Cannon Beach Planning Commission

Staff Report Addendum (Close of Business, March 3, 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 3, 2022. The Planning Commission asked that submissions adhere to the Oregon 7-7-7 rule, with closing arguments limited to 5 minutes. You will find Exhibits A-4 to A-10 to be what appears a partial list from Mr. Harrison, with materials to follow in the coming packet. Please note that next week's submissions are limited - they can only be used to rebut or respond to other material that was submitted today.

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.

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-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);

"D" Exhibits – Public Comment

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;

A-4

AA# 22-01 Harrison Exhibits

(updated 3/3/2022)

1. Lot 4 Garage - East Elevation showing more than 50% of lower space above grade and over 6 ft in height.
2. Lot 4 Garage - North Elevation showing more than 50% of lower space above grade and over 6 ft in height.
3. Living Wall – Submitted unsigned estimate accepted instead of, “executed contract with landscape professional” with “timeline for the establishment of plantings on the wall”.
4. Harrison prepared statement – City Council 06/05/2018.
5. Harrison letter to Planning Commission re: “living wall”, 06/25/2020.
6. Shared Access and Maintenance Agreement – Open Space easement uses and allowed improvements.
7. Harrison prepared statement of 2/24/2022 .
8. Picture – OHSU Skybridge
9. Transcription – CC 3/1/2016 discussion of “living wall”.
10. Shared Access and Maintenance Agreement (SAMA).
11. Respondent Cannon Beach Answering Brief – *Najimi v. City of Cannon Beach*
12. LUBA Final Opinion and Order – *Najimi v. City of Cannon Beach 2020-118*

A-5

02/24/2020 – AA#22-01 Lot 4 Appeal – Harrison prepared statement

Good evening, Jeff Harrison, PO Box 742, Cannon Beach. Tonight I represent myself and my wife Jennifer Harrison.

We feel too much last-minute information has come in late from both sides on this, and no one has had a realistic chance to properly consider the arguments. That, and a conflict for our attorney convinced us to ask for a continuance in your now-typical 7-7-7 format.

That said, I do want to make a statement tonight. Please accept that these comments were written before I have had a chance to review much of the newly submitted material.

We are discouraged to find ourselves having to do another appeal of another flawed building permit on this never-ending PUDemic.

We have of course known since 2016 that houses will be built on the Nicholson PUD. But we thought the City would make the best of a bad situation going forward. We thought the City would at least follow our code and the uphold the approval conditions imposed. Instead, we see more disappointing approvals.

Before I get into the details, I want to make a couple of things clear. Frist, these appeals are not personal for us. We have never met Mr. Najimi so it would be hard to consider our appeals of his permits personal. Granted, it didn't help when he sent the police to our house.

We have owned our home since 2008 so we are still "newbies" in the neighborhood. To our knowledge, Mr. Bouvet has been our neighbor since we started coming in 2005. In 17 years, we have only met him once, so we certainly have no personal issues with him, either. One

time, a neighbor told us Mr. Bouvet was bothered by the light at our front door because it shined into his window on the rare occasions it was on. I cut a strip of aluminum foil and positioned it in the light fixture to block the light from shining into his window. I never heard if it helped, but we hoped it did.

We have no issues with him building a house. He owns a lot, he gets to build a house and we hope it works out well for him. It looks like a nice design with a lot of light. That said, we of course don't support any more plans that violate our zoning code or the approval conditions of this PUD.

Last month, we watched a prohibited detached 2-story garage come down but another prohibited detached 2-story garage was approved. In the same month. Why do these types of permits continue to be issued?

For this appeal, we have 3 issues.

1. The detached 2-story garage
    A. Approval condition #16 prohibits detached 2-story garages on this PUD. To us, the proposed garage is clearly a detached 2-story building and is not allowed. I didn't time how long it took to determine this structure was 2 stories but I'm sure it was under 30 minutes. Please see our exhibits 1 and 2. These are the East and North Elevations. The area shaded in green is 8'8" tall above grade plane and represents more than 50 % of the total lower area. The area in red appears to us to be over 12 ft in height.
    B. The 2021 Oregon Residential Specialty code and the 2018 International Building Code, which are both code in effect here, both confirm that this space meets the definition of "story" and "story above grade".

i. The height is over 6 ft for more than 50% of the total perimeter
ii. At one point the height appears to be more than 12 ft above finished ground level at the tallest point.

C. I didn't want to read the detail actual code definitions here because this is already tedious. They are, however, available for your review in the Findings of Fact submitted by Mr. Hathaway on our behalf. We believe the lower area inarguably qualifies as a story based on the definitions of both code sources.

D. The Staff Report is flawed in the explanation of how this structure was deemed one story:
   i. Staff cites our Gross Floor Area definition, which does not appear to be relevant.
   ii. Staff then says, "the City's decision found that the garage did not contain a second story because all other livable space had been removed".
      1. We would like to know to which code piece staff is referring. Neither the Oregon Residential Specialty Code nor the International Building code mention livable space or habitability when defining a building story or story above grade. The key factor is the physical dimension of vertical height. Not livability.

E. The staff report mentions an alternative plan, submitted on 2/4/2022, after our appeal was filed, whereby the proposed 2-story garage is attached to the house. This was referenced as Exhibit C-5 but when we reviewed where C-5 was supposed to be we saw a blank page. Today was our first

opportunity to see the proposed alternate plans and we will review them as soon as possible.

As approved, this is a 2-story detached garage and is not allowed.

We know there will be further discussion about what constitutes attached and detached.

2. The proposed drywell system.
    A. This permit includes a drywell system that would be a prohibited use in a "Common/shared outdoor living area" on Lot 4. As I believe you are all aware from previous proceedings re: this PUD, 30% of all the space on all of the lots must be considered shared by all PUD owners. These Common/Shared Outdoor living spaces are shown on the plat, approved by the city and recorded with Clatsop County.
    B. Use of these areas is tightly controlled by a "Shared Access and Maintenance Agreement", or SAMA. This agreement only allows PUD lot owners to weed in these areas, stated as, "removing non-native vegetation" and does not allow improvements that exclusively benefit one lot. Please see our Exhibit 6. We believe the proposed drywell system is an exclusionary benefit to Lot 4. No other lot derives benefit. In today's letter, Mr. Alterman suggests that the drywell system will help other PUD owners use this space. We are skeptical this is truly the case.
    C. Mr. Alterman also asserts that we may not attack the SAMA because we are not PUD lot owners and are not benefitted parties. He is correct we are not lot owners in the PUD, but

we disagree this is relevant. City Council approved the SAMA content as part of this PUD. The SAMA was passed out by Nicholson's attorney during the final approval hearing on 3/1/2016. It wasn't available to the public and at least one City Councilor said he had not seen it before it was handed to him during the hearing. But it was made part of the PUD approval and can be found in the LUBA record on page 73.

D. PUD Condition #2 ordered the preparation and recordation of the SAMA. For tonight's appeal, Staff's position is that when Nicholson's attorney did prepare and record the SAMA, Condition #2 was satisfied. Staff further holds that the SAMA is simply a real estate agreement, like CC&R's and that, "generally, the City does not review proposals for consistency with real estate agreements".
    i. The problem with this argument is that this particular agreement was made part of the PUD approval and the specific language was approved by City Council. The content of this agreement, it's provisions and limitations, is "baked in" to this PUD. We maintain the content of the SAMA is wholly part of Condition #2 and violation of the SAMA is a valid ground for denial of a Type 1 building permit.
    ii. Therefore, the SAMA can't be ignored as part of any building permit review and is like any other zoning code or any other approval condition.
        1. Last year, in his LUBA Respondent brief for *Najimi v. City of Cannon Beach*, Mr. Kabeiseman argued on behalf of the city that, "Under CBMC 92.010(C)(1), a Type 1 permit requires an

administrative review in which the City reviews the work proposed in an application to find if the work "conform[s] to the requirements of this [Title 17 – the City's land use regulations], and **any conditions imposed** by the reviewing authority". Any condition.

2. We agree with attorney Kabeiseiman; the Planning Commission does have the authority and obligation to review any building permit against any approval condition imposed by a reviewing authority, as is the case here with approval condition #2.
3. Two things in Staff's response on this make no sense to us:
    a. First, it makes no sense for staff to say the SAMA only had to be recorded...but the language adopted by Council could be ignored, or was someone else's problem.
    b. Second, it makes no sense for staff to advise the Planning Commission to approve something they believe violates an approval condition.

If you believe the drywell system is exclusionary to Lot 4, and does not benefit the other PUD owners, as we do, then it is not allowed in one of the common/shared outdoor living areas on this PUD based on the agreement language approved by City Council as part of this PUD.

3. The living wall
    A. This is certainly not a new topic to this Commission. Condition #17 of the PUD required an executed contract with a professional landscaper and a timeline to establish plantings. These requirements remain unsatisfied. An unsigned estimate is not an executed contract and was not with a landscape professional. There is no timeline for plantings to establish. Please see our Exhibit 3.
    B. We have brought up this blight on our neighborhood numerous times, as you well know. Please see our Exhibits 4 and 5. The wall was one of our appeal items for the 2nd appeal of the now-approved 3,745 sq ft Najimi cottage. During your deliberations, you seemed to feel you did not have the authority to deny a building permit for a house based on this approval condition.
        i. We brought the issue back to you for this appeal because our attorney and your attorney actually agree on this: you not only have the authority, you have the obligation to review this Type 1 permit against **ANY** condition imposed on the PUD.
        ii. As we discussed with the drywell issue, Mr. Kabeiseman argued to LUBA that under CBMC 92.010.(C)(1), you are required to ensure the work confirms to any condition imposed by the reviewing authority.
        iii. It also seemed appropriate to bring the wall issue forward for this appeal because the large majority of this ugly, industrial-looking concrete eyesore is installed on Lot 4.

iv. A year or two ago, the Planning Commission DID discuss the non-living wall and recommended to Council that the wall get fixed. Council decided to wait to work with the HOA. There is still no HOA, despite state law requiring one. The wall is still not fixed and Condition 17 remains unsatisfied. So do the neighbors.

C. It's time to fix this wall. To us, it seems the right thing to do is for the City to fix it, as was promised by Mr. Kabeiseman and as afforded in the language of Condition 17, and send developer Nicholson the bill. Then begin to issue building permits once approval Condition #17 is finally satisfied. This ugly wall does not fit the character of our rustic neighborhood, or any neighborhood in Cannon Beach. It cannot continue to be nobody's responsibility.

In general, what we are frequently seeing from our hired officials these days is "approval by omission": That is, the mindset that "if our code doesn't specifically say you can't do it, then it will be allowed". Blaming the code for overly-permissive development has become tiresome. You can't expect our code, or any code, to predict and have built-in guard-rails for every specific situation. There is always going to be a crafty lawyer or savvy architect trying to get around the rules with slick arguments as to why the rules don't apply to their project. When discretionary decisions must be made, we believe they should favor the Comprehensive Plan, the Vision statement, and the desire of the citizenry instead of the developer.

Re: the Comp Plan, we are only talking about the garage here. We don't think it is appropriate for it's setting. Not all lots have garages, ours included. We know the the Comp Plan is not an approval standard for a building permit. Buit we see the Comp Plan being paid lip-service too often.

Lastly, we wanted to respond to something said earlier tonight. Mr. Adams said that is something should have been done but wasn't, he feels it is, "too late, too bad, tough luck". That bothers us.

As always, we appreciate your time and thank you for your service to Cannon Beach.

A-6

EXHIBIT 15

3/1/2016 – City Council discussion of "Living Wall", Final Approval Hearing, Nicholson PUD

3:02:00 mark

COUNCILOR VETTER: I have a concern uh my main concern is I hear about the common area, the wall, uh and the fact that this is such a sensitive piece of property and if the landscaping is not maintained properly then we could have problems, it could be a problem not only for that property but for the neighbors. Uh, the worst way to get something done is to assign a lot of people to it because nobody is in charge, so I am concerned about if no one is properly in charge who will take the step to say it's you, you need to do some work on the landscaping and you know some other aspect …restriction. So, who's gonna do that?

COUNCIOR BENEFIELD: Their lawyer should address that.

WILL RASMUSSEN: will Rasmussen, thank you for the question. That question can be addressed any number of ways among the four owners. Uh, like the deed restriction that is in the record, there is also a deed common space easement that's currently structured so that those open common spaces are essentially outdoor vegetation common area that allows any of the owners to go in and remove non-native vegetation but ultimately give the owner of the underlying lot the responsibility to maintain it. If it's important to the council that the plantings that are done as part of the landscape plan be maintained uh we would accept just about any sort of allocation of responsibility the city decision could be come up with how that could be done, I frankly included you know some ..city to poke the homeowner to fix the planting if they're not, uh, we're entirely open to address that issue any way the city feels is appropriate.

COUNCILOR VETTER: Could the homeowners be required to ….

WILL RASMUSSEN: We could basically make the homeowners jointly responsible for maintaining those areas under the common space easement that is currently in the record and in that give the city authority to required fixing plantings or whatever when it is not um if the city feels the plantings are not being maintained as per the landscaping plan, make all 4 homeowners jointly responsible …for that…and fixed.

MARK BARNES: While they are talking about it we as staff actually have some enforcement authority there anyway…

COUNCILOR VETTER: Yeah, we do that with businesses…

MARK BARNES: Yeah, if their landscape plans is failing for instance, we have the ability to enforce that anyway and the 4 owners, send the 4 owners a letter saying you need to meet these requirements, that means fixing the landscaping for instance.

COUNCILOR CADWALLADER: I too am hearing concerns about the wall are we including the plantings on the wall when we talk about landscape?

MARK BARNES: that seems to be the one people are most concerned about...

COUNCILOR CADWALLADER: ...is the wall.

MARK BARNES: Any landscape failure there that is part of this approval would be subject to enforcement from our end.

WILL RASMUSSEN: Jeff Nicholson's point is the landscaping plan is to largely reflect the plantings that are already there and to supplement with native plantings. Keep the native trees, keep the native brush, and add that additional stuff. Um, to the degree the city thinks that is not happening I would agree with what planner Barnes is saying that if we are not complying with the plan, the city says you are not complying with the plan, the city has enforcement authority just like on any other property that's not complying with an approved land use decision, uh, so that's one enforcement mechanism. If you want something baked in as a joint common space easement put it into a condition of approval we can do that we can even bring that language back to you next week if you want to see how that works.

COUNCILOR VETTER: Mark, how do you see that working, if you or your staff see that not working then stuff needs attention, who would you go to?

MARK BARNES: There's 4 owners there, whatever this is going to be called send a letter to all 4 owners, it's going to have a name...

WILL RASMUSSEN: It would be a notice of violation to all 4 owners even if the violation is just on one property.

MARK BARNES: Yeah.

MAYOR STEIDEL: It is a landscaping plan basically maintaining what's there. But the wall is something new. It's something new so the maintenance of that also.

WILL RASMUSSEN: Yes.

MAYOR STEIDEL: Ok. So that would also include the damaged areas, what has happened around the buildings that needs fill, ...need plants.

COUNCILOR CADWALLADER: but the wall, again, I heard a lot of testimony about the wall, and the wall it seems to talk about and make applicant...the wall's coming quite quickly on the driveway that's going to lead down to get to the first site, correct?

WILL RASMUSSEN: Yeah, the driveway sits on top of the wall, that's correct.

COUNCILOR CADWALLADER: So essentially the wall will initially only be the responsibility of the applicant because he will be the only owner at this point...

WILL RASMUSSEN: That's correct.

COUNCILOR CADWALLADER: So it will be solely on the applicant to do the initial plantings, maintenance, whatever, whatever, whatever, until they are other owners, am I seeing this correctly?

WILL RASMUSSEN: Yes.

BILL KABEISEMAN: And, so, certainly at the time of development the owners response will....getting it going. When they get sold off, assuming there are 4 future owners, each of them would have some level

of responsibility for doing it and again this is something where we want to make the city a benefitted party that they could actually force the issue.

COUNCILOR CADWALLADER: Correct. So initially there will be one owner and then if the other lots get sold off there will be more parties responsible for the maintenance of the wall and the plantings.

BILL KABEISEMAN: Yeah, and you know, Councilor Vetter does bring up a good point, the more people involved the more diffuse the responsibility the easier it is for somebody to say no we need to make it clear they are all responsible.

COUNCILOR CADWALLADER: Do we need to include the wall in landscaping as a condition, that could be its own condition?

BILL KABEISEMAN: We could call it out in a separate condition.

COUNCILOR CADWALLADER: I'd like...

MAYOR STEIDEL: I was ...what businesses often do is hire a contractor to maintain things, the 4 owners could ...way of

WILL RASMUSSEN: And, uh, the property owner wanted also to make clear that maintenance of that access drive is the joint responsibility of all 4 of those people because that NE lot is where the majority of the maintenance is going to happen and the benefitted lots are really the ones on the west side of the property so we feel like they should be responsible for maintaining that also.

COUNCILOR CADWALLADER: The NE lot? Number 4?

WILL RASMUSSEN: Number 4, yeah.

COUNCILOR CADWALLADER: Direction sometimes get screwed up...

WILL RASMUSSEN: I'm special, a lot of people aren't.

After recording return to:

William L. Rasmussen
Miller Nash Graham & Dunn LLP
111 S.W. Fifth Avenue, Suite 3400
Portland, Oregon 97204

Recording Instrument #: 201609087
Recorded By: Clatsop County Clerk
# of Pages: 5 Fee: 67.00
Transaction date: 11/21/2016 09:39:40
Deputy: drush

(COMMON OPEN SPACE AND COMMON ACCESS EASEMENT)

SHARED ACCESS AND MAINTENANCE EASEMENT

THIS SHARED ACCESS AND MAINTENANCE EASEMENT (this "Easement") is declared on October 31, 2016, by Lucie's Cottages LLC ("Declarant").

RECITALS

A. Declarant is the owner of four lots that were reconfigured by the CANNON BEACH PRESERVATION plat (the "Plat"). Those lots are now known as Lots 1, 2, 3 and 4 of CANNON BEACH PRESERVATION in the City of Cannon Beach (the "City") and were previously known as Lots 8, 9, 16, and 17, and the south 25 feet of Lots 7 and 18, Block 29, SEAL ROCK BEACH, in the City.

Said real property is described in this Easement as the "Grantor Property" or the "Four Lots."

B. Easement rights declared herein are for the benefit of any future owner of one or more of the Four Lots and its officers, directors, beneficiaries, members, partners, managers, employees, agents, contractors, tenants, licensees, and invitees (the "Benefited Parties"), unless otherwise specified.

C. Declarant desires to declare and establish an easement by this Easement that will benefit and burden the Grantor Property in the event there is more than one owner of the Four Lots in the future, on the terms set forth herein.

Declarant hereby declares as follows:

1. **Grant of Common Access Easement.** Declarant hereby declares a nonexclusive and perpetual Common Access Easement on, over, under, and across the portion of the Grantor Property labelled "COMMON ACCESS EASEMENT" on the Plat only for purposes of utilities and ingress and egress to and from one of the Four Lots by an owner of

one of the Four Lots or that owner's Benefitted Parties. Benefitted Parties are not authorized by this Easement to park in the Common Access Easement area except on property they own in fee and to the degree that such parking does not interfere with Easement rights of other Benefitted Parties.

2. **Grant of Common Open Space Easement.** Declarant hereby declares a nonexclusive and perpetual Common Open Space Easement on, over, under, and across the portion of the Grantor Property labelled "Common Open Space Easement" on the Plat for the benefit of the Benefitted Parties. Benefitted Parties may use the Common Open Space Easement areas only for purposes of removing non-native vegetation. If agreed upon by all owners of the Four Lots, the Common Open Space Easement areas may also be used by Benefitted Parties for purposes of planting with additional native vegetation, improving with an access trail or other shared facilities, or using in conjunction with outdoor events. The owner of a lot burdened with a Common Open Space Easement area may not construct a building over the Common Open Space Easement area, or fence it, but may generally plant that area or improve it with a trail, patio, deck, or similar non-exclusionary improvement consistent with the terms of this Easement.

3. **Stairway Easement.** Declarant hereby declares a nonexclusive and perpetual access easement on, over, under, and across the portion of the Grantor Property labelled Future 5.00' Wide Stairway Easement only for purposes of pedestrian ingress and egress for Benefitted Parties.

4. **Restrictions and Obligations.**

4.1 The Benefited Parties shall:

4.1.1 Use the easements granted by this Easement in accordance with all applicable laws, ordinances, rules, regulations, and standards of all governmental agencies or entities;

4.1.2 Use the easements granted by this Easement at such time and in such a manner so as not to unreasonably interfere with other Benefitted Parties including the individual owners of the Four Lots; and

4.2 Each owner of one or more of the Four Lots shall:

4.2.1 Not construct any building or other improvement, store any property, or take any other action that blocks, obstructs, or interferes with flow or passage of vehicular or pedestrian traffic throughout the Common Access Easement area, except as is reasonably required for limited periods of time for repair, restoration, or reconstruction of the Common Access Easement area or improvements thereto; and

4.2.2 Promptly repair, at such owner's sole cost and expense, any damage (excluding normal wear and tear), including damage to landscaping, paving, or other improvements, caused by such party or its officers, directors, beneficiaries, members, partners,

managers, employees, agents, contractors, tenants, licensees, or invitees, to the Common Access Easement areas, the Common Open Space Easement areas or the property adjacent to the easement area.

5. Maintenance Responsibility.

5.1 Ordinary Maintenance.

The owners of each of the Four Lots shall be jointly responsible for the ordinary maintenance of the Common Access Easement area (including but not limited to the access drive and living retaining wall in the Common Access Easement) and Stairway Easement area and shall confer from time-to-time regarding performance of required maintenance under this Agreement. Ordinary maintenance expense shall be divided equally such that the owner of each of the Four Lots will pay one quarter of the cost of maintenance, except that ratio shall be proportionally reduced if additional parties use the Common Access Easement area and agree to share maintenance cost. Ordinary maintenance is maintenance not covered by Section 4.2.2 above.

5.2 Standard of Ordinary Maintenance.

Maintenance of the Common Access Easement area and Stairway Easement area includes normal maintenance work to adequately permit all weather access. Resurfacing or replacing of pavement in the easement area shall be done with the same type of material originally installed or with a substitute material of equal or better quality, use, or durability to the original surfacing material.

5.3 Improvements.

An owner of one of the Four Lots may improve or replace the improvements in the Common Access Easement area or Stairway Easement area or construct new improvements in these two areas on the terms set forth in this Section. Any such improvements or replacements must be done in a good and workmanlike manner and in compliance with all applicable laws. Any owner who attempts to improve or replace the improvements in these two areas must leave them in at least as good of a condition that existed prior to such owner commencing such improvements or replacements. An owner who does not agree to such improvements or replacements will not be responsible for any portion of the cost of such improvements or replacements, but may use such improvements.

5.4 Maintenance of Vegetation on Living Wall.

The plantable living wall portion of the retaining wall shall be maintained with living plants.

5.5 City Compliance.

The City of Cannon Beach may enforce the maintenance called for in Section 5 of

this Easement, including requiring that living plants be maintained in the living wall. The City is a benefitted party of this easement only for purposes of Section 5 of this Easement.

6. **Taxes.** The owner of each of the Four Lots shall pay when due all real property taxes, assessments, and other charges with respect to their fee owned property, respectively, without right of contribution.

7. **Utilities.** The Benefitted Parties' right to use the Common Access Easement area for utilities under Section 1 of this Easement includes the right to repair, maintain and install existing and new utilities in the area at that party's expense. If that party's use of the Common Access Easement area for utilities damages any other improvements in the Common Access Easement area, including but not limited to a paved driveway in the area, that party shall repair those improvements to at least as good of a condition that existed prior to such damage.

8. **Modification and Amendment.** No amendment, modification, or termination of this Easement shall be effective until the written instrument setting forth its terms has been executed and acknowledged by each owner of the Four Lots.

9. **Cross Indemnity.** Each owner of one of the Four Lots agrees to indemnify, defend and hold harmless all other owners of the Four Lots from and against all liabilities, damages, claims, costs, losses, obligations, actions, suits, judgments, demands, fines, and expenses whatsoever, including reasonable attorney's fees and court costs, arising out of or in any way related to (a) use of the Easement Area by that owner or its Benefited Parties, (b) entry by that owner or its Benefited Parties onto another owner of the Four Lots property, or (c) the acts or omissions of that owner or its Benefited Parties.

10. **Effect of Easement.** The easements, benefits, burdens, obligations, and restrictions created in this Easement shall create covenants, benefits, and servitudes upon the Grantor Property as set forth herein, and they shall run with the land and bind and inure to the benefit of Declarant as well as each of its successors and assigns. This Easement only benefits the Benefitted Parties and creates no public dedication or rights or claims for third parties. Declarant reserves all rights of ownership and use of the Grantor Property to the extent such use does not unreasonably interfere with the rights granted to Benefitted Parties herein.

11. **Governing Law.** This Easement shall be governed by and construed in accordance with the laws of the state of Oregon.

12. **Attorney's Fees.** In the event that any party brings an action to enforce its rights hereunder, including, but not limited to, at trial, on any appeal, or while enforcing its rights in any bankruptcy proceeding, the prevailing party in such action shall be entitled to receive all costs and reasonable attorney's fees in addition to any damages to which it is due by reason of such action.

WHEREFORE, Declarant has executed this SHARED ACCESS AND MAINTENANCE EASEMENT on the date set forth above.

DECLARANT:

Lucie's Cottages, LLC

By: _____ member
Name: Jeff Nicholson
Its: Member

State of OREGON

County of Multnomah

OFFICIAL STAMP
PAMELA MICHELLE KETEL
NOTARY PUBLIC-OREGON
COMMISSION NO. 951040
MY COMMISSION EXPIRES JUNE 07, 2020

This SHARED ACCESS AND MAINTENANCE EASEMENT was acknowledged before me on October 31, 2016 by Jeff Nicholson as Member of Lucie's Cottages LLC.

_____
Notary Public for the State of Oregon

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MJ NAJIMI, *Petitioner,* *v.* CITY OF CANNON BEACH, *Respondent*	LUBA No. 2020-118

RESPONDENT CITY OF CANNON BEACH'S ANSWERING BRIEF

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EXCERPT OF RECORD:

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Other Authorities

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I. STANDING

The City of Cannon Beach (the "City" or "Cannon Beach") accepts that Petitioner MJ Najimi ("Applicant" or "Petitioner") has standing to bring this appeal.

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision and Relief Sought.

The City's decision denied Petitioner's requested development permit to construct a single-family residence within the Cannon Beach Preservation Planned Development (the "PUD"). The City denies that it declared a moratorium subject to ORS 197.540, or that Petitioner is entitled to any of the relief he requests

B. Summary of Arguments.

The City properly denied Petitioner's proposed development permit because the proposal was not consistent with the common living area provisions of the planned development chapter of the Cannon Beach Municipal Code ("CBMC") and because the proposal exceeded the City's height limitations.

The common living are provisions are directly applicable to this development under CBMC 17.92.010(C)(1) and the City appropriately found that Petitioner had not demonstrated compliance with this provision. In applying the common living area provision, the City did not declare a "moratorium," but provided a method for the applicant, as well as any other owner in the planned development to obtain approval for future development.

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In addition, the proposed home contains a "turret" that exceeds the acknowledged height limit. Petitioner relies on an exception for projections such as chimneys, spires, aerials, flagpoles and other similar objects "not used for human occupancy" to avoid the otherwise appliable height limit. The City Council plausibly concluded that the turret was not similar to the listed items and that the turret exceeded the height limit.

C. Summary of Material Facts.

Petitioner provides an extensive Summary of Material Facts that, although generally accurate, includes many facts that are not material to the decision before the City or before LUBA. Below are the facts that are material to the resolution of this matter.

Prior History of the Planned Development.

As noted in Petitioner's Summary of Material Facts, this application did not occur on a clean slate; it is only the latest chapter in the fraught saga of a planned development in the northern portion of Cannon Beach. The development has been the source of significant land use disputes, including two trips to LUBA. The first LUBA appeal challenged the City's "Stage Two" approval (equivalent to a "tentative plan approval" in the classic subdivision taxonomy). LUBA affirmed the City's decision in *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015) ("*Harrison I*"). The second LUBA appeal challenged the City's "Stage Three" approval (equivalent to "final approval" in the classic subdivision taxonomy). That appeal was also resolved in favor of

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the City in *Harrison v. City of Cannon Beach*, 74 Or LUBA 202 (2016) ("*Harrison II*").

As described in the City's code, planned developments are intended to allow for flexibility in the application of regulations and encourage "flexibility of design in the placement and uses of buildings and open space":

> "**17.40.100 Purpose.**
>
> "B. Specifically, **it is the purpose of this chapter to promote and encourage the flexibility of design in the placement and uses of buildings and open space**, streets and off-street parking areas, and to more efficiently utilize the potential of sites characterized by special features of geography, topography, size or shape." (Emphasis added.)

In the 2015 Stage 2 decision, the City found that a planned development was appropriate for this property "because the site's 'unique * * * topography' qualified it for the 'degree of flexibility' that is provided by the planned development chapter." *Harrison I* (slip op at 16, quoting City's Stage 2 approval).

The application for the original planned development in 2015 recognized the unique topography on the site and as a result, sought approval for "a few cottages" that fit into the neighborhood. Rec pp 330, 102. As a result, one of the conditions of approval in that decision limited the "habitable space" in the entire planned development to less than 9,000 square feet:

> "4. The total square footage of habitable space on the site shall not exceed 9,000 square feet. . . . The habitable spaces shall be

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> distributed initially to allow 2,000 square feet to Lot 1, 3,300 square feet to Lot 2, 2,700 square feet to Lot 3, and 1,000 square feet to Lot 4. Those allocations may be amended by future owners of the lots, but in no case may any amendment allow the total square footage of habitable space on the site to exceed 9,000 square feet." Rec p 275.[1]

The earlier stage decisions understood that the cottages on any lot may be significantly over, or under, the initial allocation of square footage and, rather than set definitive locations for all buildings, the decisions identified building envelopes that would accommodate well over 9,000 square feet of development, and allowed the future buildings to fit somewhere within those envelopes. Rec p 255.

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[1] At one point in his Summary of Material Facts, Petitioner asserts that this condition of approval is "non-code" related. Pet for Rev p 8, lns 19-20. Although not directly relevant to this appeal as the condition is from a different, earlier decision, Petitioner is incorrect. CBMC 17.40.030(F) provides that some of the City's typical dimensional requirements are waived, but require the developer to design "a project that will be in harmony with the character of the surrounding neighborhood":

> "Except as otherwise provided, the minimum lot area, width and frontage, height and yard requirements otherwise applying in the zone shall not dictate the strict guidelines for development of the planned development, but shall serve to inform the designers of the importance of developing a project that will be in harmony with the character of the surrounding neighborhood."

That code provision, requiring a planned development to be in harmony with the character of the surrounding neighborhood, is the code basis for the condition of approval.

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In addition to the standard requiring the development to "be in harmony with the character of the surrounding neighborhood," CBMC 17.40.030(A) requires a planned development to devote "a minimum of forty percent of the total area" to outdoor living area, of which 25% may be used privately:

> "A. Outdoor Living Area Requirements. **In all residential developments, a minimum of forty percent of the total area shall be devoted to outdoor living area.** Of this area, twenty-five percent of the outdoor living area may be utilized privately by individual owners or users of the planned development; **a minimum of seventy-five percent of this area shall be common or shared outdoor living area.**" (Emphasis added.)

The location of the "common living area" (the 75% of the 40%) is not identified on the plat.

As Petitioner notes in the Petition for Review, the plat recorded for the PUD (the "2015 Plat") subjects a portion of the property to a "common open space easement" (the "Open Space Easement"), found in the Record at pp 256 – 60.[2] However the area subject to the Open Space Easement is less than that required for the common living area required CBMC 17.40.030(A).

The 2015 Plat also includes an area subject to a "shared access and maintenance easement" (the "Access Easement"). The Access Easement appears to have been adopted to comply with the PUD Condition of Approval 3, which requires the following:

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[2] The document at record pp 256 – 60 contains both the Open Space Easement and the Access Easement, which is discussed further below.

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> "3. 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 Access Easement states that the use of the Access Easement may be used "only for purposes of utilities and ingress and egress to and from one of the Four Lots by an owner of one of the Four Lots." Rec pp 256 – 57.

The Application at Issue.

In 2020, Applicant submitted an application to build a 3,745 square foot home on Lot 1 of the PUD. Rec p 168.[3] The application included a building plan set, beginning at Rec p 173, and a map and calculations showing the "outdoor living area," as calculated by the Applicant's representatives. Rec pp 170 – 71. Those calculations appear to rely on both the Open Space Easement as well as the Access Easement to meet the outdoor living area provisions of CBMC 17.40.030(A).

In addition, the plan set included elevations that identify the height of the proposed structure:

[3] Based on the initial allocation on condition of approval 4, discussed above, some other lot provided an additional 1,000 square feet of habitable space. That agreement is not in the Record.

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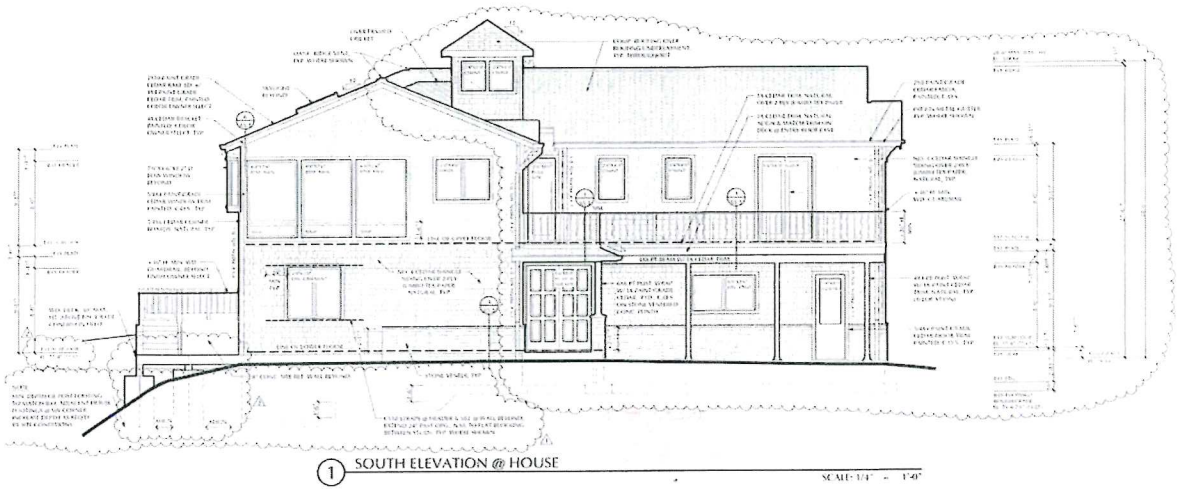

Rec p 183.

As shown in the measurements on the right side of that elevation, the ridge line of the home is 28 feet in height. The plan does not identify the ultimate height of the turret, but it is significantly higher than the 28 foot high ridge line.

On August 5, 2020, after a staff administrative review, the City approved the application and issued both a development permit and a building permit for the project. Shortly thereafter, a neighbor, Jeff Harrison, filed an appeal of that development permit. As required by the code, the Planning Commission heard the appeal and overturned the issuance of the development permit. The Applicant appealed that decision to the City Council, which affirmed the Planning Commission.

III. JURISDICTION

ORS 197.825(1) grants LUBA "exclusive jurisdiction to review any land use decision or limited land use decision of a local government." In this case, the City is a local government and its decision denying the Applicant's

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proposed development was a limited land use decision as that term is defined at ORS 197.015(12). Accordingly, LUBA has jurisdiction over this appeal.

IV. RESPONSES TO ASSIGNMENTS OF ERROR

A. RESPONSE TO FIRST ASSIGNMENT OF ERROR – THE CITY PROPERLY CONSTRUED ITS OWN LAND USE REGULATIONS IN REQUIRING THE PROVISION OF SUFFICIENT COMMON LIVING AREA AND DID NOT IMPOSE A MORATORIUM AS THAT TERM IS USED IN OREGON LAND USE LAW.

1. Preservation of Error.

The City does not dispute Petitioner's statement regarding preservation of error.

2. Standard of Review.

An applicant bears the burden of proof to demonstrate that an application complies with each of the applicable approval standards. *Wilson v. Washington County*, 63 Or LUBA 314 (2011). In addition, LUBA will affirm a decision denying an application as long as there is one valid basis for denial, notwithstanding that the local government may have committed error with respect to other, alternative or independent bases for denial. *Wilson v. Washington County*, 63 Or LUBA 314 (2011); *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

To the extent Petitioner challenges the interpretation of the City's own code, LUBA is required under ORS 197.829(1) to affirm the City's

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interpretation of its land use regulations, unless LUBA determines that the local government's interpretation:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

In the context of a review of a governing body's own interpretation of its own land use regulations LUBA applies the highly deferential standard of review described in *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (governing body's interpretation must be upheld if it is "plausible"). LUBA is not allowed to overturn the City's interpretation of its own code, even if another interpretation might be more persuasive. *Id.* Thus, the question is not whether the City's interpretation is "correct" in some absolute sense of the term, but whether the City's interpretation is plausible under the "highly deferential" standard imposed by ORS 197.829(1) and *Siporen*. *Tonquin Holdings v. Clackamas County*, 247 Or App 719, 722, 270 P3d 397 (2012).

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3. Argument.

a) Response to First Subassignment of Error: The City Properly Found that Petitioner Had Not Demonstrated that there was Sufficient Common Living Area as Required by CBMC 17.40.030(A).

The City code provides that all structures that require a building permit must also obtain a Type 1 development permit:

> "1. A development permit is required for:
>
> a. The construction, enlargement, alteration, repair, moving, improvement, removal, conversion or demolition of any structure or building which requires a building permit pursuant to either the State of Oregon, One and Two Family Dwelling Code, or the State of Oregon, Structural Specialty Code. (For the purpose of this section, these are referred to as Type 1 development permits.)" CBMC 17.92.010(A)(1)

Under CBMC 17.92.010(C)(1), a Type 1 permit requires an administrative review in which the City reviews the work proposed in an application to find if the work "conform[s] to the requirements of this title [Title 17 – the City's land use regulations], and any conditions imposed by a reviewing authority." CBMC 17.92.010(C)(1) goes on to provide that a decision on the development permit "may be appealed to the planning commission in accordance with Section 17.88.140."

Section 17.88.140(A) provides for such appeals as follows:

> "A. A decision on the issuance of a . . . development permit may be appealed to the planning commission by an affected party by filing an appeal with the city manager within fourteen

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> consecutive calendar days of the date that written notice of the decision was mailed. . . . The matter at issue will be a determination of the appropriateness of the interpretation of the requirements of this chapter."

In accordance with that provision, Mr. Harrison appealed the development permit and the Planning Commission held a hearing on September 24, 2020, and left the record open pursuant to ORS 197.763. During the course of that proceeding, Mr. Harrison, and other participants, raised issues with the proposal's compliance with several provisions of Title 17, including whether the proposed development of a 3,745 square foot home complied with the outdoor living area requirement of CBMC 17.40.030(A) (Rec p 330). The Planning Commission agreed with the appeal, overturning the staff decision. Petitioner then appealed the Planning Commission's decision to the City Council.

In making its final decision, the one at issue in this appeal, the City Council interpreted the requirement for "outdoor living area" to not include a shared driveway that provided access to several houses within the planned development, especially when the easement providing the shared access limits its use solely to ingress and egress:

> "Turning to the Common Outdoor Living Area, the City Council finds that, although the Planned Development Chapter 17.40 does not define Common Outdoor Living Area, the intent is not to have driveways as part of the Common Outdoor Living Area. The Council finds that at least 7,500 square-feet of the 25,000 SF Planned Development area must be provided as common shared

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> open space. If the driveway easements are removed from the calculations provided in Exhibits C-6-8, the Planned Development has provided only 5,138 SF of common shared open space." Rec p 45.

Petitioner's argument does not initially attack the Council's interpretation that the Access Easement is not part of the common living area.[4] Instead, Petitioner begins his argument by noting that the code "differentiates between 'yards, parking areas, pathways, and driveways,'" but notes an "overarching purpose" of open space to be for "light and air," and not recreational purposes. Pet for Rev, p 16. However, under CBMC 17.40.030, yards and other required parts of the development are treated differently than the outdoor living area – compare CBMC 17.40.030(F), allowing waiver of yard and other dimensional requirement, with CBMC 17.40.030(A), regarding outdoor living area.

Petitioner is correct that the CBMC does not define "outdoor living area," but rather than explain why the City's interpretation is "implausible," Petitioner turns to the dictionary definitions and states that "driveways are a critical aspect of constructing homes and lots that are suitable for living purposes." Pet for Rev, p 17. While driveways may be part of the development of a home, that does not mean that the driveway is part of a common living area, especially when the only allowed "living" activities are driving in and out of your

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[4] Petitioner likely does not directly attack the plausibility of that interpretation because it is entirely plausible to conclude that the Access Easement, which limits the other owners to only ingress and egress, is incompatible with the idea of the area being "common living area."

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property. The City Council implicitly interpreted the term "common living area" as a place people could be without concern of being in the way of motor vehicles. It may be that a plausible interpretation of "common living area" could include a driveway, but that is not the question – the question is whether the City Council plausibly interpreted "common living area" to not include the area subject to the Access Easement. Because the Access Easement allows only ingress and egress, which hardly covers most "living" activities, it is entirely plausible for the City Council to interpret the provision as it as it did.

Petitioner next argues that the record contains "substantial evidence" that the plat complied with CBMC 17.40; however, Petitioner provides no evidence that actually evaluates CBMC 17.40.030(A) as part of the plat review and acceptance. Petitioner cites to Record pages 267 – 78 as showing compliance with the common living area requirement. However, those pages, which are part of the City's 2016 approval of the Stage 3 (final plat) approval of the planned development, deal with nothing more than the submittal requirements for the final stage. The cited pages include no reference to CBMC 17.40.030, much less the specific "common living area" provisions of CBMC 17.40.030(A).

Petitioner also cites to statements from the City's Community Development Director, as well as the original appellant of the staff decision, to support his position that the 2015 Plat complied with the requirements for common living area. However, Petitioner does not acknowledge that the

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interpretation that matters for purposes of LUBA review is that of the City Council. The Council disagreed with the interpretation proffered by the Petitioner and, so long as the Council's interpretation is plausible, it is entitled to deference.

Finally, Petitioner gets to the heart of his objection – that by requiring him to show what areas are the "common living areas," the City is somehow overturning its prior approval of the planned development plat. Regardless of whether the extent of the common living area was determined in those previous approvals, the PUD no longer complies with the provision, as a large garage was constructed on a portion of the Access Easement. Compare Rec p 179, with Rec pp 22 and 174. The City urges LUBA to review the specific points made by Petitioner on page 20 of the brief, as well as the City's final stage 3 decision on the final plat, in the Record at pp 263 – 75, and find any indication of where the common living area is located.

As noted in the standard of review, it is an applicant's burden to demonstrate compliance with all applicable standards. *Wilson*. CBMC 17.92.010(C)(1) requires the City to review all development permits, including the development permit requested by Applicant in this case, to determine if the work "conform[s] to the requirements" of Title 17. One of the provisions in Title 17 is CBMC 17.40.030(A), which requires planned developments to provide at least 40% (or 10,000 square feet) of its area as "outdoor living area," and 75% of that "outdoor living area" (or 7,500 square feet) must be "common"

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living area. Petitioner was either unwilling or unable to meet that burden. Petitioner pointed to some areas subject to a "common open space easement" and some other areas subject a "common access easement," but nothing suggests that those areas would be combined to satisfy the "common living area" requirement.

Petitioner suggests that the City "did not identify any respect in which Petitioner's application for a building permit and a development permit did not comply with the plat." Pet for Rev p 22. The City agrees; but the recordation of the plat did not resolve all issues related to future development and, in particular, it did not resolve exactly where the "common living areas" were. More importantly, the controlling standard that that the City applied was not the plat, but the requirement in CBMC 17.92.010(C)(1), requiring the City to find that the proposed development conforms to the requirements of Title 17, including the provisions in CBMC Chapter 17.42. Petitioner could have done so as part of this application but, because he was either unable or unwilling to identify an appropriate amount of "common living area" in the planned development, the City correctly found that the work proposed did not conform to the requirements of Title 17.

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b) Response to the Second Sub-Assignment of Error – Denying this Application Did Not Impose a Moratorium on All Development in the Cannon Beach Preservation Planned Development.

As discussed above in the Response to Petitioner's First Subassignment of Error, the City's code required it to review the proposed development for conformity to the requirements of the City's land use regulations, which includes the requirement from CBMC 17.40.030(A) for a minimum amount of common living area. Because the Applicant was not able to demonstrate how that requirement was met, the City rejected the proposed development.

In the course of rejecting Petitioner's development permit the City provided an explicit explanation of why it was doing so and, in addition, provided a manner for the applicant to have his development permit approved:

> "Until the Home Owners Association can provide the 2,362 additional square-feet of common shared open space or each owner provides 591 SF of common shared open space, through an easement benefiting all owners of the Planned Development, the City will not approve a building permit for any properties of the Cannon Beach Preservation Planned Development Subdivision." Rec p 45.

That finding does not effect a moratorium; it is an explanation of why the requested development permit was denied and an explanation of what is required to obtain a development permit in the future. Petitioner could file an application tomorrow and, so long as he can demonstrate either (1) that the common living area for the entire PUD has been provided, or that the required

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common living area on his lot has been provided, this criterion will be no impediment to the development of his property.

As LUBA has previously held, in denying an application, the local government must provide reasonably definite guides about what will be required for approval. *See Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351, 371 (1994). At a minimum, the City must inform the applicant of the steps necessary to gain approval of the application, or inform the applicant of why they cannot gain approval. *Gu v. City of Bandon*, ___ Or LUBA ___ (Luba No. 2018-004, opinion issued June 27, 2018) (*quoting Ontrack, Inc. v. City of Medford*, 37 Or LUBA 472, 477 (2000)). The City did nothing more here than what LUBA has required elsewhere – explain what will be required for approval of an application; it is hard to conceive of how explaining how to achieve an approval could be considered a moratorium.

Before turning to his substantive argument, Petitioner appears to make some sort of procedural argument that LUBA must reverse or remand a decision "when the County's notice to landowners did not adequately identify the relevant criteria." Pet for Rev p 23, quoting *Furler v. Curry County*, 27 Or LUBA 546, 550 (1994). However, *Furler* was not remanded for any notice issue. As in *Furler*, Petitioner here was well aware of the criteria at issue. The question of how to interpret the term "common living area" was raised before the Planning Commission (Rec p 330-31) and addressed by Petitioner himself

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(Rec p 3). It is very difficult to see how Petitioner was not aware of the issue of common living area when he participated in that discussion.

Petitioner asserts that the decision "halts all development on all four lots" (Pet for Rev, p 24); but the decision does no such thing. The decision simply requires compliance with the City's land use regulations. Petitioner could achieve compliance in concert with his neighbors by providing a document identifying the common living areas on all of the lots or, as set forth in the decision, Petitioner could move forward by providing an easement to each of the other owners for 591 square feet of living space. The choice of how to comply is entirely up to Petitioner and is not dependent in any way on his neighbors, unless he wants it to be.

Ultimately, the resolution of this subassignment of error turns on whether the City's finding regarding the common living area creates a moratorium or not. As explained above, it is not – the finding does nothing to prevent Petitioner from building on his lot any more than a finding that a home was located in a setback would prevent development of a future home that complies with the City's land use regulations.

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B. RESPONSE TO THE SECOND ASSIGNMENT OF ERROR – THE CITY DID NOT ADOPT A MORATORIUM ON DEVELOPMENT IN THE CANNON BEACH PRESERVATION PLANNED DEVELOPMENT.

1. Preservation of Error.

The City does not dispute Petitioner's statement regarding preservation of error.

2. Standard of Review.

An applicant bears the burden of proof to demonstrate that an application complies with each of the applicable approval standards. *Wilson v. Washington County*, 63 Or LUBA 314 (2011). In addition, LUBA will affirm a decision denying an application as long as there is one valid basis for denial, notwithstanding that the local government may have committed error with respect to other, alternative or independent bases for denial. *Wilson v. Washington County*, 63 Or LUBA 314 (2011); *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

To the extent Petitioner challenges the interpretation of the City's own code, LUBA is required under ORS 197.829(1) to affirm the City's interpretation of its land use regulations, unless LUBA determines that the local government's interpretation:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

In the context of a review of a governing body's own interpretation of its own land use regulations, as is the case here, LUBA applies the highly deferential standard of review described in *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (governing body's interpretation must be upheld if it is "plausible"). LUBA is not allowed to overturn the City's interpretation of its own code, even if another interpretation might be more persuasive. *Id.* Thus, the question is not whether the City's interpretation is "correct" in some absolute sense of the term, but whether the City's interpretation is plausible under the "highly deferential" standard imposed by ORS 197.829(1) and *Siporen*. *Tonquin Holdings v. Clackamas County*, 247 Or App 719, 722, 270 P3d 397 (2012).

3. Argument.

Much of the argument in the Second Assignment of Error overlaps with the argument in the Second Subassignment of Error in the First Assignment of Error and, accordingly, the City adopts the discussion in its Response to the Second Subassignment of Error as if set out here. The remainder of this Response to the Second Assignment of Error will respond to the remaining arguments in Petitioner's Second Assignment of Error.

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The City agrees with Petitioner that the City did not follow the statutory process set out in ORS 197.505 *et seq* for the declaration of a moratorium. The reason the City did not follow the statutory process for declaring a moratorium is because the City did not impose a moratorium on development in the Planned Development. As discussed above, the City's decision did nothing other than deny Petitioner a development permit for failure to comply with its land use regulations. To the extent LUBA agrees with the City on this point, i.e., that the City did not declare a moratorium, it need go no further and may simply deny this assignment of error.

As LUBA has previously held, the denial of an application is not a "moratorium" and is allowed under ORS 197.524(2), where the city concluded the application was not consistent with the applicable code provisions and petitioner has not had prior permit applications denied. *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339 (2016). The same is true here; all the City has done is deny the permit because it wasn't consistent with the provisions of the city code. There have been no previous permit denied and it simply is not a moratorium, no matter how much Petitioner asserts that it is so.

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C. RESPONSE TO THE THIRD ASSIGNMENT OF ERROR – THE CITY PROPERLY APPLIED CBMC 17.40.030 TO THE APPLICATION FOR A BUILDING PERMIT.

1. Preservation of Error.

The City does not dispute Petitioner's statement regarding preservation of error.

2. Standard of Review.

An applicant bears the burden of proof to demonstrate that an application complies with each of the applicable approval standards. *Wilson v. Washington County*, 63 Or LUBA 314 (2011). In addition, LUBA will affirm a decision denying an application as long as there is one valid basis for denial, notwithstanding that the local government may have committed error with respect to other, alternative or independent bases for denial. *Wilson v. Washington County*, 63 Or LUBA 314 (2011); *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

To the extent Petitioner challenges the interpretation of the City's own code, LUBA is required under ORS 197.829(1) to affirm the City's interpretation of its land use regulations, unless LUBA determines that the local government's interpretation:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

In the context of a review of a governing body's own interpretation of its own land use regulations, as is the case here, LUBA applies the highly deferential standard of review described in *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (governing body's interpretation must be upheld if it is "plausible"). LUBA is not allowed to overturn the City's interpretation of its own code, even if another interpretation might be more persuasive. *Id.* Thus, the question is not whether the City's interpretation is "correct" in some absolute sense of the term, but whether the City's interpretation is plausible under the "highly deferential" standard imposed by ORS 197.829(1) and *Siporen*. *Tonquin Holdings v. Clackamas County*, 247 Or App 719, 722, 270 P3d 397 (2012).

3. Argument.

As discussed above, this matter began with the applicant seeking a development permit from the City. When such an application is submitted, CBMC 17.92.010(C)(1) directs the City to issue the development permit if the City:

> "finds that the work described in an application for a development permit and the plans, specifications, and other data

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> filed with the application conform to the requirements of this title, and any conditions imposed by a reviewing authority."

The City did what that code provision required – it reviewed the work described in the application in an attempt to find whether it was in conformance with the requirements of the City's land use regulations and any conditions imposed by the City. In this case, the City was unable to find that the work described was in conformance with CBMC 17.40.030(A), regarding the provision of common living areas in a planned development and, accordingly, the City denied the permit.

Petitioner argues that the City improperly used CBMC 17.40.030(A) in evaluating its development permit because it "is a standard to be used only for the issuance of a planned development permit [and] is not a standard for issuing a single-family home construction permit." Pet for Rev p 32. However, Petitioner never reckons with the requirement in CBMC 17.92.010(C)(1), which requires conformance to all of the requirements of the code.

Petitioner's argument appears to be that, once a final plat is recorded for a planned development, nothing else can be used to judge the development of a later structure within the planned development; that position is not tenable. The final plat did not address, e.g., parking requirements (CBMC Chapter 17.78), nor did it address signs (CBMC Chapter 17.56), or any of the provisions in CBMC Chapter 17.90, covering matters from lighting standards to occupancy

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of recreational vehicles. Under Petitioner's theory, an owner of a lot in the PUD would be free to ignore these regulations.

It is true that the common living area requirement is not the same as, e.g., parking requirements or signage, as the standard is found in the planned development chapter of the code CBMC 17.40, but Petitioner cannot seriously assert that, once the PUD is approved the City can never look at the common living area requirement again. This is particularly apt here, where the lot on which Petitioner wishes to build has already been developed with a large garage.

If Petitioner's argument is correct, a future applicant could get a planned development approved and then propose to construct a home directly in the middle of the common living area. When the City reviewed the application, the future applicant could simply say that the common living area is part of the planned development permit, and I am not seeking a planned development permit here, so that has no bearing on my application. Such an outcome is absurd; of course the City can enforce the common living area provisions of CBMC 17.40.030(A) in a later development.

D. RESPONSE TO THE FOURTH ASSIGNMENT OF ERROR – THE CITY PROPERLY CONCLUDED THAT THE PROPOSED TURRET EXCEEDED THE CITY'S HEIGHT LIMIT.

1. Preservation of Error.

The City agrees that this issue was preserved for review.

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2. Standard of Review.

An applicant bears the burden of proof to demonstrate that an application complies with each of the applicable approval standards. *Wilson v. Washington County*, 63 Or LUBA 314 (2011). In addition, LUBA will affirm a decision denying an application as long as there is one valid basis for denial, notwithstanding that the local government may have committed error with respect to other, alternative or independent bases for denial. *Wilson v. Washington County*, 63 Or LUBA 314 (2011); *Johns v. City of Lincoln City*, 34 Or LUBA 594 (1998).

To the extent Petitioner challenges the interpretation of the City's own code, LUBA is required under ORS 197.829(1) to affirm the City's interpretation of its land use regulations, unless LUBA determines that the local government's interpretation:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

In the context of a review of a governing body's own interpretation of its own land use regulations, as is the case here, LUBA applies the highly

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deferential standard of review described in *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010) (governing body's interpretation must be upheld if it is "plausible"). LUBA is not allowed to overturn the City's interpretation of its own code, even if another interpretation might be more persuasive. *Id.* Thus, the question is not whether the City's interpretation is "correct" in some absolute sense of the term, but whether the City's interpretation is plausible under the "highly deferential" standard imposed by ORS 197.829(1) and *Siporen. Tonquin Holdings v. Clackamas County*, 247 Or App 719, 722, 270 P3d 397 (2012).

3. Argument.

CBMC 17.40.030 provides that, in a planned development, the height restrictions of the underlying zone will apply. The PUD is located within the R2 zone, which provides for a 28 foot height limit for a structure with a pitched roof, such as the one proposed here. CBMC 17.14.040(E). However, the code makes an exception for

> "projections such as chimneys, spires, domes, elevator shaft housings, towers, wind generators, aerials, flagpoles and other similar objects not used for human occupancy." CBMC 17.90.080.

As Petitioner acknowledges, the ridge line of the proposed home will be 28 feet high, and there is a structure, which Petitioner calls a "turret," that projects above the ridge line and is prohibited, unless it fits within the narrow category

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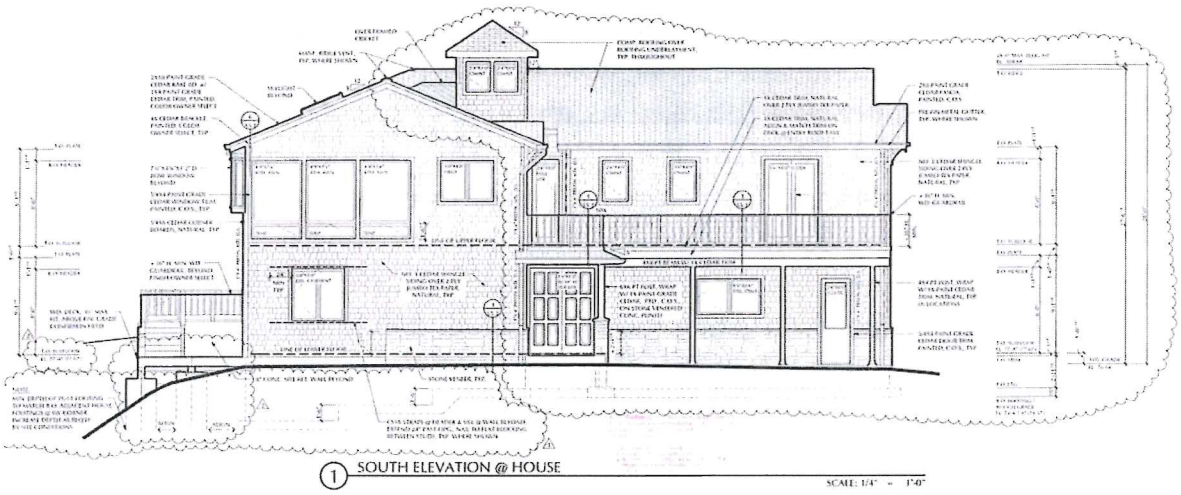
above. The turret is approximately 62 square feet, enclosed and insulated with windows. The exterior of the turret can be seen in the elevation below:



As originally proposed, the turret was accessed via a staircase with handrails. Rec p 177. However, after the height limit issue was identified, the plans were revised to eliminate the staircase, but not the room. The size of the turret room was not changed, nor was the framing, the windows, or the insulation. As proposed, the turret is simply as an entirely enclosed room – with finished floors, walls and roof. The floor of the turret room extends from wall to wall with a hatch access (Rec p 199); no light will be transmitted from the windows to the spaces below and the room itself appears to have little function.[5]

[5] A review of the Record indicates that Petitioner never actually identified the eventual use of the turret room; the closest Petitioner ever came is in a letter from his attorney found on page of the Record p 2. That letter does not actually identify the purpose of the turret; instead, it cagily says that the room would be "in the nature of a storage area." If so, it would be an ideal

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The City Council reviewed the proposed turret and found that it did not qualify for the exception in CBMC 17.90.080:

> "The City Council finds that the turret is not of ornamental or utilitarian character, containing windows and although not providing direct access, accessible through ladder access, which could possibly be used as an observation deck, not in keeping with the intent of the CBMC. The City Council specifically interprets the list of uses allowed to exceed the height limit to involve decorative or functional projections, but not ones that allow persons to spend extended periods of time in them. The applicant asserts that the turret would be 'more in the nature of a storage area,' but a storage area, such as an attic or a loft, would also allow persons to spend extended periods of time in it. Each of the examples in the list in CBMC 17.90.080 would not allow a person to spend an extended period of time in it. Accordingly, the Council concludes that the turret as proposed does not meet the terms of the exception in CBMC 17.90.080."

Petitioner makes a series of arguments, but never really explains how the Council's interpretation of CBMC 17.90.080 is implausible and for that reason alone, the City's decision should be affirmed.

Petitioner first attacks the discussion of ladder access, stating that "no ladder appears in Petitioner's plan." Pet for Rev, p 38. Petitioner is correct that the submitted plans do not include a ladder; instead they provide for an enclosed, insulated, fenestrated space with a hatch on the floor and suggest the space will be used "in the nature of a storage area." Unless Petitioner has somehow acquired the power to levitate, it is difficult to understand how the

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place to "store" a desk or a couch and would have one of the nicest views of any "storage area" in the state.

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turret space will be accessed without the use of a ladder – whether it is actually used for storage or not.

In any event, how the area would be accessed is not critical to the City's decision; the question is whether the turret is "similar" to "chimneys, spires, domes, elevator shaft housings, towers, wind generators, aerials, flagpoles," and other projections not used for human occupancy. The City Council reviewed that question and found that, because the turret area could be accessed (whether via a ladder, levitation, or otherwise) and used for an extended period of time, such as by placing a desk, bed, or seating options, it was not similar to projections such as "chimneys, spires, domes, elevator shaft housings, towers, wind generators, aerials, flagpoles." Such a conclusion is eminently plausible and, under *Siporen*, LUBA must affirm the City's decision rejecting Petitioner's plans.

III. CONCLUSION

For all – or any – of the above reasons, the City properly denied Petitioner's requested development permit and LUBA should affirm the City's decision.

Dated this 3rd day of May, 2021.

BATEMAN SEIDEL P.C.

By: _____
William K. Kabeiseman, OSB #944920
Of Attorneys for City of Cannon Beach

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word count limitation in OAR 661-010-0030(2)(b) and contains 7,739 words; and it is proportionately typed, not smaller than 14-point font, for the body and footnotes.

Dated this 3rd day of May, 2021.

BATEMAN SEIDEL MINER BLOMGREN CHELLIS & GRAM, P.C.

By: _____
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CERTIFICATE OF FILING AND SERVICE

I certify that on May 3, 2021 I caused to be delivered by first class mail an original and four copies of the enclosed **RESPONDENT CITY OF CANNON BEACH'S ANSWERING BRIEF** with the:

Land Use Board of Appeals
775 Summer Street, Suite 330
Salem, OR 97301-1283

and, on the same date, I caused to be delivered by first class U.S. mail, a true and correct copy of the foregoing document on

Dean N. Alterman, OSB # 891850
Erica N. Menze, OSB # 123940
Alterman Law Group PC
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Cannon Beach City Council

Revised Findings of Fact & Decision

APP# 20-01, ALTERMAN APPEAL ON BEHALF OF MJ NAJIMI OF A PLANNING COMMISSION APPROVAL OF AA# 20-15, JEFF AND JENNIFER HARRISON APPEAL OF THE CITY'S ADMINISTRATIVE APPROVAL TO ISSUE A DEVELOPMENT/BUILDING PERMIT TO BUILD A NEW SINGLE-FAMILY RESIDENCE. THE PROPERTY IS LOCATED AT 544 N. LAUREL STREET (TAX LOT 07000, MAP 51019AD), AND IN THE CANNON BEACH PRESERVATION SUBDIVISION PLANNED DEVELOPMENT IN THE RESIDENTIAL MEDIUM DENSITY (R2) ZONE; CONFIRMING THE PLANNING COMMISSION DECISION, AND ADOPTING FINDINGS.

Agenda Date: December 1, continued to December 8, 2020 **Prepared By:** Jeffrey S. Adams, PhD
Findings Revised at Cannon Beach City Council Meeting of February 2, 2021

SUMMARY & BACKGROUND

The City of Cannon Beach Planning Commission (PC) rendered a decision to reverse the Administrative Decision to approve a Building/Development Permit (BP#19-1084) for the Najimi Residence, at 544 N. Laurel, Tax Lot 7000, Map 51019AD, of the Cannon Beach Preservation Planned Development Subdivision, at the request of Jeffrey Harrison, of 539 N. Laurel St., at its October 22nd, 2020, regularly scheduled Planning Commission meeting. The PC's Findings are attached as Exhibit 2.

Dean N. Alterman, on behalf of M.J. Najimi, requested a review of the decision in an application and letter received November 3, 2020, within the 14 consecutive calendars appeal period, from the date the final order was signed. The City Council held a Scope of Review meeting on November 10th to discuss, as a non-public hearing item, the terms under which it wishes to review the matter, according to Section 17.88.160 of the Cannon Beach Municipal Code.

The applicant had requested a limited scope of review, for the two reasons provided in Exhibit A. The City Council, under the guidance of 17.88.140-160, rendered a scope of review decision on November 10th to restrict the review to an 'on the record' appeal, based on the evidence that was presented before the Planning Commission.

The City Council heard public testimony and closed the public hearing on December 1, 2020. The City Council continued the item to its December 8, 2020, hearing to complete the public record and provide an opportunity for further deliberation.

FINDINGS

The City Council considered testimony in the record and finds the turret, extending above the allowable maximum building height peak of 28-feet, to not meet the definition of Cannon Beach Municipal Code (CBMC) 17.90.080:

> **17.90.080 Exceptions to building height regulations.**
>
> Projections such as chimneys, spires, domes, elevator shaft housings, towers, wind generators, aerials, flagpoles and other similar objects not used for human occupancy are not subject to the building height limitations of the zoning ordinance.

The City Council finds that the turret is not of ornamental or utilitarian character, containing windows and although not providing direct access, accessible through ladder access, which could possibly be used as an observation deck, not in-keeping with the intent of the CBMC. The City Council specifically interprets the list of uses allowed to exceed the height limit to involve decorative or functional projections, but not ones that allow persons to spend extended periods of time in them. The applicant asserts that the turret would be "more in the nature of a storage area," but a storage area, such as an attic or a loft, would also allow persons to spend extended periods of time in it. Each of the examples in the list in CMBC 17.90.080 would not allow a person to spend an extended period of time in it. Accordingly, the Council concludes that the turret as proposed does not meet the terms of the exception in CBMC 17.90.080.

Turning to the Common Outdoor Living Area, the City Council finds that, although the Planned Development Chapter 17.40 does not define Common Outdoor Living Area, the intent is not to have driveways as part of the Common Outdoor Living Area. The Council finds that at least 7,500 square-feet of the 25,000 SF Planned Development area must be provided as common shared open space. If the driveway easements are removed from the calculations provided in Exhibits C-6-8, the Planned Development has provided only 5,138 SF of common shared open space.

Until the Home Owners Association can provide the 2,362 additional square-feet of common shared open space or each owner provides 591 SF of common shared open space, through an easement benefiting all owners of the Planned Development, the City will not approve a building permit for any properties of the Cannon Beach Preservation Planned Development Subdivision.

APPLICABLE PROCEDURES

17.88.170 Review on the record.

A. Unless otherwise provided for by the reviewing body, review of the decision on appeal shall be confined to the record of the proceeding as specified in this section. The record shall include the following:

1. A factual report prepared by the city manager;

2. All exhibits, materials, pleadings, memoranda, stipulations and motions submitted by any party and received or considered in reaching the decision under review;

3. The final order and findings of fact adopted in support of the decision being appealed;

4. The request for an appeal filed by the appellant;

5. The minutes of the public hearing. The reviewing body may request that a transcript of the hearing be prepared.

B. All parties to the initial hearing shall receive a notice of the proposed review of the record. The notice shall indicate the date, time and place of the review and the issue(s) that are the subject of the review.

C. The reviewing body shall make its decision based upon the record after first granting the right of argument, but not the introduction of additional evidence, to parties to the hearing.

D. In considering the appeal, the reviewing body need only consider those matters specifically raised by the appellant. The reviewing body may consider other matters if it so desires.

E. The appellant shall bear the burden of proof. (Ord. 89-3 § 1; Ord. 79-4 § 1 (10.083))

17.88.110 Decision.

Following the procedure described in Section 17.88.060, the hearing body shall approve, approve with conditions or deny the application or if the hearing is in the nature of an appeal, affirm, affirm with modifications or additional conditions, reverse or remand the decision that is on appeal.

DECISION AND CONDITIONS

Motion: Having considered the evidence in the record, and upon a motion by Councilor Benefield, second by Councilor McCarthy, the Cannon Beach City Council, on a vote of five in favor and none against,

unanimously denies the appeal to reverse the Planning Commission's decision to reverse the Administrative Decision.

VOTE: to deny appeal

YEA: Benefield, McCarthy, Ogilvie, Risley, Mayor Steidel

NAY:

RECONSIDERATION

Motion: Having considered the evidence in the record, and upon a motion by Councilor McCarthy, second by Councilor Benefield, the Cannon Beach City Council, on a vote of five in favor and none against, approves the reconsideration of the Findings of Fact and Decision, rendered at its December 8th, 2020 meeting, to be repealed and replaced with the Findings of Fact and Decision included herein.

VOTE: to approve reconsideration

YEA: Benefield, McCarthy, Ogilvie, Risley, Mayor Seidel

NAY:

BEFORE THE CITY COUNCIL
OF THE CITY OF CANNON BEACH

IN THE MATTER OF PLANNED DEVELOPMENT STAGE 3 APPROVAL REQUEST FOR THE FOLLOWING PROPERTY:

Map 51019AD, Tax Lot 7000
532 N Laurel Street

FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER NO. PD 15-01

IN ZONE: R2

Applicant: Jeffrey Nicholson
4190 SW Council Crest Drive
Portland OR 97239

The above-named applicant applied to the City for final approval (stage three) for PD 14-01, planned development application, and approval of a final subdivision plat. The property is located at 532 N Laurel Street (Tax Lot 7000, Map 51019AD) and is in a Residential Medium Density (R2) zone. The property is owned by Lucie's Cottages LLC. The planned development request was reviewed against the criteria of the Municipal Code, Section 17.40.040.C, Planned Development (PD) Zone, Planned development procedures, Final Approval (Stage Three), and 16.04, Subdivisions.

The public hearing on the above-entitled matter was opened before the Planning Commission on 12/21/15; the Planning Commission closed the public hearing at recommended denial to the City Council at the 01/28/16 meeting. The public hearing on the above-entitled matter was opened before the City Council and a tentative decision of approval was made on 03/01/16 subject to preparation of final findings of fact and an order; a final decision was made at the 03/08/16 meeting.

THE CITY COUNCIL ORDERS that the request be GRANTED and adopts the findings of fact, conclusions and conditions contained in Attachment "A".

This decision may be appealed to the Land Use Board of Appeals by an affected party within 21 days of this date.

CANNON BEACH CITY COUNCIL

DATED: 3-8-16

Sam Steidel, Mayor

FINDINGS

PD15-01, A REQUEST BY JEFF NICHOLSON FOR FINAL PLAN (STAGE THREE) APPROVAL OF A FOUR-LOT RESIDENTIAL PLANNED DEVELOPMENT AT 532 NORTH LAUREL STREET

BACKGROUND

This matter came before the Cannon Beach City Council for public hearing and consideration on March 1, 2016. The City Council conducted a public hearing and received oral and written testimony. At the conclusion of the hearing, the Mayor closed the record and the City Council voted to tentatively approve the request, subject to conditions, pending adoption of findings on March 8, 2016. At a meeting on March 8, 2016, the City Council voted to adopt these findings of fact in support of their decision and approved the request subject to conditions.

This decision approves a four-lot residential planned development at 532 North Laurel Street, tax lot 51019AD-7000. The City previously approved preliminary plans for this project on March 5, 2015, in Final Order PD 14-01. The subject property is located as shown on the aerial photograph on the top of page 2 of the March 1, 2016 staff report.

The property is in the Residential Medium Density (R2) zone, with a Planned Development (PD) overlay. Cannon Beach's planned development review process has three steps: pre-application, preliminary approval, and final approval; also described as stages one, two and three. Stages one and two were previously completed and approved; the subject decision governs final/stage three plan approval for the project.

A planned development is a modified subdivision. Planned developments are intended to "*...provide a degree of flexibility in the application of certain regulations which cannot be obtained through traditional lot-by-lot subdivision.*" (Cannon Beach Municipal Code 17.40.010.A) A conventional subdivision is unsuited for some of this planned development's features, such as the 9,000 square foot building limit, increased setbacks from Laurel Street, and the preservation of certain trees on the site.

This planned development is the subject of an approved variance to slope-density requirements in CBMC 16.04.310. Pursuant to Final Order No. V14-06, the City Council approved that variance on March 5, 2015, and the Land Use Board of Appeals (LUBA) affirmed the City's decision on September 30, 2015. The variance remains in effect (CBMC 17.84.090 and 17.40.020.E). Likewise, the City's decision to place a Planned Development (PD) overlay zone designation on this property remains in effect.

This application was submitted on October 20, 2015, and determined to be complete on November 18, 2015. It is subject to ORS 227.178, requiring the City to take final action within 120 days after the application is deemed complete. The City's final decision on this was made on March 8, 2016. The 120-day deadline is March 17, 2016.

REVIEW CRITERIA AND PROCEDURE

This request is subject to approval criteria in CBMC 17.40.040.C. These criteria are excerpted in these findings, and in the March 1, 2016 staff report.

At the March 1, 2016 public hearing Jeff Harrison, a nearby property owner, challenged the City Council's jurisdiction to hear this matter. Mr. Harrison asserted that that CBMC 17.40.040.C.4 does not allow this matter to come before the City Council unless the Planning Commission approves the final concept and that the City Council's hearing of this matter "usurped the Planning Commission's authority." Since the Planning Commission voted to recommend that the City Council deny this application, Mr. Harrison argues, the matter is not properly before the City Council as no Planning Commission approval has been given and no appeal was filed.

The City Council rejects this assertion and interprets its code to provide the City Council with the authority to make this decision. Reading CBMC 17.40.040.C.3 and 4 in context, the Planning Commission is not required to hold a hearing, nor is it empowered to make a final decision. The Council notes that other code provisions, such as 17.80.020 explicitly authorize the Planning Commission to approve or deny applications, but the PUD stage three procedure is not structured in the same manner. Under CBMC 17.40.040.C.4, the City Council is required to hold a hearing and is the body that has the ultimate authority to "approve or disapprove" the application. The Council acknowledges that the provision is inartfully drafted, but interprets the text and context to allow the Council to hear this matter.

This conclusion is supported by the City's previous decision and other context in the code and plan. First, the City Council directed that this procedure be followed. Approval condition 6, part of the March 5, 2015, preliminary approval, reads in part: "*...The final plan will be reviewed by the Planning Commission, who will make a recommendation to City Council regarding compliance of the final plan with this preliminary approval. Council will make the final decision on the final plan...*" This Condition of Approval was never contested in the stage two approval this development, which was appealed to LUBA and affirmed. As a final land use decision, it is not subject to collateral attack in this subsequent stage of development.

Second, the language in CBMC 17.40.040.C.4 supports this procedure:

> *4. After final concept approval by the planning commission, the planned development application will be sent to the city council for consideration for final approval. A public hearing as specified in Chapter 17.88 shall be held on each such application. After such hearing, the city council shall determine whether the proposal conforms to the permit criteria set forth in Section 17.40.050 and to the planned development regulations, and may approve or disapprove the application and the accompanying development plan or require changes or impose conditions of approval as are in its judgment necessary to ensure conformity to such criteria and regulations. The decision of the city council shall be final.*

Nearly all of subsection 4 can be read as requiring a City Council hearing on each final plan application. The only potentially conflicting language is in the first sentence: "*After final concept approval by the planning commission, the planned development application will be sent to the city council...*" Reading this sentence as giving the Planning Commission final decision-making authority conflicts with the rest of the paragraph. The text is silent as to what happens if the Planning Commission votes to deny a stage three request; or even if the Planning Commission has the authority to do anything other than approve the request. The City Council's interpretation of this text -- that the Planning Commission makes a recommendation and forwards it to the City Council for a final decision – avoids some of the procedural problems associated with the interpretation urged by Mr. Harrison.

Further, any error in this process would have been procedural and not jurisdictional in nature. Mr. Harrison appears to acknowledge that if the Planning Commission had in fact denied the subject application, the appeal route was to the City Council. This appeal process is specified in CBMC 17.88.150 when the Planning Commission makes a decision, as opposed to a recommendation. Whether the specified appeal form was completed is procedural in nature, not jurisdictional, and given his robust participation before City Council, Mr. Harrison was able to participate and make his case.

Finally, Cannon Beach's land use regulatory program involves a high degree of public participation; in many cases much more than the statutory minimum. The City's Comprehensive Plan takes note of this in the Vision Statement, which describes several unique characteristics, including ... "*a community spiritedness which results in a high level of community participation and the development of innovative solutions to problems*". When ordinance interpretation deals with public processes, staff has generally leaned in the direction of more public input. In this case, that supports an interpretation of CBMC 17.40.040.C.4 along the lines followed here: public hearings at both the Planning Commission and City Council.

For these reasons the city Council rejects the jurisdiction objection and takes jurisdiction to make the final City decision in this matter.

PLANNING COMMISSION RECOMMENDATION

The Planning Commission recommended denial of this application to the City Council. The Planning Commission considered the proposed final plan at a public hearing on December 21, 2015. That hearing was continued to January 28, 2016. Testimony received at these hearings is documented in the minutes. At the conclusion of the January 28 hearing, the Planning Commission voted 6-0 to recommend denial of the final plan. Reasons given for the denial recommendation are included in the minutes, and are summarized in the March 1, 2016 staff report. The City Council considered the Planning Commission's recommendation, but ultimately decided to approve this request.

CRITERIA

Final plan review for this project is subject to approval criteria in CBMC 17.40.040.C. These criteria are excerpted below, followed by the City Council's findings and conclusions.

> **CBMC 17.40.040.C.1.** *Within one year after concept approval or modified approval of a preliminary development plan, the applicant shall file with the planning department a final plan for the entire development or, when submission in stages has been authorized, for the first unit of development. The final plan shall conform in all major respects with the approved preliminary development plan. The final plan shall include all information included in the preliminary plan, plus the following: the location of water, sewerage and drainage facilities; detailed building and landscaping plans and elevations; the character and location of signs; plans for street improvements and grading or earth moving plans. The final plan shall be sufficiently detailed to indicate fully the ultimate operation and appearance of the development. Copies of the legal documents required by the commission for dedication or reservation of public facilities, or for the creation of a nonprofit homes association, shall also be submitted.*

Subsection C.1 establishes several substantive requirements and several submittal requirements for the stage three approval. First, final approval must be requested within one year of preliminary approval: *Within one year after concept approval or modified approval of a preliminary development plan, the applicant shall file with the planning department a final plan for the entire development...* The City approved the preliminary development plan on March 5, 2015. This final plan approval request was submitted on October 20, 2015, within the one-year timeframe established in C.1.

Subsection C.1 recognizes the possibility of a development plan submitted in phases. The current proposal is not a phased development, so these provisions are not applicable. The City Council approved the preliminary plan without phases; the proposed final plan is unchanged in this respect.

Subsection C.1 requires conformance with the preliminary plan: *The final plan shall conform in all major respects with the approved preliminary development plan.* Staff reviewed the proposed final plan against the approved preliminary plan and found it conforming in all major respects. This is outlined in tabular form in the 12/21/15 Planning Commission staff report. The final plan diverges from the original preliminary plan drawings with respect to building setbacks from Laurel Street, which were increased as a result of a condition imposed by the City Council. Applicant submitted several conceptual photos and sketches as part of stage two review (PD14-01) and stage three review (PD 15-01) that do not look identical. These non-mandatory conceptual materials do not constitute a change in approved plans. Also, applicant reallocated its use of the 9,000 habitable square feet in the final plan through Condition of Approval three in a way that made some houses a little bigger and some houses a little smaller than the square footage estimates that were contemplated in stage two review. This minor revision in square footage allocation between houses does not constitute a major non-conformance. Similarly, the change in tree removal

plans identified on page three of the December 21, 2015, staff report is minor. In the subject application, the final plan conforms in all major respects with the approved preliminary development plan.

Subsection C.1 calls for additional submittal requirements beyond that supplied with the preliminary plan: *The final plan shall include all information included in the preliminary plan, plus the following: the location of water, sewerage and drainage facilities; detailed building and landscaping plans and elevations; the character and location of signs; plans for street improvements and grading or earth moving plans.* This additional submittal information is included with the applicant's final approval submission. Water, sewer and drainage facilities are on sheets C5.1 and C5.2. Detailed building plans are on sheet C8.1 (Retaining Wall Details), and sheets C2.3 and EX1.0 (Detailed Building Plans), as well as in the other plans submitted by applicant. Landscaping plans are on sheets L1.0 (Planting Plan) and C3.3 (Tree Retention and Revegetation Plan). Elevations are on sheets C7.2 and C7.3 in the form of cross-sections, sheet C3.1 for site elevations, and on sheet C8.1 for the retaining wall. Sheet EX1.0 includes a table with maximum and minimum building elevations for the four dwellings. No signs are proposed, so information on the "character and location of signs" is not applicable. Street improvement plans are not included because no public street improvements are proposed or needed for this project. Improvement plans for a shared driveway are on sheets C5.1 and C8.1. Grading and earth-moving plans are on sheet C3.1. The City Council finds that applicant submitted materials to meet this submittal requirement portion of C.1.

Subsection C.1 further requires that ... *the final plan shall be sufficiently detailed to indicate fully the ultimate operation and appearance of the development* ... The proposed final plan provides operational details: the configuration and size of a shared driveway, the location and size of all utilities, the location of a pedestrian amenity on the west side of the site, the location of common open space, and building envelopes for up to four single-family residences. The proposed final plan includes details about the development's ultimate appearance: the location and size of trees to be retained, building envelopes for up to four residences, maximum height information for the residences, a habitable space square footage cap, and a detailed plan for the driveway retaining wall. A conceptual sketch submitted by the applicants at the 1/28/16 Planning Commission hearing shows four residences on the property. Although the City Council understands that it could interpret this provision to require a greater level of detail, the City Council believes that, with the information that it has, as well as the conditions that it is placing on the plan, the proposed final plan is sufficiently detailed to indicate fully the development's ultimate operation and appearance.

Finally, subsection C.1 requires that the applicant submit ... *Copies of the legal documents required by the commission for dedication or reservation of public facilities, or for the creation of a nonprofit homes association.* This subsection is a submittal requirement. The first part of this requirement is not applicable because there are no dedications or reservations of public facilities. The proposed driveway will be a private shared facility, not a public street. Municipal utilities (water and sanitary sewer) will be public within the Laurel Street right-of-way, and private on the subject property. The second part of this requirement is also not applicable because there is no required nonprofit homes association for this project. The applicant has indicated that they will

not be creating a homeowners association because the functions of a homeowners association can be met by deed restrictions and easements. The City's code does not require the creation of a homeowners' association. Documents submitted by the applicant at the City Council's March 1, 2016 hearing are sufficient to meet the City's needs.

CBMC17.40.040.C.1 establishes the major substantive approval criteria for final approval of a planned development and some submittal requirements. Based on the City's previous stage 2 approval, on information provided by the applicant, on the City's staff reports, and on the reasoning in the preceding paragraphs, the City Council finds that the applicant's final plan submittal, subject to conditions, meets all of the requirements of CBMC 17.40.040.C1. This criterion is met.

> **CBMC 17.40.040.C.2**. *Within thirty days after the filing of the final development plan, the commission shall forward such development plan and the original application to the public works department for review of public improvements, including streets, sewers and drainage. The commission shall not act on a development plan until it has first received a report from the public works department, or until more than thirty days have elapsed since the plan and application were sent to the public works department, whichever is the shorter period.*

The final development plan was submitted on October 20, 2015, and was forwarded to the Public Works Department for review and comment. The Public Works Department's review, dated November 25, 2015 is provided in the December 21, 2015 staff report. The Council finds that the items mentioned in the Public Works Department's review can be addressed during the normal course of building permit review, and implemented via approval conditions. Based on this, and on the Public Works Department's review, the City Council finds the proposed stage three approval consistent with CBMC 17.40.040.C.2. This procedural requirement is met.

> **CBMC 17.40.040.C.3**. *Upon receipt of the final development plan the planning commission shall examine such plan and determine whether it conforms to all applicable criteria and standards and whether it conforms in all substantial respects to the previously approved planned development permit, or require such changes in the proposed development, or impose such conditions of approval as are in its judgment necessary to ensure conformity to the applicable criteria and standards. In so doing, the commission may permit the applicant to revise the plan within thirty days.*

The Planning Commission conducted public hearings on the proposed final development plan on December 21, 2015 and January 28, 2016; and determined that it did not meet applicable criteria for the reasons listed on pages 3 and 4 of the March 1, 2016 staff report. The City has met the procedural requirements of CBMC 17.40.040.C.3. Some public comments suggested that the text of CBMC 17.40.040.C.3 which calls for a determination of compliance with "all applicable criteria and standards" contemplates the City re-opening and re-considering the decision and ap-

proval criteria that were addressed in the stage two review of PD 14-01. The City rejects such an interpretation as being against the text and context of this procedural requirement and as contradicting state law mandating that final land use decisions remain final and not be subject to collateral attack.

> **CBMC 17.40.040.C.4.** *After final concept approval by the planning commission, the planned development application will be sent to the city council for consideration for final approval. A public hearing as specified in Chapter 17.88 shall be held on each such application. After such hearing, the city council shall determine whether the proposal conforms to the permit criteria set forth in Section 17.40.050 and to the planned development regulations, and may approve or disapprove the application and the accompanying development plan or require changes or impose conditions of approval as are in its judgment necessary to ensure conformity to such criteria and regulations. The decision of the city council shall be final.*

Subsection C.4 describes the procedure at the City Council for review of planned developments at the final stage. The City Council has followed this procedure.

Subsection C.4 further requires that... *After such hearing, the city council shall determine whether the proposal conforms to the permit criteria set forth in Section 17.40.050 and to the planned development regulations...* The criteria in CBMC 17.40.050 are:

> *A. That the location, design, size and uses are consistent with the comprehensive plan, development map or ordinance adopted by the council;*
>
> *B. That the location, design and size are such that the development can be well integrated with its surroundings, and in the case of a departure in character from surrounding uses, that the location and design will adequately reduce the impact of the development;*
>
> *C. That the location, design and size and uses are such that traffic generated by the development, except in single-family density, can be accommodated safely and without congestion on existing or planned arterial or collector streets and will, in the case of commercial developments, avoid traversing local streets;*
>
> *D. That the location, design, size and uses are such that the residents or establishments to be accommodated will be adequately served by existing or planned facilities and services;*
>
> *E. That the location, design, size and uses will result in an attractive, healthful, efficient and stable environment for living, shopping or working.*

These criteria were addressed by the City Council at the preliminary plan approval stage in March 2015. The Council determined that the proposal met these criteria and that decision was upheld on appeal by the Oregon Land Use Board of Appeals. The proposed final plan before the Council now is in all material respects the same as the preliminary plan with even greater detail;

so the City Council's earlier findings at pages nine through eleven of Order No. PD 14-01 are still applicable and are incorporated here by reference. None of the new information received during the proceedings of PD 15-01 alters the Council's assessment that these criteria are met. The detailed development plans submitted by KPFF in the record and the conditions of approval attached to this decision governing building envelope, maximum habitable space, building height, and design will further ensure compliance with the location, design, and size requirements of CBMC 17.40.050. These criteria are met.

Subsection C.4 also refers to "planned development regulations," in addition to the criteria in CBMC 17.40.050. Those regulations are CBMC 17.40.020, Standards and requirements; CBMC 17.40.030 Development standards; and CBMC 17.40.060 Mapping. These requirements were fully addressed in the findings adopted by the City Council upon approval of the preliminary plan in Order No. PD 14-01 from March 2015. The proposed final plan before the Council now is in all material respects the same as the preliminary plan; so the City Council's earlier findings are still applicable and are incorporated here by reference. None of the new information received during the proceedings of PD 15-01 alters the Council's assessment that these criteria are met, or enables a collateral attack of the findings in PD 14-01.The City also supplements those findings with the following:

- CBMC 17.40.020.D (General Information) provides submittal requirements and the provisions contained therein are not approval criteria.

- CBMC 17.40.020.E and CBMC 17.40.030.D (Density Guidelines) specifies that the density of a planned development shall not exceed the density of the parent zone. The development site is 25,000 square feet and the R-2 base zone in which it is located sets a 5,000 square foot minimum lot size density. Each of the four proposed lots exceeds 5,000 square feet. The subject development obtained a variance to the slope-density requirement of CBMC 16.04.310 in Final Order No. V14-06. Alternatively, and distinctly from Final Order No. V14-06, the City finds that the four-dwelling density proposed as part of this application is independently authorized under CBMC 17.40.020.E and CBMC 17.40.030.D and approved as part of this decision in PD 15-01.

- CBMC 17.40.030.F allows for flexibility in yard and other dimensional requirements. The yard setbacks for the development specified on Sheet C2.2 from KPFF Consulting Engineers, submitted on October 20, 2015, complies with Condition of Approval one in PD 14-01. These yard setbacks will ensure that the project will be in harmony with the character of the surrounding area.

- CBMC 17.40.030.G.2 requires a home owners type association "[w]henever private outdoor living area is provided * * *." CBMC 17.40.030.A makes clear that there are two types of outdoor living areas—those that are private and those that are common. As is shown on the final plat submitted by applicant, all of the outdoor living areas for the site will be subject to a common space easement and are therefore not private. Because no

private outdoor living areas are provided as part of this proposal, no home owners type association is required by CBMC 17.40.030.G.2.

- CBMC 17.40.040.A (Stage One) and CBMC 17.40.040.B (Stage Two) do not apply for purposes of this stage three review. As explained in Final Order PD 14-01, even if these subsections of Code applied to this stage three review, the provisions of CBMC 17.40.040.B are mere submittal requirements and not approval criteria because they only describe materials to be included with the application and not substantive standards by which the application is to be judged.

Finally, subsection C.4 states that the City Council *may approve or disapprove the application and the accompanying development plan or require changes or impose conditions of approval as are in its judgment necessary to ensure conformity to such criteria and regulations.* The Council finds the conditions at the end of this document to be necessary to ensure conformity with the applicable criteria.

Based on (1) the City's previous stage 2 approval, (2) the information provided by the applicant (including but not limited to information submitted by applicant's professional team of Matt Dolan, Will Rasmussen, and Don Rondema), (3) the approval conditions at the end of this document, and (4) the reasoning in the preceding paragraphs, the City Council finds the proposed stage three final plan approval consistent with CBMC 17.40.040.C.4.

Schedule

Several Code provisions reference a "stage development schedule." For example, two of the submittal requirements CBMC 17.40.040.B.1 provide:

> *c. A stage development schedule demonstrating that the developer intends to commence construction within one year after the approval of the final development plan and will proceed diligently to completion;*
>
> *d. If it is proposed that the final development plan will be executed in stages, a schedule thereof will be required.*

CBMC 17.40.040.B.2 provides:

> *... The commission may, in its discretion, authorize submission of the final development plan in stages corresponding to different units or elements of the development. It may do so only upon evidence assuring completion of the entire development in accordance with the preliminary development plan and stage development schedule...*

CBMC 17.40.080.A provides:

> *... The approved final plan and stage development schedule shall control the issuance of all building permits and shall restrict the nature, location and design of all uses. Minor changes in an approved preliminary or final development plan may be approved by the code enforcement officer if such changes are consistent with the purposes and general character of the development plan. All other modifications, including extension or revi-*

sions of the stage development schedule, shall be processed in the same manner as the original application and shall be subject to the same procedural requirements.

The text and context of these provisions indicate that a planned development schedule is only required for multi-stage developments. Every quoted passage section above that includes the phrase "development schedule" is preceded by the word "stage" with the exception of CBMC 17.40.040.B.1.d, which states explicitly that if the development is proposed in stages, then a development schedule will be required. The text of CBMC 17.40.040.B.1.d would be meaningless if a development schedule was required for single stage developments by other provisions in the Planned Development Code. Because the subject application is a single stage development, no development schedule is required.

Even if the referenced "stage development schedule" were a requirement for planned developments, it would be a submittal requirement as part of the stage two review. In the Planned development procedures section of CBMC 17.40.040, the "stage development schedule" is discussed exclusively in the stage two portion of the code found in CBMC 17.40.040.B and not at all in the stage three portion of the code found in CBMC 17.40.040.C. This planned development was found to comply with CBMC 17.40.040.B as part of its stage two review on page 9 of Order No. PD 14-01. Order No. PD 14-01 is a final land use decision and therefore not subject to collateral attack in PD 15-01.

Even if these provisions required a development schedule for single stage developments and even if the findings of compliance with CBMC 17.40.040.B in Order No. PD 14-01could be collaterally attacked in the current land use process, a development schedule exists for this development and is enforced through conditions of approval specifying that utilities and the shared drive commence construction within a year and proceed with diligence until completion.

Because the purpose section of the Planned Development Code provides for flexibility and these schedule provisions does not provide any specific timeline for development, no specific timeline necessarily needs to be set for single stage planned developments. The Council took testimony on the appropriate schedule in PD 14-01. In response to testimony from applicant and the public, the Council determined that forcing the four dwellings to be built on this site in a set time frame was unnecessary. This is the reason the Council adopted Condition of Approval #6 in PD 14-01, providing that "[t]here is no time limit for construction of the four homes authorized by this approval * * *." Because this issue was addressed in PD 14-01 and because the Code does not require a specific timeframe, the Council determines that the appropriate schedule for building the four homes is any time.

GEOLOGIC SITE INVESTIGATION REPORT

A geologic site investigative report must be obtained prior to the issuance of building permits in areas with an average slope of twenty percent or greater, pursuant to CBMC 17.50.020, CBMC 17.50.030, and CBMC 17.50.040. These Code Provisions are not approval criteria for this stage three review and can be addressed prior to issuance of building permits. Purusuant to reports and communications in the record from Don Rondema at Geotech Solutions, Inc., it is feasible for

applicant to provide a geologic site investigation report. This approval is conditioned on applicant providing such a report by condition of approval 15. This building permit applicaiton requirement is met.

FINAL PLAT

A planned development is a modified subdivision. Approved subdivision plats must be recorded with the County Surveyor. The plat cannot be recorded until the City's review is completed. Cannon Beach Municipal Code section 16.04.210 establishes procedures for final plat review:

> *A. If the city determines that the final plat for either a subdivision or partition conforms to the tentative plan and applicable conditions have been met, the chairman of the planning commission shall sign and date the final plat.*
>
> *B. If the city determines that the final plat does not conform to the tentative plan, the plat will be forwarded to the planning commission for its review. The planning commission shall approve or deny the modifications to the final plan.*

The final plat submittal by applicant on March 1, 2016 conforms to the tentative plan and meets all conditions. Approval condition 12 implements this requirement.

SUPPLEMENTAL FINDINGS: The staff reports, including but not limited to those dated December 21, 2015 and March 1, 2016, and the applicant submittals, including but not limited to those dated October 20, 2015, December 21, 2015, January 21, 2016, January 27, 2016, February 25, 2016, and March 1, 2016. Address all of the approval criteria and other requirements thoroughly. Those reports and materials are incorporated and adopted herein as findings, except to the extent any portions of those reports or materials are contradicted by the express findings in this document.

APPROVAL CONDITIONS FROM PRELIMINARY APPROVAL

The City Council's March 2015 preliminary approval was subject to seven conditions. Those conditions are listed here:

1. The lot configuration and building envelope for this approval shall substantially comply with Exhibit C7.4, except that the building envelopes for Lot 3 and Lot 4 will each be shifted five feet to the west.

2. Any damage to Laurel Street resulting from construction on the subject property will be repaired at the owner's expense, and the street will be restored to its current condition. Applicant shall not pave Laurel Street.

3. 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.

4. The total square footage of habitable space on the site shall not exceed 9,000 square feet. Habitable space includes the enclosed areas in residences including all floors of living space and excludes driveways, decks, porches, garages, and uninhabitable accessory buildings.

5. Applicant will retain a certified arborist prior to beginning construction of the driveway to make recommendations on measures to reduce the likelihood of damage to the two large spruce trees on the site. The arborist will prepare a report with his or her recommendations—those recommendations will be incorporated into the relevant design documents, and applicant will follow those recommendations.

6. Within one year after the date of this preliminary approval, applicant will submit a final plan for development indicating the location of water facilities, sewer facilities, drainage facilities, building envelopes in compliance with Condition 1 above, landscaping plans, and grading plans. The final plan will be reviewed by the Planning Commission, who will make a recommendation to City Council regarding compliance of the final plan with this preliminary approval. Council will make the final decision on the final plan. There is no time limit for construction of the four homes authorized by this approval, and there is no minimum time requirement in which these four homes must be built by applicant or another owner.

7. Only one driveway/access point shall be allowed off Laurel Street.

The City Council finds that the proposed final plan conforms to these conditions. Several of these conditions are carried forward in modified form as final plan conditions.

CITY COUNCIL ACTION

The City Council approves the proposed final plan as submitted subject to the following conditions:

1. Any damage to Laurel Street resulting from construction on the subject property will be repaired at the Applicant's expense, and the street will be restored to its current condition. Applicant shall not pave Laurel Street. Before commencing construction, applicant will provide the City photos of the existing condition of Laurel Street.

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.

3. The total square footage of habitable space on the site shall not exceed 9,000 square feet. Habitable space includes the enclosed areas in residences including all floors of living space and excludes driveways, decks, porches, garages, and uninhabitable accessory buildings. Unfinished attics, crawl spaces, storage areas and similar spaces are not habitable space. Sleeping lofts, detached accessory sleeping quarters, fully enclosed sun rooms, and hallways are habitable space. The habitable spaces shall be distributed initially to allow 2,000 square feet to Lot 1, 3,300 square feet to Lot 2, 2,700 square feet to Lot 3 and 1,000 square feet to Lot 4. Those allocations may be amended by future owners of the lots, but in no case may any amendment allow the total square footage of habitable space on the site exceed 9,000 square feet.

4. Applicant will retain a certified arborist prior to beginning construction of the driveway to make recommendations on measures to reduce the likelihood of damage to the two large spruce trees on the site. The arborist will prepare a report with his or her recommendations. Those recommendations will be incorporated into the relevant design documents, and applicant will follow those recommendations. The arborist will be on-site during any construction related tree removal or pruning to advise contractors. Minor realignments, modifications, or other changes to the driveway or buried utilities needed to avoid damaging trees may be approved by the code enforcement officer (Planning Director) based on the arborist's recommendations pursuant to CBMC 17.40.080. Violations of this condition may be subject to the penalties in CBMC 17.70.030.N, as well as any other remedies available to the City.

5. There is no time limit for construction of the four homes authorized by this approval, and there is no minimum time requirement in which these four homes must be built by applicant or another owner.

6. For this project, given the larger size of the sewer extension to the interior of the parcel, the developer's contractor will coordinate all work with the City Public Works Department for the sewer extension.

7. The water services will be extended to the property line by City crews. Installation and maintenance of water lines on the subject property will be the responsibility of the developer.

8. Maximum building height shall be calculated using applicable requirements in the city's municipal code.

9. No impact or vibratory hammer installation will be used. Any piles that may be used will consist of either helical, augured, drilled, or hydraulically advanced systems.

10. Applicant shall provide the City with a bond equal to $140,000 to secure the construction of utilities and driveway improvements prior to beginning of construction of these improvements.

11. Prior to recording the final plat applicant shall provide the City with copies of legal documents necessary for the maintenance and use of the planned development. These documents shall address, at a minimum, the requirements of conditions 2 and 3.

12. Applicant shall record a final plat with the County Surveyor. If it is substantially the same as the final plat approved by the City Council, the Chairman of the City Planning commission shall sign it in accordance with CBMC 16.04.210.

13. Development schedule: Applicant will commence installation of utilities and construction of the shared drive within one year after this approval in PD 15-01 becomes a final land use decision and proceed diligently with the installation of utilities and construction of the shared drive until their completion.

14. All development on the site shall follow the recommendations contained in the July 1, 2015, geotechnical report prepared by Geotechnical Solutions Inc., and signed and stamped by Don Rondema, unless modified by subsequent, more detailed investigations and analysis by a similarly qualified person. A qualified geotechnical engineer (PE and GE) geologist shall be on-call during construction to observe representative portions of cut slopes, structural fills and wall foundation subgrades. The GE must also provide a final stamped letter regarding geotechnical compliance when construction of the driveway retaining wall is complete.

15. A final geotechnical site investigation report shall be prepared for each lot prior to the approval of building permits. Recommendations in the geotechnical site investigation report shall be incorporated into the house design documents and building permit. The geotechnical site investigation report shall comply with the specifications of CBMC 17.50.040 and meet the following requirements of the Cannon Beach Geologic Site Investigation Report Checklist:

- Be prepared by a registered geologist or engineering professional ("GOEP"),
- Be in writing and signed by the GOEP,
- Consider and describe any known landslides on or influencing the site,
- Describe the existing condition of the site,
- Describe the site investigation, including any subsurface explorations performed by the GEOP on or in the vicinity of the site, and
- Provide any recommendations and findings from the GOEP as contemplated by CBMC 17.50.040.A.2 and CBMC 17.50.040.A.3.

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

- The exterior of all structures shall be wood siding or wood shingles. The material may be natural or stained. No exterior surface shall be concrete or masonry, except for concrete or masonry that is part of a foundation, house trim, or fireplace chimney.
- The roof of dwellings on Lots 1, 2, 3, and 4 shall be composition, wood shake, or shingle with a pitch.
- The main front entrance of the house on Lot 1 shall face southerly. The main front entrance of the house on Lot 2 shall face northerly or southerly. The main front entrance of the house on Lot 3 shall face easterly. The main front entrance of the house on Lot 4 shall face easterly or southerly.
- 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.

17. Before permits for the driveway retaining wall are approved the applicant shall provide to the City an executed contract with a landscape professional responsible for the installation and maintenance of plant materials on the wall and shall provide a timeline for the establishment of plantings on the wall. If plants are not successfully established within those timelines, the City may take any necessary enforcement actions to assure that the requirements of the final plan and this condition are met.

18. Only one driveway/access point shall be allowed off Laurel Street.

Chapter 17.40 PLANNED DEVELOPMENT (PD) OVERLAY ZONE

17.40.010 Purpose.

A. It is the intent of this chapter to encourage appropriate and orderly development of tracts of land sufficiently large to allow comprehensive planning and to provide a degree of flexibility in the application of certain regulations which cannot be obtained through traditional lot-by-lot subdivision. In this manner, environmental amenities may be enhanced by promoting a harmonious variety of uses; the economy of shared services and facilities; compatibility of surrounding areas; and the creation of attractive, healthful, efficient and stable environments for living, shopping or working.

B. Specifically, it is the purpose of this chapter to promote and encourage the flexibility of design in the placement and uses of buildings and open space, streets and off-street parking areas, and to more efficiently utilize the potential of sites characterized by special features of geography, topography, size or shape.

C. It is not the intention of this chapter to be a bypass of regular zoning provisions solely to allow increased densities, nor is it a means of maximizing densities on parcels of land which have unbuildable or unusable areas. (Ord. 17-3 § 1; Ord. 79-4 § 1 (3.170))

17.40.020 Standards and requirements—Generally.

A. Size.

1. Planned residential development may be established in residential zones on parcels of land which are suitable for and of sufficient size to be planned and developed in a manner consistent with the purposes and objectives of the comprehensive plan and this title. The site shall include not less than three acres of contiguous land.

2. Where the development involves partitioning, subdivision or resubdivision, or condominium ownership of land and buildings, the requirements of the land division ordinance shall be adhered to concurrently.

B. Ownership.

1. The tract of land or tracts of land included in a proposed planned development must be in one ownership or control or the subject of a joint application by the owners of all the property included. The holder of a written option to purchase shall be deemed the owner of such land for the purposes of this section.

2. Unless otherwise provided as a condition for approval of a planned development permit, the permittee may divide and transfer units of any development. The transferee shall use and maintain each such unit in strict conformance with the approved permit and development plan.

C. Professional Design.

1. The applicant for all proposed planned developments shall certify that the talents of the following professionals will be utilized in the planning process for development: (a) an architect licensed by the state, (b) a landscape architect licensed by the state, (c) a registered engineer and land surveyor licensed by the state. The planning commission may waive this requirement provided the applicant can show the equivalent and acceptable design talents have been utilized in the planning process.

2. One of the professional consultants chosen by the applicant from the above group shall be designated to be responsible for conferring with the city staff with respect to the concept and details of the plan.

3. The selection of the professional coordinator of the design team will not limit the owner or the developer in consulting with the city staff or the commission.

D. General Information. The planning process for development shall include:

1. Plot plan of land in area to be developed indicating location of adjacent streets and all private rights-of-way existing and proposed;

2. A legal boundary survey;

3. Existing and proposed finish grading of the property with all drainage features;

4. Location of all proposed structures, together with the usage to be contained therein and approximate location of all entrances thereto and height and gross floor area thereof;

5. Vehicular and pedestrian circulation features within the site and on adjacent streets and alleys;

6. The extent, location, arrangement and proposed improvements of all off-street parking and loading facilities;

7. The extent, location, arrangement and proposed improvements of all open space, landscaping, fences and walls;

8. Architectural drawings and sketches demonstrating the planning and character of the proposed development;

9. The number of units proposed;

10. Contour lines at two-foot intervals.

E. Permitted Buildings and Uses. The following buildings and uses may be permitted as provided in this subsection. Buildings and uses may be permitted either singly or in combination, provided the overall density of the planned development does not exceed the density of the parent zone:

1. Single-family dwellings including detached, attached or semi-attached units, row houses, atrium or patio houses; provided each has its own separate plot;

2. Duplexes;

3. Multiple-family dwellings;

4. Accessory buildings and uses;

5. Condominiums;

6. Buildings or uses listed as permitted outright or conditionally in the parent zone in which the planned development is located. (Ord. 17-3 § 1; Ord. 79-4 § 1 (3.170)(1))

17.40.030 Development standards.

In addition to, or as a greater requirement to the regulations normally found in the zone, the following guidelines and requirements apply to all developments for which a planned development permit is required:

A. Outdoor Living Area Requirements. In all residential developments, a minimum of forty percent of the total area shall be devoted to outdoor living area. Of this area, twenty-five percent of the outdoor living area may be utilized privately by individual owners or users of the planned development; a minimum of seventy-five percent of this area shall be common or shared outdoor living area.

B. Height Requirements. The same restrictions shall prevail as permitted outright in the zone in which such development occurs, except that the commission may further limit heights:

1. Around the site boundaries; and/or

2. To protect scenic vistas from encroachments.

C. Underground Utilities. In any development which is primarily designed for or occupied by dwellings, all electric and telephone facilities, fire alarm conduits, street light wiring and other wiring conduits and similar facilities shall be placed underground by the developer.

D. Density Requirements.

1. The density of a planned development shall not exceed the density of the parent zone, however, more restrictive regulations may be prescribed as a condition of a planned development permit. When calculating density, the net area is used — the total area excluding street dedications.

2. Areas of public or semi-public uses (not public ownership) may be included in calculating allowable density.

E. Distribution of Facilities Without Reference to Lot Lines. Individual buildings, accessory buildings, off-street parking and loading facilities, open space and landscaping and screening may be located without reference to lot lines, save the boundary lines of the development, except that required parking spaces serving residential uses shall be located within two hundred feet of the building containing the living units served.

F. Waiver of Reduction of Yard and Other Dimensional Requirements. Except as otherwise provided, the minimum lot area, width and frontage, height and yard requirements otherwise applying in the zone shall not dictate the strict guidelines for development of the planned development, but shall serve to inform the designers of the importance of developing a project that will be in harmony with the character of the surrounding neighborhood.

G. Dedication and Maintenance of Facilities. The planning commission may, as a condition of approval for any development for which a planned development permit is required, require that portions of the tract or tracts under consideration be set aside, improved, conveyed or dedicated for the following uses:

1. Recreation Facilities. The commission or council, as the case may be, may require that suitable area for parks or playgrounds be set aside, improved or permanently reserved for the owners, residents, employees or patrons of the development.

2. Outdoor Living Area. Whenever commonly-held outdoor living area is provided, the commission or council shall require that an association of owners or tenants be created into a nonprofit corporation under the laws of the State of Oregon, which shall adopt such articles of incorporation and by-laws and adopt and impose such declaration of covenants and restrictions on such outdoor living areas and/or common areas that are acceptable to the commission. Such association shall be formed and continued for the purpose of maintaining such outdoor living area. Such an association, if required, may undertake other functions. It shall be created in such a manner that owners of property shall automatically be members and shall be subject to assessments levied to maintain such outdoor living area for the purposes intended. The period of existence of such association shall be not less than twenty years, and it shall continue thereafter until a majority vote of the members shall terminate it.

3. Streets. The commission or council may require that the right-of-way width of such other streets necessary to the proper development of adjacent properties be dedicated to the city.

4. Easements. Easements necessary to the orderly extension of public utilities may be required as a condition of approval. (Ord. 17-3 § 1; Ord. 79-4 § 1 (3.170)(2))

17.40.040 Planned development procedures.

There shall be a three-stage review process for planned developments consisting of pre-application (stage one), preliminary approval (stage two) and final approval (stage three).

A. Pre-Application (Stage One). The owner or authorized agent shall submit to the planning department the following information:

1. A schematic drawing, drawn to a minimum scale of one inch equals one hundred feet, showing the general relationship contemplated among all public and private uses and existing physical features;

2. A written statement setting forth the source of water supply, method of sewage disposal, means of drainage, dwelling types, nonresidential uses, lot layout, public and private access, height of structures, lighting, landscaped areas and provisions for maintenance of landscaped areas, areas to be devoted to various uses and housing densities per net acre and per gross acre contemplated by the applicant.

The developer and the city staff shall meet together and determine whether the requirements of this chapter have been complied with. If there is disagreement on this issue, the applicant, by request, or the staff may take this pre-application information to the commission for their determination of whether this site qualifies for the contemplated planned development. The professional coordinator shall be responsible for presenting the developer's plan in all of the broad professional aspects to the planning department. If the staff and the applicant reach a satisfactory agreement, the applicant may proceed to prepare the data for stage two, preliminary approval.

B. Preliminary Approval (Stage Two).

1. Applications for planned developments, preliminary approval, shall be made by the owner of all affected property, or by the authorized agent, and shall be filed on a form prescribed by the city. Applications shall be accompanied by a fee prescribed by the city and accompanied by the following information:

a. Ten copies of a preliminary development plan of the entire development, showing the following features:

i. Streets, driveways, off-street parking and loading areas;

ii. Location and maximum dimensions of structures, including activities and number of living units;

iii. Major landscaping features;

iv. Relevant operational data, drawings and/or elevations clearly establishing the scale, character and relationship of buildings, streets and open space.

v. Maps and information on the surrounding area within four hundred feet of the development.

b. A boundary survey or a certified boundary description by a registered surveyor, plus contour information, shall also be submitted. The elevation of all points used to determine contours shall be indicated on the preliminary plan and such points shall be given to true elevation above mean sea level as determined by the city engineer. The base data used shall be clearly indicated and shall be compatible with city datum, if bench marks are not adjacent. Two-foot contour intervals are required.

c. All elements listed in this subsection shall be characterized as existing or proposed and sufficiently detailed to indicate intent and impact; and the proposed ownership (private, commonly-held, public) of each feature shall be shown on the preliminary plan.

d. A tabulation of the land area to be devoted to open space, streets or other uses, and a calculation of the average residential density per net acre;

e. A development schedule demonstrating that the developer intends to commence construction within one year after the approval of the final development plan and will proceed diligently to completion;

f. If it is proposed that the final development plan will be executed in stages, a schedule thereof will be required.

2. An application for permit preliminary approval (stage two) shall be submitted to the planning commission. A public hearing as specified in Chapter 17.88 shall be held on each such application. After such hearing, the commission shall determine whether the proposal conforms to the permit criteria set forth in Section 17.40.050, and to the planned development regulations, and may approve or disapprove the application and the accompanying preliminary development plan, or require changes or impose conditions of approval as are in its judgment necessary to ensure conformity to such criteria and regulations. In doing so, the commission may, in its discretion, authorize submission of the final development plan in stages corresponding to the units or elements of the development. It may do so only upon evidence assuring completion of the entire development in accordance with the preliminary development plan and staged development schedule.

3. The planning commission's decision on an application for preliminary approval (stage two) may be appealed to the City Council pursuant to Section 17.88.140.

C. Final Approval (Stage Three).

1. Within one year after approval or modified approval of a preliminary development plan, the applicant shall file with the planning department a final plan for the entire development or, when submission in stages has been authorized, for the first unit of development. The final plan shall conform in all major respects with the approved preliminary development plan. The final plan shall include all information included in the preliminary plan, plus the following:

a. The location of water, sewerage and drainage facilities;

b. Detailed building and landscaping plans and elevations. Elevations shall be to scale, and shall show four sides of each proposed building, with at least one elevation of the street-facing side of each building visible from a public street. For lots or buildings on slopes of twenty percent or greater, at least one elevation shall be perpendicular to the slope.

c. The character and location of signs;

d. Plans for street improvements and grading or earth moving plans.

e. Copies of the legal documents required by the commission for dedication or reservation of public facilities, or for the creation of a nonprofit home owners association.

The final plan shall be sufficiently detailed to indicate fully the ultimate operation and appearance of the development.

2. The public works director shall review a submission for final approval (stage three) and prepare a report addressing the proposal's public improvements, including streets, sewers, drainage and water. The public works director's report shall be submitted to the planning commission at least seven days prior to the commission's public hearing on the final plan.

3. Upon receipt of the final development plan the planning commission shall conduct a public hearing in accordance with Chapter 17.78. The commission shall examine such plan and determine:

a. Whether it conforms to all applicable criteria and standards and

b. Whether it conforms in all substantial respects to the stage two approval.

The planning commission may require such changes in the proposed development, or impose such conditions of approval as are in its judgment necessary to ensure conformity to the applicable criteria and standards. In so doing, the commission may permit the applicant to revise the plan within thirty days. Any conditions of approval or changes to the proposed development plan required by the planning commission may be appealed by any party of record to the city council.

4. The planning commission's decision may be appealed to the city council pursuant to Section 17.88.140.

5. Permit Expiration. Final plan approval (stage three) shall be void after one year unless a building permit has been issued. However, when requested, the planning commission, at a public hearing conducted pursuant to Chapter 17.88, may extend authorization for an additional period not to exceed one year. Only one extension may be granted. (Ord. 17-3 § 1; Ord. 92-11 §§ 45, 46; Ord. 79-4 § 1 (3.170)(3))

17.40.050 Permit criteria.

A planned development permit may be granted by the planning commission only if it is found that the development conforms to all the following criteria, as well as to the planned development regulations:

A. That the location, design, size and uses are consistent with the comprehensive plan, development map or ordinance adopted by the council;

B. That the location, design, size and uses are such that the development can be well integrated with its surroundings, and in the case of a departure in character from surrounding uses, that the location and design will adequately reduce the impact of the development;

C. That the location, design, size and uses are such that traffic generated by the development, except in single-family density, can be accommodated safely and without congestion on existing or planned arterial or collector streets and will, in the case of commercial developments, avoid traversing local streets;

D. That the location, design, size and uses are such that the residents or establishments to be accommodated will be adequately served by existing or planned facilities and services;

E. That the location, design, size and uses will result in an attractive, healthful, efficient and stable environment for living, shopping or working. (Ord. 17-3 § 1; Ord. 79-4 § 1 (3.170)(4))

17.40.060 Mapping.

Whenever a planned development permit has been granted, and so long as the permit is in effect, the boundary of the planned development shall be indicated on the land use and zoning map of the city as a sub-district "PD." (Ord. 17-3 § 1; Ord. 92-11 § 47; Ord. 79-4 § 1 (3.170)(5))

17.40.070 Limitation on resubmission.

Whenever an application for a planned development permit has been denied, no application for the same plan or any portion thereof shall be filed by the same applicant within six months after the date of denial. (Ord. 17-3 § 1; Ord. 79-4 § 1 (3.170)(6))

17.40.080 Adherence to approved plan—Modifications.

A. The applicant shall agree in writing to be bound, for him or herself; and for any and all successors in interest, by the conditions prescribed for approval of a development. The approved final plan and staged development schedule shall control the issuance of all building permits and shall restrict the nature, location and design of all uses. Any changes in an approved preliminary or final development plan shall be reviewed by the planning commission in the same manner as the original application and shall be subject to the same procedural requirements.

B. A performance bond shall be required, in an amount to be determined by the planning commission to ensure that a development proposal is completed as approved and within the time limits agreed to. (Ord. 17-3 § 1; Ord. 79-4 § 1

(3.170)(7))

17.40.090 Violation—Permit revocation.

Failure to comply with the final development plan, any condition of approval prescribed under Section 17.40.040, or to comply with the staged development schedule, shall constitute a violation of this chapter. In this event, the city council may, after notice and hearing, revoke the planned development permit. (Ord. 17-3 § 1; Ord. 79-4 § 1 (3.170)(8))

17.40.100 Establishment of the planned development overlay zone.

A. The planned development (PD) overlay zone designation may be placed on a property or group of properties following the requirements of Chapter 17.86, Amendments.

B. An application for a zoning map amendment to place the planned development (PD) overlay zone designation on a property or group of properties may be made either prior to, or concurrent with, an application for preliminary approval (stage two).

C. An application package consisting of concurrent requests for a zoning map amendment to place the planned development (PD) overlay zone designation on a property or group of properties, and for preliminary approval (stage two) requires final approval by the city council. The planning commission's action on a combined zone map amendment and preliminary approval (stage two) application package is a recommendation to the city council. (Ord. 17-3 § 1)

Chapter 17.90 GENERAL REQUIREMENTS AND REGULATIONS

17.90.010 Authorization of similar uses.

The planning commission may authorize that a similar use, not specifically listed in the allowed uses of a zone, shall be included among the allowed uses if deemed similar. However, this section prohibits the inclusion in a zone where it is not listed, a use specifically listed in another one, or a use of the same general type and similar to a use specifically listed in another zone. (Ord. 79-4 § 1 (4.020))

17.90.020 Access requirement.

Every lot shall abut a street, other than an alley, for at least twenty-five feet. Lots which were created prior to adoption of the zoning ordinance which do not meet this provision may be accessed via an irrevocable recorded easement of a minimum of ten feet in width. (Ord. 87-14 § 1; Ord. 79-4 § 1 (4.030))

17.90.030 Maintenance of access.

The city shall review, under ORS 271.080 through 271.230, proposals for the vacation of public easements or rights-of-way which provide access to the ocean beach or estuarine waters. Existing rights-of-way and similar public easements which provide access to coastal waters shall be retained or replaced if they are sold, exchanged or transferred. Rights-of-way may be vacated so long as equal or improved access is provided as part of a development project. (Ord. 89-28 § 3; Ord. 86-10 § 4; Ord. 79-4 § 1 (4.035))

17.90.040 Clear-vision areas.

A. Requirement. A clear-vision area shall be maintained on the corners of all property adjacent to the intersection of two streets. A clear-vision area shall contain no planting, fence, wall, structure, or temporary or permanent obstruction exceeding three feet in height, measured from the top of the curb or, where no curb exists, from the established street center line grade, except that trees exceeding this height may be located in this area, provided all branches and foliage are removed to a height of eight feet above the grade.

B. Measurement. A clear-vision area is that area enclosed by the lines formed by the center lines of intersecting pavements or driving surfaces and a straight line drawn diagonally, across the corner, connecting those lines at the various distances specified by the chart below. The measured distance along the uncontrolled driving surface is "vision clearance distance -a-." The measured distance along the controlled driving surface is "vision clearance distance -b-." Measurement of the vision clearance distance -a- shall be from the point of intersection of the center lines of the two travel surfaces. Measurement of the vision clearance distance -b- shall be from the adjacent stop sign.

C. Exceptions. The requirements of subsection B do not apply to public utility poles or traffic control signs.

	Clear-Vision Area	
Street Classification	Vision Clearance Distance -a-	Vision Clearance Distance -b-
15 mph street and 15 mph street	75 ft.	10 ft.
15 mph street and 20 mph street	125 ft.	10 ft.
15 mph street and 30 mph street	200 ft.	10 ft.

(Ord. 93-21 §§ 2, 3, 4)

17.90.050 Maintenance of minimum requirements.

No lot area, yards, other open space or off street parking or loading area existing on or after the effective date of the zoning ordinance shall be reduced below the minimum required for it by the zoning ordinance. No conveyance of any portion of a lot, for other than a public use, shall leave a structure on the remainder of the lot with less than minimum ordinance requirements. (Ord. 79-4 § 1 (4.070))

17.90.060 Dual use of required open space.

No lot area, yard or other open space or off street parking or loading area which is required by the zoning ordinance for one use shall be a required lot area, yard or other open space or off-street parking or loading area for another use. (Ord. 79-4 § 1 (4.080))

17.90.065 Architectural design elements.

All single-family dwellings, modular housing and manufactured homes located in the RVL, RL, R1, R2, RAM, R3, RM, and C1 zones shall utilize at least two of the following architectural features: dormers; more than two gables; recessed entries; covered porch/entry; bay window; building off-set; deck with railing or planters and benches; or a garage, carport or other accessory structure. (Ord. 94-5 § 11)

17.90.070 Projections into required yards.

A. Cornices, eaves, window sills and similar incidental architectural features may project not more than eighteen inches into a yard required to be a minimum of five feet, or thirty-six inches into a yard required to be fifteen feet or more.

B. Bay windows, with no useable floor area and not exceeding a length of ten feet and not more than one per building elevation, may project not more than eighteen inches into a required side yard, or thirty-six inches into a required front or rear yard. Bay windows may not project into a required ocean yard.

C. Chimneys shall project not more than twenty-four inches into any required yard.

D. Building Entrances.

1. Unroofed landings may project not more than thirty-six inches into a required front yard, rear yard or street side yard where they provide access to the first story of a dwelling, as the term story is defined by the building code and where the landing is limited to no more than ten lineal feet. Such a landing may be accessed by no more than three risers. Unroofed landings and stairs may not project into a required ocean yard.

2. A covered entry to a dwelling may project not more than thirty-six inches into a required front yard, rear yard or street side yard where the entry provides access to the first story of the dwelling, as the term story is defined in the building code. The covered entry is limited to no more than ten feet in length and shall be completely open on all sides. The entry may be accessed by no more than three risers. Covered entries and stairs may not project into a required ocean yard.

E. Patios and decks, including any fixed benches, railings, or other attachments, which are no more than thirty inches in height above the existing grade may project into a required yard, but may not be closer than two feet to any property line. For lots abutting the oceanshore, a deck or patio permitted in the required yard may not be closer than two feet to the western property line or the Oregon Coordinate Line, whichever is further east. Patios and decks constructed in a required yard shall not obstruct significant views of the ocean, mountains or similar features from abutting property. (Ord. 08-1 §§ 58, 59; Ord. 92-11 § 54; Ord. 92-11 § 54; Ord. 79-4 § 1 (4.090))

17.90.080 Exceptions to building height regulations.

Projections such as chimneys, spires, domes, elevator shaft housings, towers, wind generators, aerials, flagpoles and other similar objects not used for human occupancy are not subject to the building height limitations of the zoning ordinance. (Ord. 79-4 § 1 (4.180))

17.90.090 Limited triplexes.

Triplexes permitted by Section 17.16.020(D) shall conform to the following standards:

A. The minimum lot size shall be five thousand square feet;

B. Four off-street parking spaces shall be provided;

C. The property owner shall annually submit a notarized sworn statement that a minimum of two of the dwelling units are used for nothing other than long-term rental purposes (periods of thirty calendar days or more). (Ord. 92-11 § 65; Ord. 89-3 § 1; Ord. 79-4 § 1 (4.150))

17.90.100 Control of lights on public beach.

No artificial light source shall be placed so that it directly illuminates the public beach at a distance of more than one hundred feet from the Oregon Coordinate Line or the property line, whichever is most eastward, after January 1, 1985. "Artificial light source" is defined as a lamp or other emitter of light which is directly visible from the public beach, including but not limited to flood lamps, area or barn lights, and street lights. (Ord. 79-4 § 1 (4.105))

17.90.110 Residential exterior lighting.

Exterior lighting, either free-standing or attached to a single-family residence, shall comply with these standards.

A. General Requirements. For residential properties including multiple residential properties not having common areas, all outdoor luminaires shall be fully shielded and shall not exceed one thousand two hundred sixty lumens.

B. Exceptions.

1. One partly shielded or unshielded luminaire at the main entry, not exceeding six hundred thirty lumens.

2. Any other partly shielded or unshielded luminaires not exceeding three hundred fifteen lumens.

3. Low voltage landscape lighting aimed away from adjacent properties and not exceeding two thousand one hundred lumens.

4. Shielded directional flood lighting aimed so that direct glare is not visible from adjacent properties and not exceeding two thousand one hundred lumens.

5. Open flame gas lamps.

6. Lighting installed with a vacancy sensor, where the sensor extinguishes the lights no more than fifteen minutes after the area is vacated.

7. Exempt Lighting.

a. Temporary lighting for theatrical, television, performance areas and construction sites.

b. Underwater lighting in swimming pools and other water features.

c. Temporary lighting and seasonal lighting provided that individual lamps are less than ten watts and seventy lumens.

d. Lighting that is only used under emergency conditions.

e. Low voltage landscape lighting controlled by an automatic device that is set to turn the lights off no later than ten p.m.

f. Upcast lighting illuminating a flag of the United States, not exceeding two thousand one hundred lumens. (Ord. 14-6 § 8)

17.90.120 Conversion of motels to condominiums.

In the event a motel is converted to a condominium, the requirements of the use to which it is converted shall apply. (Ord. 79-4 § 1 (4.125))

17.90.130 Storage in front yards.

Boats eighteen feet in length or greater, or recreation vehicles six feet six inches in height or greater shall not be stored in a required front yard. (Ord. 90-11A § 1 (Appx. A § 13); Ord. 79-4 § 1 (4.050))

17.90.135 Recreational vehicle occupancy.

Recreational vehicles may not be occupied on any lot in the city except as follows:

A. In an approved recreational vehicle park; or

B. During the construction period of a permitted use for which a building permit has been issued, but not to exceed one year and where the size of the recreational vehicle does not exceed three hundred square feet. (Ord. 90-11A § 1 (Appx. A § 14); Ord. 79-4 § 1 (4.055))

17.90.140 Storage of unused vehicles, junk or debris.

It is unlawful to keep inoperative vehicles or vehicle parts within view of persons on a public street or adjacent properties, or to keep unsightly and potentially hazardous accumulations of debris within view of persons on the public street or adjacent properties. (Ord. 79-4 § 1 (4.850))

17.90.150 Outdoor merchandising.

A. Purpose. The purpose of this section is to ensure that certain commercial activities are carried out in a manner that is aesthetically compatible with adjacent uses, minimizes congestion in commercial areas, minimizes impact on pedestrian circulation and maintains open space areas designed for pedestrian use.

B. All uses in the C1, C2 and RM zones shall be conducted entirely within a completely enclosed building except that the outdoor storage, display, sale or rental of merchandise or services may be permitted where the standards of subsection D of this section are met. The following uses and activities, subject to applicable conditions, are exempt from this prohibition:

1. The sale of living plant materials and cut flowers;
2. Outdoor seating in conjunction with a restaurant;
3. Christmas tree sales lot;
4. The dispensing of gasoline at a service station;
5. Newspaper vending machines subject to subsection (E)(1) of this section;
6. The sale of goods and services by a nonprofit organization subject to subsection (E)(2) of this section;
7. Automatic teller machines, subject to the design review requirements of Chapter 17.44;
8. Telephone booths, subject to the design review requirements of Chapter 17.44;
9. Live music and other outdoor performances, subject to subsection (E)(3) of this section; and
10. Farmers' market, subject to subsection (E)(4).

C. The prohibition on the outdoor storage or display of merchandise in conjunction with a commercial use applies to the general type of merchandise which is sold within the business premises, not just specific merchandise styles or brands.

D. The outdoor storage, display, sale or rental of merchandise or services may be permitted where:

1. The outdoor area in which the merchandise or service is stored, displayed, sold or rented is accessible only through a building entrance; or

2. The outdoor area is screened from a public street or adjacent property in a manner approved by the design review board.

E. The following additional requirements are applicable to certain types of outdoor merchandising:

1. Newspaper vending machines: Newspaper vending machines, placed on a public sidewalk, shall be located so that the use of the sidewalk by handicapped persons is not impeded. This standard shall be met by maintaining a minimum, unobstructed sidewalk width of four feet.

2. Nonprofit organization sales: The sale is authorized by a site specific use permit granted by the city manager after finding that:

a. The sale has the approval of the owner or lessee of the property on which it is to take place;

b. The sale will be located in a manner that will not interfere with pedestrian or vehicular traffic;

c. The sale will not interfere with the operation of adjacent businesses;

d. The sale shall be held no more than twice a year; and

e. The sale shall be for a specified period of time. The duration of the sale shall not exceed one day.

3. Live music or outdoor performances: The music or outdoor performance complies with the following:

a. The event has the approval of the property owner or lessee of the property;

b. The location of the music will not interfere with pedestrian traffic or the operation of adjacent businesses;

c. Where the music is proposed to be amplified by electronic means, the location is appropriate;

d. The hours proposed for the live music are appropriate to the location; and

e. The live music will be for a specified period of time.

4. Farmers' market: The farmers' market is approved by a site specific authorization made by the city manager after finding that the following standards are met:

a. The location will not unduly interfere with pedestrian or vehicular traffic;

b. The location will not unduly interfere with the operation of adjacent businesses;

c. The farmers' market is conducted for a specified period of time, including hours of operation; and

d. The farmers' market is limited to food, specific food related items and cut flowers.

F. For the purposes of this section, the free distribution of merchandise is considered outdoor merchandising and is prohibited. (Ord. 10-5 §§ 1, 2; Ord. 08-1 §§ 60, 61; Ord. 97-2 § 2; Ord. 90-10 § 1 (Appx. A § 44); Ord. 79-4 § 1 (4.900))

17.90.160 Land surveys.

Before an action is taken pursuant to this title which would cause adjustments or realignment of property lines, required yard areas or setbacks, the exact lot lines shall be validated by location of official survey pins or by a recorded survey performed by a licensed surveyor. If a property boundary survey was recorded prior to January 1, 1986, a letter from the licensed surveyor responsible for the recorded survey, or another licensed surveyor, shall be submitted stating that the survey as performed and recorded is still valid and accurate and that nothing in the monumentation or methods used has changed since the survey was done which would make it inaccurate or invalid, and no known disputes of that survey exist. Failing to produce such a letter, the property owner shall be required to secure a new survey. (Ord. 96-2 § 1; Ord. 92-11 § 68; Ord. 90-10 § 1 (Appx. A § 45); Ord. 79-4a § 1 (4.955))

17.90.170 Duplex standards.

The following standards are applicable to duplexes:

The individual dwelling units of a duplex may not be sold as separate personal property. (Ord. 09-2 § 1; Ord. 06-10 § 12; Ord. 95-8 § 13)

17.90.180 Claims for compensation under ORS 197.352.

A. For purposes of this section, "final action" means an order approved by the city council modifying, removing or not applying the city's land use regulation(s) in response to a demand for compensation under ORS 197.352.

B. The following standards must be met in order for a use to be considered a use permitted outright in the zone in which it is located:

1. If the demand does not involve a land division, the use or structures described in the development agreement created as part of the city's final action have been constructed in conformance with the standards and conditions of the development agreement by the person who obtained the right(s) to use the property under the city's final action; or

2. If the demand involves a land division, the lots are shown on a final plat recorded in conformance with the development agreement created as part of the city's final action and any state laws or city ordinances that continue to apply; or

3. If the use described in the development agreement created as part of the city's final action does not require construction and is not a land division, the property continues to be owned by the person who obtained the right(s) to use the property under the city's final action;

4. The state of Oregon has made a final determination to modify, remove or not apply the requirements of any applicable state laws or regulations that restrict the intended use of the property, thus permitting the use of the property as provided for in the city's final action. (Ord. 06-3 § 27)

17.90.190 Site plan.

Except for interior renovation of an existing structures and exterior renovations such as siding replacement where there will be no ground disturbance, no new construction shall be approved unless a site plan containing the following information is submitted and approved showing the location of:

A. Property boundaries and dimensions.

B. Easements, if any.

C. Existing and proposed structures.

D. Existing structures on adjoining property if within one tree-protection zone of the common property boundary. A tree protection zone is defined as a circle with two feet of radius for each inch of trunk diameter measured at four and one-half feet above grade.

E. Existing trees six-inch diameter at breast height (DBH) or larger.

F. Existing trees six-inch DBH or larger on adjoining property that, in the judgment of the applicant's certified arborist, might be damaged by construction activity on the subject property. Alternatively, in the absence of a report by a certified arborist, all trees on adjoining property within one tree protection zone of the common property boundary. A tree protection zone is defined as a circle with two feet of radius for each inch of DBH.

G. Existing trees six-inch DBH or larger in the adjoining street right-of-way that, in the judgment of the applicant's certified arborist, might be damaged by construction activity on the subject property. Alternatively, in the absence of a report by a certified arborist, all trees in the adjoining street right-of-way within one tree protection zone of the subject property.

H. Existing and proposed features needed to calculate lot coverage as defined in Section 17.04.335.

I. Topographic information needed to determine average grade as defined in Section 17.04.275.

J. For property in the oceanfront management overlay (OM) zone, data needed to calculate oceanfront setback pursuant to Section 17.42.050(A)(6).

K. For property in the wetland overlay (WO) zone, the location of wetlands and riparian corridors.

L. For property in the flood hazard overlay (FHO) zone, the location and type of flood hazard.

The planning director may waive any of these requirements if not applicable for particular developments or sites. (Ord. 19-3 § 1)

Chapter 17.92 ADMINISTRATIVE PROVISIONS

17.92.010 Development permits.

A. Permit Required.

1. A development permit is required for:

a. The construction, enlargement, alteration, repair, moving, improvement, removal, conversion or demolition of any structure or building which requires a building permit pursuant to either the State of Oregon, One and Two Family Dwelling Code, or the State of Oregon, Structural Specialty Code. (For the purpose of this section, these are referred to as Type 1 development permits.); or

b. An activity or structure specifically listed in this title as requiring a development permit. (For the purpose of this section, these are referred to as Type 2 or Type 3 development permits.)

2. In the case of a structure or building requiring a building permit, the development permit may be part of the building permit.

B. Application. A property owner or their designated representative may initiate a request for a development permit by filing an application with the city using forms provided by the city.

C. Administrative Review of Development Permits.

1. Administrative Review of Type 1 Development Permits. The building official shall issue a development permit to the applicant if the building official finds that the work described in an application for a development permit and the plans, specifications, and other data filed with the application conform to the requirements of this title, and any conditions imposed by a reviewing authority. A decision of the building official may be appealed to the planning commission in accordance with Section 17.88.140.

2. Administrative review of Type 2 development permits shall follow the following procedure:

a. The development permit application shall be reviewed by planning department against the applicable standards contained in this title and the application shall either be approved, approved with conditions, or denied.

b. A decision shall be made within twenty days of the receipt of a complete application.

c. The decision of the planning department shall be by signed written order. The order shall comply with Section 17.88.110(B). The written order is the final decision on the matter and the date of the order is the date that it is signed. The order becomes effective on the expiration of the appeal period, unless an appeal has been filed.

d. The applicant shall be notified of the decision in accordance with the provisions of Section 17.88.130. Property owners within one hundred feet of the exterior boundary of the subject property shall likewise be notified.

e. A decision on the development permit may be appealed to the planning commission in accordance with Section 17.88.140.

3. Administrative review of Type 3 development permits shall follow the following procedure:

a. A development permit application shall be submitted in accordance with Section 17.92.040.

b. A notice of the proposed development shall be mailed to property owners within one hundred feet of the exterior boundary of the subject property. The notice shall include the information specified in Section 17.88.030(A), (C), (D), (E), (G) and (I). The notice shall also include a statement that persons are invited to submit information within twenty days relevant to the standards pertinent to the proposal giving reasons why the application should or should not be approved or proposing modifications the person believes are necessary for approval according to the applicable standards.

c. Following the end of the notice period described in Section 17.92.010(C)(3)(b), the planning director shall approve, approve with conditions or deny the application. The decision shall be by a signed written order. The order shall comply with Section 17.88.110 (B). The written order is the final decision on the matter and the date of the order is the date that it is signed. The order becomes effective on the expiration of the appeal period, unless an appeal has been filed.

d. The applicant and other persons who commented on the proposed development permit shall be notified of the decision in accordance with the provisions of Section 17.88.130.

e. A decision on the development permit may be appealed to the planning commission by a party who commented on the proposed development permit in accordance with Section 17.88.140.

D. Emergency Issuance. A Type 2 development permit may be issued without meeting the requirements of subsection (C)(2) of this section when necessary to alleviate an immediate threat to property. At the conclusion of the emergency, measures taken as a result of the emergency will be reviewed and appropriate modifications, to conform to city standards, shall be made.

E. Expiration. A development permit shall become null and void if work has not commenced within one hundred eighty days of its issuance or if the work is abandoned for more than one hundred eighty days after work has started.

F. Revocation. For Type 1 development permits, the portion of the development permit which pertains to building code requirements may be revoked by the building official upon a finding of noncompliance with the standards set forth in the State of Oregon, One and Two Family Dwelling Code, or the State of Oregon, Structural Specialty Code, or with conditions applied to the permit. That decision may be appealed to the Building Board of Appeals. The portion of the development permit which pertains to land use standards contained in this title may be revoked by the building official upon a finding of noncompliance with provisions of this title. That decision may be appealed to the planning commission. A Type 2 development permit may be revoked by the city manager upon a finding of noncompliance with the provisions of this title, or conditions attached to the development permit. That decision may be appealed to the planning commission.

Revocation of a development permit is a remedy available in addition to and in lieu of other remedies provided by this code. (Ord. 08-1 § 62; Ord. 02-17 §§ 2, 3; Ord. 94-8 § 22)

17.92.020 Enforcement.

The building official or code enforcement officer shall have the power and principal responsibility for enforcing provisions of this title. Neither the building official nor any other public employee or official of the city shall issue any permit or license for any use, activity or structure which violates provisions of this title. Any permit or license issued in conflict with the provisions of this title, intentionally or otherwise, shall be void. (Ord. 94-8 § 22; Ord. 90-10 § 1 (Appx. A § 69); Ord. 79-4 § 1 (11.010))

17.92.030 Building permits.

Before issuing a permit for the construction, reconstruction or alteration of a structure, it will be the responsibility of the building official to make sure that provisions of this title will not be violated. (Ord. 94-8 § 22; Ord. 79-4 § 1 (11.020))

17.92.040 Application information.

A. An application for an action or permit provided for by this title shall consist of:

1. A complete application form and the appropriate application fee;

2. Proof that the property affected by the application is in the exclusive ownership of the applicant, or that the applicant has the consent of all partners in ownership of the affected property;

3. Legal description of the property affected by the application.

B. If the application is complete when first submitted, or the applicant submits the requested additional information within one hundred eighty days of the date the application was first submitted, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted.

C. If an application for a permit or zone change is incomplete, the city shall notify the applicant of the additional information required within thirty days of the receipt of the application. The applicant shall be given the opportunity to

submit the additional information required. The application shall be deemed complete upon receipt of additional information required. If the applicant refuses to submit the required additional information, the application shall be deemed complete on the thirty-first day after the governing body first received the application. (Ord. 94-8 § 22; Ord. 79-4 § 1 (11.030))

17.92.050 Consolidated application procedure.

Where a proposed development requires more than one development permit, or a change in zone designation from the city, the applicant may request that the city consider all necessary permit requests in a consolidated manner. If the applicant requests that the city consolidate his or her permit review, all necessary public hearings before the planning commission shall be held on the same date. (Ord. 94-8 § 22; Ord. 86-10 § 16; Ord. 79-4 § 1 (11.035))

17.92.060 Filing fee.

It shall be the responsibility of the applicant to pay for the full cost of processing permit applications. Minimum fees shall be set by resolution by the city council, and the applicant shall pay the minimum fee to the city upon the filing of an application. Such fees shall not be refundable. The applicant shall be billed for costs incurred over and above the minimum permit fee at the conclusion of city action of the permit request. (Ord. 94-8 § 22; Ord. 90-10 § 1 (Appx. A § 70); Ord. 90-3 § 20; Ord. 79-4 § 1 (11.040))

A-10

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MJ NAJIMI,
Petitioner,

vs.

CITY OF CANNON BEACH,
Respondent.

LUBA No. 2020-118

FINAL OPINION
AND ORDER

Appeal from City of Cannon Beach.

Dean N. Alterman filed the petition for review and argued on behalf of petitioner. Also on the brief were Erica N. Menze and Alterman Law Group PC.

William K. Kabeiseman filed a response brief and argued on behalf of respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, P.C.

RYAN, Board Member; RUDD, Board Chair; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 06/21/2021

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the city council denying a building permit for a single-family dwelling.

FACTS

Petitioner owns two lots zoned Residential Medium Density (R2), located in the Cannon Beach Preservation Subdivision (the Subdivision), a four-lot planned development (PD). In 2015, the city approved the tentative PD plan for the Subdivision under the provisions of Cannon Beach Municipal Code (CBMC) 17.40.040(B). In 2016, the city approved the final PD plan for the Subdivision under CBMC 17.40.040(C) and the final plat for the Subdivision under CBMC 16.04.210. Petitioner subsequently purchased Lots 1 and 3 of the Subdivision and, in 2020, applied for a building permit for a dwelling on Lot 1. The building official issued petitioner a building permit. Neighbors appealed the building official's decision to the planning commission, which reversed the building official's decision and denied the building permit on two grounds. We discuss those grounds later in our resolution of the assignments of error. Petitioner appealed the planning commission's decision to the city council, which held a hearing on the appeal. At the conclusion of the hearing, the city council voted to affirm the planning commission's decision and deny the building permit. This appeal followed.

INTRODUCTION

The city denied petitioner's application. Generally, only one valid basis is required for denial of an application and, where LUBA has affirmed one basis for denial, any error committed with respect to alternative or independent bases for denial does not provide a basis for reversal or remand. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd*, 195 Or App 762, 100 P3d 218 (2004), *rev den*, 338 Or 17 (2005). For the reasons explained below, we deny the fourth assignment of error and conclude that at least one of the city's bases for denial is valid—that the turret is not a projection that may exceed the 28-foot height limit in CBMC 17.14.040(E). Because we deny the fourth assignment of error, the city's decision must be affirmed. In that circumstance, LUBA typically does not address challenges directed at other, alternative bases for denial. However, due to the posture of this appeal and the other bases for denial, resolution of additional issues may be useful if, in the future, petitioner files a new building permit application. We therefore also resolve the issues presented in the first, second, and third assignments of error, so that the parties will have a more complete resolution by LUBA of the appeal.

FIRST AND THIRD ASSIGNMENTS OF ERROR

One basis for the city council's denial of the building permit was its conclusion that the Subdivision fails to comply with CBMC 17.40.030(A), which applies "to all developments for which a [PD] permit is required" and provides:

"In all residential developments, a minimum of forty percent of the

> total area shall be devoted to outdoor living area. Of this area, twenty-five percent of the outdoor living area may be utilized privately by individual owners or users of the [PD]; a minimum of seventy-five percent of this area shall be common or shared outdoor living area."

The Subdivision is 25,000 square feet. The city council concluded that the Subdivision fails to provide the 7,500 square feet of common open space required by CBMC 17.40.030(A). Record 45.

In the third assignment of error, petitioner argues that the city council exceeded its jurisdiction in applying CBMC 17.40.030(A) to an application for a building permit for a dwelling in a previously approved PD. Petitioner argues that the plain language of CBMC 17.40.030 makes it clear that its standards apply only to "developments for which a [PD] permit is required." Petitioner argues that CBMC 17.40.030(A) is not a standard that applies to petitioner's application for a building permit, because no PD permit is required to construct a single-family dwelling and because a PD permit was approved for the Subdivision several years ago.

In the first assignment of error, petitioner maintains that the city's decisions in 2015, approving the tentative PD plan, and in 2016, approving the final PD plan and the final plat, conclusively resolved the issue of whether the Subdivision satisfies CBMC 17.40.030(A), and the city may not revisit those conclusions in considering whether to approve the building permit. Petitioner points out that, under CBMC 17.40.050(A), the city may issue a PD permit only if "the location, design, size and uses [of the PD] are consistent with the

comprehensive plan, development map or ordinance." Petitioner also points to findings from the city's 2016 decision approving the final PD plan that both the final PD plan and the final plat conform with the approved tentative PD plan and that the final PD plan provides the location of common open space and provides sufficient detail "to indicate fully the development's ultimate operation and appearance."[1] Record 267, 273.

The city responds that CBMC 17.92.010 allows the city to review an application for a building permit for compliance with the standards in CBMC 17.40.030. CBMC 17.92.010(A)(1) requires petitioner to obtain a development permit for the dwelling, and CBMC 17.92.010(C)(1) requires the city to determine whether "the work described in an application for a development permit and the plans, specifications, and other data filed with the application *conform to the requirements of this title*, and any conditions imposed by a reviewing authority." (Emphasis added.) As the city's argument goes, because CBMC 17.40.030(A) is part of CBMC title 17, the city may review whether the entire Subdivision conforms to all of the PD standards in CBMC chapter 17.40 in considering whether to approve petitioner's building permit application.

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[1] CBMC 17.40.040(C)(1) requires an applicant for a PD permit to file a final plat that "shall conform in all major respects with the approved" tentative PD plan. CBMC 16.04.210(A) requires the city to approve a final plat for a subdivision if the final plat "conforms to the tentative plan and applicable conditions have been met."

There are two problems with the city's response. First, the CBMC provisions on which the city relies in its brief are not cited or relied on in the city council's decision. We will not consider arguments that are raised for the first time in the response brief.

Second, and more importantly, the city's response fails to give any effect to the three prior city decisions that concluded that CBMC 17.40.030 was met: the 2015 decision approving the tentative PD plan and the 2016 decisions approving the final PD plan and the final plat. The city concedes that petitioner's building permit application complies with the final plat. Response Brief 15.

In *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004), we reversed the city's denial of an application for parking lot improvements that were intended to implement a previous site plan approval for a gas station and associated parking. The city council denied the parking lot improvement application after agreeing with the intervenor that the city had miscalculated the lot area in the previous site plan review and, as a result, miscalculated the required number of parking spaces to be constructed. We concluded that the city's attempt to correct that miscalculation by denying the subsequent application for construction of the improvements was "nothing short of a collateral attack on the correctness of the [prior] decision." *Safeway*, 47 Or LUBA at 501. Similarly, here, the city's attempt to correct what it has essentially concluded may have been a mistake in the final PD plan and the final plat is nothing short of a collateral attack on the correctness of those decisions.

The first and third assignments of error are sustained, in part.[2]

FOURTH ASSIGNMENT OF ERROR

The maximum height for structures with pitched roofs in the R2 zone is 28 feet. CBMC 17.14.040(E). The city council found that the building permit application failed to satisfy CBMC 17.14.040(E) because a turret included on the building plans exceeds 28 feet in height. CBMC 17.90.080 excepts from the 28-foot height limit "[p]rojections such as chimneys, spires, domes, elevator shaft housings, towers, wind generators, aerials, flagpoles and other similar objects not used for human occupancy." Petitioner argued below that the turret is such a projection. In the fourth assignment of error, petitioner argues that the city council's decision is not supported by substantial evidence in the record. As petitioner explains, the original building plans included a turret measuring approximately 10 feet by six feet, with windows on all sides, that was accessed via a staircase. After the building official reviewed the plans and concluded that the turret could be used for human occupancy and exceeded the 28-foot height limit, petitioner submitted revised plans that removed the staircase and instead showed a hatch access.

The city council interpreted CBMC 17.90.080 as follows:

"The City Council finds that the turret is not of ornamental or

---

[2] A portion of the second subassignment of error under petitioner's first assignment of error contains arguments similar to those resolved in our discussion of the second assignment of error.

> utilitarian character, containing windows and although not providing direct access, accessible through ladder access, which could possibly be used as an observation deck, not in-keeping with the intent of the CBMC. *The City Council specifically interprets the list of uses allowed to exceed the height limit to involve decorative or functional projections, but not ones that allow persons to spend extended periods of time in them. [Petitioner] asserts that the turret would be 'more in the nature of a storage area,' but a storage area, such as an attic or a loft, would also allow persons to spend extended periods of time in it. Each of the examples in the list in CMBC 17.90.080 would not allow a person to spend an extended period of time in it.* Accordingly, the Council concludes that the turret as proposed does not meet the terms of the exception in CBMC 17.90.080." Record 45 (emphasis added).

Based on that interpretation, the city council concluded that the proposed turret is not a "projection" that is exempt from the 28-foot height limit because it is a space that may be accessed and used for extended periods of time for human occupancy, and it is therefore not similar to "chimneys, spires, domes, elevator shaft housings, towers, wind generators, aerials, [and] flagpoles." CBMC 17.90.080.

Petitioner does not challenge that interpretation. Rather, petitioner's argument focuses on the lack of evidence in the record that the space could be accessed via a ladder. While the evidence of ladder access may be sparse, the city council did not rely on evidence that the turret could be accessed via a ladder to conclude that CBMC 17.90.080 does not exempt the turret from the height limit. The city council relied on its interpretation of CBMC 17.90.080 as not extending to features that can be occupied and used by humans for extended periods of time—regardless of how they are accessed—to conclude that the turret is not a

projection entitled to exemption from the height limit. Absent any challenge to that interpretation, petitioner's arguments do not provide a basis for reversal or remand of the decision.

The fourth assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner argues that the city's decision adopted a moratorium on development in the Subdivision without complying with the procedures in ORS 197.520(1) and without demonstrating a need for the moratorium, as required by ORS 197.520(3).[3] Petitioner's argument is based on the following city council finding:

> "Turning to the Common Outdoor Living Area, the City Council finds that, although the [PD] Chapter 17.40 does not define Common Outdoor Living Area, the intent is not to have driveways as part of the Common Outdoor Living Area. The Council finds that at least 7,500 square-feet of the 25,000 SF [Subdivision] must be provided as common shared open space. If the driveway easements are removed from the calculations provided in Exhibits C-6-8, the [Subdivision] has provided only 5,138 SF of common shared open space.
>
> "*Until the Home Owners Association can provide the 2,362 additional square-feet of common shared open space or each owner provides 591 SF of common shared open space, through an easement benefiting all owners of the [Subdivision], the City will not approve a building permit for any properties of the* [*Subdivision*]." Record 45 (emphasis added).

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[3] The second subassignment of error under petitioner's first assignment of error includes a similar argument.

The city responds, and we agree, that the city's decision is not a moratorium on development. We have explained that "denial of [an] application for a permit because the city concluded the application was not consistent with the [local code] does not come within the definition of a moratorium, and is allowed under ORS 197.524(2)." *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339, 349 (2016). We conclude above that the city properly denied the building permit application because the turret failed to satisfy the height limitation in CBMC 17.14.040(E). That is a permissible basis for denial. However, we emphasize that, as explained in our resolution of the first and third assignments of error, the city has no authority to apply the PD standards to an application for a building permit for a lot in the Subdivision, and it may not deny a building permit application that otherwise complies with the applicable building permit standards for failure of the Subdivision or an individual lot in the Subdivision to provide common open space.

The second assignment of error is denied.

The city's decision is affirmed.

From: direx@charter.net <direx@charter.net>
Sent: Tuesday, March 1, 2022 2:53 PM
To: City Hall Group <cityhall@ci.cannon-beach.or.us>
Subject: AA220-01 Harrison Appeal

To the City of Cannon Beach Planning Commissioners:

Regarding AA22-01

This appeal by Jeff and Jennifer Harrison stems from the City's failure to meet its obligation to assure that all eighteen conditions of approval attached to the Planned Unit Development have been met. Those conditions were imposed to placate those in opposition, namely the Planning Commission and an extraordinary number of articulate citizens who voiced strenuous and well reasoned objections based on the Cannon Beach Comprehensive Plan and Codes.

There should be no ambiguity about whether building plans comply with the requirements of Condition 16. Questions of design should be decided in favor of the intention of the Condition rather than in favor of an effort by the developer to circumvent the requirement. Since a detached garage may not include a second story or livable space, there should be no question whether the plans allow such. The enclosed bottom area of the garage as presented in the plans gives reason to think that a floor could be added, creating livable space. Moreover, enclosing the space created by the steep slope adds to the mass of a building which, according to the intention of Condition 16, should be kept to a minimum. Leaving open space beneath the garage floor would alleviate the possibility of livable space and would make the garage appear less massive.

In addition, it seems little to ask of the City to make certain that the requirements of Condition 17 be met, that "the applicant shall provide to the City an executed contract with a landscape professional responsible for the installation and maintenance of plant materials on the wall and shall provide a timeline for the establishment of plantings on the wall. If plants are not successfully established within those timelines, the City may take any necessary enforcement actions to assure that the requirements of the final plan and this condition are met." Granted, an individual without professional landscape credentials has made an effort to plant materials in the wall's pockets, but this has failed to fulfill the requirement of Condition 2: "The proposed retaining wall for the access drive will be a "living wall" design as shown in the documents submitted by the applicant." That design as presented by the applicant for the PUD showed a wall completely obscured by greenery. Instead, the wall as it stands remains an industrial eyesore.

In your deliberations and conclusion regarding this appeal, please keep in mind the City's obligation to see that all the Conditions of this Planned Unit Development are indeed fulfilled.

Sincerely,

Diane Amos
P. O. Box 494
Cannon Beach OR 97110
503-436-0936

D-6

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LAW GROUP

DEAN N. ALTERMAN
ATTORNEY

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

March 3, 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 on behalf of our client Paul Bouvet as our post-hearing submission of additional evidence in support of Mr. Bouvet's application and in response to the appeal of his building permit submitted by Greg Hathaway on behalf of his clients Jeff and Jennifer Harrison.

Mr. Bouvet's house plan complies with the requirements of the plat and code about floor area and setbacks. The staff report and the evidence and testimony at last week's hearing showed that only two issues remain. One issue is the stormwater drywell and the other issue is the garage. Both issues have simple clear answers.

1. The drywell is not an "exclusionary improvement" because it will be underground and will not prevent the open space from serving its intended purpose.

The first issue is whether Mr. Bouvet may manage stormwater with an on-site drywell on the portion of his lot that is covered by the private open space easement. In my first letter, I pointed out that the drywell fulfills the public policy that the city has expressed in CBMC §13.16.020.C: "Every person that uses property has an obligation to minimize or eliminate detrimental impacts on other persons or property that result from such use. If a user of property alters the property in any way that increases the flow of surface water from the property, the user must control the flow."

Why is the drywell where it is? The drywell's location must comply with Section 1101.6.3.2 of the Uniform Plumbing Code as adopted in Oregon, which states that drywells for storm drainage must not be closer than 5 feet to a property

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line nor closer than 10 feet to a building unless approved by the building official. Mr. Bouvet has chosen a location that complies with the code.

Even though the drywell is in a location that complies with the Uniform Plumbing Code and even though it implements the city policy on stormwater management, the Harrisons contend that Mr. Bouvet's drywell would violate Condition 2 of the PUD approval for the subdivision. Condition 2 required the developer to "prepare and record a shared access and maintenance agreement for the shared drive serving the four lots contemporaneous with or within three months following recordation of the final plat for the development." The developer drafted and recorded the agreement. Nothing in Condition 2 prohibits the individual lot owners from managing stormwater in on-site drywells.

The Harrisons' actual argument against the drywell has two parts: first, they contend that Mr. Bouvet would violate the shared access and maintenance agreement (the "SAMA") if he put a drywell underneath his portion of the shared open space, because the drywell would manage stormwater from only his property and would not be shared by the owners of the other lots. Second, they contend that if he violates the SAMA he is violating Condition 2.

Both contentions are wrong.

The SAMA allows lot owners to build patios, decks, and similar "non-exclusionary improvements" within the open space easement area. Commissioner Moritz identified why the Harrisons' first contention is wrong 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. You can and should find that an underground drywell that does not obstruct the surface is a non-exclusionary improvement because it does not interfere with the lot owners' ability to use the surface: it does not exclude any of the owners from using the surface. The owners will not even be able to see the drywell; it will be underground.

The Harrisons' second contention is also wrong. A violation of the SAMA (and the drywell is not one) is not a violation of Condition 2. A violation of the SAMA doesn't cause the SAMA to get un-drafted and un-recorded. Rather, a violation would give the other lot owners a right to sue the offending lot owner to enforce their rights under the SAMA.

2. The garage is attached to the house, and so whether it has a "second story" is irrelevant; however, it does not in fact have a "second story" because it has only one floor.

A. What does Condition 16 of the PUD approval actually allow?

The garage question is also simple, though it's more intricate than the underground drywell.

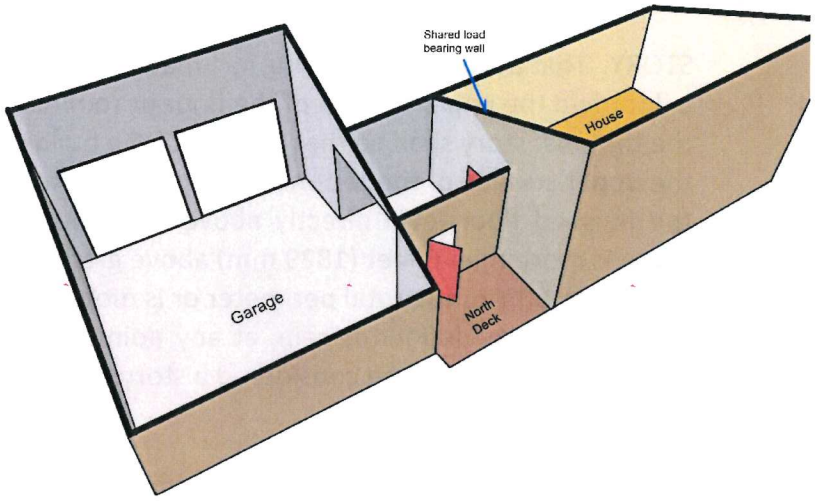
The relevant condition is Condition 16 of the PUD approval, which reads:

> 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.

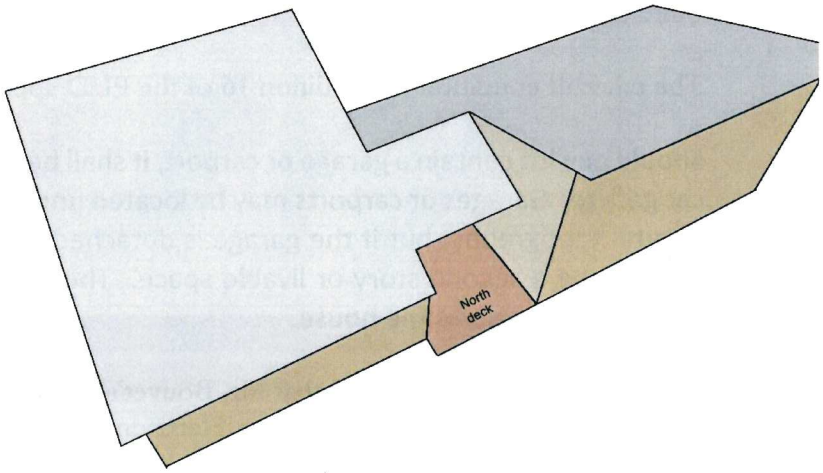
The Harrisons have suggested that Mr. Bouvet's proposed garage includes a second story. For you to find in favor of the Harrisons, you must find both that it is a detached garage, and that it includes a second story. Please note that "a second story" is different from "a two-story structure" because a second story is a floor level that is above a first story.

Several commissioners said last week that it would help them to evaluate the application to see a rendering of the proposed structure that shows the relation between the house and the garage.

The following diagram shows how Mr. Bouvet would attach the house and the garage, if you find that the garage in his first design is not attached to the house. The diagram shows the structure with the roof removed, as seen from the north. The living area is to the right, and is connected to the garage by a wall and interior door. The colors are not part of the design; the different colors are simply for clarity.



The next rendering shows the roofline. The roof over the living space slopes in one direction. The roof over most of the garage slopes in the other direction.



Mr. Bouvet proposes a garage that is structurally and visually attached to the house. Because it will be attached to the house, it is not a "detached garage." Because it is not a detached garage, it doesn't matter whether this structure with one floor is considered to have a second story.

If you agree that the garage is attached to the house, then Condition 16 does not prohibit the garage from including a second story, and you do not have to decide whether the garage includes a second story.

B. What is a "second story"?

The appellants have cited to a provision of the Oregon Residential Specialty Code, Section R210, that defines "story" as follows:

> 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, except that the topmost story shall be that portion of the building included between the upper surface of the top-most floor and the ceiling or roof above. If the finished floor level directly above a usable or unused underfloor space is more than 6 feet (1829 mm) above grade, as defined herein, for more than 50% of the total perimeter or is more than 12 feet (3658 mm) above grade, as defined herein, at any point, such usable or unusable underfloor space shall be considered a story.

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. The 1988 Uniform Building Code, on which the state code is based, uses the same definition of "story" that is in today's code. The 1988 Uniform Building Code also includes a definition for "Story, First," which reads as follows:

> STORY, FIRST, is the lowest story in a building which qualifies as a story, as defined herein, except that a floor level in a building having only one floor level shall be classified as a first story, provided such floor level is not more than 4 feet below grade, as defined herein, for more than 50 percent of the total perimeter, or not more than 8 feet below grade, as defined herein, at any point.

In common speech a second story is above a first story, not below a first story. Under the 1988 code definition, the garage floor is the "first story" because it is the only floor level and it is not below grade. The hillside below the garage cannot be a "second story" because it is not above the "first story." You may reasonably find that a building with only one floor is a building that does not have a second story.

C. The purpose of Condition 16 was not to prohibit owners from building garages on slopes, but to prohibit owners from building two detached living spaces on one lot.

In context, and as you know from other building permit applications involving this subdivision, the purpose of the requirement that a detached garage not have a second story was not for fire protection, and not as a height restriction, but to prevent a single lot from having two distinct living spaces – to prevent this four-home subdivision from having more than four dwelling units. The reason that the definition of "story" is important in the Residential Specialty Code is that Section R101.2.1 of that code states that it applies to "detached one- and two-family dwellings and townhouses classified as Group R-3, not more than three stories above grade plane in height, and their accessory structures." The definition of "story" is not to limit the size of buildings but to identify which buildings are subject to the Residential Specialty Code and which buildings are subject to other codes.

If you find that the garage is not attached to the house, then you may nevertheless find that the garage does not include "a second story" because the garage is the "first story" and has no floor level above the garage floor. If you determine, however, that the ungraded, unfinished slope below the garage is a "story," then you will have found the second story of this building to be not above but below the first story. That would be contrary to the ordinary meaning of the words "first story" and "second story" and would serve no useful purpose.

D. Alternatively, you can find that when it approved this subdivision the City Council intended to encourage the owners to build carports and parking decks instead of garages.

If you do find that the slope below the garage is a "story" despite it being neither level nor finished, then Mr. Bouvet will add as much attachment as necessary between the house and the garage so that the garage is indisputably an attached

garage, or he will remove as much of the garage as necessary so that it becomes a carport or parking deck, to which the restriction does not apply.

3. 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 as proposed is an attached garage and so whether the space below the garage floor is a "second story" simply because it is on a steep slope is irrelevant, but if you find that it is not an attached garage as proposed, he will attach it to the house with north and south walls so that it will be an attached garage, in which case whether the code deems it to be a two-story building becomes irrelevant. It is clearly not a "second story" within the intent of Condition 16 of the PUD approval.

You should deny the appeal and uphold the city's administrative decision to issue the building permit.

Very truly yours,

Dean N. Alterman

Dean N. Alterman

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

Attachment: Definition of "Story, First" from 1988 UBC

R

Sec. 419. REPAIR is the reconstruction or renewal of any part of an existing *building* for the purpose of its maintenance.

S

Sec. 420. SENSITIZER is a chemical that causes a substantial proportion of exposed people or animals to develop an allergic reaction in normal tissue after repeated exposure to the chemical.

SERVICE CORRIDOR is a fully enclosed passage used for transporting HPM and for purposes other than required exiting.

SHAFT is a vertical opening through a building for elevators, dumbwaiters, mechanical equipment or similar purposes.

SHALL, as used in this code, is mandatory.

SMOKE DETECTOR is an approved device that senses visible or invisible particles of combustion. The detector shall bear a label or other identification issued by an approved testing agency having a service for inspection of materials and workmanship at the factory during fabrication and assembly.

STAGE See Chapter 39.

STORY is that portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. If the finished floor level directly above a usable or unused under-floor space is more than 6 feet above grade as defined herein for more than 50 percent of the total perimeter or is more than 12 feet above grade as defined herein at any point, such usable or unused under-floor space shall be considered as a story.

STORY, FIRST, is the lowest story in a building which qualifies as a story, as defined herein, except that a floor level in a building having only one floor level shall be classified as a first story, provided such floor level is not more than 4 feet below grade, as defined herein, for more than 50 percent of the total perimeter, or not more than 8 feet below grade, as defined herein, at any point.

STREET is any thoroughfare or public way not less than 16 feet in width which has been dedicated or deeded to the public for public use.

STRUCTURE is that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

T

Sec. 421. No definitions.

U

Sec. 422. U.B.C. STANDARDS is the Uniform Building Code Standards