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**VIA EMAIL: MCLANEC@CITYOFBOARDMAN.COM** OR-27092-001

City of Boardman Planning Commission
c/o Ms. Carla McLane, Planning Official
200 City Center Circle
P.O. Box 229
Boardman, OR 97818

*RE: Wilson Lane Apartments/ City File RVW26-000024*
*Applicant's Hearings Memorandum & Response to ODOT Comments dated May 21, 2026.*

Dear Members of the Planning Commission:

This office represents Cobalt Consulting Group, LLC with regard to the above referenced site design review application under consideration. In its May 21, 2026, comment letter, the ODOT: (a) requested a continuance, (b) challenged the applicant's TIS, (c) requested a revised TIS to address interchange ramp queue lengths, (d) requested an IGA to impose mitigation and ensure funding for improvements, and (e) requested construction of those improvements prior to completion of the proposed development. For the record, this letter constitutes the applicant's Hearing Memorandum in response to transportation issues raised by the ODOT.

## Executive Summary:

As an Executive Summary, we raise and briefly answer three important issues that must guide the city's decision-making in this case:

1. Because this application results in a limited land use decision, the city must only apply the standards and criteria set forth in the city's zoning code to the subject application. ORS 197.195. ODOT recommends application of discretionary standards set forth in other documents, such as the Comprehensive Plan, TSP, IAMP, and the Oregon Highway Plan, which do not apply to the proposed development.

2. Because the applicant proposes "housing," the city may only apply approval standards and criteria which are "clear and objective" on their face, a high burden. ORS 197A.400(1). To the extent that the ODOT recommends applying discretionary and ambiguous standards cited in its May 21 comment letter, the city must reject the ODOT's demands and apply the standards cited in its *Findings of Fact* for RVW26-000024 and approve the development.

3. ODOT seeks mitigation for alleged impacts to the state highway yet failed to sustain its burden to provide the constitutionally required "*Nollan-Dolan*" analysis, a prerequisite to imposing mitigation conditions upon a landowner proposing development. Local governments run afoul of federal constitutional standards if they impose mitigation for transportation impacts without first meeting the four-part test under *Nollan* and *Dolan*. See essential nexus test in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1985) "*Nollan,*" and the rough proportionality test for a land use exaction in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) "*Dolan*."

## Argument:

### A. The Statute Governing "Limited Land Use Decisions" Requires That Only Standards Incorporated into "Land Use Regulations" Be Used to Judge this Application.

The applicant proposes a 240-unit apartment complex for the development of needed housing. The application constitutes a "limited land use decision" as defined in ORS 197.015(12)(a)(B). This statute states:

> ***(12) "Limited land use decision":***
> ***(a) Means a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:***
> * * * * *
> ***(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to site review and design review.* * * *. (Underline added).***

Multi-family housing is a permitted use in the Residential (R) District and in the Multi-family Sub-District. This application is for site design review, which constitutes a Limited Land Use Decision.

As of 2025,[1] ORS 197.195(6) provides:

> ***(6) A city shall apply the procedures in this section, and only the procedures in this section, to a limited land use decision, even if the city has not incorporated limited land use decisions into land use regulations, as required by ORS 197.646(3), except that a limited land use decision that is made under land use standards that do not require interpretation or the exercise of policy or legal judgment may be made by city staff using a ministerial process.***

Procedurally, this decision should have been made by staff with a local appeal. ORS 197.195(6). While it is perhaps too late to follow the correct procedure in this case, the city must

[1] The Oregon Legislature amended ORS 197.195 in 2024 to add subsection (6), which is applicable to cities. This new statute went into effect on January 1, 2025. *See* Section 45, 2024 Or Laws Ch 100 (SB 1537).

follow the substantive limitations the statute imposes with regard to approval standards.

As noted in ORS 197.195(1), a limited land use decision "shall be consistent with applicable provisions of city or county comprehensive plans and land use regulations." This statute sets both affirmative and negative conditions: a limited land use decision is required to be consistent with the comprehensive plan, but it is not required to be consistent with other laws such as the Oregon Highway Plan.

The statute also requires all comprehensive plan standards applicable to limited land use decisions to be "incorporated" into their land use regulations. LUBA has stated that, as a minimum:

> ORS 197.195(1) contemplates more than a broad injunction to comply with unspecified portions of the comprehensive plan. In order to "incorporate" a comprehensive plan standard into a local government's land use regulations within the meaning of ORS 197.195(1), the local government must at least amend its land use regulations to make clear what specific policies or other provisions of the comprehensive plan apply to a limited land use decision as approval criteria.

*See Paterson v. City of Bend*, 49 Or LUBA 160, 167 (2005), *rev'd in part on other grounds*, 201 Or App 344, 118 P3d 842 (2005); *Oster v. City of Silverton*, 79 Or LUBA 447 (2019). *See also Holland v. City of Cannon Beach*, 142 Or App 5, 920 P2d 562, *rev. den*., 324 Or 229, 925 P2d 907 (1996) (in considering application for subdivision, city was precluded from applying "comprehensive plan provisions that had not been incorporated into the city's land use regulations pursuant to ORS 197.195(1)"); *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, 437 (2004), *aff'd,* 196 Or App 787, 106 P3d 699 (2004)(county cannot apply provisions set forth in an IGA to a LLUD when the IGA provisions were never adopted into the plan or zoning code).

In this context, the city should be particularly mindful of ORS 197.522, which limits the types of laws that can be applied to applications proposing needed housing. Specifically, ORS 197.522 clarifies that the county may only apply comprehensive plans and land use regulations as land use standards. It also sets forth a "fix-it" provision in the event that the city does not believe the applicant's proposal does not meet the required standards. The law requires the city to allow the applicant the opportunity to "offer an amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations." The ODOT recommended mitigation measures are not based upon city adopted land use regulations and should be disregarded.

### B. ORS 197A.400 Also Prohibits the City from Applying any "Standard" Which is Not Clear and Objective or Otherwise Discourages Needed Housing Through Unreasonable Cost or Delay.

The city must also consider the effect of ORS 197A.400 (formerly ORS 197.307(4)). This provision of law, known as the "housing statute" was renumbered by legislative counsel after the 2023 session, and now ORS 197.307(4) is found at ORS 197A.400. But its substance remains the same. It states:

> ***197A.400 Clear and objective approval criteria required; alternative approval process. (1) Except as provided in subsection (3) 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, on land within an urban growth boundary. 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.*** (Emphasis added).

Traditionally, "needed housing" was generally associated with low-income housing, but ORS 197A.348 and ORS 197.522(1)(a) now define "needed housing" more broadly to all housing types:

> ***"all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes, as those terms are defined by the United States Department of Housing and Urban Development under 42 [USC section] 1437a."***

*See also* ORS 197A.018 (defines the term "needed housing" broadly); ORS 227.173 (providing similar guidance to cities with regard to the application of clear and objective standards).

ORS 197.831 places the burden on local governments to demonstrate, in an appeal before LUBA or the court of appeals, that standards and conditions imposed on "housing" "are capable of being imposed only in a clear and objective manner." ORS 197.831 provides:

> ***197.831 Appellate review of clear and objective approval standards, conditions and procedures for needed housing. In a proceeding before the Land Use Board of Appeals or an appellate court that involves an ordinance required to contain clear and objective approval standards, conditions and procedures for housing, including under ORS 197A.200 and 197A.400, the local government imposing the provisions of the ordinance shall demonstrate that the approval standards, conditions and procedures are capable of being imposed only in a clear and objective manner.*** [1999 c.357 §5; 2011 c.354 §7; 2023 c.13 §90]

*See also Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370, 377-83 (2002) (discussing the genesis of the enactment of ORS 197.831). This is a high burden.

In its May 21, 2026, comment letter, the ODOT requested a continuance, a revised TIS to address

interchange ramp queue lengths, an IGA to impose mitigation and ensure funding for improvements as well as construction of those improvements prior to completion of the proposed development. None of these requests by the ODOT are based upon clear and objective standards in the city development code. The ODOT's proposed conditions run afoul of the standards in ORS 197.831 because they are discretionary and are not set forth in local code. Furthermore, imposing the ODOT's recommended conditions in the present case will directly cause unreasonable cost and delay in violation of ORS 197A.400. As a result, the city should disregard the ODOT's comments and approve the development subject to the analysis in its *Findings of Fact* for RVW26-000024.

### C. ODOT Has Not Prepared the Required *Nollan / Dolan* Findings.

Without required findings under *Nollan* and *Dolan*, the ODOT proposed transportation mitigation violates the Fifth Amendment.

1. Background on the Unconstitutional Conditions Doctrine.

We ask the city to be mindful of the Fifth Amendment when imposing exactions that require the dedication of land, the construction of public improvements, or the payment of money because of a long line of U.S. Supreme Court cases that scrutinize doing so. Local governments seeking exactions from developers must determine that the exaction meets a four-part test:

- The "legitimate state interest" test: requires the local government to identify a legitimate public problem.

- The first "nexus" requirement: requires the local government to demonstrate that the proposed development for which a permit is sought creates or exacerbates the identified public problem.

- The second "nexus" requirement: requires the local government to demonstrate that the proposed solution has a tendency to solve or alleviate the identified problem.

- The rough proportionality test: requires the local government to demonstrate that the proposed exaction is roughly proportional to the impacts created by the development.

The 'essential nexus' component of the *Nollan/Dolan* test comes from *Nollan*, 483 U.S. 825, (1987). It asks, "whether there is an 'essential nexus' or logical connection between the government's legitimate state interest and the permit condition." *Sheetz v. County of El Dorado*, 601 U.S. 267, (2024), "*Sheetz*." The 'rough proportionality' component of the *Nollan/Dolan* test comes from *Dolan*, 512 U.S. 374, (1994). It requires a court to determine whether the degree of the land-use exaction demanded by the government's permit condition 'bears the required relationship to the projected impact of the landowner's proposed development." *Sheetz*, (citing *Dolan*, 512 U.S. at 388). *Sheetz* was a case involving transportation impacts similar to the present matter and applied these tests directly to the imposition of traffic impact fees.

To satisfy the above standard, the permit condition (e.g. impact fee or mitigation project cost) must have 'rough proportionality' to the proposed development's impact or burden on the government's land-use interest (in this case, the alleged traffic congestion), and must not require a landowner to give up (in this case, pay for improvements to the traffic system) more than is necessary to mitigate the harm (social costs) resulting from the new development." *Sheetz*, 601 U.S. at 275-276).

ODOT has made no effort to assist the city in sustaining its burden of proof pertaining to traffic-related exactions, and none appears in this land use record. Without such a record, any imposition of mitigation as recommended by ODOT violates the Fifth Amendment to the U.S. Constitution.

**D. ORS 197.835(10)(a) Attorney Fee Liability.**

As discussed above, this application seeks approval of "housing" because it is seeking a partition so that it can build 240 more new homes. Thus, it is important for the city to take the "clear and objective" requirement seriously. ORS 197.835(10)(a)(A) requires LUBA to reverse a city's denial if it is "outside the discretion allowed the city under its comprehensive plan and implementing ordinances." This provision also makes local governments vulnerable to paying a landowner's attorney fees at LUBA if they wrongfully deny a land use application:

> ***(10)(a) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:***
> ***(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; or***
> ***(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.***
> ***(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government.***

While this provision has been around for a long time, it has taken on new significance in light of the clear and objective criteria mandate. ORS 197.835(10)(b) mandates that when LUBA "does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government." *See* ORS 197.835(10)(b); OAR 661-010-0075(1). LUBA has been routinely reversing city and county decisions which seek to apply discretionary criteria and has been ordering those local governments to approve the landowner's application. This statute has proven to be dangerous for local governments, as the following cases demonstrate:

- *Walter v. City of Eugene*, 74 Or LUBA 671 (LUBA No. 2016-024, Dec. 21, 2016) ($16,141.59 award against city);

- *Mjai Oregon 5 LLC v. Linn County,* 80 Or LUBA 1021, (LUBA No. 2018-096, Aug. 16, 2019) ($24,958.50 award against city);
- *Nieto v. City of Talent*, __ Or LUBA __ (LUBA No. 2020-100, May 10, 2021) ($15,387.50 awarded against city);
- *Legacy Devel. Group v. City of The Dalles*, __ Or LUBA __ (LUBA No. 2020-099, Order, May 17, 2021) ($18,039.50 award against city);
- *Hollander Hospitality v. City of Astoria*, __ Or LUBA __ (LUBA No. 2021-061, Order, March 21, 2022) ($18,940.00 award against city);
- *Hendrickson v. Lane County*, __ Or LUBA __ (LUBA No. 2021-117, Order, August 18, 2022) ($26,380.00 award against county); and
- *East Park, LLC v. City of Salem*, __ Or LUBA __ (LUBA No. 2022-0050, Order, Dec. 6, 2022) ($47,384.00 award against city).

If the city choses to apply discretionary criteria, LUBA could reverse the city decision and award fees to the applicant.

**Conclusion:**

Based upon the reasons set forth above, the city must reject the arguments set forth in the ODOT letter dated May 21, 2026, and proceed in compliance with its own clear and objective standards in approving this development according to its *Findings of Fact* for RVW26-000024.

We thank you for your attention to this matter.

Sincerely,

**VF LAW**

/s/ Andrew H. Stamp
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ASTA/DMP/ssch

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