



Cannon Beach Planning Commission

Staff Report Addendum (Close of Business, March 10, 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 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

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 4-10, 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.

"A" Exhibits – Application Materials

A-11 Petitioner's Final Written Closing Argument and Proposed Findings, dated and received March 10, 2022;

**BEFORE THE PLANNING COMMISSION
OF
THE CITY OF CANNON BEACH, OREGON**

**In the Matter of the Appeal of the
Issuance of Building Permit No.
164-20-000055-DWL for Property
located at 534 N. Laurel Street
by Petitioners Jeff and Jennifer
Harrison.**

**Petitioners' Final Written Closing
Argument and Proposed Findings**

March 10, 2022

I. Introduction.

Petitioners previously submitted their Proposed Findings of Fact and Conclusions of Law on February 23, 2022, regarding their appeal of the above-entitled matter. Petitioners also submitted additional evidence on March 3, 2022, in accord with the Planning Commission's procedures. Dean Alterman, the attorney for Mr. Bouvet, submitted a letter on March 3, 2022, rebutting the issues identified in Petitioners' Notice of Appeal and the arguments presented by Petitioners at the Planning Commission's February 23, 2022 Appeal hearing.

Petitioners respectfully submit their Final Written Closing Argument and Proposed Findings for your consideration that address the issues and arguments contained in Mr. Alterman's letter dated March 3,

**PETITIONERS' FINAL WRITTEN CLOSING ARGUMENT AND
PROPOSED FINDINGS**

2022. As explained below, none of Mr. Alterman's arguments sufficiently rebut any of Petitioners' Appeal issues or arguments and should be rejected.

II. Final Written Closing Argument and Proposed Findings

Petitioners' Final Written Closing Argument and Proposed Findings can be adopted by the Planning Commission in granting the Harrison's Appeal.

FINDING NO. 1: The proposed detached garage is a two-story garage in violation of PUD Condition No. 16.

Response to Mr. Alterman:

The Proposed Detached Garage is a two-Story Garage based on the correct and applicable Building Code.

In his March 3, 2022 letter, Mr. Alterman asks, "What is a 'second story'?" As explained below, he then erroneously supports his argument using definitions from the 1988 Uniform Building Code. This argument, and his provided definition of a "story", fail because in 1973, with the passage of SB 73, Oregon adopted the first of its kind statewide building code model. This model included state preemption. Preemption is the use of state law to nullify a municipal ordinance or authority. If state law preempts local

action, the local action is invalid. To be clear, “ORS 455.040 State Building Code Preempts Local Ordinances and Rules”, states:

“The state building code shall be applicable and uniform throughout this state and in all municipalities, and no municipality shall enact or enforce any ordinance, rule or regulation relating to the same matters encompassed by the state building code, but which provides different requirements ...”

This preemption is particularly relevant here because the City and Mr. Alterman make arguments relating to the definition of a residential structure “story” that do not comport with the current governing building code adopted by the state of Oregon. The relevant code for this Appeal issue is the 2021 Oregon Residential Specialty Code. On April 1, 2021, the Oregon Building Codes Division adopted the 2021 Oregon Residential Specialty Code (ORSC). It is the governing code source for residential structures in the State of Oregon. The outdated definition of “story” provided to you by Mr. Alterman was sourced from the 1988 Uniform Building Code which simply does not apply.

Although Cannon Beach Municipal Code (“CBMC”) does not specifically reference the 2021 Oregon Residential Specialty Code, as Clatsop County does, it is, nonetheless, the code source in effect as per the preemption model adopted by SB 73 and enforced today by ORS 455.040.

Mr. Alterman states, *“Neither the city building code nor the state codes that the city has adopted by reference define ‘second story’ and they don’t define ‘first story’, either”*. This argument fails because the City does not get to make this choice. As explained, ORS 455.040 codifies our state’s preemptive Building Code model. The adopted Building Code at the state level prevails and in this matter that Code is the 2021 Oregon Residential Specialty Code.

The **2021 Oregon Residential Specialty Code** contains the following definitions that are relevant to this issue:

Story:

That portion of a building included between the upper surface of a floor and the upper surface of the floor next above... If the finished floor level directly above a usable or **unused underfloor space is more than 6 ft above grade, as defined herein, for more than 50 % of the total perimeter** or is more than 12 ft above grade, as defined

herein, at any point, such usable **or unusable underfloor space shall be considered a story.** (Emphasis added)

Story above grade plane.

A basement shall be considered a story above grade plane where the finished surface of the floor above the basement is:

- 1. More than 6 feet above grade plane; or**
- 2. More than 12 feet above the finished ground level at any point.** (Emphasis added).

Similarly, the following statement in the February 24, 2022 Staff Report, is as confusing as it is irrelevant: “the City's decision found that the garage did not contain a second story because all other livable space had been removed.” There is simply no component in any cited code whereby livability is considered when defining the term story or determining whether a specific area of a specific residential structure constitutes a story. As explained above, the only relevant element is the physical vertical measurement between unusable (in this case) underfloor area and the finished floor above.

The staff report also makes the following statements: “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).” As explained below, the use of this Code and the definition relied on my Staff for the term “Story” is not applicable.

As with Mr. Alterman’s outdated definition of “story”, the definition offered by Staff is also outdated and rendered moot by ORS 455.040 and OAR 918-480-0005, as explained above. The vertical measurements of the proposed garage, as displayed on the building plans, clearly qualify as a two-story structure as per the definition of “story” found in the 2021 Oregon Residential Specialty Code. No other definition preempts this definition.

Conclusion: Based on the foregoing and the applicable Code, (and review of Exhibits 1 and 2), the Planning Commission finds the proposed garage is a detached two-story garage in violation of PUD Condition No. 16 and is not allowed for the following reasons:

(1) The lower area of the proposed detached garage qualifies as a story and a story above grade plane;

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(2) The height between the average grade of the unused underfloor space below the finished surface of the floor of the parking area above measures over six feet for more than 50% of the total area;

(3) The finished floor of the parking area appears to measure more than 12 feet above the finished ground at the tallest point; and

(4) The vertical measurements of the proposed garage, as displayed on the building plans, clearly qualify as a two-story structure as per the definition of ‘story’ found in the 2021 Oregon Residential Specialty Code. No other definition preempts this definition.

The proposed Two-Story Garage is not Attached to the proposed House and is, therefore, Detached.

In his March 3, 2022 letter, Mr. Alterman asserts the garage is attached to the proposed house because it is attached by a deck and/or roof. Please see Petitioners’ Exhibit 8, which depicts the “Skybridge” at Oregon Health and Science University. This 660-foot skybridge connects the main OHSU Hospital building and the VA Medical Center. Petitioners contend there are two detached buildings in Exhibit 8 and that the Hospital is not

considered attached to the Medical Center. Here, the proposed two buildings (like the buildings in Exhibit 8) are two separate detached buildings: a house and a detached garage.¹

Moreover, in the February 24, 2022 Staff Report, Staff states: “The Building Official has traditionally regarded a building to be attached when the garage or accessory structure shares a load-bearing wall”. Extending the foundation to connect the two separate foundations of the two separate buildings does not create a common, load-bearing wall and does not transform the detached garage into an attached garage.

Additionally, the proposed alternate plan to construct an enclosed hallway between the two buildings constitutes additional habitable space and must count towards the 600 square foot cap for this lot. The dimensions are not shown in the elevations, presumably because plans do not yet exist. How much square footage does this habitable hallway add to the building plans and towards the 600 square foot cap for this lot? This is,

¹ As a side note, the elevations approved by the City depict different heights of the proposed garage doors. The Planning Commission should inquire which garage door height is the one proposed to be constructed. See, Building Plan Sheet A3.1 and Building Plan Sheet A1.1 and A2.2.

of course, immaterial if the Planning Commission finds the garage remains a detached, two-story building as shown and is not allowed as explained above.

The Planning Commission concludes that the City is required under its City Code to enforce any conditions of approval in issuing a Building/Development Permit (CBMC 17.92.010 C.1). The City's issuance of the Building Permit violated PUD Condition No. 16 because the proposed garage is two-stories and, therefore, was improperly issued by the City.²

FINDING NO. 2: The Building Permit violates the PUD's Shared Access and Maintenance Agreement ("SAMA") in Violation of PUD Condition #2.

Response to Mr. Alterman:

Mr. Alterman did not sufficiently address Petitioners' argument that the issued Building Permit violates the PUD's SAMA in violation of PUD Condition No. 2.

² In prior proceedings regarding the Harrisons' appeals, the City Attorney has recognized the authority of the Planning Commission to ensure that the issuance of a building permit/development permit conforms to any previously imposed conditions of approval as set forth in CBMC 17.92.010 C.1 such as the Nicholson PUD conditions of approval.

Therefore, Petitioners reassert their position and respectfully request the Planning Commission to adopt the following findings:

(1) PUD Condition No. 2 required the preparation and recordation of a SAMA;

(2) The City approved the “content” of the SAMA during its Stage 3 approval of the PUD application;

(3) The SAMA was then recorded with Clatsop County. As a result, the content of the SAMA is part of the PUD approval;

(4) The City adopted SAMA specifically limited allowed activity in the identified shared/common open spaces to, “removing non-native vegetation” and does not allow exclusionary improvements that would only serve the lot burdened with a shared/common open space;

(5) The submitted plans for Lot 4 include a proposed drywell system that would be installed in an area labelled “COMMON OPEN SAPCE EASEMENT” on the plat approved by the City and recorded with Clatsop County. Arguably, this drywell system does not qualify as an

activity of “removing non-native vegetation” and is clearly exclusionary because it serves only Lot 4 and no other PUD lot; and

(6) Under CBMC 17.92.010 C.1, the City was required to ensure that Condition No. 2 was not violated when it issued the Building Permit. The City has an obligation to ensure approval conditions it imposes are followed and cannot approve building permits that unambiguously violate language it specifically approved. The SAMA was a required condition imposed by the City Council and the issued Building Permit must conform to the provisions contained therein.

FINDING NO. 3: The Planning Commission finds that PUD Condition No. 17 regarding the Living Wall has not been satisfied, and, therefore, the City is not authorized to issue the Building Permit pursuant to CBMC 17.92.010 C.1.

Response to Mr. Alterman:

Mr. Alterman did not address Petitioners’ assertion that Condition No. 17 has not been satisfied, and, therefore, the City does not have the authority to issue the Building Permit pursuant to CBMC 17.92.010 C.1. Therefore, Petitioners reassert their position and respectfully request the Planning Commission to adopt the following findings:

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(1) The Planning Commission finds there is no evidence in this record that Condition No. 17 has been satisfied and that there is an executed contract with a landscape professional responsible for the installation and maintenance of plant material on the living wall with a timeline for the establishment of planting on the wall.

(2) There is evidence in the record that Mr. Harrison has raised this issue previously with the City and that the City has not provided any evidence that would demonstrate that Condition No. 17 has been satisfied. The only evidence regarding Condition No. 17 is an unsigned “estimate” from Vasquez Yard and Tree Work, Inc. that does not constitute substantial evidence demonstrating compliance with PUD Condition No. 17.

(3) The Planning Commission acknowledges that all approval conditions must be met prior to issuance of building permits pursuant to CBMC 17.92.010 C.1(1). The unsatisfied requirements of Condition No. 17 are particularly relevant to this permit application given the large majority of the “living wall” is installed on Lot 4.

(4) Therefore, the Planning Commission concludes that the Building Permit was unlawfully issued and cannot be issued until PUD Condition No. 17 is satisfied.

III. Conclusion.

Petitioners respectfully request the Planning Commission to accept Petitioners' Final Written Closing Argument and adopt the above Proposed Revised Findings and revoke the City's issuance of the Building Permit. Other than testimony from Mr. Alderman, all other testimony received by the City supports the Harrisons' Appeal.

DATED this 10th day of March 2022.

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