



August 14, 2024

Rockaway Beach City Council
City of Rockaway Beach
276 Hwy 101
Rockaway Beach, OR 97136

**Re: Appeal of Findings, Conclusions, and Final Order in Case File # PUD 24-1,
Nedonna Wave Planned Unit Development Application, dated August 1, 2024**

Decision Sought to be Review

A decision of the Planning Commission may be appealed to the City Council by a party to the hearing by filing an appeal pursuant to Rockaway Beach Zoning Ordinance 11.070(2)-(3). The Oregon Shores Conservation Coalition (“Oregon Shores”) is filing this appeal to oppose the Planning Commission’s decision, dated August 1, 2024, approving Applicant’s request to modify the approved final plan for Planned Unit Development Application #SPUD-07-19, allowing Applicant to create two lots instead of one lot at the north end of Jackson Street, identified as lots 21 and 22 on the plans submitted with the Application; and to create four lots instead of three lots at the northeast corner of Kittiwake Drive and Riley Street, identified as lots 13, 14, 15 and 16 on the plan submitted with the Application.

Statement of Interest

Oregon Shores is a non-profit organization, with members in Rockaway Beach, that works to protect Oregon’s coastal environment and employ Oregon’s land use planning system to its best possible effect in preserving coastal communities. Oregon Shores opposes approval for Nedonna Development LLC’s proposed second phase of a planned unit development first permitted in 2008 (PUD #24-1, 2N1020AB, Tax Lots 10200, 10400, and 10,500). Oregon Shores was a party to the initial proceedings, submitting two comments to the Planning Commission below. This appeal is based on the following issues that Oregon Shores also raised in the proceedings below:

- A. The original 2008 approval of the plan for this development has expired.

- B. ORS 92.040 requires the Applicant to resubmit its initial application for this development.
- C. RBZO 3.080 prohibits residential development in a Special Area Wetlands Zone.
- D. RBZO 3.142 requires the Applicant develop evacuation measures and improvements.
- E. RBZO 4.150 requires the City to enforce its riparian setback for McMillan Creek pre-approval.
- F. The Planning Commission failed to adequately address each of these legal concerns.

Issues and Grounds for Review

The following is a breakdown of those issues apparent in the proposed application that were not adequately remedied or considered below, and should be reviewed by the City Council.

I. The Original 2008 Approval of the Plan for this Development Has Expired

The original approval for the full 28-lot Nedonna Wave Development on February 11, 2008 conditioned final plat approval on the basis that “[t]he developer shall complete the improvements within one year of tentative plan approval unless an extension is granted by the City to complete improvements.”¹ The City never granted an extension, nor was this condition rescinded. When the developer failed to complete all planned improvements within a year, the approval for the second phase of the project lapsed.

While the Applicant had not yet received approval to develop in two phases at the time of this initial approval, the City was aware that “the development may be completed in two phases.”² Accordingly, it is evident that the City expected the Applicant to complete all necessary on-site improvements for both phases of the development within that specified one-year period, prior to final plat approval.³ That condition attached to the final plan approval for the full development and when the project was later approved to be developed in two phases, the City made clear that all “conditions of approval [from the earlier decisions] continue to apply in their entirety except where amended specifically in these findings of fact and this modification

¹ Application # SPUD 2007-19, Exhibit A: Findings of Fact, p. 12 (Feb. 11, 2008); Application # SPUD 2007-19, Final Order: Exhibit B: Conditions of Approval, p. 6 (Feb. 11, 2008). Further, in the 2007 project justification for this development, it’s explained that “[t]he development of this property will be completed in this calendar year.” Project Justification for Nedonna Wave PUD, p. 1 (Nov. 2007). Likewise, it is estimated that construction would be completed by “Spring of 2008.” *Id.*

² Application # SPUD 2007-19, Exhibit A: Findings of Fact, p. 23 (Feb. 11, 2008).

³ See Application #07-19, Exhibit C: Findings of Fact: Final Plan Approval, p. 13-14 (July 22, 2008); see also RBZO Article 13, Section 16, Agreement for Improvements.

does not relieve them of the responsibility imposed during these previous public hearing processes.”⁴ And the City never explicitly altered that original condition. The modified final approval now specifically clarified that “[p]rior to approval of the final plat, all improvements for Phase One shall be installed,”⁵ however, this is not in conflict with the original condition of approval that required all improvements for the full subdivision to be completed within one year of tentative plan approval. This condition remained in effect, and the Applicant failed to meet it.

Regardless, even if the modification of the development plan allowing the project to move forward in two phases was intended to free the Applicant from this one-year requirement, this still would not excuse the Applicant from completing improvements and finalizing the development plans for Phase II in a timely manner, or meeting other requirements of the Rockaway Beach Zoning Ordinance (RBZO). Timing is a crucial component of the Planned Unit Development (PUD) proposal and permitting process. When a final development plan will be executed in stages, applicants are required to submit a proposed schedule for the execution of each stage, pursuant to RBZO 10.050(1)(i). Further, the RBZO specifically requires that a proposed plan be able to be “completed within a reasonable period of time,” RBZO 10.050(2)(d). The Planning Commission failed to make such a determination about the second phase of this project in 2008, or to otherwise find that special physical conditions or objectives of development existed that warranted a departure from the standard ordinance requirements. *Id.*; RBZO 10.050(2)(a).

In its most recent decision on the modification, the Planning Commission found that there was insufficient evidence to support the Applicant’s request to plat the proposed next stage of development as two separate subphases.⁶ During the July 18, 2024 meeting of the Commission and staff, it was noted that “the PUD code states that a schedule be provided if the development is to be completed in stages . . . [and] no such schedule had been provided by the Applicant.”⁷ In 2008, just like now, the Planning Commission should have determined there was insufficient evidence to support the Applicant’s request to develop the site in two stages due to its failure to provide a schedule as required by the PUD code. While RBZO 10.060(1) does include another

⁴ Application # 2007-19, Exhibit D: Modified Preliminary and Final Approval for a Two Phase Development, p. 3 (July 29, 2008).

⁵ *Id.* at 4.

⁶ Application # PUD 24-1, Findings, Conclusions, and Final Order, p. 16 (Aug. 1, 2024).

⁷ *Id.* at 6.

important distinction between staged and non-staged projects, requiring applicants to file a “final plan for the entire development or, when submission in stages has been authorized, for the first unit of the PUD” within one year after the city approves a preliminary development plan, this does not change the fact that the Commission’s 2008 decision to authorize the two-phase development plan was improper.

Further, while the code does not set a specific time limit on when an applicant must apply for subsequent units or stages of the PUD, as noted above, during the preliminary steps of the PUD planning process it still must be determined that the proposed plan can be completed within a reasonable period of time. RBZO 10.050(1)(i), (2)(d). Even if the Applicant had provided a schedule, and there was sufficient evidence for multi-stage development, that would not absolve the Applicant from meeting this timing requirement. It cannot be reasonably argued that taking a more-than-15-years-long break between planning and construction is a “reasonable period of time” in which to execute a project of this kind and scope.

The Applicant applied for and received final plat approval for the first phase of the Planned Unit Development within one year after receiving final plan approval, and recorded the plat of Nedonna Wave Phase I on February 2, 2009 (Plat C-573, Tillamook County Plat Records). At that time, the Commission plainly understood that Phase II of the project would timely follow. When the project was approved to be developed in two phases, the Planning Commission made clear that all “conditions of approval [from the earlier approval order] continue to apply in their entirety except where amended specifically in these findings of fact and this modification does not relieve them of the responsibility imposed during these previous public hearing processes.”⁸ The Planning Commission did nothing to alter that condition, or extend the time permitted between preliminary planning and execution, as to allow Phase II of the Applicant’s development plan to remain in limbo for more than 15 years.

For any of the reasons explained above, the City Council should find that the 2008 approval is no longer valid, and reverse the Planning Commission’s unreasonable decision on this application.

II. ORS 92.040 Requires the Applicant to Resubmit its Initial Application for this Development

⁸ Application # SPUD 2007-19, Exhibit D: Modified Preliminary and Final Approval for a Two Phase Development, p. 3 (July 29, 2008).

Even if this Council believes that this application has not expired, ORS 92.040(3) requires that the proposed development be reviewed for compliance with the City's current regulations. ORS 92.040(3) provides that all subsequent stages of subdivision development must be reviewed for compliance with current local regulations when more than 10 years has passed since the initial land use decision. The Oregon Court of Appeals explained the operation of ORS 92.040: "92.040(2) allows applicants who request approval to develop a subdivision lot to choose to apply to all subsequent construction on the lot the local government laws in effect at the time that the subdivision application was made *However, the protection provided to developers by subsection (2) may not exceed a period of 10 years.*"⁹ At bottom ORS 92.040(3) sets a ten-year time limit before a PUD approval expires, after which any further development must be approved under a new application, based on contemporary standards and regulations.

Because the Applicant here has reapplied for a modification of their initial approval in order to begin construction on the property after a significant lapse in time, this is a subsequent phase of construction which now compels the City to determine whether the development still fully complies with current regulations. This is especially true given that the Applicant is requesting to develop additional lots that were not included in the original 2008 proposal and development plan. Since the 10-year window has long since closed, the City must require the Applicant to file a new application if they wish to reinitiate site development. Allowing the Applicant to do otherwise defies state law.

The Applicant argues that ORS 92.040 is not relevant here, because this statute "applies only to subdivisions and partitions," whereas the present application is to "subdivide property in accordance with the current zoning of the property, which includes the PUD overlay, and in accordance with the current zoning code."¹⁰ However, this misconstrues the legal framework, as made clear by the original PUD approval at issue in this matter. Nedonna Wave, as a subdivision, is governed by ORS Chapter 92 and RBZO Article 13, which both concern subdivisions and partitions. The particular development project at issue is further regulated by RBZO Article 10, which specifically concerns Planned Unit Developments.¹¹ The Findings of

⁹ *The Athletic Club of Bend, Inc. v. City of Bend*, 239 Ore App 89, 97 (2010) (emphasis added).

¹⁰ Alterman Memo, p. 3 (July 4, 2024).

¹¹ A tentative PUD approval is a combination of both types of "[l]imited land use decision[s]", as defined by ORS 197.015(12), meaning the approval or denial of "a tentative subdivision or partition plan" or "an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but

Fact dated February 11, 2008 specifically state, “The project proposes the subdivision of a Planned Unit Development. The standards of the City Subdivision Ordinance and Oregon Revised Statutes Chapter 92 shall apply to approval of the final plat.”¹² In a section of the Findings of Fact considering improvement requirements and final plat approval, it is also specified that, “The Final Survey Plat shall be submitted consistent [with] ORS Chapter 92, with RBZO Article 13, Section 46, and applicable conditions of approval.”¹³ The original PUD approval makes it abundantly clear that the requirements of ORS Chapter 92 apply to the Nedonna Wave Planned Unit Development Subdivision project, including those sections that concern the review and approval of tentative plans and plats of subdivisions, like ORS 92.040. Due to this fact, any development within this PUD that occurs after 2018 must be reviewed anew, through an entirely separate application process, not merely a modification request.

If the City does not apply ORS 92.040(3) at this time, granting the approval would be a significant waste of resources because under this statute, the Applicant will not be able to get a final plat or building permits for this subdivision without a full review of the current City Code. And as discussed in the sections below, this development, as proposed, would not be allowed under Rockaway Beach’s current regulations.

The City Council must deny the application and make clear to the Applicant that it will need to get full approval of the proposed “Phase II” development before moving forward with construction.

III. RBZO 3.080 Prohibits Residential Development in a Special Area Wetlands Zone

Much of the proposed development, including the lots that are newly created by this modification, is in the City’s Special Area Wetlands Zone (SA). RBZO 3.080. This zone is distinct from the City’s Wetland Notification Overlay, which only requires notification to state agencies about wetland development. RBZO 3.080. In contrast, the SA zone is its own base zone, the purpose of which is to “conserve significant freshwater wetlands and the shoreland and aquatic environment of Rockaway Beach’s lakes.” RBZO 3.080(1).

not limited to site review and design review." *Willamette Oaks, LLC v. City of Eugene*, 248 Or App 212, 226 n 4, 273 P3d 219, 227 (2012).

¹² Application # SPUD 2007-19, Exhibit A: Findings of Fact, p. 5 (Feb. 11, 2008).

¹³ *Id.* at p. 32-33.

Residential development is not an allowed use within the SA zone. RBZO 3.080(2)-(3). Only recreational, restoration, and stabilization uses are allowed there, and all activities involving construction or alteration must be reviewed by the Oregon Division of State Lands and the U.S. Army Corps of Engineers. RBZO 3.080(2)-(4). The fact that there is an existing PUD overlay over this property does not change this fact or impact the underlying uses allowed in the SA zone; the PUD overlay only allows for the same density of the parent zone. RBZO 10.030. Given the firm limitations on development in the SA zone, any approval of residential development in these areas within the Nedonna Wave subdivision would clearly violate the RBZO, regardless of the PUD overlay.

When “development is proposed in the vicinity of an area designated Special Area Wetlands” the City requires a site investigation from “a qualified agent such as a biologist from the U.S. Army Corps of Engineers or the Division of State Lands” to delineate the extent of the zone prior to approval. RBZO 3.080(5). No such investigation has occurred, even though much of the proposed development, including the new lots that are requested as part of the modification, are in the SA zone. As explained above, the City cannot approve these modifications and allow new construction to move forward without assessing the proposed development within the context of the current local regulations and site conditions.

Due to the lack of site investigation, and the failure of the Applicant to demonstrate compliance with the requirements of RBZO 3.080, the City Council must deny this application.

IV. RBZO 3.142 Requires the Applicant Develop Evacuation Measures and Improvements

RBZO 3.142(6) provides that: “[e]xcept single family dwellings on existing lots and parcels, all new development, substantial improvements and land divisions in the Tsunami Hazard Overlay Zone shall incorporate evacuation measures and improvements, including necessary vegetation management, which are consistent with and conform to the adopted Tsunami Evacuation Facilities Improvement Plan.” This requires improvements be made that “ensure adequate pedestrian access from the development site to evacuation routes designated in the Evacuation Route Plan in all weather and lighting conditions.” RBZO 3.142(6)(a)(i).

This project will have a detrimental impact on the City’s Tsunami Evacuation plan by blocking access to and increasing the number of people using the already constrained evacuation routes. In order to “conform to the adopted Tsunami Evacuation Facilities Improvement Plan,” the developer would need to make improvements to the evacuation routes, and ensure that they

are maintained and that additional capacity is added to them through the creation of new routes. RBZO 3.142(6). However, the application does not address evacuation route improvements. In fact, during the initial hearing the Applicant claimed that such an action was the City's responsibility, but RBZO 3.142 makes clear that is not the case. The improvements developers need to make can include both on-site improvements and off-site improvements, and therefore developers can both improve access on the property they own or provide funding for the City to make off-site improvements in other areas to adjust for the detrimental effect of the development.

The Findings, Conclusions, and Final Order still do not sufficiently address this issue, or the inadequacy of the existing routes to serve a larger population. While the Applicant is ordered to conduct a traffic study,¹⁴ doing so is not an "improvement" to evacuation routes, as RBZO 3.142 requires. And while the Applicant has also been ordered to submit evidence that the tsunami evacuation routes are sufficient to the proportional needs of the proposed development, the Final Order does not include any discussion about what actual findings or improvements would serve as evidence that the standard has been adequately met. The Applicant must make actual improvements to alleviate the detriment this development will have on existing evacuation routes, however, there are no consequences or mechanisms of enforcement included in the conditions of approval to ensure that sufficient improvements are actually carried out.

The record does not clearly support a determination of compliance with the approval criteria in regards to the evacuation route issue, and the City should not find otherwise. *See Deal v. City of Hermiston*, 35 Or LUBA 16 (1998). The City cannot defer matters for later review or action when it has no meaningful ability to subsequently enforce a requirement, or where public input will not be possible. *See Citizens Against LNG v. Coos County*, 63 Or LUBA 162 (2011). After final approval the City can no longer add conditions requiring specific improvements necessary to address the issues that might be identified during the traffic study. Accordingly, this issue should be fully interrogated at this early stage in the process, while the City is able to meaningfully act.

V. RBZO 4.150 Requires the City to Enforce its Riparian Setback for McMillan Creek Pre-Approval

¹⁴ PUD # 24-1, Findings, Conclusions, and Final Order, p. 18 (Aug. 1, 2024).

Under RBZO 4.150 riparian vegetation within 15 feet of McMillan Creek must be maintained and protected, and likewise, no development is allowed within the setback. The Final Order suggests that the Applicant coordinate with Oregon Department of Fish and Wildlife (ODFW) to develop a plan to mitigate impacts when the setback cannot be maintained due to “site constraints.”¹⁵ However, that is not the standard laid out in RBZO 4.150.

RBZO 4.150(5) provides that “the City may approve the removal of riparian vegetation when vegetation removal and a plan to re-vegetate the riparian area has been approved by [ODFW].” This provision clearly only envisions temporary removal of riparian vegetation within setback areas that can then be “re-vegetate[d],” while the ordinance clearly does not allow any kind of development within the riparian area, regardless of whether those impacts are mitigated. Additionally, this provision is forward-looking, requiring the Applicant to consider the impacts that will occur in the setback area and then have a plan for vegetation removal approved by ODFW that is to be decided on by the City during the application review process. RBZO 4.150(5). Approving the application without actually knowing the impact on riparian vegetation and the extent of removal that will occur, and consequently before coordination with ODFW had occurred, is plainly contrary to the RBZO.

The City cannot approve this application until the Applicant makes clear that the development plan can meet the requirements of the 15-foot setback area, and if vegetation removal will occur, the Applicant must submit a plan approved by ODFW for how that removal will occur and how the area will be re-vegetated. The City should not approve development based on a hypothetical mitigation and regeneration plan, without having thoroughly considered the extent of the expected impact on McMillan Creek and whether the standards in RBZO 4.150 can be realistically achieved based on that information.

Request for Review

Review of this application and the decision of the Planning Commission dated August 1, 2024 is requested under RBZO 11.070(2).

Respectfully submitted,

¹⁵ *Id.* at 17.

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