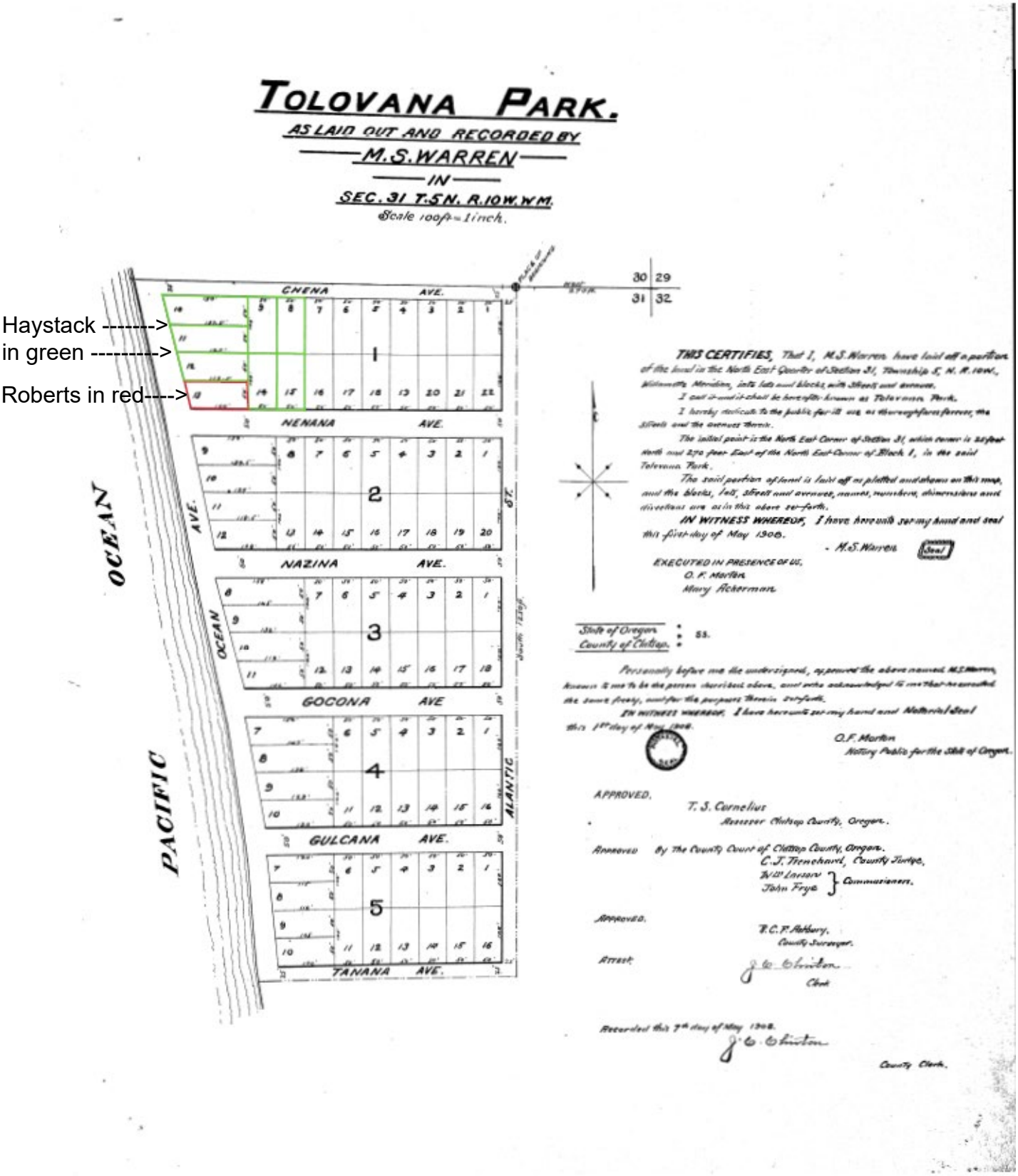
Trial Attorney: William L. Rasmussen

Haystack ------->
in green ---------->

Roberts in red---->




Haystack
Boring
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Thomas
Roberts
NENANA AVE
James
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Cannon
S HEMLOCK STREET
Alve
Alve
Tower
Cope
Amos
Amos
Existing Ownership

lancaster mobley

321 SW 4th Ave., Suite 400
Portland, OR 97204
503.248.0313
lancastermobley.com

February 25, 2022

Haystack Rock, LLC
c/o Steven Liday
Miller Nash LLP
111 SW Fifth Avenue, Suite 3400
Portland, OR 97204

Dear Sirs,

Thank you for engaging Lancaster Mobley to conduct a study of the available sight distance and transportation safety implications of the proposed access to S Hemlock Street within the Nenana Avenue right-of-way in Cannon Beach, Oregon.

In order to complete our analysis of the sight distance, safety, and operation of the new intersection, we will require the following information:

- A detailed drawing of the configuration of the driveway as it intersects S Hemlock Street. This includes the following:
    - Details on how the new driveway matches into the existing pavement on S Hemlock Street.
    - A to-scale drawing that in addition to design details for the new driveway, includes features on the existing portion of S Hemlock Street that are relevant to the operation of the driveway:
        - Location of the edge of pavement,
        - All existing striping, including lane and shoulder widths,
        - Location of existing guardrail,
        - Location of any new guardrail along the new driveway alignment.
        - The point of the grade break between S Hemlock Street and the proposed 4.8% grade of the new driveway approaching S Hemlock Street
        - Any trees planned for removal along S Hemlock Street either on the subject property or within the Nenana Avenue right-of-way.

Until we have the information noted above, we will not be able to proceed with our analysis.

Sincerely,

Todd E. Mobley, PE
Principal

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

STANLEY ROBERTS and REBECCA ROBERTS, *Petitioners,* v. CITY OF CANNON BEACH, *Respondent,* and OREGON COAST ALLIANCE and HAYSTACK ROCK, LLC, *Intervenors-Respondents.*	LUBA No. 2020-116

RESPONDENT CITY OF CANNON BEACH'S ANSWERING BRIEF

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(303) 859-0403
Attorney for Intervenor-Respondent Oregon Coast Alliance

MAY 2021

is, in fact, buildable pursuant to recently enacted state law and, therefore, there is a buildable lot between their lot and the oceanshore. This would result in their lot not being subject to the oceanfront setback.

Petitioners' argument is based entirely on ORS 197.779, enacted in 2019, which, according to Petitioners, definitively makes all public property that is zoned residential available for residential development. ORS 197.779(2) provides as follows:

> "[n]otwithstanding any land use regulation, comprehensive plan, or statewide land use planning goal, a local government may allow the development of housing on public property."

Petitioners note that ORS 197.779(1) defines "public property" to mean "all real property of the state, counties, cities... or all other public or municipal corporations in this state." Therefore, according to Petitioners, because the Ocean Avenue is the "public property" of the City, it is available for development of housing and, therefore, is buildable.

The difficulty with Petitioners' argument is that it is contrary to long-standing Oregon law – the Ocean Avenue right-of-way is not "real property of the City." The Ocean Avenue right-of-way was dedicated by the Tolovana Park plat, which contained a dedication to a specific use:

> "I hereby dedicate to the public for its use as thoroughfares forever, the streets and avenues therein." Rec p 2523.

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Under Oregon law, when property is "dedicated" to a particular use, a city is without power to change the use of that property. *Raley v. Umatilla County*, 15 Or 172, 13 P 890, 3 Am St R 142 (1887); *City of Klamath Falls v. Flitcraft*, 7 Or App 330, 490 P2d 515 (1971), *rev den* ___ Or ___ (1972).

As the Supreme Court held in *Hyland v. City of Eugene*, 179 Or 567, 173 P2d 464 (1946):

> "It is the universally accepted rule of law that land dedicated by a private owner for a specific purpose must be used in conformity with the terms of the dedication and not diverted to any other purpose. *Church v. City of Portland*, 18 Or 73, 22 P 528, 6 L.R.A. 259, 39 Am. Jur. 816, § 21. . . When such a grant has been made by a private owner, the municipality, by accepting the dedication, becomes a trustee to carry out the terms of the grant and it has no power to sell or lease the property for purposes foreign to the dedication. Tiffany on Real Property (3rd ed.), § 1113." *Hyland* at 572.

The Court in *Hyland*, went on to note that

> "The extent to which the use of [dedicated] property may be changed is governed, to some extent, by a consideration of the manner in which the property was acquired, whether by dedication by the owner or by purchase or condemnation by the municipality. In determining whether there has been a misuser or diversion of the property, **courts are more strict in cases of grant by private owners**." *Hyland* at 573 (emphasis added).

Perhaps most pertinently, in *Public Interest Council v. Lincoln City*, 28 Or App 67, 69, 558 P2d 1291 (1977), the Court of Appeals reviewed the action of Lincoln City in placing a sewer pump station in a public right-of-way. The

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Oregon Court of Appeals told the City – in no uncertain terms – that a dedicated street right-of-way must remain available for street use:

> "May a city construct a sewer-pump-station structure in a dedicated public street right-of-way where the city does not own the underlying fee title, and where the structure would substantially obstruct use of the street as a public thoroughfare and would interfere with ingress and egress by abutting property owners?
>
> "The answer is no."

In this case, the City acquired its interest in the platted but undeveloped Ocean Avenue right-of-way from a dedication grant from a private owner of the underlying plat to be used "as thoroughfares," Thus, the City cannot authorize the development of housing on the site, or allow the use of the dedicated Ocean Avenue right-of-way for any purpose other than right-of-way.

Petitioners argue that the adoption of ORS 197.779 "changed the legal framework for buildable lots." Pet for Rev p 58, ln 7. Whatever it did for the framework of buildable lots, it did not, and could not, change the nature of the property rights that the City has in the dedicated Ocean Avenue right-of-way. According to Oregon state law, the City has no ability to build, or authorize others to build, any residential structure in that right-of-way. Any other result would result in the state, as well as each and every city and county in the state, being subject to significant takings claims for usurping the rights of the owners

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of the property underlying dedicated streets. Petitioners' arguments to the contrary are absurd and must be rejected.

III. CONCLUSION

For all of the above reasons, the City properly denied Petitioner's requested development permit because it did not comply with the Oceanfront Setback standard and, accordingly, LUBA should affirm the City's decision.

Dated this 7th day of May, 2021.

BATEMAN SEIDEL P.C.

By: _____
William K. Kabeiseman, OSB #944920
Of Attorneys for City of Cannon Beach

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ORDINANCE NO. 93-07

AN ORDINANCE VACATING THE CHENA AVENUE RIGHT-OF-WAY BETWEEN OCEAN AVENUE AND HEMLOCK STREET (FORMERLY THE OLD COAST HIGHWAY), AS SHOWN ON THE PLAT OF TOLOVANA PARK, TOWN PLAT, BOOK 3, PAGE 70, CLATSOP COUNTY, OREGON, WITHIN THE CITY OF CANNON BEACH, CLATSOP COUNTY, OREGON, AND RESERVING PUBLIC WAY EASEMENTS AND UTILITY EASEMENTS.

WHEREAS, the City Council initiated vacation proceedings pursuant to ORS 271.080 for vacation of the Chena Avenue right-of-way between Ocean Avenue and Hemlock Street (formerly known as the Old Coast Highway), as shown on the Plat of Tolovana Park, Town Plat, Book 3, page 70, Clatsop County, Oregon, within the City of Cannon Beach, Clatsop County, Oregon, and more particularly described as follows: The Chena Avenue right-of-way having a width of 25 feet and an undetermined length west of Hemlock Street (formerly known as the Old Coast Highway) to Ocean Avenue.

WHEREAS, the Cannon Beach City Council having found no reason manifestly existing why the vacation should not be allowed and the necessary notices having been posted on the subject real property and a formal hearing on this vacation was held at 7:00 p.m. on the January 5, 1993, in the City Hall Council Chambers, Cannon Beach, Clatsop County, Oregon; and

WHEREAS, due notice of the time and place of hearing was given as required by law; and

WHEREAS, the property owners of the abutting property have consented to the vacation and the vacation will result in the owners of abutting property receiving the vacated Chena Avenue pursuant to ORS 271.140; and

WHEREAS, the City Recorder has indicated that all City liens and all taxes have been paid on the lands covered by the vacation; and

WHEREAS, a formal hearing was held at the appointed time and place on the requested street vacation, and all objections having been received by the City Council; and

WHEREAS, it appears that it is in the best interests of the City of Cannon Beach to allow the vacation of the right-of-way of Chena Avenue west of Hemlock Street to Ocean Avenue in that Chena Avenue is unsuitable for improvement for vehicular traffic, but reserving public way easements and utility easements.

NOW, THEREFORE, THE CITY OF CANNON BEACH DOES ORDAIN AS FOLLOWS:

Section 1. The property in the City of Cannon Beach, Clatsop County, Oregon, more particularly described as the Chena Avenue right-of-way west of Hemlock Street (formerly known as the Old

Coast Highway) and Ocean Avenue, having a width of 25 feet and an undetermined length, as shown on the Plat of Tolovana Park, Town Plat, Book 3, page 70, Clatsop County, Oregon, is hereby vacated, but reserving to the public two 15-foot wide public way easements as described on Exhibits A and B attached hereto and by this reference made a part hereof; and this vacation is hereby made a matter of public record and expressly changed of public record so as to indicate, as required by law, such vacation; it is further provided that the City of Cannon Beach shall file a certified copy of this ordinance with the County Clerk of Clatsop County, State of Oregon, and the County Assessor and County Surveyor of Clatsop County, Oregon. Nothing contained herein shall cause or require the removal or abandonment of any sewer, water main, drainage pipe, conduit, pipe of any kind, including wires, poles or any other thing used or intended to be used for any public service, and the right is hereby reserved to maintain, continue, repair, construct, renew, replace, rebuild and/or enlarge any and all such things, including drainage pipe, now or hereafter in the future.

Section 2. The 15-foot wide public way easement described in Exhibit B attached hereto shall terminate automatically upon the dedication to the public of a strip of land at least 15 feet wide beginning at the south end of Pacific Drive and extending south to the north side of the 15-foot wide public way easement described in Exhibit A attached hereto.

This Ordinance shall become effective on May 7, 1993.

PASSED by the Common Council of the City of Cannon Beach this 6th day of April, 1993, by the following vote:

YEAS: Anderson, Buckley, Adamson, Shields, Schwab

NAYS: None

ABSENT: None

SUBMITTED to the Mayor this 7th day of April, 1993 and APPROVED by the Mayor this 7th day of April, 1993.

Herbert M. Schwab, Mayor

ATTEST:

City Recorder/Treasurer

REVIEWED:

William R. Canessa
City Attorney

John Williams, City Manager

Legal Description of Portion of Chena Avenue To Be Retained as 15 foot wide public way from Pacific Drive to Ocean Avenue

A portion of Chena Avenue a 25 foot wide public road as laid out and recorded by M. S. Warren in the plat of TOLOVANA PARK and recorded in Book 3, Page 70, Town Plat Records, County of Clatsop, State of Oregon, more particularly described as follows:

The North 15 feet of Chena Avenue which lies East of the Northerly Extension of the East line of Ocean Avenue, and West of the Southerly extension of the East line of Pacific Drive as laid out by the Plat of Tidal View, said East line being located North 88°43'33" West 774.43 feet of a 3 1/4" County Surveyor aluminum cap at the corner common to Sections 29, 30, 31, 32 Township 5 North, Range 10 West, W.M., and bears South 00°00'03" East.

The Basis of Bearing for this description is the line between Oregon State Highway Dept. brass disks CB 26 and CB 24 which bears North 8°33'45" East the record value on the Oregon (North Zone) State Plane Coordinate System.

EXHIBIT A

Legal Description of Portion of Chena Avenue To Be Retained as 15 foot wide public way from Pacific Drive to Hemlock St.

A portion of Chena Avenue a 25 foot wide public road as laid out and recorded by M. S. Warren in the plat of TOLOVANA PARK and recorded in Book 3, Page 70, Town Plat Records, County of Clatsop, State of Oregon, more particularly described as follows:

The North 15 feet of Chena Avenue which lies West of the Old Oregon Coast Highway now known as Hemlock Street and East of the Southerly Extension of the East right of way of Pacific Drive as laid out by the Plat of Tidal View, said East line being located North 88°43'33" West 774.43 feet of a 3 1/4" County Surveyor aluminum cap at the corner common to Sections 29, 30, 31, 32 Township 5 North, Range 10 West, W.M., and bears South 00°00'03" East.

The Basis of Bearing for this description is the line between Oregon State Highway Dept. brass disks CB 26 and CB 24 which bears North 8°33'45" East the record value on the Oregon (North Zone) State Plane Coordinate System.

EXHIBIT B