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1 **INTERVENORS' SECOND ASSIGNMENT OF ERROR**

2 1. Intervenors' Petition ("Petition") provides a detailed analysis
3 demonstrating that the method of calculating "Dwelling unit size"
4 under EC 9.274(4)(b) and other code sections is not clear and objective.

5 The City's response recaps case law regarding the interpretation of
6 "clear and objective standards" (which is not in dispute) and then just
7 steps through the offending code provisions using slightly different
8 language. City Response ("CityResp") at 35-37.

9 The City's argument comprises nothing but conclusory statements
10 that "in the context of the standard, it is very clear what an applicant
11 needs to do to measure a dwelling unit" and "[t]he definition of
12 'dwelling unit size' * * * provides an understandable route to approval *
13 * *." *Ibid.*

14 Intervenor-Respondent Kashinsky's argument is no better and
15 relies on hand-waving that "[a]n applicant would have to be
16 intentionally obtuse to not know what they must show during the
17 application process." This fatuous statement is based on a list of several
18 provisions of the standard (e.g., not excluding closet area) which are not
19 in dispute and are irrelevant to Intervenors' challenge.

20 Kashinsky Response ("KashResp") 20-22.

21

1 Neither response addresses specific issues raised by Intervenors
2 nor offers a clear way out of the confusion –

3 • “Full story,” “story,” and “level” aren’t defined. Specific
4 ambiguous cases include unfinished basements and living space
5 within the “knee walls” (which are not “exterior”) on the top floor
6 of a 1-1/2 story residence. Petition 45-47.

7 • The following two criteria conflict:

8 ○ “The square foot area must be measured at the exterior
9 perimeter walls * * *”

10 ○ “[The square foot area] is defined as all square footage inside of
11 a dwelling * * *.” *Ibid.*

12 “Inside a dwelling” is plain English for what lies *within* the enclosing
13 walls and roof. “At the exterior perimeter walls” could reasonably be
14 parsed to mean either:

15 a) “Exterior perimeter” specifies *which walls*. The measurement
16 would be taken from where a floor meets the *interior* face of an
17 “exterior perimeter” wall; or

18 b) “Exterior” specifies *which side* of the “perimeter walls” is the
19 boundary from which the measurement would be taken.

20 Without clarification or citation to established definitions, such as found
21 in the 2021 *International Residential Code*,¹ an applicant cannot know for

¹ 2021 *International Zoning Code* defines “floor area, gross” and “story.”

1 certain how to measure "Dwelling unit size."

2 The City must adopt an unambiguous term, such as "Gross Floor
3 Area, Middle Housing," for the calculation of "Dwelling unit size."

4

5 2. Intervenors accept the City's assertion that, in EC 9.2741(4)(d), "'area
6 median income' means area median income as calculated by HUD."
7 CityResp 39.

8 *However, resolving that partial interpretation is not sufficient to
9 disambiguate the term.*

10 HUD publications for AMI values allow selection of either Lane
11 County or Eugene-Springfield Metropolitan Statistical Area.
12 (Exhibit A.) Neither respondent clarifies *which specific area* should be
13 used.

14 Respondents also don't clarify *which* of the two HUD calculations
15 (e.g., "Median Family Income" or "income limits") is intended. (See
16 Petition at 50-51.) Respondents actually take *opposite* positions,
17 confirming the term's ambiguity. The City asserts: "'AMI' is the term
18 commonly used for HUD's annual estimation of **median family income**
19 for each metropolitan area." (Emphasis added) CityResp 39.

20 In contrast, Kashinsky asserts: "The usage of a particular
21 percentage of area median income * * * is common throughout Eugene's
22 code * * *" and "[a]s Intervenor-Petitioners [*sic*] cite: 'if the term AMI is

1 qualified in some way ... then this is a reference to HUD's **income**
2 **limits.**" (Emphasis added) KashResp 22.

3 If the Board finds that "Area Median Income" is unambiguous, the
4 Board must also clarify *which* of respondents' conflicting interpretations
5 is correct.

6 Finally, the required maximum rent for a dwelling unit *cannot* be
7 calculated using HUD "income limits" unless a nominal household size
8 is specified because the HUD calculations produce *different* values for
9 "income" based on household size. (Kashinsky doesn't address this
10 problem.)

11

12 3. Neither respondent disputes Intervenors' statement that
13 EC 9.2741(4)(d) doesn't specify the *duration* for providing income-
14 qualified unit(s). Petition 49, 52.

15 The City argues: "[N]othing requires the City to identify a period
16 during which middle-housing must remain income-qualified to be
17 entitled to the lot area." CityResp 40. Kashinsky argues: "[T]he lack of
18 such requirement doesn't render the requirement unclear."
19 KashResp 25.

20 Both arguments mistakenly assume that the *lack of a required*
21 *duration results in a clear standard*. Neither respondent provides a *plausible*
22 objective interpretation. The City claims "an applicant must show" a
23 proposed middle housing development meets the [income-qualified]

1 standard "at the time of land use approval or building permit issuance."
2 CityResp 40. That criterion isn't clear or objective because a developer
3 can't "show" units are affordable to income-qualified occupants until
4 the units are offered for rent or sale, except perhaps by a recorded deed
5 restriction, which is not a requirement in the standard.

6 Kashinky's proposed criterion is even less objective: "the applicant
7 must be *proposing*" to meet the criterion. KashResp 25.

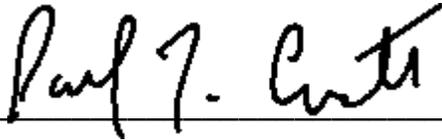
8 Both responses necessarily imply that the absence of a minimum
9 duration means *no duration at all is required*. An applicant could "show"
10 or "propose" to meet the standard before occupancy and increase the
11 rent the day after occupancy is permitted. Respondents' interpretation
12 would completely eviscerate the criterion, giving it no effect at all; and
13 such cannot reasonably be the legislative intent. ORS 174.010.

14 Kashinsky cites to several instances in the Eugene Code where an
15 "income-qualified" housing standard is applied, including EC 2.937,
16 EC 2.946(2)(h), EC 7.725(2)(h)1 and 2, and EC 8.440(3)(b).
17 Kashinsky 22-23. *All these code sections include both a stated duration and*
18 *consequences for not complying.* (Exhibit B)

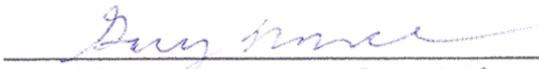
19 In all examples, the duration for "income-qualified" housing is
20 "clear enough for an applicant to know what he must show during the
21 application process." *West Main Townhomes v. City of Medford*. The
22 current code fails that test and requires an applicant to gamble what
23 duration, if any, is required.

1 The Board must remand the ordinance for the reasons above.

2 Respectfully submitted on December 23, 2022,

3  _____

4 Paul T. Conte, Intervenor-Petitioner

5  _____

6 Gary Nance, Intervenor-Petitioner

CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

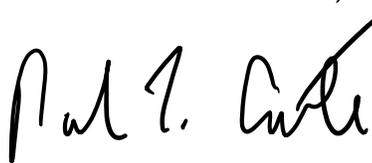
Brief Length

I certify that (1) this brief complies with the word-count limitation of 1,000 words in OAR 661-010-0039, and (2) the word count of this brief as described in OAR 661-010-0030(2)(b) is 976 words according to the MS Word document statistics.

Type Size

I certify that the size of the "Palatino Linotype" proportional type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by OAR 661-010-0030(2)(e).

Dated: December 23, 2022.

A handwritten signature in black ink, appearing to read "Paul T. Conte", written over a horizontal line.

Paul T. Conte
Intervenor-Petitioner

CERTIFICATE OF FILING & SERVICE

I hereby certify that on December 23, 2022, I filed by certified, first-class mail, postage prepaid, an original and two copies of the foregoing REPLY on the Oregon Land Use Board of Appeals at DSL Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283.

I also certify that on December 23, 2022, I served a true and correct copy of the REPLY by First Class Mail to the following persons:

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