



Cannon Beach Planning Commission

Findings of Fact and Conclusion

PUBLIC HEARING AND CONSIDERATION OF **AA 22-01**, GREG HATHAWAY'S, ON BEHALF OF JEFF AND JENNIFER HARRISON, APPEAL OF THE CITY'S ADMINISTRATIVE APPROVAL OF A BUILDING/DEVELOPMENT PERMIT FOR 534 NORTH LAUREL STREET. THE PROPERTY IS LOCATED AT 544 N. LAUREL STREET (TAX LOT 07002, MAP 51019AD), AND IN A RESIDENTIAL MEDIUM DENSITY (R2) ZONE. THE REQUEST WILL BE REVIEWED PURSUANT TO MUNICIPAL CODE, SECTION 17.88.180, REVIEW CONSISTING OF ADDITIONAL EVIDENCE OR DE NOVO REVIEW AND APPLICABLE SECTIONS OF THE ZONING ORDINANCE, CONDITIONS OF APPROVAL OF THE CANNON BEACH PRESERVATION PLANNED DEVELOPMENT SUBDIVISION AND APPROVED PLAT.

Agenda Date: February 24, continued to March 24, 2022

Prepared By: Jeffrey S. Adams, PhD

GENERAL INFORMATION

NOTICE

Public notice for this February 24th, 2022 Public Hearing is as follows:

A. Notice was mailed and posted at area Post Offices on February 17th, 2022;

DISCLOSURES

Any disclosures (i.e. conflicts of interest, site visits or ex parte communications)?

EXHIBITS

The following Exhibits are attached hereto as referenced. All application documents were received at the Cannon Beach Community Development office on January 25, 2022 unless otherwise noted.

"A" Exhibits – Application Materials

A-1 Administrative Appeal Application, dated January 25, 2022, including Hathaway letter of appeal, on behalf of Jeff and Jennifer Harrison;

A-2 Amended Notice of Appeal, dated February 22, 2022, Greg Hathaway, on behalf of Jeff and Jennifer Harrison;

A-3 Proposed Findings of Fact and Conclusions of Law, dated February 23, 2022, Greg Hathaway, on behalf of Jeff and Jennifer Harrison;

A-4 Exhibits List, Submitted electronically via email, March 3, 2022, (Harrison, Exhibits List);

A-5 02/24/2020 – AA#22-01 Lot 4 Appeal – Harrison Prepared Statement, Submitted electronically via email, March 3, 2022, (Harrison, Exhibit 7);

A-6 OSHU Skybridge Photo, Submitted electronically via email, March 3, 2022, (Harrison, Exhibit 8);

- A-7** 3/1/2016 – City Council discussion of “Living Wall”, Final Approval Hearing, Nicholson PUD, Submitted electronically via email, March 3, 2022, (Harrison, Exhibit 9);
- A-8** 2016 Shared Access and Maintenance Agreement, Submitted electronically via email, March 3, 2022, (Harrison, Exhibit 10);
- A-9** Respondent City of Cannon Beach’s Answering Brief, Submitted electronically via email, March 3, 2022, (Harrison, Exhibit 11);
- A-10** Final Opinion and Order, MJ Najimi vs. City of Cannon Beach, LUBA No. 2020-118, Submitted electronically via email, March 3, 2022, (Harrison, Exhibit 12);
- A-11** Petitioner’s Final Written Closing Argument and Proposed Findings, dated and received March 10, 2022;

“B” Exhibits – Agency Comments

None received as of this writing;

“C” Exhibits – Cannon Beach Supplements

- C-1** Cannon Beach Preservation Planned Development Subdivision Conditions of Approval,, from LUBA Record 2016-033;
- C-2** Cannon Beach Preservation Planned Development Subdivision Plat, Recorded November 21, 2016,, Recorded November 21, 2016;
- C-3** Building Permit #164-20-000055-DWL, with Plan Attachments, excluding Structural Calculations; issued January 11, 2022;
- C-4** Initial House Plans for Harding-Bouvet Residence, by Tolovna Architects, with requested revisions, dated May 31, 2021;
- C-5** Alternative House Plans for Harding-Bouvet Residence, by Tolovna Architects, undated, received February 4, 2022;
- C-6** Staff Report Addendum, November 12, 2021

“D” Exhibits – Public Comment

- D-1** None received as of this writing;
- D-2** Betty Ayers, Email correspondence, received February 23, 2022;
- D-3** Darrell Clukey, letter received via email, dated February 23, 2022;
- D-4** Kent Suter, Email correspondence, received February 23, 2022;
- D-5** Diane Amos, Email correspondence, received March 1, 2022;
- D-6** Dean Alterman letter, on behalf of the applicant, Paul Bouvet, dated and received March 3, 2022;
- D-7** Dean Alterman letter, on behalf of the applicant, Paul Bouvet, dated and received March 17, 2022;

SUMMARY & BACKGROUND

The appellants, Jeff & Jennifer Harrison, are appealing the administrative decision to approve a building/development permit (BP# 164-20-000055-DWL) authorizing a new residential structure at 534 N. Laurel, also known as the Harding/Bouvet Lot 4. This site is one of the lots in the Cannon Beach Preservation Planned Development Subdivision (also known as the Nicholson Planed Development), which was approved by the Cannon Beach City Council in 2016.

The application for a home on this lot, including accompanying building plans, was received August 14, 2020 and staff began the Plan Review process within the week. The Plan Review process incorporates all Oregon Building Code requirements under Title 15 of the Cannon Beach Municipal Code as well as all applicable portions of Title 17 Zoning Code, including the Planned Development plat and conditions of approval for the Planned Development.

The scope of Plan Review is important to the efficient processing of applications for building permits. CBMC 17.92.010(A)(2) states, “In the case of a structure or building requiring a building permit, the development permit may be part of the building permit.” Thus, BP# 164-20-000055-DWL, **Exhibit C-3**, serves as both the Building Permit and Development Permit for the Harding-Bouvet Residence. In the case of a development permit accompanying a building permit, the scope of review is typically limited, as the use is outright permitted in the zone, and it is not intended to grant an opportunity to revisit issues settled in previous actions, such as the appropriateness of the underlying zoning, any variances or setback reductions, or, as in this case, issues decided in the subdivision process.

Staff corresponded with the Harding-Bouvet’s representatives over a number of months and a number of revisions of the Application, before a set of plans which meets the conditions of approval, plat and specifications of the agreements, were produced and approved. See **Exhibit C-3**. Final Building Permit approval was issued on January 11, 2022. On January 25, 2022, within the 14 consecutive day appeal period, Mr. Hathaway on behalf of Jeff and Jennifer Harrison filed an appeal of the administrative decision, based on three arguments of appeal.

1. Building Permit violates PUD Condition #16

First, the appellants argue that

“Materially, the proposed new house is allowed two stories, but the proposed new garage is not.”

Appellants argument is based on Condition #16 of the Cannon Beach Preservation Subdivision, which provides as follows:

The homes to be built on the site shall all comply with the following design requirements:

{...}

- *The yard setbacks for the development will be as specified on Sheet C2.2 from KPFF Consulting Engineers, submitted on October 20, 2015, regardless of the orientation of the main front entrance or street to front, side, and rear yards. Should any lot contain a garage or carport, it shall be no larger than a two car garage. Garages or carports may be located under a house due to the natural topography, **but if the garage is detached, then the garage may not include a second story or livable space.** The exterior of any garage must be the same as the house.*

So, the question presented in this issue is whether the proposed garage has a “second story” and whether the garage is “detached” as those terms are used in the condition of approval.

a. Number of Stories.

The City of Cannon Beach Municipal Code’s (CBMC) Zoning language does not define ‘story’ even though CBMC 17.04.283, which defines gross floor area (see below), refers to it, and those terms that have been at the heart of previous appeals involving thisPUD.

17.04.283 Gross floor area.

“Gross floor area” means the sum, in square feet, of the gross horizontal areas of all floors of a building, as measured from the exterior walls of a building, including supporting columns and unsupported wall projections (except eaves, uncovered balconies, fireplaces and similar

architectural features), or if appropriate, from the center line of a dividing wall between buildings. Gross floor area shall include:

1. Garages and carports.
2. Entirely closed porches.
3. Basement or attic areas determined to be habitable by the city's building official, based on the definitions in the building code.
4. Unhabitable basements areas where the finished floor level of the first floor above the basement is more than three feet above the average existing grade around the perimeter of the building's foundation.

In addition the calculation of gross floor area shall include the following:

5. All portions of the floor area of a story where the distance between the finished floor and the average of the top of the framed walls that support the roof system measures more than fifteen feet shall be counted as two hundred percent of that floor area.

In their appeal, the appellants contend that "both structures qualify as two-story structures per CBMC, Oregon Residential Specialty Code (which is recognized by Clatsop County, Oregon as, "Code in Effect")." It appears that the appellants are referring to language from the Oregon Residential Specialty Code, which is not included in the letter of appeal.

The 2018 Edition of the International Building Code, as published by the International Code Council, and amended by the Building Codes Division is adopted by ORS 918-460-0010, is enforced in the City (CBMC 15.04.110) and that code defines 'Story' as follows:

2018 International Building Code (IBC) BASIC Upgrade to Premium Fifth Version: Sep 2020

CHAPTER 2 DEFINITIONS

[BG] STORY. That portion of a building included between the upper surface of a floor and the upper surface of the floor or roof next above (see "Basement," "Building height," "Grade plane" and "Mezzanine"). A story is measured as the vertical distance from top to top of two successive tiers of beams or finished floor surfaces and, for the topmost story, from the top of the floor finish to the top of the ceiling joists or, where there is not a ceiling, to the top of the roof rafters.

[BG] STORY ABOVE GRADE PLANE. Any story having its finished floor surface entirely above *grade plane*, or in which the finished surface of the floor next above is:

1. More than 6 feet (1829 mm) above *grade plane*; or
2. More than 12 feet (3658 mm) above the finished ground level at any point.

The Community Development Department responded to the initial set of plans, **Exhibit C-4**, by requesting that the architect revise the plans to remove the vaulted ceiling of the garage, while allowing only an unfinished rat-slab concrete foundation, as suggested by the geo-tech report for structural stability. The Harding-Bouvet's were also required to remove the walk-in entry to the under-flooring, to allow the maximum 3' x 5' crawl-space entry, to further limit habitability and use of the under-flooring area.

The discrepancies between the City's gross floor area language regarding stories and the IBC boil down to interpretations over the story above "grade plane,"; in this case, the City's decision found that the garage did not contain a second story because all other livable space had been removed.

b. Is the Garage Detached.

But just as Condition 16 turns on 'story' as a term, it also turns on 'detached.' Detached is another term which is not defined in the CBMC but referred to in many instances. The Building Official has traditionally regarded a building to be attached when the garage or accessory structure shares a load-bearing wall. In other words, if the applicant were to attach the garage directly to the primary residence, sharing the easterly wall of residence, then Condition 16's stipulation regarding detached garages, is no longer applicable.

The applicant has provided an 'alternative' set of plans, **Exhibit C-5**, showing an attached garage, as described above. The Planning Commission finds the appellant's argument to not allow detached two-story garages persuasive, as defined by the Oregon Residential Specialty Code, and yet, as the Cannon Beach Building Official has stated that the garage depicted in **Exhibit C-5** is attached. The Planning Commission denies the appeal based

on a modification of the approval conditioned upon the attachment of the garage, as depicted in **Exhibit C-5**, satisfying Condition 16.

2. The Building Permit violates the Cannon Beach Comprehensive Plan.

Second, the Appellants claim that the building permit violates the Cannon Beach Comprehensive Plan's (CBCP) Vision Statement:

"Cannon Beach will continue to be a small town where the characteristics of a village are fostered and promoted. Both the physical and social dimensions associated with a village will be integral to Cannon Beach's evolution during the next two decades. The elements of the town's physical form which the plan will foster are: Development that honors the city's physical setting. A compact development pattern where various land uses are readily accessible to residents and visitors. A distinct edge to the town which defines the separation of urban from rural and natural resource uses. Mixed land uses which promote the livability of the town. Buildings that are generally small in scale and appropriate to their setting." (CBCP, p. 5)

The Planning Commission finds that Building Permits are not reviewed against the Cannon Beach Comprehensive Plan, as the zoning ordinances and building codes, under which the plan review process function, are approved through a legislative process under the guidance of the Comprehensive Plan. See also ORS 197.195(1), which prohibits the use of comprehensive plan provisions in reviewing limited land use decisions, such as the this. The argument fails.

3. The Building Permit violates the PUD's Shared Access and Maintenance ("SAMA") in Violation of PUD Condition #2.

Condition of approval #2 of the PUD approval provides as follows:

"2. Applicant will prepare and record a shared access and maintenance easement for the shared drive serving the four lots contemporaneous with or within three months following recordation of the final plat for this development. The proposed retaining wall for the access drive will be a "living wall" design as shown in the documents submitted by the applicant. Maintenance of wall vegetation will be addressed as part of the shared access and maintenance agreement required by this condition. The agreement will identify the City as a benefitted party and allow for City enforcement of the maintenance requirements, including maintenance of the living wall." (Exhibit C-1, p. 14-5)

In short, that condition required the developer of the PUD to record a "shared access and maintenance easement" (a "SAMA"), and requires it to address maintenance of certain common areas. Appellants do not argue that the proposed house violates the condition of approval; rather, on page 4 of their appeal, they argue that the proposed house is inconsistent with one of the provisions within the SAMA :

"The only specifically allowed activities in the identified shared/common open spaces of the PUD and SAMA are limited to, 'removing non-native vegetation,' and are not to be non-exclusionary improvements serving only the burdened lot."

Generally speaking, in reviewing applications, the City reviews whether a proposal is consistent with the City's code; in some circumstances, such as this PUD, it also reviews for compliance with conditions of approval from previous decisions. However, generally, the City does not review proposals for consistency with real estate agreements, such as easements or CC&Rs. Enforcing those provisions are typically beyond the authority of the City and should be resolved in circuit court. There may be instances when resolving a real estate question is critical to determine whether a code provision is met or not, but this is not such a case.

In this case, it is not disputed that the developer complied with the condition of approval by preparing and recording the SAMA. The Appellants are not seeking to enforce the requirements of the SAMA, but the provisions of that SAMA that go beyond the requirements of the condition. That is not the Planning Commission's role and it should reject this basis for appeal. As staff stated in a previous staff report on this issue, "The review of this building permit is limited to CBMC Title 15, and the applicable parts of CBMC Title 17, as well as the applicable parts of the PUD conditions of approval. None of those provisions authorize the City to refuse to issue a building permit on this basis. The Planning Commission finds that the City must deny the appeal, based on the fact that the drywell is not 'exclusionary' as the applicant's evidence provides. The Planning Commission, however, finds that the City may take "enforcement action" under its code, which does not extend to allowing it to refuse to issue a building permit that otherwise meets the requirements of its code and the PUD" (**Exhibit C-6**), and conditions this denial on the drafting of a letter to City Council, on behalf of the Planning Commission, seeking enforcement of condition #2 and maintenance of wall vegetation.

APPLICABLE PROCEDURE

17.88.160 Scope of review.

- A. An appeal of a permit or development permit shall be heard as a de novo hearing.

17.88.180 Review consisting of additional evidence or de novo review.

A. The reviewing body may hear the entire matter de novo; or it may admit additional testimony and other evidence without holding a de novo hearing. The reviewing body shall grant a request for a new hearing only where it finds that:

1. The additional testimony or other evidence could not reasonably have been presented at the prior hearing; or

2. A hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action; and

3. The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.

B. Hearings on appeal, either de novo or limited to additional evidence on specific issue(s), shall be conducted in accordance with the requirements of Sections 17.88.010 through 17.88.100.

C. All testimony, evidence and other material from the record of the previous consideration shall be included in the record of the review. (Ord. 90-10 § 1 (Appx. A § 62); Ord. 89-3 § 1; Ord. 79-4 § 1 (10.084))

PLANNING COMMISSION CONCLUSION

INITIAL MOTION: Having considered the evidence in the record, upon a motion by Commissioner Moritz and seconded by Commissioner Bates to **tentatively** deny the Hathaway application, on behalf of Jeff & Jennifer Harrison, for an appeal of an administrative decision, the Planning Commission on a vote of four in favor and two opposed, approve Building Permit (BP# 164-21-000179-DWL), application **AA# 22-01**, based on the finding that the garage is attached, as discussed subject to the following conditions and requests that staff draft findings for review and adoption, at a special called meeting, next Thursday at 6PM, March 31st, 2022, at City Hall.

1. Attachment of the Garage to the Primary Residence, as depicted in **Exhibit C-5**.

VOTE

YEA Bates, Johnson, Moritz & Newton

NAY Kerr & Knop

SECOND MOTION: Having considered the evidence in the record, upon a motion by Commissioner Moritz and seconded by Commissioner Bates to ***tentatively*** deny the Hathaway application, on behalf of Jeff & Jennifer Harrison, for an appeal of an administrative decision, the Planning Commission unanimously approve Building Permit (BP# 164-21-000179-DWL), application **AA# 22-01**, based on the finding that the drywell is not 'exclusionary,' as discussed and requests that staff draft findings for review and adoption, at a special called meeting, next Thursday at 6PM, March 31st, 2022, at City Hall.

VOTE

YEA Bates, Johnson, Kerr, Knop, Moritz & Newton

NAY

THIRD MOTION: Having considered the evidence in the record, upon a motion by Commissioner Moritz and seconded by Commissioner Knop to ***tentatively*** deny the Hathaway application, on behalf of Jeff & Jennifer Harrison, for an appeal of an administrative decision, the Planning Commission unanimously approve Building Permit (BP# 164-21-000179-DWL), application **AA# 22-01**, based on the finding that the 'living wall' is an enforcement issue, as discussed subject to the following conditions and requests that staff draft findings for review and adoption, at a special called meeting, next Thursday at 6PM, March 31st, 2022, at City Hall.

1. Letter to be sent from the Planning Commission to the City Council requesting enforcement action regarding the 'living wall.'

VOTE

YEA Bates, Johnson, Kerr, Knop, Moritz & Newton

NAY

FOURTH MOTION: Having considered the evidence in the record, upon a motion by Commissioner Bates and seconded by Commissioner Newton to ***tentatively*** deny the Hathaway application, on behalf of Jeff & Jennifer Harrison, for an appeal of an administrative decision, the Planning Commission unanimously approve Building Permit (BP# 164-21-000179-DWL), application **AA# 22-01**, based on the finding that the Comprehensive Plan is not a part of the building permit review process, per ORS 197.195(1), as discussed and requests that staff draft findings for review and adoption, at a special called meeting, next Thursday at 6PM, March 31st, 2022, at City Hall.

VOTE

YEA Bates, Johnson, Moritz & Newton

NAY Kerr & Knop