CLEAR AND OBJECTIVE STANDARDS

Oregon City Attorneys Association and OSB Government Law Section Joint Fall CLE 2022

OVERVIEW

- The Clear and Objective Requirement and Pertinent Case Law
- Attorney Fees in Clear and Objective Appeals and the Developer Perspective
- Looking Forward

ORS 197.307 (4) – THE CLEAR AND OBJECTIVE REQUIREMENT

197.307 Needed housing policy; clear and objective standards for housing; siting of manufactured dwellings.

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(4) Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:

(a) May include, but are not limited to, one or more provisions regulating the density or height of a development.

(b) May not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay.

ORS 197.307 (4) – THE CLEAR AND OBJECTIVE REQUIREMENT

- An applicant proposing development of housing must be able to utilize clear and objective standards, conditions, and procedures.

- The clear and objective standards, conditions, and procedures may not, individually or cumulatively, discourage needed housing through unreasonable cost and delay.

ORS 197.307(6) – THE DISCRETIONARY OPTION

(6) In addition to an approval process for needed housing based on clear and objective standards, conditions and procedures as provided in subsection (4) of this section, a local government may adopt and apply an alternative approval process for applications and permits for residential development based on approval criteria regulating, in whole or in part, appearance or aesthetics that are not clear and objective if:

(a) The applicant retains the option of proceeding under the approval process that meets the requirements of subsection (4) of this section;

(b) The approval criteria for the alternative approval process comply with applicable statewide land use planning goals and rules; and

(c) The approval criteria for the alternative approval process authorize a density at or above the density level authorized in the zone under the approval process provided in subsection (4) of this section.

ORS 197.307 (6) – THE DISCRETIONARY OPTION

- In addition to clear and objective standards for housing, a local government may offer discretionary (and likely more flexible) standards.

- An applicant to develop housing MUST be able to utilize clear and objective standards, but MAY CHOOSE to utilize discretionary standards.

ORS 197.307(6) – THE DISCRETIONARY OPTION

- Eugene offers two sets of approval criteria (a Clear and Objective Track and a Discretionary Track) for each of the following land use applications: CUP, PUD, Subdivision, Partition, and Site Review.

- An applicant proposing housing may choose to proceed under the Clear and Objective Track or the Discretionary Track.

- Some Clear and Objective Standards are adjustable – adjustment review is a discretionary process that an applicant may opt into.

ORS 197.307(5) – EXCEPTIONS TO THE CLEAR AND OBJECTIVE REQUIREMENT

(5) The provisions of subsection (4) of this section do not apply to:

(a) An application or permit for residential development in an area identified in a formally adopted central city plan, or a regional center as defined by Metro, in a city with a population of 500,000 or more.

(b) An application or permit for residential development in historic areas designated for protection under a land use planning goal protecting historic areas.

WHAT MAKES A STANDARD CLEAR AND OBJECTIVE?

"[F]ew tasks are *less* clear or *more* subjective than attempting to determine whether a particular land use approval criterion is clear and objective." *Rogue Valley Association of Realtors v. City of Ashland*, 35 Or LUBA 139, 157-58 (1998), *aff'd,* 158 Or App 1 (1999).

WHAT MAKES A STANDARD CLEAR AND OBJECTIVE?

- Clear and objective standards include numerical and similar clear standards but do not include standards that require subjective, value-laden analyses designed to balance or mitigate impacts of the development on the property to be developed or adjoining properties. *Rogue Valley Association of Realtors v. City of Ashland*, 35 Or LUBA 139, 157-58 (1998), *aff'd,* 158 Or App 1 (1999).

- Where the purpose of a standard is clear from the text of the standard, that standard is more likely to be clear and objective. *Walter v. City of Eugene*, 73 Or LUBA 356, *aff'd* 281 Or App 461 (2016).

WHAT MAKES A STANDARD CLEAR AND OBJECTIVE?

[T]he ultimate question under ORS 197.307[(4)] is whether the *standard* is clear and objective, viewed in context. That the standard may contain imprecise or ambiguous terms is a relevant and, depending on the terms and their function in the standard, perhaps sufficient, consideration in answering that ultimate question. However, the existence of imprecise or ambiguous terms in a standard does not *necessarily* resolve whether that standard violates ORS 197.307[(4)]. *Roberts v. City of Cannon Beach*, 316 Or App 305, 314 (2021).

WHAT MAKES A STANDARD CLEAR AND OBJECTIVE?

- A standard prohibiting grading on a slope of 20% or greater is clear and objective even though the standard itself does not identify the contours on which the slope must be measured, where the City's application form notifies applicants that slope will be measured using five-foot contour intervals. *SE Neighbors v. City of Eugene,* 68 Or LUBA 5, *aff'd* 249 Or App 309 (2013).

- A standard with multiple possible interpretations and that is intended to balance or mitigate the effect of the development is not clear and objective. *Walter v. City of Eugene*, 73 Or LUBA 356, *aff'd* 281 Or App 461 (2016).

FACIAL CHALLENGES V. "AS APPLIED" CHALLENGES TO CLEAR AND OBJECTIVE STANDARDS

- To mount a facial challenge to a clear and objective standard, the petitioner must demonstrate that the standard is categorically incapable of being clearly and objectively applied under any circumstances. *Rogue Valley Association of Realtors v. City of Ashland*, 158 Or App 1, 4 (1999).

- Most successful clear and objective challenges are "as applied."

WHAT ABOUT UNREASONABLE COST AND DELAY?

- To date, there have not been a lot of decisions discussing what constitutes "unreasonable cost and delay." However, that verbiage has been included in recent ADU and Middle Housing legislation, so it is likely that we will see more decisions focusing on "unreasonable cost and delay" in the near future.

WHAT IF AN APPLICANT CAN'T DEVELOP UNDER ADOPTED C&O STANDARDS?

"[C]lear and objective standards by their nature tend to be more rigid and less flexible than discretionary standards. Clear and objective standards must address in a "one-size-fits-all" way the city's legitimate regulatory interests in public health and safety, as applied to many different properties, each of which may have topographic or other challenges to development under inflexible cookie-cutter standards. Consequently, it may be inherent in a two-track system such as [Eugene's] that particular development proposals on particular properties may not be approvable under some clear and objective standards, due to site-specific topographic characteristics such as predominant steep slopes, although such proposals can be approved under more flexible discretionary standards.... Applicants in such circumstances will either have to modify their development proposal to one that complies with the applicable [clear and objective] standards, or choose to apply under the more flexible general track standards. While there may be a strong incentive in many cases to choose the more flexible general track, that does not mean that such applicants do not have the 'option of proceeding' under clear and objective standards, as required by ORS 197.307(6)(a), or that that the option is only illusory."

Dreyer v. City of Eugene, 78 Or LUBA 391 (2018).

"ALL HOUSING" V. "NEEDED HOUSING"

- SB 1051 (2017) amended ORS 197.307(4). Previously clear and objective standards were only required for "needed housing on buildable land." Now clear and objective standards are required for all housing and the "on buildable land" requirement has been removed.
- In some communities only certain types of housing are "needed."
- Goal 10 OAR (660-008-0005) defines "buildable land" as residentially designated land within the UGB except if it is:
  - Severely constrained by natural hazards under Goal 7
  - Is subject to natural resource protection measures under Goals 5, 6, 15, 16, 17 or 18
  - Has slopes of 25% or greater
  - Is within the 100-year floodplain; or
  - Cannot be provided with public facilities.

CASE STUDY (DEVELOPER PERSPECTIVE)

Nieto v. City of Talent

- **<u>Background</u>**

  49-lot Subdivision (preliminary)

  Low Density Residential

  Single Access to Subdivision across Railroad (Required Upgrade)

EXHIBIT 5

TALENT VIEW ESTATES
TENTATIVE SUBDIVISION PLAT

located in the

SOUTHEAST QUARTER OF SECTION 25,
NORTHWEST & NORTHEAST QUARTER OF SECTION 36,
TOWNSHIP 38 SOUTH, RANGE 1 WEST,
WILLAMETTE MERIDIAN, CITY OF TALENT,
JACKSON COUNTY, OREGON

for

TONY AND TORI NIETO

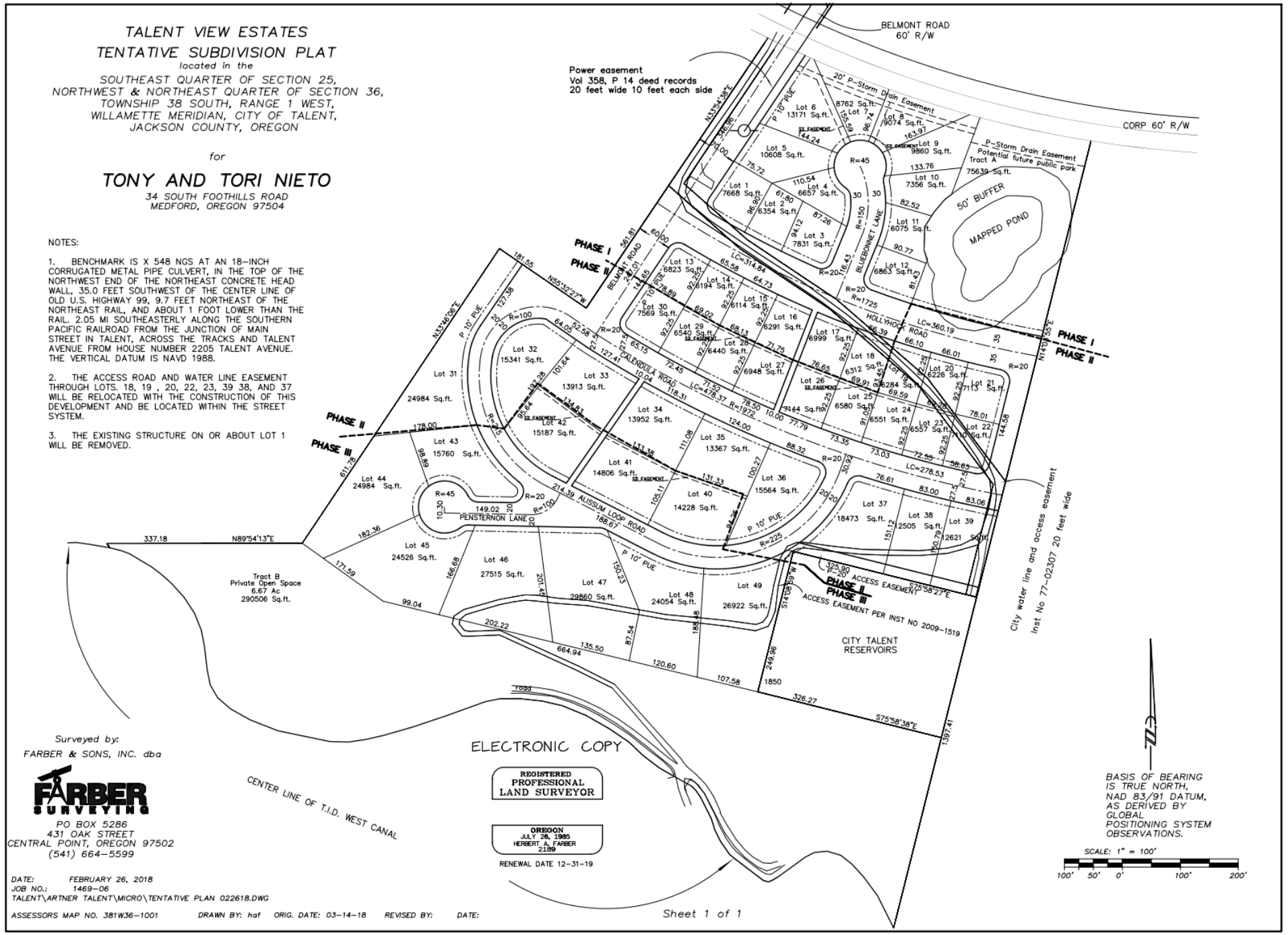
34 SOUTH FOOTHILLS ROAD
MEDFORD, OREGON 97504

NOTES:

1. BENCHMARK IS X 548 NGS AT AN 18-INCH CORRUGATED METAL PIPE CULVERT, IN THE TOP OF THE NORTHWEST END OF THE NORTHEAST CONCRETE HEAD WALL, 35.0 FEET SOUTHWEST OF THE CENTER LINE OF OLD U.S. HIGHWAY 99, 9.7 FEET NORTHEAST OF THE NORTHEAST RAIL, AND ABOUT 1 FOOT LOWER THAN THE RAIL. 2.05 MI SOUTHEASTERLY ALONG THE SOUTHERN PACIFIC RAILROAD FROM THE JUNCTION OF MAIN STREET IN TALENT, ACROSS THE TRACKS AND TALENT AVENUE FROM HOUSE NUMBER 2205 TALENT AVENUE. THE VERTICAL DATUM IS NAVD 1988.

2. THE ACCESS ROAD AND WATER LINE EASEMENT THROUGH LOTS. 18, 19 , 20, 22, 23, 39 38, AND 37 WILL BE RELOCATED WITH THE CONSTRUCTION OF THIS DEVELOPMENT AND BE LOCATED WITHIN THE STREET SYSTEM.

3. THE EXISTING STRUCTURE ON OR ABOUT LOT 1 WILL BE REMOVED.



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DATE: FEBRUARY 26, 2018
JOB NO.: 1469-06
TALENT\ARTNER TALENT\MICRO\TENTATIVE PLAN 022618.DWG

ASSESSORS MAP NO. 381W36-1001 DRAWN BY: haf ORIG. DATE: 03-14-18 REVISED BY: DATE:

CASE STUDY (DEVELOPER PERSPECTIVE)

Nieto v. City of Talent

- **Approval Criterion**

  When vehicle access is required for development, access shall be provided by one of the following methods (a minimum of 10 feet per lane is required). These methods are 'options' to the developer/subdivider.

  Staff found criterion met because each parcel had direct access to a public street.

  Hearings Officer found criterion NOT met because entire subdivision did not have (current) access across railroad.

CASE STUDY (DEVELOPER PERSPECTIVE)

Nieto v. City of Talent

- **LUBA Conclusions**

  Standard not clear from its plain text. "It is not clear whether it applies to access and circulation within a proposed subdivision … or whether it requires access to and from a proposed subdivision…."

  Not clear "whether the standard requires that such access be provided at the time of tentative plat approval or whether it requires merely that access eventually be provided through one of the five listed options, regardless of whether it exists.at the time of tentative plat approval."

  Lack of a clear purpose allowed the hearings officer to exercise significant subjectivity in choosing their preferred interpretation.

CASE STUDY (DEVELOPER PERSPECTIVE)

Nieto v. City of Talent

- **<u>Important Considerations/Lessons Learned</u>**

  Hearings Officer acknowledged City Code had MULTIPLE subjective standards

  Applicant addressed all criteria, but preserved C&O challenge

  City decided not to appear at LUBA

  Attorney Fees are non-discretionary

QUESTIONS?

THANK YOU!

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