



Cannon Beach Planning Commission

Findings of Fact and Conclusions of Law

PUBLIC HEARING AND CONSIDERATION OF **AA 21-01**, JEFF AND JENNIFER HARRISON ADMINISTRATIVE APPEAL OF THE CITY'S APPROVAL OF A BUILDING/DEVELOPMENT PERMIT FOR 544 NORTH LAUREL STREET. THE PROPERTY IS LOCATED AT 544 N. LAUREL STREET (TAX LOT 07000, MAP 51019AD), AND IN A RESIDENTIAL MEDIUM DENSITY (R2) ZONE. THE REQUEST WILL BE REVIEWED PURSUANT TO MUNICIPAL CODE, SECTION 17.88.180, REVIEW CONSISTING OF ADDITIONAL EVIDENCE OR DE NOVO REVIEW AND APPLICABLE SECTIONS OF THE ZONING ORDINANCE, CONDITIONS OF APPROVAL OF THE CANNON BEACH PRESERVATION PLANNED DEVELOPMENT SUBDIVISION AND APPROVED PLAT.

Agenda Date: October 28, 2021

Prepared By: Jeffrey S. Adams, PhD

GENERAL INFORMATION

NOTICE

Public notice for this October 28th, 2021, Public Hearing is as follows:

A. Notice was mailed and posted at area Post Offices on October 6th, 2021;

EXHIBITS

The following Exhibits are attached hereto as referenced. All application documents were received at the Cannon Beach Community Development office on October 20, 2021 unless otherwise noted.

"A" Exhibits – Application Materials

A-1A Administrative Appeal Application, dated August 18, 2021, including Hathaway letter of appeal, on behalf of Jeff and Jennifer Harrison, dated August 18, 2021;

A-1B Appeal of Building Permit No. 164-21-00179 (544 N. Laurel Street) Letter, Jeff & Jennifer Harrison, dated October 20, 2021.

A-2 EXHIBIT 01, Harrison Submittal: Harrison email correspondence with Bruce St. Denis, City Manager, copied to Councilor Risley, blind-copied to Commissioners Bernt and Kerr, dated September 21, 2021;

A-3 EXHIBIT 02, Harrison Submittal: FAR Worksheet, correction dated July 15, 2021;

A-4 EXHIBIT 03, Harrison Submittal: Adams email correspondence with David Vonada, Tolovana Architects, dated July 9, 2021;

- A-5** EXHIBIT 04, Harrison Submittal: Photo of Harding's residence and accessory structures; Clatsop MLS 2021
- A-6** EXHIBIT 05, Harrison Submittal: Photo of interior of Harding's accessory structure; Clatsop MLS 2021
- A-7** EXHIBIT 06, Harrison Submittal: Photo of interior of Harding's accessory structure; Clatsop MLS 2021
- A-8** EXHIBIT 07, Harrison Submittal: Photo of interior of Harding's accessory structure; Clatsop MLS 2021
- A-9** EXHIBIT 08, Harrison Submittal: Photo of interior of Harding's accessory structure; Clatsop MLS 2021
- A-10** EXHIBIT 09, Harrison Submittal: Applicant's transcript from January 14, 2020 City Council Work Session discussion re: Harding 'garage' on Lot 1 of the Nicholson PUD.
- A-11** EXHIBIT 10, Harrison Submittal: Applicant's transcript from October 23, 2020 Planning Commission, first appeal of administrative decision to approve Najimi building on Lot 1 of Nicholson PUD.
- A-12** EXHIBIT 11, Harrison Submittal: Applicant's transcript of December 1, 2020 City Council discussion, appeal of Najimi building permit, Lot 1, Nicholson PUD
- A-13** EXHIBIT 12, Harrison Submittal: Vasquez Yard & Tree Work Inc. Invoice for Living Wall landscaping work, dated September 11, 2021;
- A-14** EXHIBIT 13, Harrison Submittal: Harrison email correspondence with Adams and Kabeiseman, dated May 7, 2021;
- A-15** EXHIBIT 14, Harrison Submittal: Applicant's Site Plan analysis;
- A-16** EXHIBIT 15, Harrison Submittal: Applicant's transcript of March 1, 2016 City Council discussion of 'Living Wall', Final Approval Hearing, Nicholson PUD;
- A-17** EXHIBIT 16, Harrison Submittal: Applicant's November 26, 2019 Planning Commission, Good of the Order, discussion re: incompatibility between Nicholson PUD Shared Access Maintenance Agreement (which includes private space) and the lack of HOA based on promise of no private space.
- A-18** EXHIBIT 17, Harrison Submittal: email re: including existing loft in FAR calc.;
- A-19** EXHIBIT 18, Harrison Submittal: 2nd floor of building plans, Harding garage/loft/studio;
- A-20** Harrison Prepared Statement for Oct. 28 Planning Commission Meeting;
- A-21** Written Argument & Proposed Findings & Conclusions of Law, dated Nov. 4, 2021;
- A-22** Harrison response to comments at Oct. 28 Planning Commission Meeting, dated Nov. 4, 2021;
- A-23** Harrison response to November 4 comments, dated November 11, 2021;
- A-24** Harrison letter to PC, regarding the living wall, dated June 25, 2020;
- A-25** Harrison prepared statement to City Council regarding the living wall, dated June 5, 2018;
- A-26** Proposed Revised findings of Fact and Conclusions of Law, Greg Hathaway, dated November 11, 2021;

“B” Exhibits – Agency Comments

None received as of this writing;

“C” Exhibits – Cannon Beach Supplements

- C-1** Cannon Beach Preservation Planned Development Subdivision Conditions of Approval,, from LUBA Record 2016-033;
- C-2** Cannon Beach Preservation Planned Development Subdivision Plat, Recorded November 21, 2016;, Recorded November 21, 2016;
- C-3** Memo, Staff Produced and dated January 8, 2020;
- C-4** Building Permit #19-1084, with Plan Attachments, excluding Structural Calculations; issued August 5, 2020;
- C-5** House Plans for Najimi Residence, by Tolovna Architects, dated June 9, 2020; with Attachments;
- C-6** Outdoor Living Area Map; Staff produced, undated;
- C-7** Outdoor Living Area KPFF Calculations; Staff produced, undated;
- C-8** Outdoor Living Area Staff Calculations; Staff produced, undated;
- C-9** (Common Open Space and Common Access Easement) Shared Access and Maintenance Easement, Recorded November 21, 2016;
- C-10** Grant of and Agreement with Respect to Easements, Clatsop County Recorded Document# 201401763;March 28, 2014;
- C-11** Amendment to Grant of and Agreement with Respect to Easements, Clatsop County Recorded Document# 201404937; August 6, 2014;
- C-12** NA
- C-13** Staff Report Addendum, dated October 22, 2020;
- C-14** Cannon Beach Planning Commission Order, Findings of Fact and Conclusions of Law, signed October 22, 2020;
- C-15** Letter of Appeal, Dean Alterman, Alterman Law Group, LLC, on behalf of M. J. Najimi, dated and received November 3, 2020; and Application;
- C-16** Minutes from the September 24, 2020 Cannon Beach Planning Commission Meeting;
- C-17** Minutes from the October 22, 2020 Cannon Beach Planning Commission Meeting;
- C-18** Scope of Review Staff Report, November 10, 2020;
- C-19** Minutes from the November 10, 2020 Cannon Beach City Council Meeting;
- C-20** Minutes from the December 1, 2020 Cannon Beach City Council Meeting;
- C-21** Cannon Beach City Council Findings of Fact & Decision, December 8, 2020;
- C-22** Minutes from the December 8, 2020 Cannon Beach City Council Meeting;
- C-23** Cannon Beach City Council Revised Findings of Fact & Decision, February 2, 2021;
- C-24** Minutes from the February 2, 2021 Cannon Beach City Council Meeting;

- C-25 Land Use Board of Appeals (LUBA No. 2020-118) Final Opinion and Order, June 21, 2021;
- C-26 Second Najimi Building Permit, BP# 164-21-000179-DWL, issued August 18, 2020;
- C-27 Staff Report Addendum (New materials received prior to Close of Business, November 4, 2021);
- C-28 Staff Report Addendum (November 12, 2021);

“D” Exhibits – Public Comment

- D-1 **provided in October 28th packet**
- D-2 Judy & Jim Morton, Email correspondence, dated Oct. 26, 2021;
- D-3 Rex & Diane Amos, Email correspondence, dated Oct. 27, 2021;
- D-4 Dale & Linda Hintz, Email correspondence, dated Oct. 27, 2021;
- D-5 Tommy Huntington, Email correspondence, dated Oct. 27, 2021;
- D-6 Phil Morton, Email correspondence, dated Oct. 28, 2021;
- D-7 Kent Suter, Email correspondence, dated Oct. 27, 2021;
- D-8 Betty Gearen, Email correspondence, dated Nov. 3, 2021;
- D-9 Darrell Clukey & Susan Glarum, Email correspondence, dated Nov. 3, 2021;
- D-10 Dean Alterman, Email correspondence, dated Nov. 4, 2021;

APPLICABLE PROCEDURE

17.88.160 Scope of review.

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

17.88.180 Review consisting of additional evidence or de novo review.

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

1. The additional testimony or other evidence could not reasonably have been presented at the prior hearing; or
2. A hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action; and
3. The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.

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

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

SUMMARY OF APPEAL ISSUES AND ARGUMENT

Petitioners appealed the City's issuance of Building Permit No. 164- 21-000179-DWL for property located at 544 N. Laurel Street owned by Mr. Najimi and located in the Cannon Beach Preservation subdivision, which was approved as a planned unit development, hereinafter referred to as the "Nicholson PUD." Petitioners reside across the street from Mr. Najimi's property. As presented in Petitioners' Notice of Appeal ("Appeal") and at the October 28th hearing, and as described below, Building Permit No. 164- 21-000179-DWL ("Building Permit") violates the conditions of approval of the Nicholson PUD. As a result, the Petitioners' argue in their Appeal that the Building Permit must be revoked. There are three overriding principles that govern the Planning Commissions' review of Petitioners' Appeal:

(1) The Planning Commission (PC) is not precluded from considering Petitioners' Appeal of the Building Permit notwithstanding the City's prior review in another case involving the same property. It is a new building permit application, a new review and issuance of a building permit by the City, and a new Appeal by Petitioners. The City's Code does not preclude the PC's consideration of the Appeal. As a result, the PC is legally authorized to consider the Appeal and render a decision.

(2) The Land Use Board of Appeals ("LUBA") decision in *Najimi v. City of Cannon Beach* (LUBA No. 2020-118) does not preclude the Planning Commission from considering the new application and subsequent Appeal. LUBA did caution the City in its decision that it could not apply PUD standards to any subsequent building permit request from Mr. Najimi. Petitioners agree with LUBA's ruling that the Planning Commission cannot apply PUD standards in considering their Appeal. However, Petitioners are not requesting the Planning Commission to apply PUD standards in this Appeal, but instead, requesting the Commission to determine whether the issued Building Permit complies with the Conditions of Approval that were part of the approval of the Nicholson PUD. There is a significant legal difference between the City applying PUD standards in its review of a building permit request as opposed to determining whether a building permit request complies with City imposed conditions of approval applicable that resulted from the approval of the PUD. As a result, the Planning Commission is not precluded from determining whether the issued Building Permit complies with any PUD conditions of approval.

(3) City Staff and the Planning Commission are legally obligated under the City's Code to ensure that any applicable City Code provisions and applicable conditions of approval are met when issuing a building permit. CBMC 17.92.010 C.1. Under the City's Code, the issuance of a building permit also constitutes the issuance of a development permit for property. As a result, since this is a new building permit request, the City has a legal obligation to ensure compliance with all applicable City Code provisions and any applicable conditions of approval.

FINDING OF FACT

1. The issued Building Permit violates the City's FAR requirements in the R-2 Zoning District.

The City's maximum Floor Area Ratio ("FAR") in the R-2 Zone is 60%. FAR refers to the intensity of development on a parcel of property in relation to the size of the parcel. FAR is important to the City of

Cannon Beach to ensure that parcels are not “over-developed”. The City is required to count the proposed Gross Floor Area as that term is defined at CBMC 17.04.283. The counting of Gross Floor Area on Mr. Najimi’s property is unusual in this case since there is a pre-existing garage owned by the applicant’s neighbor pursuant to an easement. Although not part of the proposed structure, it is a structure on the lot and it must be accounted for in computing FAR—even though not owned or used by Mr. Najimi. In this instance, City Staff did not count the finished loft area (which contains 210 sq. ft. of floor space) because Staff determined that the finished loft was not habitable.

Although Staff’s interpretation of CBMC 17.04.283(3), “Basement or attic areas determined to be habitable by the city’s building official, based on the definitions in the building code,” relies upon the city’s building official determination and does not take into account whether the loft space is ‘finished’ or ‘unfinished,’ since the term used in CBMC 17.04.283, Gross Floor Area, is in reference to ‘finished floor level,’ as used in the building code. Yet the Planning Commission finds that the petitioner’s pictorial Exhibits A5 through A9, demonstrating the Harding’s loft area is ‘finished’ and, therefore, does not qualify as an “attic”. As a result, the Planning Commission finds that Staff should have counted the Gross Floor Area of the finished loft area and did not. The total counted Gross Floor Area should have been 4,594 sq. ft. and not 4,384 sq. ft. (as counted by City Staff), resulting in an FAR lot coverage of 61.25% violating the 60% maximum FAR specified in CBMC 17.14.040(D).

The Planning Commission rejects Mr. Alterman’s position that the Planning Commission is not authorized to fully review Mr. Najimi’s current Building Permit application. The Planning Commission finds that it is not precluded from considering Petitioners’ Appeal of the Building Permit, notwithstanding the City’s prior review in another case involving the same property. It is a new building permit application, a new review and issuance of a building permit by the City, and a new Appeal by Petitioners. Therefore, the Planning Commission concludes that the issued Building Permit violates the City’s FAR requirements in the R-2 Zoning District. Further, the Planning Commission concludes that neither the City’s Code nor LUBA’s decision in *Najimi v. City of Cannon Beach* (LUBA No. 2020-118) precludes the Planning Commission from considering the Harrison’s Appeal.

Based on the foregoing, the Planning Commission finds that the City’s FAR worksheet calculation used to approve the Building Permit is in error.

2. The issued Building Permit unlawfully allows a second garage on Mr. Najimi’s property in violation of PUD Condition No. 16 that limits his property to one garage.

As noted in the introduction above, the City is required to ensure that the issued Building Permit complies with all applicable conditions of approval for the Nicholson PUD. The PC finds that Nicholson PUD Condition No. 16 limits Mr. Najimi’s parcel to one garage: “Should any lot contain a garage or carport, it shall be no larger than a two-story garage.... if the garage is detached, then the garage may not include a second story of livable space.” (Emphasis added). The Planning Commission has the authority to interpret PUD Condition No. 16 in addressing this Appeal issue. As stated in Petitioners’ Appeal, all references to a garage in PUD Condition No. 16 are unambiguously singular limiting each Nicholson PUD lot to only one garage. As a result, since Mr. Najimi’s lot already contains the Harding’s two-story garage, his proposed attached garage violates PUD Condition No. 16. The Planning Commission notes that, any interpretation that would allow multiple garages would be contrary to the intent in PUD condition of approval 16, as a property owner could erect multiple garages that would far exceed the 2-car limit embedded in the condition.

Based on the foregoing, the Planning Commission finds that the application does not meet PUD Condition No. 16 and determines that any Nicholson PUD lot is limited to one garage.

The Planning Commission rejects Mr. Alterman's position that Condition No. 16 does not limit the Najimi lot to one garage. The Planning Commission finds it has the authority to interpret Condition No. 16 and interprets Condition No. 16 as limiting the Najimi lot to one garage. The Planning Commission further finds that its interpretation does not constitute a "new" condition of approval but simply constitutes an interpretation of existing Condition No. 16. The Planning Commission also rejects Mr. Alterman's position that the City Council previously determined that Condition No. 16 does not limit the Najimi lot to one garage. The Planning Commission finds that, although the City Council may have discussed Condition No. 16 in a prior proceeding [see Exhibit A-12], the City Council never made a formal finding interpreting Condition No. 16. Therefore, the Planning Commission concludes that the issued Building Permit unlawfully allows a second garage on Mr. Najimi's lot in violation of PUD Condition No. 16.

3. The Living Wall.

Third, Appellants argue that the condition of the "living wall" installed with the original PUD requires denial of this building permit:

"The PUD is in violation of Approval Condition #17 regarding the Living Wall. The City wrongfully approved the Building Permit without requiring that all PUD conditions of approval be satisfied; or that the Building Permit be conditioned on compliance with the PUD Conditions of Approval."

Condition of approval #17 of the PUD approval provides as follows:

"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."

(Exhibit C-1, p. 17)

That condition addresses the installation of the living wall and requires a contract with a landscape professional. To the extent that the planting is not successful, it authorizes the City to "take any necessary enforcement actions." As noted above, the review of this building permit is limited to CBMC Title 15, and the applicable parts of CBMC Title 17, as well as the applicable parts of the PUD approval. None of those provisions authorize the City to refuse to issue a building permit on this basis. The Planning Commission does not find the appellants argument persuasive and finds the City may take "enforcement action" under its code, but that does not extend to allowing it to refuse to issue a building permit that otherwise meets the requirements of its code and the PUD.

4. The Homeowners Association.

Fourth, the Appellants argue that the City cannot issue a building permit until a homeowners association is formed.

"The City wrongfully approved the Building Permit because no Homeowners Association ("HOA") has been formed pursuant to ORS 94.625." See above.

Appellants withdrew this argument before the Planning Commission and, accordingly, this decision will not address this contention.

CONCLUSION

The Planning Commission adopts these Findings of Fact and revokes the City's issuance of the Building Permit.

PLANNING COMMISSION ACTION

TENTATIVE MOTION: Having considered the evidence in the record, upon a motion by Commissioner Patrick and seconded by Commissioner Kerr to *tentatively reverse* the administrative decision to conditionally approve Building Permit (BP# 164-21-000179-DWL and unanimously **APPROVES** the Greg Hathaway application, on behalf of Jeff & Jennifer Harrison, application number **AA#21-02 Administrative Appeal**, as discussed and requests staff to draft findings for review and adoption, at a special called meeting, next Thursday at 6PM, December 2nd at City Hall.

MOTION TO ADOPT FINDINGS: Having considered the evidence in the record, I move to adopt the changes in the findings as proposed *reversing* the administrative decision to conditionally approve Building Permit (BP# 164-21-000179-DWL and **APPROVE** the Greg Hathaway application, on behalf of Jeff & Jennifer Harrison, application number **AA#21-02 Administrative Appeal**.

AMENDED MOTION: Having considered the evidence in the record, I move to adopt the changes in the findings, as proposed, to *Amend* the previous motion and to **MODIFY IN PART** the administrative decision to conditionally approve Building Permit (BP# 164-21-000179-DWL with regards to the Greg Hathaway application, on behalf of Jeff & Jennifer Harrison, application number **AA#21-02 Administrative Appeal**, as discussed, with the following condition:

1. Najimi Building Permit, BP# 164-21-000179-DWL, is approved, *following the removal* of the Harding Garage from Lot 1 of the Cannon Beach Preservation Subdivision (taxlot# 51019AD07000).