

CITY OF ROCKAWAY BEACH

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# APPEAL #24-1: NEDONNA WAVE PUD PHASE 2

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CITY COUNCIL PUBLIC HEARING

# BACKGROUND

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In 2008, the City approved Nedonna Wave's application for a phased 28-lot development with PUD overlay. In 2009, the Applicant applied for and received final approval for the first phase of the PUD, and recorded the plat of Nedonna Wave - Phase 1.

Earlier this year the City received a request from the Applicant to make modifications to the approved Phase 2 final plan. A public hearing was held before the Planning Commission to consider the request.

The Planning Commission approved the Applicant's request to (1) create two lots instead of one lot at the north end of Jackson Street and to create four lots instead of three lots at the northeast corner of Kittiwake Drive and Riley Street could be developed in accordance with the applicable standards of the Rockaway Beach Zoning Ordinance.

The Planning Commission denied Applicant's request to plat Phase 2 as two separate subphases.

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The Planning Commission's Final Order was posted and served in accordance with the Rockway Beach Zoning Ordinance.

An appeal of the Planning Commission's decision was filed by Oregon Shores Conservation Coalition based on the following issues:

1. The original 2008 approval of the plan for this development has expired.
2. ORS 92.040 requires the Applicant resubmit its initial application for this development.
3. RBZO 3.080 prohibits residential development in a Special Area Wetlands Zone.
4. RBZO 3.142 requires the Applicant develop evacuation measures and improvements.
5. RBZO 4.150 requires the City to enforce it's riparian setback for McMillan Creek, preapproval.

**FOLLOWING RECEIPT OF THE APPEAL, THE CITY COUNCIL DETERMINED THE SCOPE OF REVIEW WOULD BE LIMITED TO EVIDENCE REGARDING THE FIVE ISSUES RAISED IN THE APPEAL.**

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**ONLY ADDITIONAL EVIDENCE GIVEN REGARDING THE FIVE ISSUES RAISED IN THE APPEAL MAY BE CONSIDERED BY THE CITY COUNCIL.**

During the public hearing, testimony will be given and written comment received for the City Council's consideration. The City Councilors will need to use their discretion to determine whether the testimony they have received are regarding one of the five criteria in the appeal.

If the testimony received is outside of the scope of review, the City Councilors should not consider this testimony in their decision making.

However, if the testimony given is regarding one of the five criteria in the appeal, this additional evidence should be considered by the City Council in making their decision.

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## **ISSUE #1**

### **THE ORIGINAL 2008 APPROVAL OF THE PLAN FOR THIS DEVELOPMENT HAS EXPIRED.**

#### **RBZO Article 10. Planned Unit Development (PUD)**

##### Section 10.060. Procedure - Final Approval.

1. Within one year after concept approval or modified approval of a preliminary development plan, the applicant shall file a final plan for the entire development or, when submission in stages has been authorized, for the first unit of the PUD, with the Planning Commission. The final plan shall conform in all respects with the approved preliminary development plan.

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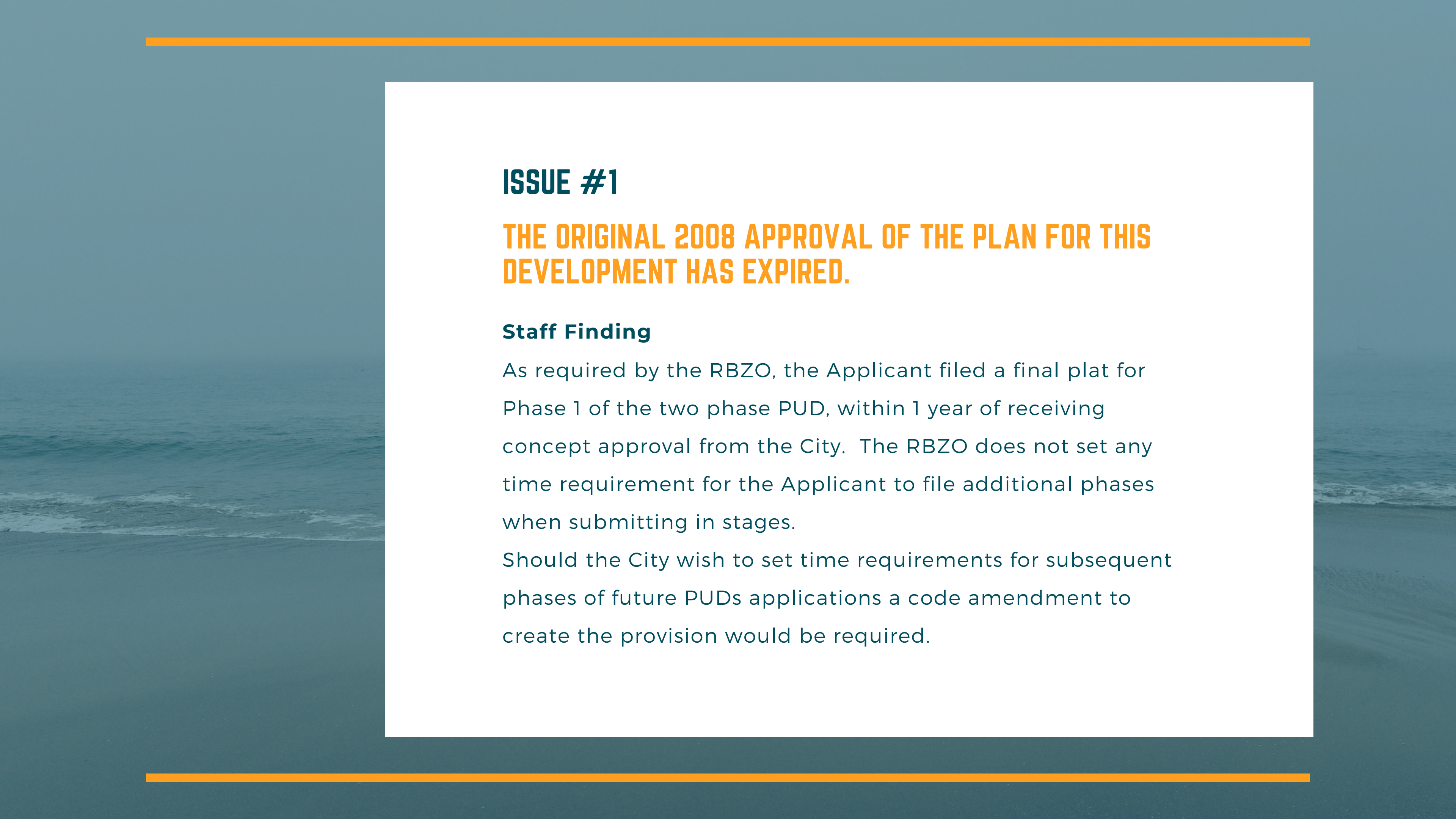
## **ISSUE #1**

### **THE ORIGINAL 2008 APPROVAL OF THE PLAN FOR THIS DEVELOPMENT HAS EXPIRED.**

#### **Staff Finding**

As required by the RBZO, the Applicant filed a final plat for Phase 1 of the two phase PUD, within 1 year of receiving concept approval from the City. The RBZO does not set any time requirement for the Applicant to file additional phases when submitting in stages.

Should the City wish to set time requirements for subsequent phases of future PUDs applications a code amendment to create the provision would be required.





## ISSUE 2

### ORS 92.040 REQUIRES THE APPLICANT RESUBMIT ITS INITIAL APPLICATION FOR THIS DEVELOPMENT.

#### ORS 92.040. Application for Approval of Subdivision or Partition

2. After September 9, 1995, when a local government makes a decision on a land use application for a subdivision inside an urban growth boundary, only those local government laws implemented under an acknowledged comprehensive plan that are in effect at the time of application shall govern subsequent construction on the property unless the applicant elects otherwise.
  3. A local government may establish a time period during which decisions on land use applications under subsection (2) of this section apply. However, in no event shall the time period exceed 10 years, whether or not a time period is established by the local government.
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## ISSUE 2

### ORS 92.040 REQUIRES THE APPLICANT RESUBMIT ITS INITIAL APPLICATION FOR THIS DEVELOPMENT.

#### Staff Finding

While City Staff initially agreed with the Appellant's interpretation of this ORS, which would have caused the 2008 approval to expire and require the Applicant resubmit the application in its entirety, after speaking with the Applicant and the City's legal counsel, Staff reversed its opinion, based on the arguments presented by the Applicant and the applicable case law.

The Applicant argued that ORS 92.040(3) does not make land use decisions expire; rather, it states that a City can allow an Applicant whose application was approved to choose between the old rules and the new rules for up to 10 years after the application is approved.

This interpretation was supported by the ruling in *Claus v. City of Sherwood* (LUBA No. 2022-080, filed on March 9, 2023) and in *Athletic Club of Bend, Inc. v. City of Bend*, 239 Or App 89 (2010).

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## ISSUE 3

### RBZO 3.080 PROHIBITS RESIDENTIAL DEVELOPMENT IN A SPECIAL AREA WETLANDS ZONE

#### RBZO Section 3.080. Special Area Wetlands.

##### 5. Zone Boundary Determination.

At such time that a development is proposed in the vicinity of an area designated Special Area Wetlands, the City may require a site investigation to determine the exact location of the zone boundary. The site investigation shall be performed by a qualified agent such as a biologist from the U.S. Army Corps of Engineers or the Division of State Lands.

## **ISSUE 3**

### **RBZO 3.080 PROHIBITS RESIDENTIAL DEVELOPMENT IN A SPECIAL AREA WETLANDS ZONE**

#### **Staff Finding.**

The Application has been provided to DSL for review. The DSL response is included with the record, outlining additional reporting and permitting necessary for this Application. Staff have spoken with representatives from DSL regarding this application, who confirmed that the proposed areas of development have already been mitigated during Phase 1, for Phase 2.

## ISSUE 3

### RBZO 3.080 PROHIBITS RESIDENTIAL DEVELOPMENT IN A SPECIAL AREA WETLANDS ZONE

#### **Staff Finding.**

Additionally, Staff note that, do to Section 3.080(5), the City has historically applied the SA Zone as an overlay to neighboring residential zones. There are multiple nearby properties in the Nedonna Beach neighborhood which have been developed as recently as 2021 which are located in the SA Zone, but were approved for development after a wetland delineation was completed and development approved by the Department of State Lands.



## ISSUE 4

### **RBZO 3.142 REQUIRES THE APPLICANT DEVELOP EVACUATION MEASURES AND IMPROVEMENTS.**

#### **RBZO Section 3.140 (6), Tsunami Hazard Overlay Zone (TH).**

In the TH zone the following regulations shall apply:

6. Evacuation Route Improvement Requirements. ...All new development, substantial improvements and land divisions in the TH shall incorporate evacuation measures and improvements,...

Such measures may include:

- a. On-site improvements.
  - b. Off-site improvements.
  - c. Evacuation route signage.
  - d. Evacuation route improvements.
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## ISSUE 4

### RBZO 3.142 REQUIRES THE APPLICANT DEVELOP EVACUATION MEASURES AND IMPROVEMENTS.

#### Staff Finding.

The Applicant has submitted supplementary material to address the on-site, evacuation route, and signage improvements that will be made, addressing the requirements of the TH zone.

As noted in the supplementary materials, no off-site improvements are proposed to the evacuation routes, as these areas are privately owned, nor are any improvements outlined in the Tsunami Evacuation Facilities Improvement Plan for this area, outside of those proposed by the Applicant.

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## **ISSUE #5**

### **RBZO 4.150 REQUIRES THE CITY TO ENFORCE IT'S RIPARIAN SETBACK FOR MCMILLAN CREEK, PREAPPROVAL.**

#### **RBZO Section 4.150. Riparian Vegetation.**

Riparian vegetation adjacent to the lakes and streams in Rockaway Beach shall be protected in accordance with the following provisions:

1. The following areas of riparian vegetation are defined:
  - a. Fifteen feet on either side of McMillan...

## **ISSUE #5**

### **RBZO 4.150 REQUIRES THE CITY TO ENFORCE IT'S RIPARIAN SETBACK FOR MCMILLAN CREEK, PREAPPROVAL.**

#### **Staff Finding.**

No development is proposed within 15 feet of McMillan Creek, as reflected in the maps provided by the Applicant. The only utility crossings of McMillan Creek are existing water service lines and valves. The proposed building footprints appear to be 15' or more from McMillan Creek. This requirement will be reviewed again for conformance when zoning applications are submitted.

# STAFF RECOMMENDATION

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STAFF RECOMMEND **DENIAL OF APPEAL 24-1 ON ALL GROUNDS.**

Staff find that substantive evidence exists to uphold the Planning Commission's July 18, 2024 decision on application PUD 24-1. The Applicant has provided evidence in the application and additional materials submitted to meet the requirements of the City's ordinances, as well as State law.

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# CONCLUSION

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The City Council should carefully consider the request, including all oral and written testimony on record and presented at the public hearing, **ONLY AS THE TESTIMONY PERTAINS TO THE FIVE CRITERIA ON WHICH THE APPEAL WAS FILED.** After considering testimony as it relates to these applicable criteria, the City Council will need to make a decision on the request.

Notice of the City Council decision shall be provided to all parties to the hearing within five working days of the date that the final order is signed. The decision may be appealed to the Land Use Board of Appeals by filing a notice of intent to appeal within 21 days

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