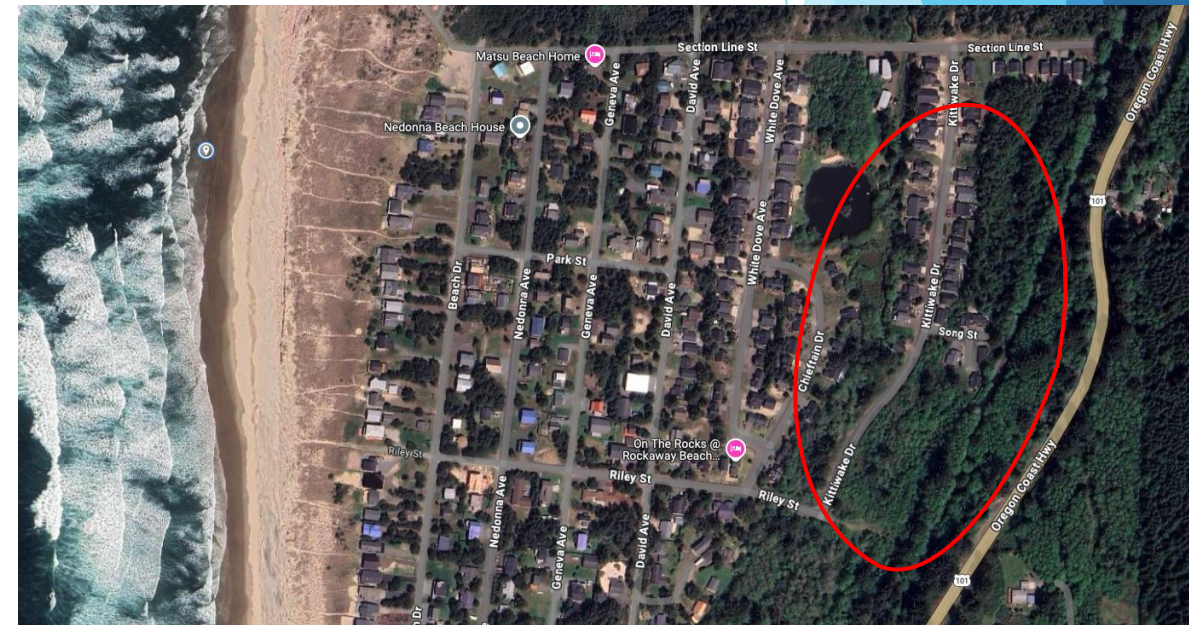
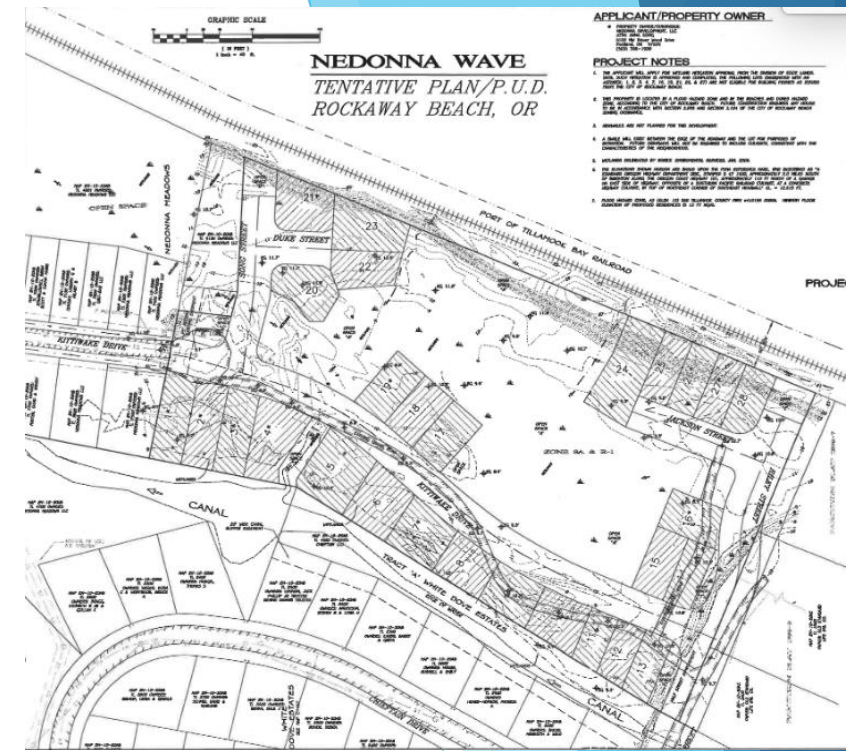




APPEAL #24-1:
Nedonna Wave Planned
Unit Development

Case Background

- ▶ **Nedonna Wave:** A 28-lot Planned Unit Development (PUD) approved in 2008.
- ▶ **Phased Development:**
 - ▶ PUD was approved for development in two phases in July 2008
 - ▶ Applicant recorded the plat of Nedonna Wave Phase I on February 2, 2009
 - ▶ 8 lots were developed during Phase I, before construction was suspended
 - ▶ Phase II improvements were never completed



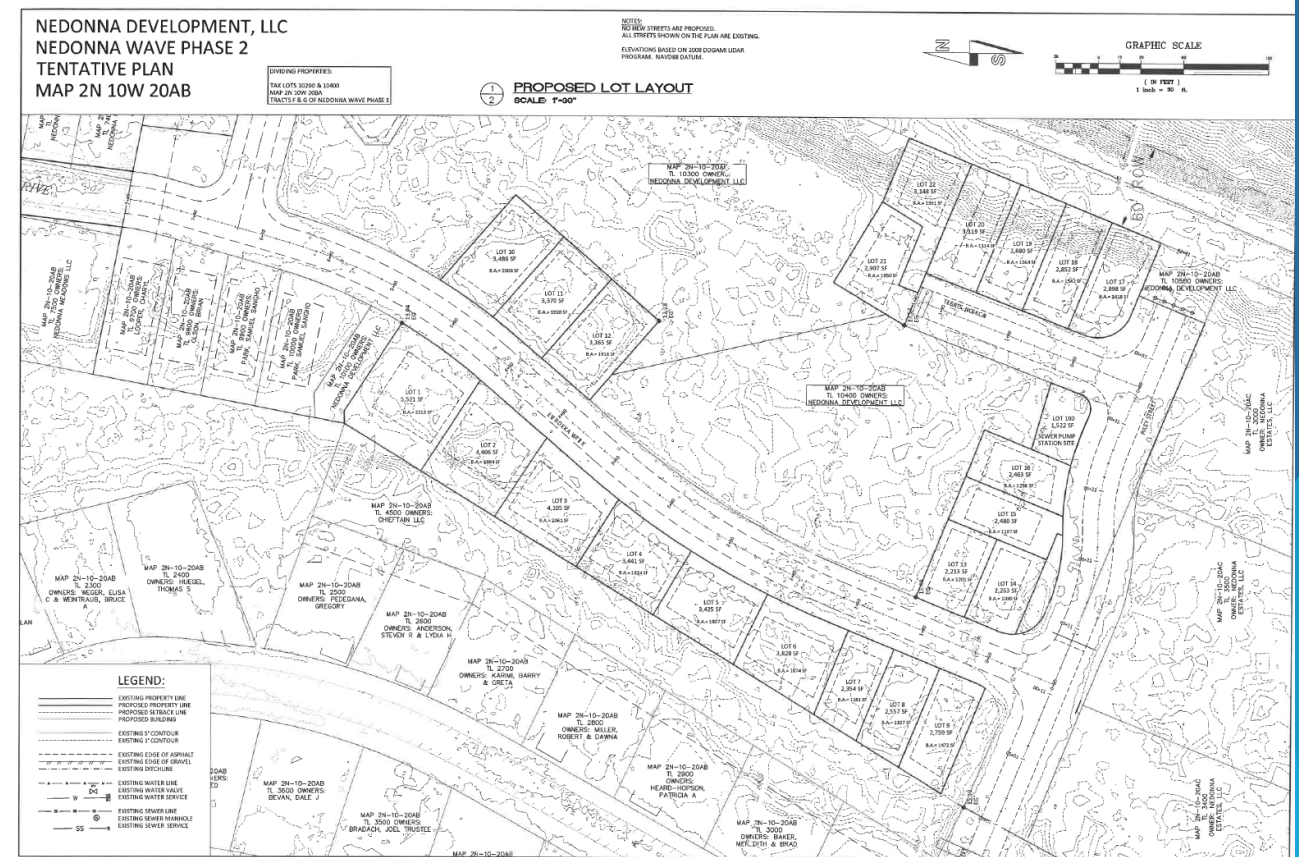
Current Application

- ▶ Developer now wants to resume & expand Phase II
- ▶ March 4, 2024
 - ▶ Application for PUD #24-1
 - ▶ Modification to approved Final Plan
 - ▶ Phase 2.1: lots east of Kittiwake Drive
 - ▶ Phase 2.2: lots west of Kittiwake Drive
 - ▶ **Two additional lots**—requested to create two lots instead of one lot at the N end of Jackson St., and four lots instead of three at the NE corner of Kittiwake Dr. and Riley St.
- ▶ June 20 and 27, 2024
 - ▶ Public Hearings
- ▶ July 18, 2024
 - ▶ Planning Commission Meeting w/ City Staff
- ▶ August 1, 2024
 - ▶ Notice of Decision
 - ▶ Findings, Conclusions, and Final Order



Findings, Conclusions, and Final Order in PUD 24-1 (8/1/2024)

- ▶ Allowing Phase II of development to resume under the original 2008 approval, with modifications
 - ▶ Applicant's request to develop Phase II in two sub-phases was **denied**; and
 - ▶ Applicant's request to add *two additional lots* to the development was **approved**, with conditions



Grounds for Appeal

Oregon Shores' appeal is based on five key issues:

1. **Expired Approval:** The original 2008 PUD approval has lapsed.
2. **Resubmission Required Under State Law:** ORS 92.040 requires the applicant to resubmit the initial application under current regulations.
3. **Development in Wetlands:** RBZO 3.080 prohibits residential development in Special Area Wetlands Zones.
4. **Evacuation Measures:** RBZO 3.142 requires the applicant to develop evacuation measures and improvements.
5. **Riparian Setback:** RBZO 4.150 requires the City to enforce its riparian setback for McMillan Creek before approval.

Issue 1: Expired Approval

- ▶ The 2008 approval lapsed when the Applicant failed to complete all planned improvements within one year of tentative plan approval, as required by the conditions of approval.
 - ▶ **Phased Development:** Even though later approval allowed two phases, all initial conditions, including timing requirements, remained valid.
 - ▶ **Failure to Comply:** No extension was granted by the City beyond one year from tentative plan approval, and the developer suspended construction before completing all improvements.
 - ▶ No unique schedule was adopted for the Phase II improvements
 - ▶ The time to complete those improvements under the 2008 approval has long since passed

Supporting Docs

- ▶ Nedonna Wave Project Plan (November 2007) [at Ex 1]

- ▶ “DEVELOPMENT SCHEDULE: The development of this property **will be completed in this calendar year**. In general, development will proceed according to the following schedule: Summer 2007 Phase I construction with completion by Spring of 2008” (p 1/3)

Property Location:
Map: ~~ZN10 ZONB~~ Tax Lot: 4600, 4900, 9000 Block: - Lot(s): -
Situs Address: n/a
Name of Proposed Subdivision: Nedonna Wave
consisting of 6.23 acres divided into 28 lots, proposed in 1 phases.
Township 2N Range 10W Section 20AB Land Use Zone R-1

- ▶ Staff Report (January 2008) [at Ex 2]

- ▶ “The developer shall complete the improvements within one year of tentative plan approval unless an extension is granted by the City to complete improvements. Final plat review shall conform to the procedures of RBZO Article 10 and Article 13.” (p 12/33)

1st Final Order (28-lot PUD preliminary plan approval)

- ▶ **“Final Order”** (02/19/2008) [at Ex 3]
 - ▶ “The Findings of Fact relied upon by the Planning Commission for decision is attached as Exhibit “A”. Conditions of Approval are attached as “Exhibit B”.” (p 2/3)
- ▶ **“Exhibit A: Findings of Fact”** [at Ex 4]
 - ▶ “The developer shall complete the improvements within one year of tentative plan approval unless an extension is granted by the City to complete improvements. Final plat review shall conform to the procedures of RBZO Article 10 and Article 13.” (p 12/34)
 - ▶ Findings do not discuss timing concerns when considering whether “[t]here are special physical conditions or objectives of the development which the proposal will satisfy to warrant a departure from the standard ordinance requirements.” (p 24/34)
 - ▶ “The plan can be completed within a reasonable amount of time. Finding of Fact: Criteria met 1. The applicant indicates that the development may be completed in two phases.” (p 25/34)
- ▶ **“Exhibit B: Conditions of Approval”** [at Ex 5]
 - ▶ “The developer shall complete the improvements within one year of tentative plan approval unless an extension is granted by the City to complete improvements.” (p 6/7)

2nd Final Order (Two-Phase approval)

- ▶ **“Final Order (2)” (08/07/2008) [at Ex 6]**
 - ▶ **“Findings of Fact relied upon by the Planning Commission for decision are attached as Exhibit A, Exhibit C, and Exhibit D. Conditions of Approval are attached as “Exhibit B”” (p 1/2)**
- ▶ **“Exhibit C: Findings of Fact: Final Plan Approval” [at Ex 7A]**
 - ▶ **Codifying 5/27/2008 Planning Commission decision**
 - ▶ **“The developer shall complete the improvements within one year of tentative plan approval unless an extension is granted by the City to complete improvements.” (p 18/20)**
 - ▶ **“Prior to final plat approval, and within one year of preliminary plan approval on January 29, 2008 and July 22, 2008, the developer shall complete the improvements within one year of tentative plan approval unless an extension is granted by the City to complete improvements. Final subdivision plat review shall conform to the procedures of RBZO Article 10 and Article 13.” (pp 18-19/20)**
 - ▶ **“Renumbered Lots 9 - 28 shall be permitted as Phase Two of the Nedonna Wave Final Plat subject to the applicable conditions of preliminary development and tentative plan approval.” (p 19/20)**

2nd Final Order (Two-Phase approval)

- ▶ **“Exhibit D: Modified Preliminary & Final Approval for Two Phase Development” [at Ex 7B]**
 - ▶ Codifying 7/22/2008 Planning Commission decision
 - ▶ **“Final Order and Exhibits A, B, C, and D Findings of Fact apply in their entirety except where specifically amended.”** (p 2/10)
 - ▶ **“The applicant need not enumerate all improvements and conditions of approval consistent with City Standards and Final Orders and corresponding Exhibits A, B, and C, and these findings of fact Exhibit D as they 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.”** (p 3/10)
 - ▶ **“Lots 9-28 shall be permitted as Phase Two of the Nedonna Wave Final Plat subject to the applicable conditions of preliminary development and tentative plan approval.”** (p 4/10)
 - ▶ **“The Two Phase request limits the development of Phase One to eight (8) lots and Phase Two to twenty (20) lots and does for that limitation serve only to specifically postpone the installation of the remaining utilities in Riley Street east of Kittiwake, regional sewer pump station and related housings included but not limited to: 3 phase duplex station with controls, divot crane, onsite generator, telemetry, lighting and fencing; the extension of the existing 6” diameter White Dove Sewer manhole at 17th Avenue as necessary to serve the project to and to alleviate surcharging of the 23rd Avenue Manhole; and Paving remainder of Riley Street east of Kittiwake, and Jackson Street.”** (p 9/10)

3rd Final Order (PUD overlay approval)

- ▶ **“Final Order (3)”** (09/19/2008) [at Ex 8]
 - ▶ “. . . Application #SPUD 07-19 adds the overlay zone designation and limits development to that consistent with Final Orders (1), (2), and (3) and Findings of Fact Exhibits A, B, C, D, and E.” (p 1/2)
- ▶ **“Exhibit E”** [at Ex 9]
 - ▶ “All approvals shall conform to the approved Preliminary Development Plan as approved by Final Orders Exhibit A, Exhibit B and Exhibit D.” (p 3/6)
 - ▶ “No changes to the approved preliminary development plan are requested with this application for Final Approval.” (p 6/6)

City Code Supports Approval Expiration

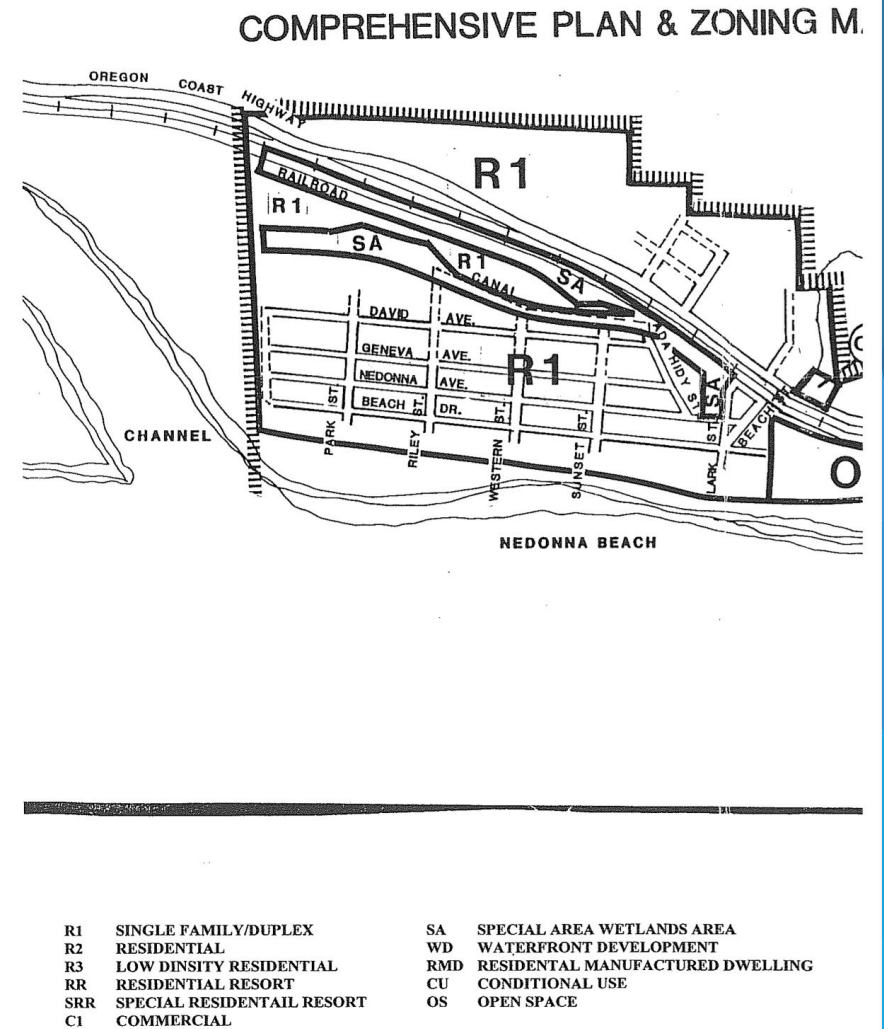
- ▶ Under the RBZO, the Planning Commission could not have intended for approval of two-stage development to extend the timeline indefinitely
- ▶ Schedule and reasonable completion period required:
 - ▶ **RBZO 10.050(1)(i)**: requires applicants to submit a **proposed schedule for the execution of each stage** when a final development plan will be executed in stages
 - ▶ **RBZO 10.050(2)(d)**: requires that a proposed plan be able to be “completed within a reasonable period of time”
- ▶ Developers cannot sit in limbo, or stop and start projects at their own discretion:
 - ▶ **RBZO 13.16**: “Before City Council's approval of a final plat, the subdivider shall either install required improvements and repair existing streets and other public facilities damaged in the development of the property or **execute and record an agreement between himself and the City, specifying the period within which required improvements and repairs shall be completed and providing that, if the work is not completed within the period specified, the City may complete the work and recover the full cost and expense . . .**”
 - ▶ **RBZO 13.43(2)**: Improvement work shall not be commenced until the City has been notified in advance, and if work has been discontinued for any reason, it shall not be resumed until the City has been notified.

Issue 2: Resubmission Required Under State Law (ORS 92.040)

- ▶ ORS 92.040(2)-(3) requires that subsequent phases of PUD development be reviewed for compliance with current regulations
 - ▶ Well over 10 years have passed since initial approval
 - ▶ Current application is a “subsequent phase of construction,” triggering ORS 92.040(3) review, especially given the modification request to develop two additional lots
- ▶ Oregon Court of Appeals and LUBA case law support this
 - ▶ *Athletic Club of Bend v. City of Bend*, 239 Or App 89 (2010)
 - ▶ *Claus v. City of Sherwood* (LUBA 2023)
- ▶ Applicant incorrectly argued that ORS 92.040 only applies to subdivisions, not PUDs
 - ▶ The original PUD approval identifies the project as a subdivision, subject to ORS Chapter 92 and RBZO Article 13
- ▶ ORS 92.040 creates a **temporary** safe harbor to protect developers from unfavorable regulation changes mid-project
 - ▶ That safeguard is not indefinite
 - ▶ In order to meet changing community needs and priorities, new development must be assessed under updated standards

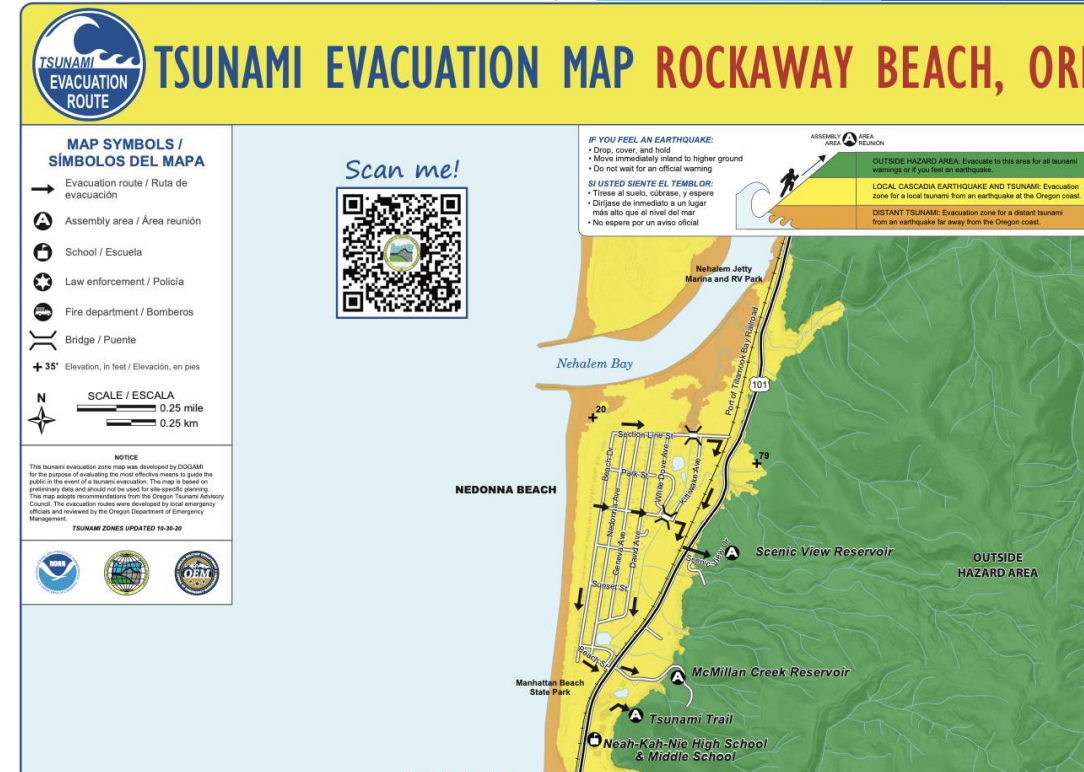
Issue 3: Development in Wetlands (RBZO 3.080)

- ▶ RBZO 3.080 prohibits residential development in Special Area Wetlands (SA) zones
 - ▶ **Permitted Uses:** Only recreational, restoration, and stabilization uses are allowed in SA zones.
- ▶ The Nedonna Wave PUD falls within the SA zone
 - ▶ Any approval of residential development within these areas would violate the RBZO
- ▶ All construction or alteration activities in SA zones require review by the Oregon Division of State Lands & the Corps (RBZO 3.080(4)(a))
 - ▶ No required site investigation by qualified agencies has been conducted for Phase II and the two new lots
- ▶ No updated “Zone Boundary Determination” under RBZO 3.080(5) occurred
- ▶ The last wetland delineation was completed in 2005



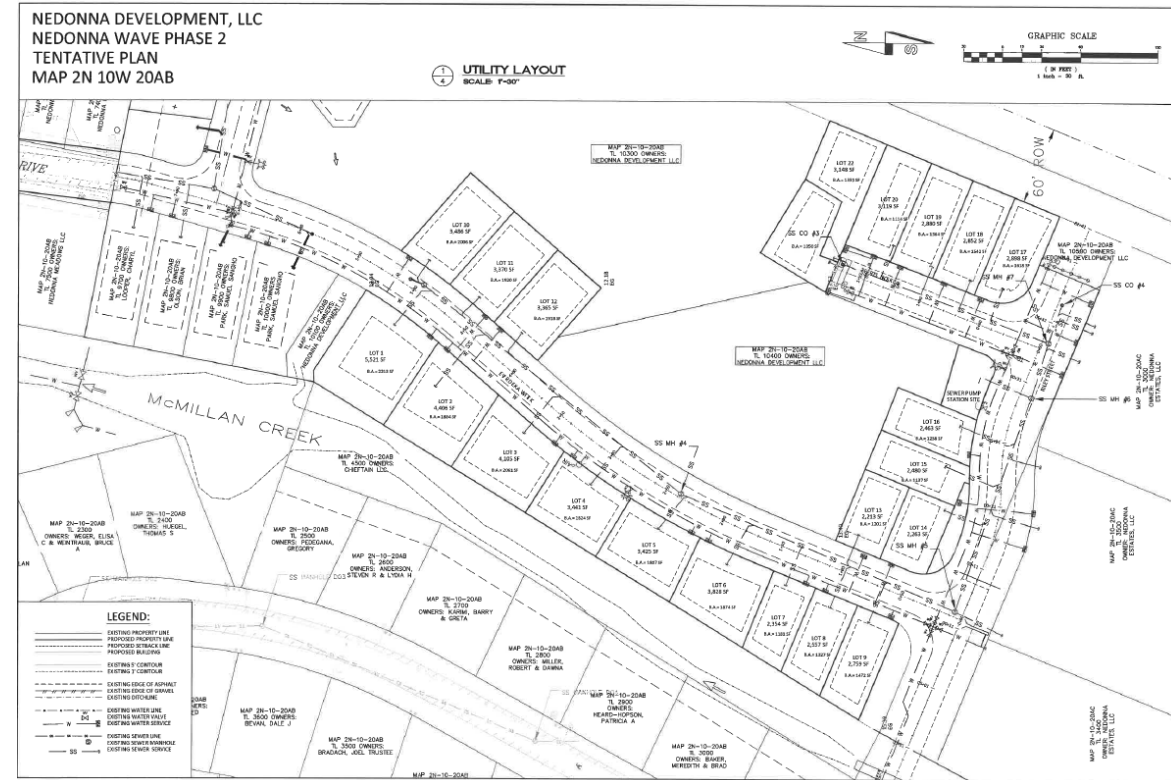
Issue 4: Evacuation Measures (RBZO 3.142)

- ▶ RBZO 3.142(6) mandates the development of evacuation measures and improvements for all new construction in the Tsunami Hazard Overlay Zone
 - ▶ The Nedonna Wave PUD falls within this zone
 - ▶ **Impact on Evacuation Routes:** Applicant's proposal will add population pressure to evacuation routes, likely requiring improvements
- ▶ The application does not address off-site evacuation route improvements or tsunami evacuation route signage
- ▶ **Insufficient Planning Commission Action:** No concrete plan or study was required to address evacuation measures, or ensure that the Applicant will fund and implement any necessary improvements
 - ▶ A traffic study post-approval does not demonstrate compliance



Issue 5: Riparian Setback (RBZO 4.150)

- ▶ RBZO 4.150 requires the City to enforce its riparian setback for McMillan Creek before approval
 - ▶ **15-Foot Riparian Setback:** Development is prohibited within this setback to protect riparian vegetation.
 - ▶ **Mitigation Plan Required:** If vegetation removal is necessary, applicants must submit a plan for removal and re-vegetation approved by the Oregon Department of Fish and Wildlife (ODFW)
- ▶ The Planning Commission approved the Application before submission of a re-vegetation plan
 - ▶ The Commission instructed the Applicant to coordinate with ODFW to develop such a plan, however, RBZO 4.150(5) is forward-looking
 - ▶ The Commission must assess the riparian setback requirements and the potential impact of the project on riparian vegetation *before* approval



In Summation

- ▶ The original approval has expired
- ▶ The developer must resubmit the application under ORS 92.040
 - ▶ Especially in light of two additional lots
- ▶ The Planning Commission failed to find that the proposal is consistent with the RBZO
 - ▶ PC's findings concerning compliance with the RBZO are inadequate in regards to wetlands, evacuations measures, and riparian setbacks
 - ▶ The staff review and approval of construction going forward will be a ministerial review process that does not include notice and an opportunity for a public hearing at which petitioners will have a right to participate.
- ▶ The City Council should deny the current application