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Clackamas County Board of Commissioners
Chair Jim Bernard
Comm. Sonya Fischer
Comm. Savas
Comm. Humberston
Comm. Martha Schrader

Via Email: bcc@clackamas.us; and
tracymor@clackamas.us

RE: Allan Cottages Condominium Threatened Density Violation
ISSUE: Need for amendment to ZDO

October 24, 2019

Dear County Commissioners,

I am grateful that Comms. Savas and Bernard met with me yesterday and for their invitation to write this letter. I request that the Board include in this fiscal year's Zoning Development Ordinance amendment certain surgical changes regarding condominiums. Specifically, I request amendments to the requirement for design review for condominiums under ZDO 1102 together with a handful of amendments to address the ZDO'S treatment of condominiums as a discrete 'use' as per ZDO 315.05(A), and the interpretation by the Planning Director, Jennifer Hughes, that prohibits the establishment of an "accessory dwelling unit" (ADU) as a condominium unit. The application of these ordinances and the interpretation by the Planning Department about ADUs has prompted a threatened density violation, which was allegedly created by the very condominium plat the County approved and executed. This has resulted in significant and growing damages to my client, Rose and Magnolia Homes, LLC.

Attached to this letter are my proposed amendments to the ZDO, which are urgently needed to:

- correct the ZDO's violation of the Oregon Condominium Act (the "Act"),
- to remedy the unlawful, slanderous cloud on title the Planning Department has imposed on Allan Cottages Condominium, and
- to remove an impediment to a potential source of affordable housing for ownership, for which the County recognizes there is an urgent need.

In a letter from Jennifer Hughes to Rose and Magnolia Homes, LLC dated August 12, 2019, she interprets the ZDO to mean that no ADU may be established as a condominium unit unless located on its own lot, as if the ADU were a single family dwelling.¹ This interpretation equates the condominium process

¹ Ms. Hughes explained in the August 12 letter that the Allan Cottages would fail design review in any case because ZDO 1012 "applies a maximum density standard to condominiums in the same manner as it does for partitions and subdivisions. The district [sic] land area per dwelling unit in the R-10 zone is 10,000 square feet, meaning that (with limited exceptions that do not apply in this case) the subject property would need to be at least 20,000 square feet to qualify for either a condominium plat or a partition." Further she erroneously equates a condominium with partitioning and subdivisions, explaining that design review approval would be based on ZDO 1012, "which applies a maximum density standard to condominiums in the same manner as it does for partitions and subdivisions."



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with partitioning land.² The ZDO also imposes on condominiums, as if they were a discreet use instead of a state-regulated ownership regime, the requirement for Design Review. Further, the ZDO limits the kind of homes that may be submitted to a condominium in various zones.³

Aside from remedying the County's unfair action against Allan Cottages after making a final determination and approving the project's condominium plat; there are two primary reasons these amendments are urgently needed: **first**, state law preempts the ZDO in respect of condominium development and the ZDO currently runs afoul of the Condominium Act (ORS Chapter 100, the "Act"); and **second**, the result of the county's interpretation of the ZDO, which prohibits an ADU from being established as a condominium unit, is contradictory to the County Housing Task Force's high priority for development of affordable homes for ownership.

First, the Oregon Real Estate Agency ("OREA") has authority to review and approve (or reject) every condominium in the state and to interpret and enforce the Act. Certain authority is delegated to county surveyors to review condominium plats based on express and limited criteria, which are set forth in ORS 100.115 *et seq.* Otherwise, local jurisdictions do not govern or get involved in the condominium process or approval. In the Act at ORS 100.022(2) it expressly validates local zoning codes and their application, so long as such zoning codes and ordinances do not: 1) prohibit any certain kind of building (whether ADU, storage closet, or otherwise) from being established as a condominium unit, or 2) impose any additional requirement upon a structure or development proposed to be submitted to the condominium form of ownership that wouldn't be imposed if it weren't going to be a condominium.

Saying that an ADU may not become a condominium unit (unless it is located on a legal lot of its own) is exactly what ORS 100.022 says a local ordinance may not do: it is an impermissible prohibition of a certain kind of structure becoming part of a condominium.⁴ Further, the imposition of design review violates ORS 100.022 because the statute does not allow any local code, law or ordinance to impose this burdensome requirement on a structure or development just because it will become a condominium.

In the case of Allan Cottages, there was no design review required as part of the permitting process. A home and ADU simply do not require design review under the ZDO on an R-10 lot of record. Allan Cottages only became subject to design review when it was proposed as a condominium, which was *after* the homes were nearly finished and not long before certificates of occupancy were issued. ZDO 1102 imposes this additional requirement on the project only because it became a condominium in violation of ORS 100.022.

Clackamas County is an outlier among nearly all other jurisdictions that understand not to interfere with the state's authority over condominiums and not to try to expand on the county surveyor's limited authority to approve plats based on the criteria set forth in ORS 100.115 *et seq.* With only one exception that I know of, other local jurisdictions do not include condominiums in their zoning and planning codes.

² ORS 92.010(8)(c): the definition of "Partitioning Land" specifically excludes condominiums; the definition of "Subdividing Land" (ORS 92.010(16) does not include condominium plats.

³ See, e.g., ZDO 315.5(A).

⁴ Ms. Hughes' explanation for prohibiting ADUs' submission to condominium regime from the August 12th letter: "Establishing separate ownership of an accessory use and a primary use negates the subordinate/incidental relationship of the accessory use to the primary use. The effect of separate ownership is to create two primary uses regardless of whether it is done via a condominium plat or a partition plat."



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Clackamas County is also an outlier regarding the interpretation of the meaning of “accessory” in ADUs to exclude separate ownership. Other jurisdictions that have nearly identical definitions of ADUs (including some in Clackamas County) allow condominiums with ADUs.

Clackamas County has proceeded with this action despite the OREA having tried to educate the planning and enforcement department heads to the contrary. Michael Hanifin is the lawyer at OREA who has authority to review and approve every new condominium in the state and who interprets and enforces the Act on behalf of the state. Earlier this year he tried to convince Ms. Hughes that the ZDO’s condominium requirements and therefore her decision to take action against Allan Cottages Condominium were contrary to state law. Obviously, she was unconvinced. Yesterday Ms. Hughes stated that she recognized the preemption of the ZDO by HB 2001; she does not concede that the Act exclusively controls condominiums. She believes one state agency but not another when it comes to the ZDO.

Because this enforcement action is being pursued by Clackamas County against Rose and Magnolia Homes, LLC the property can be neither refinanced nor sold. Offers to buy were withdrawn after the threat of a zoning violation was disclosed. The cottage and primary home had to be taken off the market. Carrying costs are damages that continue to accumulate.

It’s time to stop the harm to a citizen of Clackamas County who followed the appropriate process for the County and OREA to review and approve the Allan Cottages Condominium. It’s time to make the ZDO conform with applicable state law. It’s time to live up to the Board’s promise of promoting affordable housing for ownership. It’s time to right these wrongs, and the Board of Commissioners has authority to do that through needed amendments of the ZDO. These amendments could be done this fiscal year alongside corrections to the ZDO to make it conform to the portions of HB 2001 that become operative January 1, 2020.

Regards,

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Cc: Michael Hanifin, OREA; Rep. Karin Powers, Speaker Tina Kotek, Jennifer Donnelly, Regional Solutions DLCD, Clackamas County Counsel, Policy Advisor Tracy Moreland



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SUGGESTED REVISIONS TO CLACKAMAS COUNTY

ZONING AND DEVELOPMENT CODE

REGARDING CONDOMINIUM OWNERSHIP REGIMES

The purpose of these proposed revisions is to first, promote the development of affordable housing, to expand the housing stock in Clackamas County available for homeownership, particularly affordable housing for middle and low income families, and second, to make the ZDO comply with state law, which preempts the ZDO and (i) does not allow a local jurisdiction to prohibit the condominium form of ownership for any particular type of building or portion of a building, and (ii) from imposing any requirement upon a structure or development proposed to be submitted to the condominium form of ownership under the Oregon Condominium Act that it would not impose upon the same structure or development if it will be owned differently, without the condominium regime.¹

Condominium ownership will be the method that must be used to enable the Middle Housing that will be built under HB 2001 to be available for homeownership. Presently, Clackamas County burdens condominium projects with the requirement to go through Design Review, notwithstanding that buildings may be submitted to condominium ownership any time after they are built not just at the time of new construction and erroneously treats condominiums as a discreet use instead of the common ownership regime it is. Design review process is costly and lengthy, and it simply does not make sense given the flexibility that state law provides the condominium regime and the statutory requirement for the condominium process to come *after* construction. Treating condominiums as a use is a misconception and misapplication of state law, which does not differentiate between types of enclosed buildings that may be made into condominium units, whether garages, houses, storage closets, or apartment flats, or portions of single family homes.² ZDO 315.5(A) is overly restrictive and as such violates the Condominium Act.

¹ ORS 100.022: "(1) A zoning, subdivision, building code or other real property law, ordinance or regulation may not prohibit the condominium form of ownership or impose any requirement upon a structure or development proposed to be submitted to the condominium form of ownership that it would not impose upon a structure or development under a different form of ownership.

(2) Except as set forth in this section, no provision of this chapter invalidates or modifies any provision of any zoning, subdivision, building code or other real property use law, ordinance or regulation."

² ORS 100.020 establishes the requirements for property that may be submitted to the Oregon Condominium Act: "Property may not be submitted to the condominium form of ownership under ORS 100.005 (Definitions) to 100.627 (Electric vehicle charging stations) unless: . . . "(b) subject to paragraph (c) of this section, each unit consists of:

(A) A building or part of a building;

(B) A space used for the parking or storage of automobiles, trucks, boats, campers or other vehicles or equipment;

(C) A space for the moorage of a watercraft, floating home or other structure, or

(D) A floating structure, including a structure formerly used as a ship or other vessel that:"

{KEY: underlining means add, strike through means delete}

Definitions ZDO 202

Dwelling Unit, Accessory: A dwelling unit located on the same lot of record³ that is accessory to or used in connection with a primary dwelling. The primary dwelling may be an attached or detached single-family dwelling, or a manufactured dwelling, as specified in the underlying zoning district provisions.

Chapter 315.05 Development Standards

Delete 315.05(A).

~~“Condominiums: Except in the VR-5/7 and VR-4/5 Districts, any of the following types of dwellings, if permitted in the subject zoning district, may be platted as condominiums: detached single-family dwellings, attached single-family dwellings, two-family dwellings, three-family dwellings, and multifamily dwellings. In the case of single-family dwellings, condominium platting supersedes the requirement that each dwelling unit be on a separate lot of record; however, attached single-family dwellings must be attached at a wall (as they would be if a lot line separated the dwellings) rather than ceiling to floor.”~~

Chapter 839 Accessory Dwelling Units

829.02 Delete subparagraph “C” —Owner Occupancy.

~~“C. Owner Occupancy: Except in the HR District, owner occupancy of either the accessory dwelling unit or the primary dwelling shall be required. A deed restriction requiring owner occupancy of one of the dwelling units shall be recorded prior to issuance of a building permit for the accessory dwelling unit.”~~

Chapter 1012 Lot Size and Density

1012.1 Applicability: Delete from subparagraph “D” “. . .including residential condominiums...”

~~“D. Design review for manufactured home parks, congregate housing facilities, and dwellings including residential condominiums; and”~~

Chapter 1102 Design Review

³ {footnote for reference only---not to be used in revised ordinance} “Lot of Record: A lot, parcel, other unit of land, or combination thereof, that conformed to all zoning and Subdivision Ordinance requirements and applicable Comprehensive Plan provisions, in effect on the date when a recorded separate deed or contract creating a lot, parcel or unit of land was signed by the parties to the deed or contract; except:

1. Contiguous lots under the same ownership when initially zoned shall be combined when any of these lots, parcels or units of land did not satisfy the lot size requirements of the initial zoning district, excluding a lot in a recorded plat.
2. A unit of land created solely to establish a separate tax account, or for mortgage purposes, that does not conform.....”

1102.01(D) ----The following uses in the Urban Low Density Residential Districts: attached single-family dwellings, two-family dwellings, three-family dwellings, ~~condominiums~~, and institutional uses.

Section 1105.05

~~If a condominium platting is proposed as part of a design review application pursuant to Section 1102, *Design Review*, a separate condominium plat application is not required. Otherwise, [A] condominium plat requires review as a Type I application by the county surveyor pursuant to the Oregon Condominium Act and pursuant to Section 1307, *Procedures*. A proposed condominium plat shall comply with the applicable provisions of the Oregon Condominium Act. The buildings being submitted to the condominium regime shall comply with the applicable provisions of the section of this Ordinance that regulates the subject zoning district and with Section 1000, *Development Standards*.~~