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March 26, 2025

Hon. Pam Marsh, Chair
House Committee on Housing and Homelessness
Oregon State Capitol
900 Court Street NE
Salem, OR 97301

Re: Testimony in Support of HB 2138-2

Dear Chair Marsh and Members of the Committee:

As a Eugene land use attorney, I have been using the statute requiring clear and objective standards for housing decisions in Eugene since its enactment in 1981. I am now using the Middle Housing statute and the Middle Housing Land Division statutes to do the same.

First, I want to support an important amendment to the Middle Housing statute that is in this bill – adding a definition at page 3 line 1 for "zoned for residential use" as the trigger for having Middle Housing rights. This new language should be protected until it is enacted.

Second, I want to call out language appearing for the first time in this -2 amendment, at page 15 line 3, that is extremely problematic for the continued utility of the clear and objective standards rule for housing. This language should be dropped.

1. The new "zoned for residential use" definition in this bill should be preserved and enacted. It will ensure that cities like Eugene will not be able to use their overlay zones to diminish or negate the Middle Housing rights created by the statute.

The current trigger for Middle Housing rights appears in ORS 197A.420(2); it mandates large cities to allow "all middle housing types in areas zoned for residential use that allow for the development of detached single-family dwellings." Looking at the text and context of the whole statute, this phrase necessarily means the focus is on the residential base zoning, not overlay zones. The statute allows cities to limit Middle Housing to honor their protective goal regulations (like Goal 5 and Goal 15) with their overlay zones, subject to the safe harbor that every single-family residential lot is entitled to a duplex. But it does not otherwise allow cities to roll back Middle Housing rights with their overlay zones.

Eugene applies the current trigger language differently. It views the phrase "zoned for residential use" as allowing it to also apply its overlay zones, which proliferate in Eugene. The rationale is that the current overlay zoning is a part of how the land is "zoned for residential use." Thus, for example, it can use the /PD Planned Development overlay zone to prohibit residential uses and Middle Housing on land with R-1 base zoning. Similarly, it uses its /# Residential Density Range Overlay Zone to limit the entitlement to Middle Housing density permitted by the

statute. It can use is /SR Site Review zoning to do the same. I can provide a handful of case studies.

The Eugene Planning Director stated this interpretation informally in the fall of 2023. Their advice at the time was to go to the legislature to change the statute if the interpretation was not acceptable. The City has applied its /PD overlay zone to prohibit Middle Housing on a large part of a pending residential development proposal. I have that project approval on appeal at LUBA with the intent to have the limiting condition stricken as in violation of the Middle Housing statute.

This amendment to the statute will make the Eugene interpretation out of bounds, and it will discourage other cities from trying to duck the statute in the same or similar way. It makes clear that Housing rights stick to land with residential base zoning.

In summary, the statute allows cities to apply their goal protective overlay zones to limit Middle Housing rights, subject to the duplex safety net. It does not otherwise allow cities to apply overlay zones to limit or negate Middle Housing rights as they otherwise see fit. This amendment will clarify the current rules to defeat creative escape attempts.

2. This is the wrong time to roll back the clear and objective standards rule for public works standards related to housing development.

This language is new in the -2 at page 15 line 13.

> "**(5) If a local government denies an application for development of housing in an area described under subsection (1)(c) of this section on the basis of a public works requirement, whether or not the application was submitted under subsection (1) or (2) of this section, the denial must include clear and objective standards under which the applicant may resubmit the application and cure the deficiency with regard to those standards."**

The advisability of this language needs to be reviewed standing alone, as it would impact Oregon's 40+ year-old statute requiring clear and objective standards for housing proposals. It also needs to be reviewed in relation to a pending Supreme Court review of the Court of Appeals decision in *Roberts*, that shrinks the scope of the clear and objective statute. Looking at it from both contexts, it would be an amendment that is very bad for approval of housing.

> **(a) This language would substantially rollback and limit the utility of what for 40+ years has been dubbed the Needed Housing Statute – the rule that entitles housing proposals inside UGBs to be reviewed under only clear and objective standards.**

That law, now in ORS 197A.400(1)(a), says cities "may adopt and apply only clear and objective standards, conditions and procedures regulating**:** * * * development of housing* * * *" This is likely the most powerful too the state has to get housing approved locally. It has been very

effective for decades. It is amended regularly to be made more simple and direct. It needs to be fully protected, including from language proposed here.

The proposed (5) language in bold above would cut the legs out from under the clear and objective statute, greatly reduce its utility, and generate confusion which leads to litigation, delay and less housing. It can only be advocated by a stakeholder group that believes the clear and objective statute needs to be diluted for some reason.

The premise of the new language is based on a misunderstanding of how the current statute works. The proposed language says that if a housing proposal is denied based on a public works standard, then the denial must include clear and objective standards to get to an approval on resubmittal. Here is what is confounding about this language:

- The current statute already requires that public works standards state a clear and objective path to approval. When an applicant submits a housing proposal, they know they will get an approval because there can be no argument about what the public works standards mean; discretionary standards may not be applied. An applicant who erroneously submits an application that does not meet the clear and objective standards just needs to apply again and pay closer attention to the standards.

- The proposed language may be suggesting that it is OK for a city to force an applicant into public works standards that are discretionary if it has a backup set of clear and objective standards to apply to a second application if the first application is denied. Under that reading, subsection (5) is carving public works standards out of the current clear and objective rule and requiring any housing developer to go through the wickets twice to get clear and objective standards. You can imagine how housing developers will feel about that. Public works standards are always implicated in any substantial housing proposal. You can't provide housing without meeting public works standards. So, this reading would effectively kill the clear and objective standards statute after its good run of 40+ years. It will be utterly confusing to housing developers to have the existing clear and objective standards in place and add the proposed language, too.

- There is already a competent statute that accomplishes what this language may be intended to do. Since 2015, ORS 197.522 allows any housing developer to amend their application during the review process, including by getting more time and submitting more evidence, in order to make it approvable under the standards that apply. No need to start over. This is a competent statute, which I have used. It works fine,

(b) This is the wrong time to amend the clear and objective statute to accommodate public works interests. It will likely interfere with or terminate the Supreme Court's review of the opinion in *Roberts v. City of Cannon Beach,* 334 Or App 762 (2024), *review granted,* No. S071436 (March 6, 2025).

The Supreme Court's order granting review is attached. Supreme Court reviews of land use opinions do not come along often.

The *Robert's* decision at the Court of Appeals held that public works standards are not within the scope of the clear and objective standards statute. Improvement of a road that is needed to access a house is not subject to the clear and objective rule. The Court reversed the LUBA decision, which interpreted the statute in the context of 40 years of caselaw that applied the rule to public works standards.

My office is among those filing opening briefs at the Supreme Court on April 3.

By granting review of the *Roberts* decision, the Supreme Court is signaling it is likely to change the Court of Appeals ruling, which likely means reestablishing the rule that has been applied from the start – the clear and objective statute applies to public works standards just like it does to all other standards related to the development of housing.

If the Supreme Court sees that the legislature, after the Court of Appeals *Robert's* decision, has adopted new language providing special treatment for public works standards related to housing, why would it complete its review process? The Supreme Court's decision would be for naught because the legislature has stated with the language above how it wants public works to be exempted from rule that applies to all other housing review issues.

If, on the other hand, the legislature abandons the proposed language in (5) above, the Supreme Court can rule definitively on what the current statutory scheme means. That will provide a solid baseline – an accurate construction of the current clear and objective statute – for the legislature to work with next session.

For now, the sensible, pro-housing thing to do would be to drop the language in (5) above and leave the Supreme Court a clear road to address the issue head on.

Thank you.

Sincerely,

Bill Kloos

Bill Kloos

IN THE SUPREME COURT OF THE STATE OF OREGON

Stanley Roberts and Rebecca Roberts,
Respondents,
Petitioners on Review,

v.

City of Cannon Beach,
Respondent Below,

and

Haystack Rock, LLC,
Petitioner,
Respondent on Review.

Oregon Court of Appeals
A184314

S071436

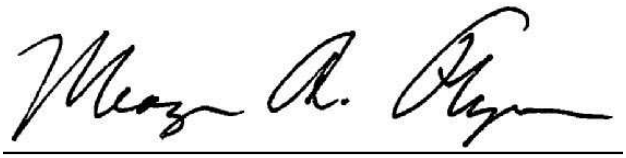
ORDER ALLOWING REVIEW

Upon consideration by the court.

It is ordered that the petition for review filed by Stanley Roberts and Rebecca Roberts is allowed.

Petitioner on review shall have 28 days from the date of this order to file a brief on the merits. Respondent on review shall have 28 days thereafter to file a brief on the merits. Upon request by a party, with good cause shown, the court will grant a request for a short extension of time, not exceeding 14 days, to file a brief.

Oral argument is set for September 2025. The parties will be notified of the date and time at a later date.



Meagan A. Flynn
Chief Justice, Supreme Court
March 06, 2025

c: Sara Kobak

William Rasmussen
Wendie L Kellington
Steven Liday
William Kabeiseman
Ivan Resendiz Gutierrez
Andrew Stamp
Bill Kloos