Cannon Beach Planning Commission

Staff Report Addendum (Close of Business, March 17, 2022)

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 SECTONS 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

Please find below all materials submitted before close of business, March 10, 2022. The Planning Commission asked that submissions adhere to the Oregon 7-7-7 rule, ORS 197.763(6)(c) & (e), with closing arguments limited to 5 minutes.

The Planning Commission has asked for a review of the alternative building plan submitted by the applicant and the Cannon Beach Building Official has deemed the new plans as 'attached' under Oregon's Residential Structural Code.

ADDITIONAL EXHIBITS, SUBMITTED MARCH 11-17, 2022

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.

"D" Exhibits – Application Materials

D-6 Dean Alterman letter, on behalf of the applicant, Paul Bouvet, dated and received March 17, 2022;

Exhibit D-6

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Cannon Beach Planning Commission
PO Box 368
Cannon Beach, OR 97110

March 17, 2022

By E-mail only (planning@ci.cannon-beach.or.us)

Re: Application of Paul Bouvet / appeal of Jeff and Jennifer Harrison
Property address: 534 N. Laurel Street
Our client: Paul Bouvet
Your file no. AA# 22-01
Our file no. 5363.001

Ladies and Gentlemen:

I'm submitting this letter as the final argument on behalf of our client Paul Bouvet in response to the appeal of his building permit submitted by Greg Hathaway on behalf of his clients Jeff and Jennifer Harrison.

As the record shows, Mr. Bouvet's house plan complies with the requirements of the plat and code in all respects. The staff report and testimony at the hearing identified only two questions about Mr. Bouvet's house: whether the code or plat prohibits Mr. Bouvet from installing a subsurface drywell in the open space easement area, and whether his garage is attached or detached. The appellants' post-hearing submission identified a third potential issue, which is whether, if Mr. Bouvet encloses the connection between the house and the garage, the additional enclosed area should be considered as part of the house (living space) or as part of the garage (not living space). All three issues have clear and simple answers.

1. The drywell is not an "exclusionary improvement."

I covered this issue in detail in my first post-hearing letter. I'll touch on it only lightly here.

The appellants argue that Mr. Bouvet will violate Condition 2 of the PUD approval if he manages stormwater with a drywell on the portion of his property that is covered by the private open space easement. Condition 2 of the PUD approval is in your record. It imposes no prohibitions on individual lot owners; rather, it merely requires the developer of the subdivision to record a shared access and maintenance agreement for the shared driveway. The developer recorded that agreement. Nothing in Condition 2 relates to the open space. Nothing in Condition 2 prohibits the individual lot owners from complying with Cannon Beach's policy on stormwater management by managing stormwater in on-site drywells.

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Commissioner Moritz identified the error in the appellants' argument at the February 24 hearing when she asked Mr. Harrison about the difference between "exclusionary" and "exclusive." The drywell may be for the *exclusive* use of Mr. Bouvet – that is, it may be managing stormwater only from his lot, Lot 4 – without being *exclusionary*, that is, without excluding the owners of the other three lots from the open space easement. If you nevertheless accept the appellants' invitation to find that the underground drywell is an "exclusionary improvement" then you must explain in your findings how the drywell would exclude the other lot owners from enjoying the open space.

2. If the garage is attached to the house, then whether it has a "second story" is irrelevant. The garage is in fact attached to the house; however, if you find that it needs additional attachment, then Mr. Bouvet will build one or two walls to further connect it to the house.

The relevant condition for the appellants' objection to the garage is Condition 16 of the PUD approval, which reads:

> 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.

The appellants suggest that Mr. Bouvet's proposed garage is not attached to the house. In their post-hearing submission they implied that the connection between the house and the garage is similar to the 660-foot long cable-stayed skybridge that connects the hospital at Oregon Health Sciences University to the Veterans Hospital. The appellants submitted an attractive picture of the skybridge but did not explain how a long skybridge that connects two buildings built at different times is analogous to a single structure to be built as a single project with a single roof by a single contractor.

The appellants also advanced a creative argument that because the 2021 Oregon Residential Specialty Code defines "Story" in a particular way, the city is compelled to count the dirt slope beneath Mr. Bouvet's garage as a "Story" even though it has no floor. The appellants confuse the building code with the specific land use regulations that apply to this property through the PUD approval from six years ago. The appellants' argument, though ingenious, could be relevant only **if** they were saying that Mr. Bouvet's garage would violate some provision of the state building code that restricts garages to one-story buildings.[1] When the city applies a

[1] No such provision exists. Section R202 of the Oregon Residential Specialty Code does define "Accessory Structure" to include certain structures that are not more than two stories in height.

provision of the state building code that uses a term that the state building code defines, it must use the state's definition of the term in the state building code.

A local jurisdiction may, however, impose stronger requirements than those of the state building code. In *State ex rel. Haley v. City of Troutdale*, 281 Or 203 (1978), the state building code contained a minimum standard for the thickness of siding if not placed over separate sheathing, i.e., a standard that allowed "single wall" construction. The City of Troutdale adopted a building code provision that required homebuilders to use "double wall" construction (separate sheathing under siding), something that the uniform state code did not require. The Oregon supreme court rejected the state's contention that Troutdale could not require builders to use double-wall construction: that is, Troutdale could impose building code requirements that were stricter than the state's requirements.

Mr. Bouvet's situation resembles that of the *Haley* case. His house and garage comply with the state building code. The city has imposed a land use requirement that does not conflict with the state building code, which is that if Mr. Bouvet's garage is detached from his house, the garage may not include "a second story." Because the city imposed this condition as a land use requirement, and not as a building code requirement, it is free to use its own reasonable definition of what it considers to be "a second story" for land use purposes. It is also free to interpret this condition in light of what the planning commission and city council were trying to accomplish in 2016 when the city imposed this condition of approval and chose to apply it to detached garages, but not to detached carports and parking platforms.

As I wrote you earlier, it's reasonable to infer that in 2016 the city wanted to avoid having detached garages contain accessory dwelling units above the garage – hence, no "second story." Mr. Bouvet's garage contains no second story. If you find that it is a detached garage, then you can readily find that it complies with the purpose, the intent, and the language of the city's condition of approval.

The garage shares a roof and common structural elements with the house. If you find that the house and garage are attached, then you do not need to decide whether the garage has a "second story." But if you find that the garage is detached, then Mr. Bouvet will attach it to the house with one or two walls. Your building official has determined that with the addition of those connecting walls, the garage will be attached to the house. If you agree with his professional opinion, then you do not need to decide whether the garage has a "second story"; you need merely to approve the alternate plan. Mr. Bouvet could also comply with the appellants' innovative interpretation by removing one or two of the walls from his garage, thus making it a carport to which the restriction against a "second story" would not apply.

3. Whether Mr. Bouvet attaches the garage to the house with one wall or two, the floor area will not be living space that counts against the 600-square-foot limit for his lot.

One planning commissioner asked if the area between the house and the garage would become living space if Mr. Bouvet were to enclose it with north and south walls. He proposed to enclose the area and add it to the garage only to satisfy the appellants' objection to the garage being in their view detached. The door between the house and the garage would remain in the same place; the enclosed area would be part of the garage and not part of the living area. It would not be additional living area.

If he were to add one wall instead of two – for example, if he added a wall under the common roof from the house to the garage – then the area would remain open. It would not be interior area and would not count as living area any more than a covered deck or patio would count as living area.

4. Conclusion

The developer complied with Condition 2 by signing and recording the Shared Access and Maintenance Agreement; the proposed drywell on Mr. Bouvet's lot does not violate that agreement because it is not exclusionary and does not interfere with the purpose of the SAMA. Furthermore, the SAMA is not even a criterion for this application.

Mr. Bouvet's garage is an attached garage. Whether the space below the garage floor is a "second story" simply because it is on a steep slope is irrelevant. However, if you find that it is not an attached garage, he will attach it to the house with one or two walls so that it will be an attached garage, making the "second story" question irrelevant, or he will remove one or two walls from the garage so that it will become a carport, also making the "second story" question irrelevant.

You should deny the appeal and uphold the city's administrative decision to issue the building permit. I have attached proposed findings for your consideration.

Very truly yours,

Dean N. Alterman

Dean N. Alterman

Copy: Mr. Paul Bouvet (e-mail only)
Gregory Hathaway, Esq. (e-mail only)

Attachment: Proposed findings

Proposed Findings
AA #22-01 – Paul Bouvet application

The Planning Commission finds that:

[Garage]

A. The connecting roof and structural members of the house and garage are sufficient to consider the garage as attached to the house, and the land use restriction against a "second story" does not apply to the garage because it is attached.

OR

A. With the addition of [one wall] [two walls] between the house and the garage, the garage will be sufficiently connected to the house to be considered as an attached garage, to which the restriction against a "second story" does not apply.

OR

A. The City imposed the restriction against a "second story" for detached garages in the Cannon Beach Preservation planned development not to restrict the height or bulk of detached garages but to prohibit detached garages from having potential living space above the garage. The City did not intend to encourage homeowners from having garages instead of carports or parking platforms. Regardless of whether the space below the garage floor would be considered a "story" under the building code, it is neither actual nor potential living space and is not a "second story" of the sort that the City intended to prohibit when it approved the planned development.

[Drywell]

B. The proposed underground drywell complies with the city policy that encourages property owners to manage stormwater onsite. It is not an "exclusionary improvement" and does not violate any condition of approval of the Cannon Beach Preservation planned development.