



CITY OF CANNON BEACH

AGENDA

VIRTUAL ATTENDANCE ONLY

In keeping with the Governor's social distancing direction and to minimize the spread of COVID-19, the City of Cannon Beach has issued an [Administrative Order](#), effective immediately, all public access and participation for City Council, Commissions, Boards and Committees meeting will be virtual until further notice. Please visit our website at ci.cannon-beach.or.us for viewing options and how to [submit public comment](#).

Meeting: Planning Commission
Date: **Tuesday, November 23, 2021**
Time: **6:00 p.m.**
Location: Council Chambers, City Hall

6:00 CALL TO ORDER

6:01 (1) **Approval of Agenda**

6:02 (2) **Consideration of the Minutes for the Planning Commission Meeting of October 28, 2021**
If the Planning Commission wishes to approve the minutes, an appropriate motion is in order.

ACTION ITEMS

6:05 (3) **Continuation and Consideration of ZO# 21-02, City of Cannon Beach request, for Subdivision and Zoning Ordinance Text Amendments.**

ZO 21-02, City of Cannon Beach is requesting Subdivision & Zoning Ordinance text amendments. The proposed amendments revise language restricting lot combinations, limiting single-family residential dwelling size, and further restricting lot coverage and floor area ratios for all residential districts, while repealing planned development language. The request will be reviewed under Cannon Beach Municipal Code 17.86.070 Amendments Criteria

6:25 (4) **Continuation and Consideration of AA# 21-01, Greg Hathaway request, on behalf of Jeff & Jennifer Harrison, for an Appeal of an Administrative Decision to approve a building/development permit.**

AA 21-01, Jeff and Jennifer Harrison appeal of the City's approval to issue a development/building permit for 544 N 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 17.88.160, 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.

- 6:45 (5) **Public Hearing and Consideration of AA# 21-02, Haystack Rock LLC request, for an Appeal of an Administrative Decision to approve a development permit.**

AA 21-02, Haystack Rock, LLC appeal of the City's administrative decision to approve development permit DP#21-20 for Taxlot 51031AA00600 for stabilization pinning of a geologically hazardous area. The property is a vacant lot located north of Nenana Ave (Tax Lot 00600, Map 51031AA), and is in a Residential Lower Density (RL) zone. The appeal will be reviewed pursuant to Municipal Code, Section 17.92.010, Development Permits, Section 17.62 Grading, Erosion and Sedimentation Control, Section 17.50 Development Requirements for Potential Geologic Hazard Areas and Section 17.88.180, Review Consisting of Additional Evidence or de Novo Review and applicable sections of the zoning ordinance.

- 7:10 (6) **Public Hearing and Consideration of SR 21-06, David Vonada request, on behalf of John Henry, of 1688 S. Hemlock, for a Setback Reduction of the rear-yard setback requirement for a deck-stairs in conjunction with an addition to an existing residence.**

SR 21-06, David Vonada, on behalf of John Henry, application to allow a setback reduction to reduce the rear yard setback from the required 15'0" to 11'6" to build a new exit stair onto a reconstructed second floor deck, according to chapter 17.14 Residential Medium Density Zone of the Municipal Code. The property is located at 1688 S. Hemlock St. (Tax Lot 04103, Map 51030DA), and in a Residential Medium Density (R2) zone. The request will be reviewed against the Municipal Code, Section 17.64.010, Setback Reduction, Provisions established.

INFORMATIONAL ITEMS

- 7:30 (7) **Tree Report**

- (8) **Ongoing Planning Items:**

**Transportation System Plan: Interactive Online Open House, October 1-31st,
@ www.cannonbeachtsp.com;**

- (9) **Good of the Order**

- 7:50 (10) **ADJOURNMENT**

Please note that agenda items may not be considered in the exact order listed, and all times shown are tentative and approximate. Documents for the record may be submitted prior to the meeting by email, fax, mail, or in person. For questions about the agenda, contact Administrative Assistant, Katie Hillenhagen at Hillenhagen@ci.cannon-beach.or.us or (503) 436-8054. The meeting is accessible to the disabled. If you need special accommodations to attend or participate in the meeting per the Americans with Disabilities Act (ADA), please contact the City Manager at (503) 436.8050. TTY (503) 436-8097. This information can be made in alternative format as needed for persons with disabilities.

Posted: November 16, 2021

Join Zoom Meeting:

Meeting URL: <https://us02web.zoom.us/j/83508783839?pwd=Z0RIYnJFK2ozRmE2TkRBRUFJNlg0dz09>

Meeting ID: 835 0878 3839

Password: 801463

One Tap Mobile:

+16699006833,,83508783839#,,1#,801463# US (San Jose)

+13462487799,,83508783839#,,1#,801463# US (Houston)

Dial By Your Location:

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Password: 801463

View Our Live Stream:

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Virtual Participation & Public Comment for Meetings:

If you wish to provide public comment as a virtual meeting participant, you must submit it by **noon**, the day of the meeting, to planning@ci.cannon-beach.or.us. All written comments received by the deadline will be distributed to the commission, parties of record and the appropriate staff prior to the start of the meeting. The written comments will be included in the record copy of the meeting.

You may also request to speak virtually during this meeting. You must submit your request to speak by **noon**, the day of the meeting, to planning@ci.cannon-beach.or.us. If you wish to speak to an issue, please provide that information within the 'subject' or 'body' of your text. If it is not directed at a particular issue, Public Comment may be taken at the beginning of the meeting.

**Minutes of the
CANNON BEACH PLANNING COMMISSION
Thursday, October 28, 2021**

Present: Chair Daryl Johnson & Commissioner Barb Knop in person
Commissioners Charles Bennett, Lisa Kerr, Clay Newton, and Joe Bernt via Zoom

Excused: Commissioner Patrick was on Zoom but having technical difficulties and did not vote.

Staff: Director of Community Development Jeff Adams, Land Use Attorney Bill Kabeiseman and
Administrative Assistant Katie Hillenhagen

CALL TO ORDER

Chair Johnson called the meeting to order at 6:00 p.m.

ACTION ITEMS

(1) Approval of Agenda

Motion: Knob moved to approve the agenda as presented; Bennett seconded the motion.

Vote: Newton, Knop, Bernt, Bennett and Chair Johnson voted AYE; the motion passed.

(2) Consideration of the Minutes for the Planning Commission Meeting of September 23, 2021

Motion: Newton moved to approve the minutes; Bernt seconded the motion.

Vote: Newton, Knop, Bernt, Bennett and Chair Johnson voted AYE; the motion passed.

(3) Public Hearing and Consideration of CU# 21-02, Joe Mansfield request, for a Conditional Use Permit to operate a privately-owned campground.

Joe Mansfield request for a Conditional Use permit for Privately Owned Campgrounds to create an eco-retreat featuring 8-10 lightweight geodesic domes. The property is located on Reservoir Road (Tax Lot 00500, Map 51029CA) in an Open Space/Recreational (OSR) Zone. The request will be reviewed under Cannon Beach Municipal Code 17.28 Open Space/Recreational & 17.80 Conditional Uses.

No one objected to the jurisdiction of the Planning Commission to hear this matter at this time. Chair Johnson asked if any Commissioner had any conflict of interest. There were none. Chair Johnson asked if any Commissioner had personal bias to declare. There were none. Chair Johnson asked if any commissioner had any ex parte contacts to declare. There were none. The commissioners declared their site visits.

Adams read his staff report (see the staff report in the packet for full details). Adams noted that if the Planning Commission chooses to approve the request, they will need to specify that one parking space per

pod is approved. Adams discussed slope considerations and the Geotech report, including the potentially most difficult areas. Adams noted that the project would have to go through Design Review before being approved. He also noted that the domes do not fit neatly into any of the definitions in the City code. Staff recommended conditional approval.

Newton asked for clarification about what CUP stood for in the conditions of approval that Adams recommended.

Adams said that it was short for Conditional Use Permit.

Bernt brought up what he considered to be an essential question, "What is this?"

Adams suggested they let the applicant present before asking those kinds of questions.

Chair Johnson asked if there was any additional correspondence. There was none.

Chair Johnson called for public testimony.

Chair Johnson stated that the pertinent criteria were listed in the staff report and criteria sheets next to the west door; testimony, arguments and evidence must be directed toward those criteria; failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal based on that issue; prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional testimony, arguments or evidence regarding the application. The Planning Commission shall grant such requests by continuing the public hearing or leaving the record open for additional written testimony, arguments or evidence; persons who testify shall first receive recognition from the Chair, state their full name and mailing address, and if appearing in a representative capacity, identify whom they represent.

Chair Johnson asked if the applicant wished to make a presentation.

Joe Mansfield 2111 SW 28th Pl. Portland, OR 97214. Mansfield thanked everyone for their time. He said that he grew up in Warrenton and he knows that a lot of people these days are seeking quiet and solace. He wants to give people a place to do this in the beautiful second growth forest. Mansfield noted that the steep slope on the property provides a lot of privacy to nearby houses. He said that he has met with neighbors to go over their concerns. He hopes to preserve the forest and let people experience it in a unique way. He pointed out that what he is proposing is very low impact. There will be a central parking area so that people are not driving through the site. Elevated board walks will provide access to the pods and will reduce the impact on roots and the environment. Mansfield said that he plans on revising the layout to reflect the steep terrain now that he has a geohazard report. He plans on getting a detailed topographic and tree report and hopes to remove only 8% of the trees. He said that his goal is to only remove dead and dying trees, in addition to a few for parking. Mansfield explained that the domes use a very noninvasive foundation technique that does not require excavation. Four-foot metal pipes are driven into the ground, this is the least invasive method for the tree roots. Mansfield said that he would like to clad the utility building with salvage material from the site. The building will have covered bike racks in addition to storage. Mansfield said that he plans on curating sculptures that accompany each unit and are

made from materials on site. He also plans to comply with buffer zones. Mansfield reiterated that the locations are not final. He said that decks will be oriented towards the north so that they are not looking at houses in the area. The units will not have firepits to reduce fire danger. Mansfield also plans to actively manage the forest to make it healthy and reduce fire danger by removing brush.

Jan Siebert-Wahrmund, PO Box 778, Cannon Beach. Siebert-Wahrmund said that she is speaking in opposition to the proposal. She read a letter from herself and her husband, Wes Wahrmund (the full letter is attached at the end of these minutes). They thought that the applicant should deal with annexation first. They have concerns about the amount of water that the units will use. Siebert-Wahrmund asked; Do we really need more rooms for visitors in the summer? She asked the Commissioners to find out more information about annexation and water usage.

Chair Johnson said that he had questions for the applicant. He asked how Mansfield arrived at the figure that Wrights for Camping are booked 95% of the time.

Mansfield said that he looked at their reservations and talked to Gail. He noted that they are only open in the summer.

Chair Johnson said that he was concerned about the slope. He said that the area is stable because of the trees now. He asked how the foundation would work with the current slope. He noted that the units have the basics for a housing unit and that they will have to bring in sewer pipes that will be disruptive.

Mansfield said that Horning's Geohazard Report addresses these issues. There is a stable 40% slope for most of the property. He does not plan on using the steeper areas. Mansfield said that the type of soil also adds to the stability. He said that the pin system is designed for wetlands and are a proven technology on slopes and other areas. He said that he will have to extend the sewer main but noted that he will do that under the access road to the parking area and under the utility building. Mansfield said that the depth for the lines from there to the pods is 2 feet while the roots on the slope are mostly deeper than 2 feet. He said that the shallow trench will not harm the roots. He also noted that there are ways to get the pipes through the roots. He noted that his wife designs sewer systems and does not see any issues with the roots. Mansfield said that the shell for the pods is very lightweight, it is an insulated fabric membrane. He said that the panel (platform) is also very small and lightweight. The only house-like component will be the bathroom. The bathroom/sleeping structure will be no more than 10 x 10 feet. He said that glamping is the idea and noted that it is much less destructive than a cabin or a traditional house.

Chair Johnson still had concerns about the utilities being brought in.

Mansfield said that the elevated boardwalks would follow a natural level line on the site. The utilities would follow that same line. He said that there happens to be a natural clearing in most of lot 301 where he would not have to worry about roots. Mansfield noted that he would be willing to work with a tree ecologist if that would help alleviate concerns.

Mansfield addressed Jan Siebert-Wahrmund's concerns about water. He said that he plans on using low flow fixtures and that the water flow will be nothing compared to a normal house. He also said that he is not sure that the hot tubs will pan out. He said that he understands her concerns.

Kerr asked how it meets one of the listed conditional uses. She noted that camping is listed, but glamping is not. She said that this seems like a type of motel disguised as something else.

Mansfield said that he thought that the impact would be similar to a campground and less than an RV park, which is allowed in the zone. This will be more in nature to a campground. There won't be a gravel tent pad, there will be no concrete. It is different than what exists next store, but he believes it will be the same level of impact as a campground.

Kerr thought maybe this could be put in as a conditional use in the code audit. She suggested that it may be better to wait and see if during the code audit this could be a substitute for the RV park. She said that it does not fit the code as it is written now.

Mansfield emphasized that his intention is to protect and preserve the forest. Current code allows the building of a single-family residence on the land, and it is not fitted for that.

Mansfield asked for feedback from Adams on how the project fits into the conditional uses.

Adams said that, of the permitted conditional uses, the project is closest to private campground. He said that it is up to the Planning Commission to decide if it fits. If they decide that it does fit, they can put on more conditions. He read the purpose of the zone.

Chapter 17.28 OPEN SPACE/RECREATION (OSR) ZONE

17.28.010 Purpose.

The purpose of the OSR zone is to provide an area of low intensity open space or recreation use in which the natural features of the land are retained to the maximum extent possible.

Kerr said that she thought it would be wrong to make things up and change what camping means.

Kabeiseman said that the intent is not that the Planning Commission is making things up. They have an application for a project that does not fit neatly into the categories. The question for the PC is where does this fit best? It is not a matter of making it up, but of looking at the categories and saying where does this fit best.

Knop asked if the business was planning to be open 12 months a year. She asked how many people would be visiting.

Mansfield said that he plans on building in phases. He said that the pods are designed for couples, but they fit a maximum of 4 people. Maximum capacity would be 40 on site, but he expects the average to be more like 20 when fully built.

Chair Johnson asked for further response from staff. There was none.

Chair Johnson asked if the applicant wished to make additional statements. There were none.

Chair Johnson closed the hearing and moved to consideration.

Chair Johnson said he has doubts about the project. He said that to him it comes across much more as a living quarter, not a campsite. Space for 4 people is a lot of activity and a lot of people. He is not comfortable addressing it as a campsite.

Newton asked the other commissioners if it would be considered more appropriate if the size were brought down and the kitchens were taken out.

Chair Johnson said that he objects to the whole site. He believes it should not be developed at all.

Kerr said it is really like a motel. There is no limit to how often it can be rented out. She said that it could possibly be redesigned with no kitchens and a communal shower.

Newton asked if ADA access would be required.

Adams said he did not know; he would have to check on that.

Newton asked how Adams thought Design Review would fit in.

Adams said that the Design Review Board would have to look at every detail. They could comment on anything.

Newton said he liked the concept but that there are a lot of unanswered. He said that for future applications there are questions he has such as will there be hot tubs or not. He also said that he would like to see the Geotech fleshed out with the individual sites.

Johnson said that he is concerned about water usage, especially with hot tubs.

Newton said he would be interested in revisiting the proposal.

Bernt again brought up the question of what this thing essentially is. He does not feel that it is camping. He is concerned that it would be rented long term. He felt that if they cannot decide what it is they should not be approving it.

Motion: Newton moved to deny the request; Knop seconded the motion.

Vote: Kerr, Newton, Bennett, Knop, Bernt and Chair Johnson voted YAY. The motion passed.

Johnson stated that the project is denied.

(4) Public Hearing and Consideration of ZO# 21-02, City of Cannon Beach request, for Subdivision and Zoning Ordinance Text Amendments.

City of Cannon Beach is requesting Subdivision & Zoning Ordinance text amendments. The proposed amendments revise language restricting lot combinations, limiting single-family residential dwelling size, and further restricting lot coverage and floor area ratios for all residential districts, while repealing planned

development language. The request will be reviewed under Cannon Beach Municipal Code 17.86.070 Amendments Criteria.

No one objected to the jurisdiction of the Planning Commission to hear this matter at this time. Chair Johnson asked if any Commissioner had any conflict of interest. There were none. Chair Johnson asked if any Commissioner had personal bias to declare. There were none. Chair Johnson asked if any commissioner had any ex parte contacts to declare. There were none. The commissioners declared their site visits.

Adams read the staff report (see the staff report in the packet for full details). He noted that there was a request for a continuance from Mr. Rasmussen. Adams showed a data breakdown of structures exceeding 3,500SF. Adams noted that both house and lot size have increased in recent years. There is a concern about tear downs and the combining of lots. Adams pointed out that this data does not include garages because it is taken from Clatsop County records. The data for garages is not available. Adams went over the history of the ordinance for it to get where it is today. Adams mentioned that affordable housing, ADUs and units over garages should be taken into consideration. He said that any changes need to be in line with the Comprehensive Plan and Statewide Planning Goals. He noted that the Commission should also address the grandfathering in of existing structures.

Kerr asked what would happen if somebody's house burned down. Would the grandfathering in still remain? Could they rebuild?

Adams said that yes, they could rebuild in one year. Adams read the code, which stated that if 80% or more is damaged they would have to rebuild in conformance with the code. Discussion followed regarding two sections of the code that appeared to be conflicting.

17.82.040 Nonconforming structures F. *If a nonconforming structure or nonconforming portion of a structure is destroyed by any means to an extent amounting to eighty percent of its fair market value as indicated by the records of the county assessor, it shall not be reconstructed except in conformity with the provisions of this title.*

17.82.606 Pre-existing uses. 1. Reconstruction. *If a structure devoted to a pre-existing use is destroyed or damaged by any cause other than actions of the owner of that structure or his agents, that structure may be rebuilt. The construction or reconstruction of the structure shall:*

- a. Conform to the setbacks, building height and floor area of the structure prior to damage or destruction; of*
- b. Conform to the setbacks, building height and other requirements of the zone in which it is located.*

There shall be no time limit on the reconstruction of a damaged or destroyed preexisting use.

Adams asked Kabeiseman for his reading.

Kabeiseman said that the preexisting use says that it can be rebuilt while the nonconforming language says that it cannot. He said that what we have is conflicting sections of the code. How that sorts out he is not certain.

Bernt noted that it was a big shift to include attics, garages, and other areas in the 3,500SF. This was the problem brought up in many of the comments. He thought that might be something they want to think about.

Chair Johnson asked if there was any additional correspondence. There was none.

Chair Johnson called for public testimony.

Chair Johnson stated that the pertinent criteria were listed in the staff report and criteria sheets next to the west door; testimony, arguments and evidence must be directed toward those criteria; failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal based on that issue; prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional testimony, arguments or evidence regarding the application. The Planning Commission shall grant such requests by continuing the public hearing or leaving the record open for additional written testimony, arguments or evidence; persons who testify shall first receive recognition from the Chair, state their full name and mailing address, and if appearing in a representative capacity, identify whom they represent.

Ashley Craven 2866 NW Shenadoah Terrace Portland, OR 97210. Craven said that their family's lot in Cannon Beach was purchased in 1971. They have three lots with one house. They are thinking about doing a lot line adjustment so that they can build a house on the two vacant lots, which have challenging terrain. They have a round house there that will eventually fall. They were wondering about grandfathering flexibility for long-term property owners who have not developed on their site. They are concerned with the recombination of lots. The 3,500 SF limit is not a problem, though including garages does put a squeeze on it.

Jackie Brown. Brown had a concern about garages. She was concerned that people would choose to not build garages. They might use all the allotted square footage for house space and then use on-street parking. She noted that this is a vacation town and families often come for reunions. 3,500SF may be fine on certain lots, for other lots a bigger home would seem more reasonable. She is very concerned about what could be rebuilt if the house were to burn down. She felt that dealing with the issues through FAR and Lot Coverage may be a better option. She asked why this specific size of 3,500SF was chosen.

Chair Johnson said that the PC wants to avoid McMansions. They are seeing a trend of larger and larger houses. That is the logic behind that figure.

Kerr said that Cannon Beach is a destination but also a community for full time residents. Kerr suggested that they continue the item with looking into the issue of houses burning down.

Bernt thought that not being able to combine lots would take care of a lot of the McMansions. He thought that having both a maximum size and prohibiting the combination of lots justifiably gets people worked up.

Kerr asked if the lots on the north end were built by combining lots.

Newton commented that they are trying to be fair and said that he thinks the PC is especially qualified to look at this issue. If they were in the shoes that the PC is in, they would understand more where they are coming from.

Adams reminded them that they will be doing a full code audit where they can look further at these things.

Andra Georges. 5270 S. Landing Square Dr. #7, Portland, OR 97239. Georges said that she owns a house on N. Laurel St. She also owns commercial properties in the City. She thought that the max SF and combination of lots should be dealt with together. She thought people should be able to combine lots to site the house where it would not be possible on one of the lots alone.

Adams pointed out that you could combine to meet minimum lot limits, in areas like slope.

Knop asked if they could approve part and not all of ZO 21-02.

Kabeiseman said that that could be confusing

They decided to keep the whole proposal together.

Chair Johnson said that people should be able to rebuild if their house is destroyed, such as by fire. The other commissioners agreed.

They decided to have Adams look into making this possible in the language.

Bernt brought up an old guidebook about building in Cannon Beach and asked if Adams knew about it.

Adams said he would ask Reinmar.

Chair Johnson continued ZO 21-01 to the next hearing.

(5) Public Hearing and Consideration of AA# 21-01, Greg Hathaway request, on behalf of Jeff & Jennifer Harrison, for an Appeal of Administrative Decision to approve a building/development permit.

Jeff and Jennifer Harrison appeal of the City's approval to issue a development/building permit for 544 N 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 17.88.160, 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.

No one objected to the jurisdiction of the Planning Commission to hear this matter at this time. Chair Johnson asked if any Commissioner had any conflict of interest. There were none. Chair Johnson asked if any Commissioner had personal bias to declare. There were none. Chair Johnson asked if any commissioner had any ex parte contacts to declare. There were none. The commissioners declared their site visits.

Adams read his staff report (see the staff report in the packet for details).

Chair Johnson noted that there was additional correspondence that was given to them earlier in the day.

Chair Johnson called for public testimony.

Chair Johnson stated that the pertinent criteria were listed in the staff report and criteria sheets next to the west door; testimony, arguments and evidence must be directed toward those criteria; failure to raise an issue accompanied by statements or evidence sufficient to afford the decision maker and the parties an opportunity to respond to the issue precludes appeal based on that issue; prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional testimony, arguments or evidence regarding the application. The Planning Commission shall grant such requests by continuing the public hearing or leaving the record open for additional written testimony, arguments or evidence; persons who testify shall first receive recognition from the Chair, state their full name and mailing address, and if appearing in a representative capacity, identify whom they represent.

Chair Johnson asked if the applicant wished to make a presentation.

Greg Hathaway, 1331 NW Lovejoy St. Suite 950 Portland, OR 97209. Hathaway said that he represents Jeff & Jennifer Harrison. They live adjacent to the property that was issued the building permit. It is clear that staff thinks that this has already been decided. Hathaway said that this is a brand-new appeal to a brand-new building permit. He said the PC is not bound to anything that happened in the past. He argued that the LUBA decision is not applicable here. He says they are not contesting the PUD standards, but rather conditions of approval. They believe these issues to be violations of the PUD standards. Hathaway went over the 4 appeal issues. He argued that the loft area should be counted in the FAR. He said that it is not an attic because it is a finished area. He agreed that it is disputable whether or not it is habitable. The second appeal issue is whether they can have more than one garage on a lot in the PUD. Hathaway pointed out that the sentence in the language is singular, it talks about one garage. He said that it is within the PC's authority to interpret this language. He also argued that the garage is in violation because it serves the neighboring lot and not the lot on which it was built. The language says that an accessory structure is a structure that serves the main structure on the lot. The third issue is the living wall. The PUD requires that a professional landscaper be commissioned to take care of the living wall. Hathaway argued that the permit cannot be issued unless the living wall is taken care of. All conditions of approval, including those of the PUD must be met for the building permit to be issued. He said that he agrees with staff on number four. He agrees that staff cannot impose an HOA. The City does not require it, but state law does. He said that he would withdraw item number four because they agree with staff. He asked if there were any questions.

Newton asked how much the difference in square footage would be to meet FAR requirements.

Jeff Harrison. Harrison said that he is representing himself and his wife Jennifer. Harrison said that the area of the first floor in the garage is being counted correctly, but the upper area is not. He pointed out that the definition for an attic from the code is unfinished space between ceiling assembly and roof assembly. This space is not unfinished. He said that with the photos they can see what it looks like for themselves. He argued that it is not an issue of habitability. He reiterated Hathaway's point that the language that

references garages is singular. He said that there is no evidence that a landscape professional has been contracted. He asked Adams where the rear yard is for the existing house.

Hathaway asked to have the hearing continued with written statements.

Jan Siebert-Wahrmund, PO Box 778, Cannon Beach. Siebert-Wahrmund read a letter that was also from her husband, Les Wahrmund (the full letter is attached at the end of these minutes). She urged the commissioners to support the appeal. She said that their understanding is that the FAR numbers do not reflect the loft area. If this area was included the new building would be too large. They also agree that a second garage would not be allowed. Siebert-Wahrmund said that the living wall appears to need the care of a professional landscaper.

Chair Johnson called for opponents of the request.

Dean Alterman spoke on behalf of the Mr. & Ms. Najimi. Alterman pointed out that the plans for this building permit are the exact same as the previous permit, just without the turret. He also pointed out that at LUBA they lost in regard to the turret but won on everything else. Alterman looked at the definition of floor area in the code.

17.04.283 Gross floor area.

"Gross floor area" means the sum, in square feet, of the gross horizontal areas of all floors of a building, as measured from the exterior walls of a building, including supporting columns and unsupported wall projections (except eaves, uncovered balconies, fireplaces and similar architectural features), or if appropriate, from the center line of a dividing wall between buildings. Gross floor area shall include:

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

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

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

He noted that habitable space is determined by building official. He also said that the objections brought up in this appeal were brought up before and have been decided by the City Council and LUBA. The turret was the only thing that was found to be out of compliance and that has been removed. Mr. Najimi has done what the City and LUBA asked him to do. Alterman said that a city may not deny a building permit if it complies with clear and objective standards. He said that if Mr. Najimi is denied it will be an issue that he cannot build a house with the garage that should be allowed. He pointed out that the PUD limited the Floor Area from what would have been allowed on the properties if they would have been developed as four separate lots. The total square footage was reduced by about 3,500 SF.

Jane & Victor Harding. PO Box 1386, Cannon Beach. Jane said that it is distressing that they got a permit that was then taken away. They agreed that they would not add more but built what is there because everything was already ordered. They feel like they are being used as a ping pong ball. They were forced to make the upper area in the garage non-habitable and now they are trying to argue that it is habitable. Jane said that Harrison has a camera on the building 24/7. She said that the front of the building is an art space. Jane said that they are now in a horrible position with their neighbor, and they do not want that. They are willing to do what it takes, such as signing something that says nobody lives there. They will take the floor out.

Victor Harding, PO Box 1386, Cannon Beach. Victor pointed out that there are no stairs to the second floor. You cannot get up there.

Kabeiseman mentioned that there was a request for continuance that must be granted. He suggested letting Hathaway speak and then Alterman and then deciding how they want to continue the item.

Hathaway gave his final statement for the evening reiterating his points from before. He disagreed with Mr. Alterman and believes that the PC has the authority to act.

Alterman gave his final comments for the evening stating that the City should not withhold a building permit from an individual for the actions of the developer. He noted that withholding building permits is not one of the remedies for action laid out in the code. The code outlines what penalties should be used when a developer does not comply with all requirements.

Kabeiseman said that the PC must grant the continuance. He asked how they want to continue it, with written comment only or with oral comments at the next meeting.

Chair Johnson opted for written comment only.

Kabeiseman clarified that the hearing will be continued to the November 23rd meeting. There will be 7 days for anyone to submit new evidence or arguments. This will last until Nov 4th at 5pm. There will be 7 additional days, until the 11th, for rebuttals. From then until Nov 18th the applicant can submit any rebuttal.

They decided that Kabeiseman and Adams would work to prepare any comments or things they would need to address for the next meeting.

There was no further response from staff.

Authorization to Sign the Appropriate Orders

Motion: Knop moved to authorize the Chair to sign the appropriate orders; Newton seconded the motion.

Vote: Newton, Knop, Bernt, Bennett and Chair Johnson voted AYE; the motion passed.

INFORMATIONAL ITEMS

- (8) **Tree Report**
No comments.

- (9) **Ongoing Planning Items**
Adams discussed ongoing planning items. There is a Council/PC TSP Joint Session on Nov. 9th.
Due to the holidays, the next PC meeting dates will be Tuesday, Nov 23rd & Tuesday, Dec 21st.
Adams gave an update on the TSP.

-
- (10) **Good of the Order**
Chair Johnson asked about accessory structures at 3988 S Hemlock. Adams gave an update.
Johnson said that he was concerned about the viability of the replacement maple trees.

ADJOURNMENT

The meeting adjourned at 9:45 pm.

Administrative Assistant, Katie Hillenhagen

Re: Joe Mansfield
Project

October 28, 2021

Dear Planning Commissioners,

Tonight's Conditional Use permit request for this project seems like it's putting the cart before the horse. Why are we not dealing with the question of annexation first, before making a decision whether or not to allow this development a Conditional Use permit?

Giving this project a green light tonight would make it much easier for the developer to annex this property into our city. This would give these outdoor 'hotel rooms', with private bathrooms, hot tubs, etc., our precious Cannon Beach city water.

During the increasing drought we've been experiencing over the past years, which we notice especially in the ever-more-dry summer months, we as a community, have disallowed county landowners to access our city water. Why should this proposal be any different?

Do we really need more rooms for more visitors in the summer? When is enough going to be enough? Is this truly a wise, ecologically-sound project for the future of our community as a whole?

Please find out more information about annexation & possible water usage by the visitors before you allow this project to go forward. Our community is already suffering from the negative effects of overtourism & overdevelopment.

Do we really want to encourage more

overnight visitors during the driest season of the year, especially considering their considerable consumption of our Cannon Beach water?

Please remember the flora & the fauna of our Ecola Creek watershed need water, too. How much will eventually be left for them?

Thankyou,
Jan Siebert - Wahrmund
&
Wes Wahrmund
P.O. Box 778
Cannon Beach, Oregon
97110

October 28, 2021

Dear Planning Commissioners,

We urge you to support Jeff & Jennifer Harrison's appeal of Mohammed Najimi's new building permit for Lot #1 of the Planned Unit Development (PUD) on N. Laurel St.

Our understanding is that:

- The Floor Area Ratio (FAR) numbers do not reflect the 'loft' space area of the building, which is already on the PUD property. If included, the new building proposed would be too large for the space permitted under the PUD conditions of approval.
- Due to the fact that there is a garage already on the property, we agree with the Harrisons that a second garage would not be allowable under the conditions of the PUD approval.
- Finally, the 'living wall' still appears to need the design guidance, & care of a professional landscaper, which was a condition of the PUD agreement. This needs to be enforced by the City.

Thank you for your time &
consideration,

Ian Siebert - Wahmund
Wes Wahmund

P. O. Box 778, Cannon Beach, OR. 97110



Cannon Beach Planning Commission

Staff Report Addendum (November 16, 2021):

CONTINUATION AND CONSIDERATION OF **ZO 21-02**, JEFF ADAMS APPLICATION, ON BEHALF OF CITY OF CANNON BEACH, REQUESTING A TEXT AMENDMENT OF THE CANNON BEACH MUNICIPAL CODE TITLE 16 SUBDIVISION ORDINANCE TEXT AMENDMENTS AFFECTING CHAPTER 4 LOT LINE ADJUSTMENTS PROHIBITING THE COMBINATION AND RECOMBINATION OF LOTS TO MAKE LARGER LOTS; AND TITLE 17 ZONING ORDINANCE TEXT AMENDMENTS AFFECTING CHAPTERS 8 RESIDENTIAL VERY LOW DENSITY, 10 RESIDENTIAL LOWER DENSITY, 12 RESIDENTIAL MODERATE DENSITY, 14 RESIDENTIAL MEDIUM DENSITY, 16 RESIDENTIAL HIGH DENSITY, 18 RESIDENTIAL ALTERNATIVE/MANUFACTURED DWELLING AND 20 RESIDENTIAL MOTEL RESTRICTING GROSS FLOOR AREAS FOR RESIDENTIAL STRUCTURES AND ALL ACCESSORY STRUCTURES INCLUDING ACCESSORY DWELLING UNITS TO 3,500 SQUARE-FEET; AND LIMITING FLOOR AREA RATIOS AND LOT COVERAGE FOR EACH RESIDENTIAL DISTRICT; WHILE REPEALING CHAPTER 40 PLANNED DEVELOPMENT

Agenda Date: October 28, 2021
Continued to November 23, 2021

Prepared By: Jeffrey S. Adams, PhD

EXHIBITS

The following Exhibits are attached hereto as referenced. All application documents were received at the Cannon Beach Community Development office on September 22, 2021 unless otherwise noted.

"A" Exhibits – Application Materials

- A-1** Application packet, including **ZO 21-02**, Received September 22, 2021;
- A-2** ZO# 20-21 Cannon Beach Subdivision & Zoning and Ordinance Track One Amendments, Planning Commission Edition Revised (10/21/2021);

"B" Exhibits – Agency Comments

None at the time of writing

"C" Exhibits – Cannon Beach Supplements

- C-1** October 28 Staff Report
- C-2** October 28 Staff Report Addendum
- C-3** Comprehensive Plan & Statewide Planning Goal Attachment

"D" Exhibits – Public Comment

- D-1** Email correspondence from Claudia and Michael Gray, received September 7, 2021;
- D-2** Email correspondence from Cleita and Eric Harvey, received September 7, 2021;

- D-3 Email correspondence from Jody Teetz, Jill and Scott VanBlarcom, received September 7, 2021;
- D-4 Email correspondence from Peter and Tamara Musser, received September 8, 2021;
- D-5 Email correspondence from Gregg and Sabrina Barton, received September 6, 2021;
- D-6 Email correspondence from Maureen F. Browne and Michael K. Byars, Jr., received September 7, 2021;
- D-7 Email correspondence from Dave and Patti Rouse, received October 8, 2021;
- D-8 Email correspondence from Jay Shepard, received October 16, 2021;
- D-9 Letter received from Jill and Steve Martin, stamped October 18, 2021;
- D-10 Email correspondence from Gary King, received October 19, 2021;
- D-11 Email correspondence from Judi McLaughlin, received October 21, 2021;
- D-12 Email correspondence from Steven Moon, received October 21, 2021;
- D-13 Email correspondence from Jeff and Jodi Moon, received October 21, 2021;
- D-14 Email correspondence from Richard Wilson, dated October 26, 2021;
- D-15 Handwritten card, from Judith Swanson & Kristina Berney, dated October 23, 2021;
- D-16 Email correspondence from Brent E. Corwin, Brent E. Corwin, PC, dated October 27, 2021;
- D-17 Email correspondence from Catherine M. Kitto, dated October 28, 2021;
- D-18 Email correspondence from Andra Georges, dated October 28, 2021;
- D-19 Email correspondence from Will Rasmussen, Miller, Nash, Graham & Dunn, LLP, on behalf of Karolyn Gordon, dated October 28, 2021;

BACKGROUND

The Cannon Beach Planning Commission continued the October Hearing Item to its November agenda after a request was received by Mr. Rasmussen, on behalf of Karolyn Gordon. After taking testimony, the Planning Commission (PC) asked for clarification on pre-existing and non-conforming language upon an instance when a structure is destroyed by natural causes.

The current pre-existing use is defined in Cannon Beach Municipal Code 17.82.060(B) Definition.

“Pre-existing use” means:

1. A use existing on June 19, 1979 which was a permitted or conditional use in its use zone, as indicated by Ordinance 79-4 and the land use and zoning map contained therein, but which, as the result of a zoning ordinance map or text change, is no longer a permitted or conditional use in its use zone; or
2. A use constructed after June 19, 1979 in a use zone in which it was a permitted or conditional use, but which, as a result of a zoning ordinance map or text change, is no longer a permitted or conditional use in its use zone.

Where a structure, such as one of the old motels along Hemlock, which existed prior to June 19, 1979, and has been rezoned to R2 Residential Medium Density and is no longer a permitted use would be allowed to be rebuilt if it burnt down, as long as it conformed to the setbacks, building height and floor area of the structure prior to damage or destruction or to that of the R2 district, a non-conforming residential home would not be allowed to be rebuilt under CBMC 17.82.040(F).

The Planning Commission asked for revisions that would bring this discrepancy into alignment and that language follows:

PRE-EXISTING & NON-CONFORMING PROPOSED LANGUAGE REVISIONS

17.82.060 Pre-existing uses.

The following provisions apply to preexisting uses:

{...}

C. Requirements. Pre-existing uses shall be subject to the following requirements:

1. Reconstruction. If a structure devoted to a pre-existing use is destroyed or damaged by any cause other than actions of the owner of that structure or his agents to an extent amounting to eighty percent of its fair market value as indicated by the records of the county assessor, that structure may be rebuilt. The construction or reconstruction of the structure shall:
 - a. Conform to the setbacks, building height and floor area of the structure prior to damage or destruction; ~~or~~^f
 - b. Conform to the setbacks, building height and other requirements of the zone in which it is located.

17.82.040 Nonconforming structures.

The following provisions apply to nonconforming structures:

- F. If a nonconforming structure or nonconforming portion of a structure is destroyed or damaged by any cause other than actions of the owner of that structure or his agents by any means to an extent amounting to eighty percent of its fair market value as indicated by the records of the county assessor, ~~it shall not be reconstructed except in conformity with the provisions of this title. that structure may be rebuilt. The construction or reconstruction of the structure shall:~~
- a. ~~Conform to the setbacks, building height and floor area of the structure prior to damage or destruction; or~~^f
 - b. ~~Conform to the setbacks, building height and other requirements of the zone in which it is located.~~

APPLICABLE CRITERIA

Chapter 17.86 AMENDMENTS

17.86.040 Investigation and report.

The city manager shall make or cause to be made an investigation to provide necessary information on the consistency of the proposal with the comprehensive plan and the criteria in Section 17.86.070. The report shall provide a recommendation to the planning commission on the proposed amendment. (Ord. 89-3 § 1; Ord. 79-4 § 1 (9.040))

17.86.070 Criteria.

- A. Before an amendment to the text of the ordinance codified in this title is approved, findings will be made that the following criteria are satisfied:
1. The amendment is consistent with the comprehensive plan;

Applicable Comprehensive Plan Policies are provided below for the Commission's consideration:

1. In order to maintain the city's village character and its diverse population, the city will encourage the development of housing which meets the needs of a variety of age and income groups, as well as groups with special needs.

6. The City recognizes the importance of its existing residential neighborhoods in defining the character of the community and will strive to accommodate new residential development in a manner that is sensitive to the scale, character and density of the existing residential development pattern.
10. The city will encourage the preservation of the older housing stock

Cannon Beach will continue to be a small town where the characteristics of a village are fostered and promoted. Both the physical and social dimensions associated with a village will be integral to Cannon Beach's evolution.

Staff Comment:

The pre-existing and non-conforming structure alignment offered above would allow those structures that are deemed non-conforming under the proposed subdivision and zoning ordinance amendments, which are destroyed by natural conditions, such as fire, to rebuild under the existing setbacks and dimensional requirements or that of the zoning district. This revision offers a 'quasi-grandfathering' of these structures which might exceed any square-footage limitations imposed by the changes.

PLANNING COMMISSION ACTION


MOTION: Having considered the evidence in the record, I move to (recommend/recommend with conditions/or deny) the City of Cannon Beach application for text amendments to Titles 16 Subdivision and 17 Zoning, Chapters 8 Residential Very Low Density, 10 Residential Lower Density, 12 Residential Moderate Density, 14 Residential Medium Density, 16 Residential High Density, 18 Residential Alternative/Manufactured Dwelling and 20 Residential Motel, while repealing Chapter 40 Planned Development from Title 16, application **ZO#21-02**, as discussed (subject to the following conditions) and requests that staff forward these recommendations to the Cannon Beach City Council for consideration and adoption.

1. Workforce Accessory Dwelling Unit program, where the construction excise funds being collected, now over \$180,000, could be used to provide building permit fee forgiveness or other types of support in an agreement that the owner would sign with their workforce program affidavit that guaranteed long-term rental housing for a workforce capped rental rate.

APPENDIX

The Clatsop County Assessor's data set provides the best source of data for which to make an analysis of the building size, gross floor area, floor area ratio and gross floor area, however, as with any data set the information provided is not perfect. Staff provides some of the limitations below.

1. The data is sent on a taxlot property basis with many duplicates, which may result from the exportation of the data, where the taxlots print multiple records for under duplicate, merged and even what appears as dead accounts, which if searched under the County's 'Account ID' result in no records. For example, in Example 2 below, three records were exported for the property, which were combined to yield one record for the study set with 2,009 SF of gross floor area. It appeared from a review of the export that records may have been extracted for each 'year built' resulting in three records. The study set combines these multiple records into one for each property, sacrificing the multiple year data for a 'last year built.' So that if a structure was built in 1930, added a garage in 2000 and additional space in 2008, the property would have a 'last year built' of 2008, which corresponds to the larger sized properties in later years.
2. As in Example 1 below, it was evident from the export that garages were not included in the square footage and thus, the study set will provide an underestimation of the gross floor area and subsequently any FAR that might be calculated.
3. The data set also includes 'attic space' as calculable area and yet, the CBMC calls for a 'habitable space' determination by the Cannon Beach Building Official before allowing this to be calculated as gross floor area. This leaves the study skewed to over-calculate such square-footage for the study set.
4. Where two or more dwelling units exist on one taxlot, such as Example 3, they have been combined to yield one record for the property.

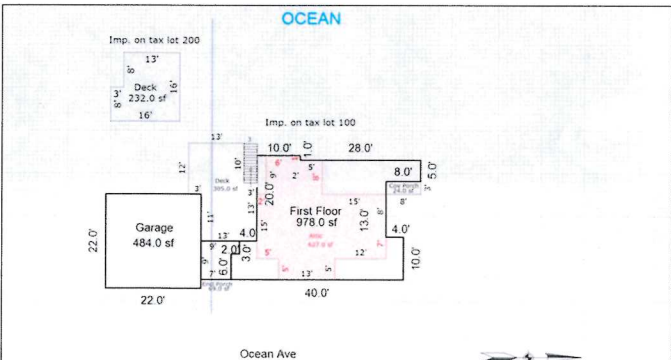

Clatsop County Property Information


263 Orford St, Cannon Beach OR
Account 1980

Property Details
Improvements
Assessments
Sales History
Taxes
Payments
Documents

Year Built	Sq Ft	Type	Stories
1938	1605	1 Story w/ Attic	1.2

Floor Type	Sq Ft	Bedrooms	Bathrooms
Attic	627	3	1
First Floor	978	1	1



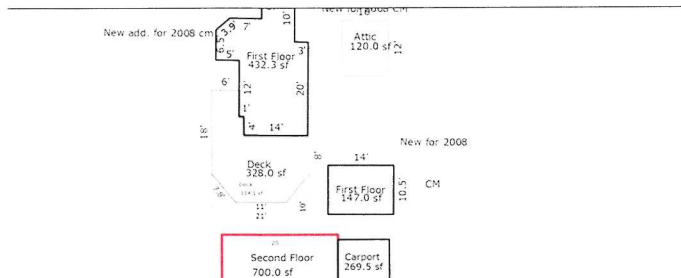


EXAMPLE 1: Square Footage Limitations

[Property Details](#)
[Improvements](#)
[Assessments](#)
[Sales History](#)
[Taxes](#)
[Payments](#)
[Documents](#)

Year Built	Sq Ft	Type	Stories
2000	147	1 Story	1.0
1930	552	1 Story w/ Attic	1.0
2008	1400	2 Story	2.0

Floor Type	Sq Ft	Bedrooms	Bathrooms
Attic	120	1	0
First Floor	432	1	1
First Floor	700	1	1
Second Floor	700	2	1
First Floor	147	1	0

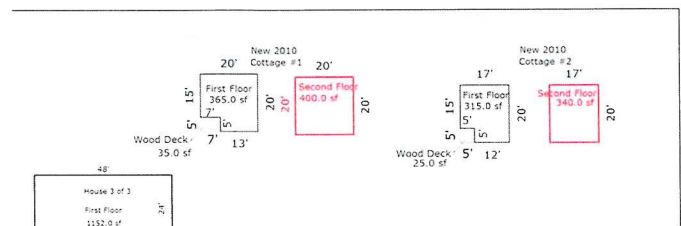


EXAMPLE 2: Multiple records for property

[Property Details](#)
[Improvements](#)
[Assessments](#)
[Sales History](#)
[Taxes](#)
[Payments](#)
[Documents](#)

Year Built	Sq Ft	Type	Stories
2008	765	2 Story	2.0
2008	655	2 Story	2.0
2013	2304	2 Story	2.0

Floor Type	Sq Ft	Bedrooms	Bathrooms
First Floor	365	1	1
Second Floor	400	1	1
First Floor	315		1
Second Floor	340	1	1
First Floor	1152	4	2
Second Floor	1152		1



EXAMPLE 3: Multiple dwelling units on single property

Original Lot Dimension Study, excerpted from the September 24, 2020 PC Staff Report

Figures

From Clatsop County Assessor Office Records (2019)

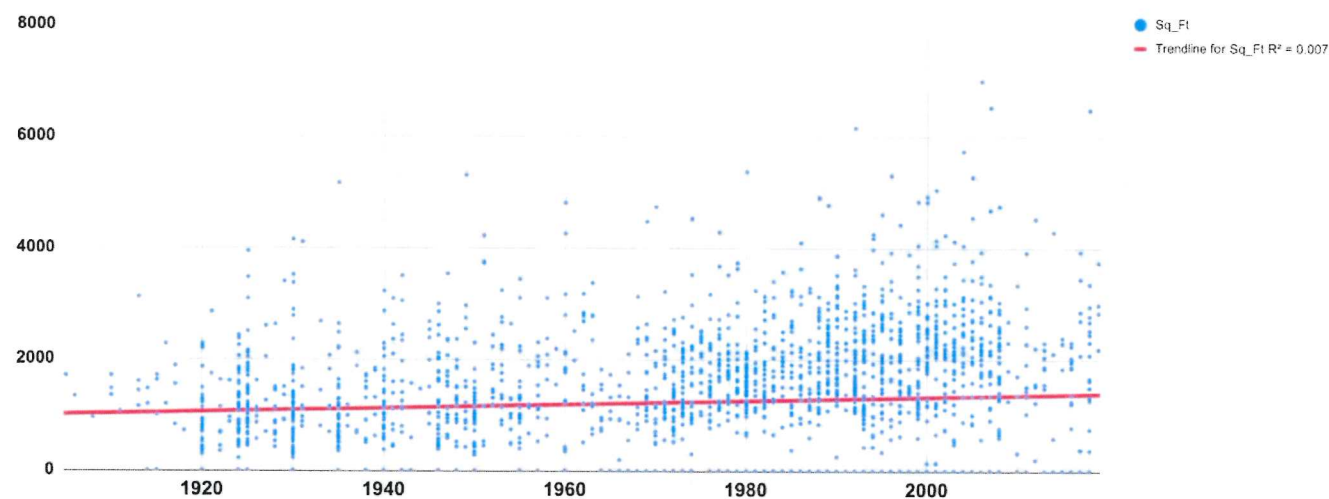


Figure 1. Cannon Beach Single-Family Residential Unit Size (by Square Footage) by Year Built

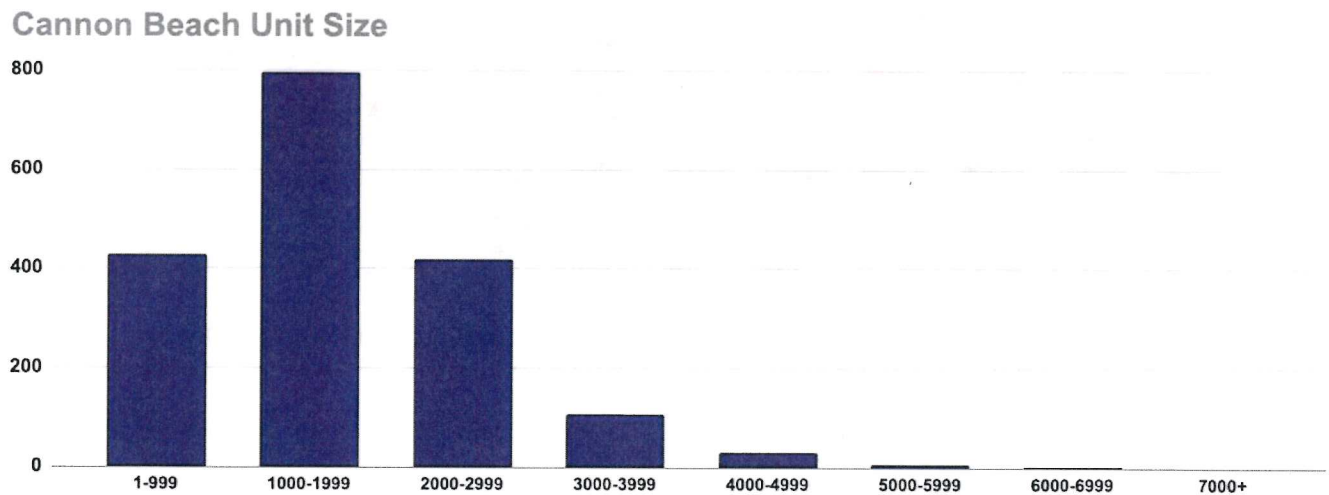


Figure 2. Number of Cannon Beach Single-Family Residential Units Built by Square Footage Class

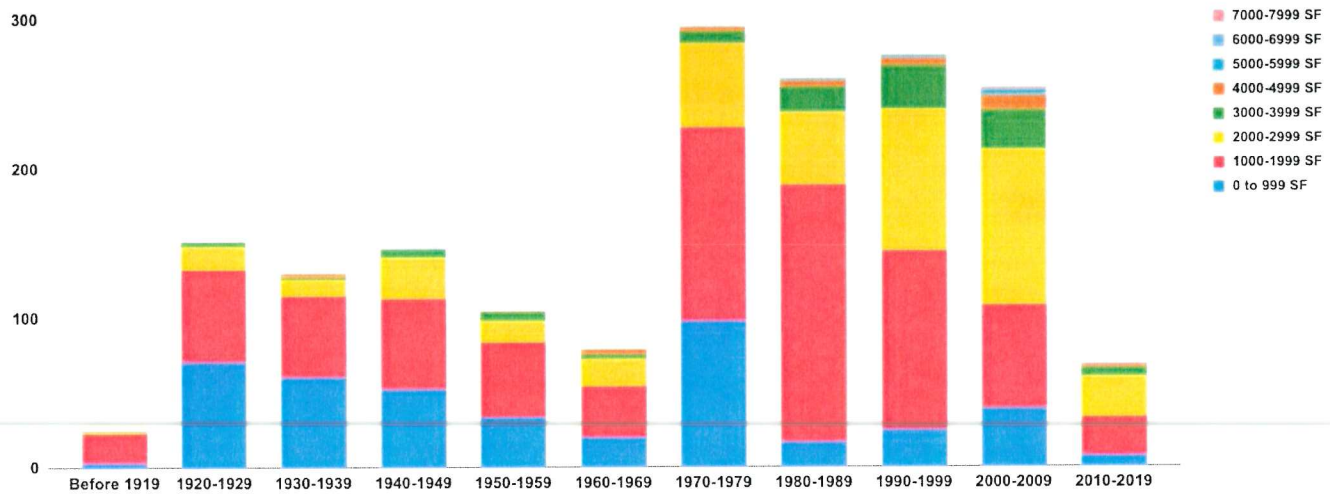


Figure 3. Number of Cannon Beach Single-Family Residential Units Built (by Class) each Decade

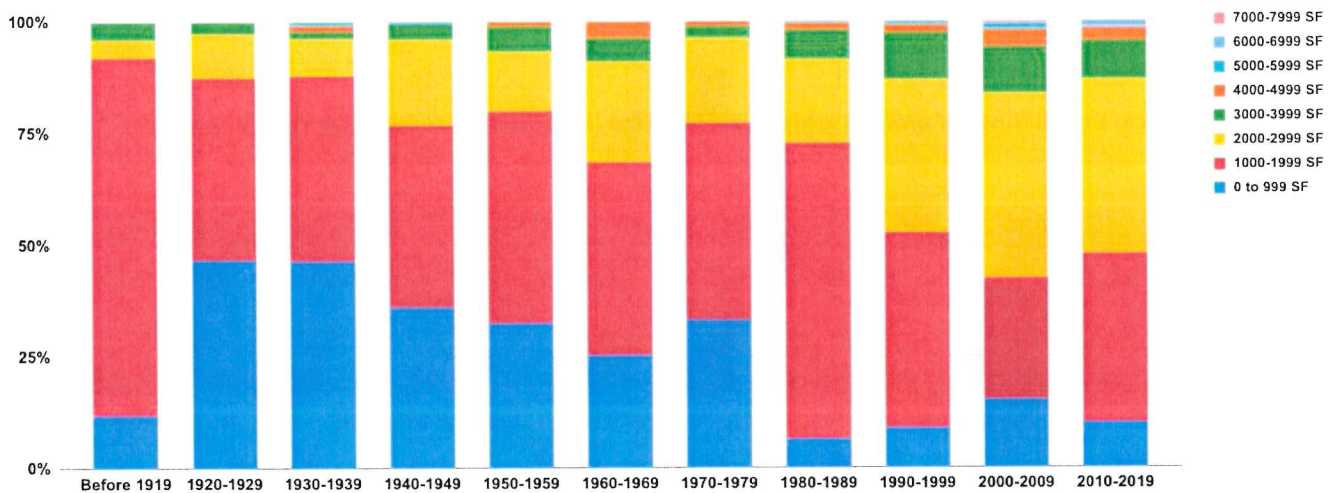


Figure 4. Percentage of Cannon Beach Single-Family Residential Units Built (by Class) each Decade

CANNON BEACH MUNICIPAL CODE TITLE 17

17.82.040 Nonconforming structures.

The following provisions apply to nonconforming structures:

A. Where a lawful structure exists at the effective date of adoption or amendment of the ordinance codified in this chapter that could no longer be built under the terms of this chapter by reason of restrictions on area, building coverage, height, yards, its location on the lot, or other requirements concerning the structure, such structure may continue so long as it remains otherwise lawful.

B. A nonconforming structure may be altered in a way that does not increase its nonconformity so long as the proposed alteration (within a three-year period) does not exceed fifty percent of the fair market value of the building, as indicated by the records of the county assessor. Alterations in excess of fifty percent of the fair market value of the building may be authorized in accordance with the provisions of Chapter 17.64, Setback Reduction.

C. A nonconforming structure may be enlarged in a way that does not increase its nonconformity provided that the total building coverage does not exceed forty percent.

D. The enlargement or alteration of a nonconforming structure in a way that increases its nonconformity may be authorized in accordance with the provisions of Chapter 17.64, Setback Reduction.

E. Any structure or portion thereof may be altered to decrease its nonconformity.

F. If a nonconforming structure or nonconforming portion of a structure is destroyed by any means to an extent amounting to eighty percent of its fair market value as indicated by the records of the county assessor, it shall not be reconstructed except in conformity with the provisions of this title. (Ord. 92-11 §§ 72, 73; Ord. 89-3 § 1; Ord. 85-3 § 3; Ord. 79-4 § 1 (7.040))

Note:

Re: ZO #21-02

Since the October 28th Planning Commissions Meeting, no new exhibits have been received for ZO #21-02. To view exhibits please see the October 28, 2021 Packet and October 28, 2021 Staff Report Addendum.

Exhibits are also available on the City's website. To view, follow the link below;

<https://www.ci.cannon-beach.or.us/planning/page/zo-21-02-titles-16-subdivision-17-zoning-ordinance-text-amendments-lot-combination>



Cannon Beach Planning Commission

Staff Report Addendum (November 18, 2021):

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;

DISCLOSURES

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

EXHIBITS

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

"A" Exhibits – Application Materials

A-1 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;
- C-2** Cannon Beach Preservation Planned Development Subdivision Plat, 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;
- C-5** House Plans for Najimi Residence, by Tolovna Architects, dated June 9, 2020; with Attachments;
- C-6** Outdoor Living Area Map;
- C-7** Outdoor Living Area KPFF Calculations;
- C-8** Outdoor Living Area Staff Calculations;
- 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;
- C-11** Amendment to Grant of and Agreement with Respect to Easements, Clatsop County Recorded Document# 201404937;
- 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** Dean Alterman letter, on behalf of M.J. Najimi, dated and received, October 21, 2021;
- 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;
- D-11** According to Oregon’s 7-7-7 rule, general public comment was closed on November 4th, responses to those comments were received on November 11th, and the applicant has until the end-of-business on November 18th to provide their response.

Staff Comments:

The first issue raised by the appellant is that “the Floor Area Ratio worksheet calculation used to approve the Building Permit is in error.” This memorandum will explain how the Floor Area Ratio (FAR) is calculated and explain the misunderstanding embedded in this appeal issue.

The term FAR is defined in CBMC 17.04.245 as follows:

“‘Floor area ratio’ means the gross floor area divided by the lot area and is usually expressed as a decimal fraction.”

Thus, in calculating the FAR, you must begin with the “gross floor area” which is also defined by the code in CBMC 17.04.283:

“‘Gross floor area’ means the sum, in square feet, of the gross horizontal areas of all floors of a building, as measured from the exterior walls of a building, including supporting columns and unsupported wall projections (except eaves, uncovered balconies, fireplaces and similar architectural features), or if appropriate, from the center line of a dividing wall between buildings. Gross floor area shall include:

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

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

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

In this case, the Cannon Beach Building Official reviewed the plans and made a determination under the state building code regarding what areas are “habitable,” consistent with CBMC 17.03.283(3), and that calculation was used to determine that the “gross floor area” of the structure is 4,384 square feet and the lot area is 7,500 SF, meaning the FAR is .58.

This is important because CBMC 17.14.040(D) provides that the maximum FAR in the R2 zone is .6 (or, expressed in a different way, the maximum amount of gross floor area cannot exceed 60% of the area of a lot). Thus, under the City’s code, using the definition from the code, the proposed residence fully complies with the FAR.

This straightforward application of the City’s FAR requirements becomes muddled because Condition 3 of the final approval of the Planned Development contains conflicting criteria for calculating the square-footage under consideration in relation to ‘habitable’ space. Condition 3 provides as follows:

“3. The total square footage of habitable space on the site shall not exceed 9,000 square feet. Habitable space includes 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 spaces. 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 total square footage of habitable space on the site to exceed 9,000 square feet.”

The argument presented by the appellant seems to revolve around the 210 square-feet of ‘loft’ area of the Harding Garage (Shown in yellow in the diagram below), which according to the Cannon Beach Building Official, and the state building code, is ‘non-habitable.’ As the diagram below shows, the 210 SF in question has no stairs or other fixed forms of access. The diagram’s blue square, the vaulted space above the garage floor, has been double-counted under CBMC 17.04.283(4). The fact that the PUD conditions of approval provide for a different definition of “habitable space” in a limitation of overall square footage in the PUD does not change the requirement for the City to use the definitions in the code in calculating the FAR under CBMC 17.14.040(D).

This disjunction between the definition of “habitable space” in the Conditions of Approval and the code’s FAR requirements, both put limits on what can be built on the lot and because the terms don’t align, there are ripple effects on other considerations. For instance, the Conditions of Approval exclude garages from habitable space calculations and yet, under the code, GFA and thus, FAR, include garages. For instance, if we are to take the maximum habitable space as defined by Condition 3, the habitable square footage for Lot 1 comes to 3,090 SF, while the GFA is calculated at 4,384 SF, or 58%.

In any event, as explained above, the ‘habitability’ determination for purposes of determining FAR is based on the state building code and under the jurisdiction of the Cannon Beach Building Official. The appellant’s argument that the area in the Harding Garage should be treated and calculated as ‘sleeping’ loft, or ‘habitable’ space simply because it is ‘finished,’ rather than a ‘storage’ loft, and ‘non-habitable,’ seems to run contrary to his concern that this accessory structure remain a garage and not a guest house or some form of ‘habitable’ space, which would require a certificate of occupancy and which would then be required to meet the Oregon Building Code for ‘habitable’ space. It appears Mr. Harrison would like the City to treat this as ‘habitable’ space so that it exceeds the ‘maximum’ habitable space allowed under Condition 3 for the lot and exceed the permitted FAR, and yet, after issuance of a certificate of occupancy, the City would have no grounds to prohibit someone from ‘occupying’ the space overnight.

As the Hardings stated at the previous hearing, the City has been asked to visit the property, to investigate just such complaints, and on December 8th, 2020, the City found no evidence that the storage loft was being utilized for any other purposed but storage. The ‘new evidence,’ or appellant’s pictures taken from inside the Harding garage highlight what they claim to be the ‘finished’ nature of the accessory structure, pointing out electrical outlets, skylights and other features, and yet, many accessory structures in Cannon Beach have outlets, windows and skylights. In fact, many accessory structures are utilized as secondary office spaces or workspaces for home occupations or hobbies. Garages across America have been the birthplace for companies ranging from Amazon to Apple, serving a wide range of needs and many are in some state of ‘finished’ space. When the appellant goes further to state that only one garage is permitted according to the zoning code, that simply is not consistent with the R2 Zoning district language, CBMC 17.14.020, which states under ‘uses permitted outright, that ‘In an R2 zone the following uses and their accessory uses are permitted outright,’ it doesn’t limit each unit to just one

structure or one use (emphasis added). In fact, the R2 district is for medium density residential uses, for up to eleven dwelling units per net acre, where two-family dwellings are permitted outright and thus, two or more accessory structures, including garages, can be found across the city.

Both the appellants, the Harrisons, and the applicants, the Najimis, make arguments about the previous LUBA decision on the development of a house on this property. The Harrisons essentially argue that this is an entirely new application and the City is free to consider any issue and make any appropriate decision on this applicant. In opposition, the Najimis argue that the City already made a decision about an almost identical house (with a turret) and that any issue that was resolved in that decision and was not appealed, was conclusively decided and cannot be revisited by the City in this decision. While both positions have some merit, the correct position is likely somewhere in the middle.

There is one position that all parties appear to agree on. In the previous LUBA decision, LUBA was clear that the City was not to apply any standards from the PUD chapter and could not:

“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.”

Beyond that, the parties dispute the impact of LUBA’s decision; however, the impact of LUBA decisions has been laid out in opinions from LUBA and the Court of Appeals.

In a case from this city, *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998), the Oregon Court of Appeals laid out some limitations on the City’s ability to change its mind on how to apply a criteria from its code, but that case was significantly different from this one, and the facts of the case are important. The *Holland* case involved the application of certain “slope and density” design standards. Before Mr. Holland filed his application, the then city attorney had concluded that the slope/density provisions had been implicitly repealed and, thus the city did not apply them to Mr. Holland’s application. Nonetheless, the city concluded the application violated other provisions of its plan and rejected it. The city’s decision was appealed to LUBA and the Court of Appeals, which remanded the city’s decision, concluding that the city was wrong in applying those plan provisions.

When the matter came back to the city on remand, the city council concluded that, in fact, the slope/density standards had not been repealed, applied them to Mr. Holland’s application and denied the application. Mr. Holland again appealed to LUBA and the Court of Appeals overturned the decision on remand. LUBA explained the ruling as follows:

“With respect to ORS 227.178(3), we understand Holland to hold that, once a local government has taken a position *in the course of a permit proceeding* that a land use regulation is not an approval criterion, the local government cannot change that position on remand, which the court viewed as part of the same permit proceeding, and apply the regulation to approve or deny the permit application. To do so is a de facto ‘shifting of the goal posts’ contrary to the statute, because it effectively allows the local government to approve or deny a permit application based on standards that the local government

deemed were not applicable at the time the permit application was filed.” *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004) (emphasis added).

In other words, the city cannot change its interpretation of the applicability of a criterion “in the course of a permit proceeding.” However, the matter before the Planning Commission now is not part of the same “permit proceeding” as Mr. Najimi’s initial application. The city denied that application, the applicant appealed to LUBA, which affirmed the city, and LUBA’s decision was not appealed further. Therefore, the city is not bound by any interpretation it may have made in the the applicant’s first application.

However, that does not mean that the City has free reign to make any interpretation it may like. The LUBA case cited above, *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004), answers that question. In that case, the city of Ashland had interpreted its code in one way, but changed its interpretation when a new application was submitted. LUBA first acknowledged the language in *Holland* that the Court of Appeals accepted “at least as an abstract proposition, the premise that a local government may “correct” its earlier interpretations of its legislation.” But LUBA then noted additional limitations on a city changing its interpretations:

“A local government may not change an existing interpretation where such reinterpretation is ‘the product of a design to act arbitrarily or inconsistently from case to case[.]’ *Alexanderson v. Clackamas County*, 126 Or App at 552. Finally, where a local government changes a pre-existing interpretation in the course of a permit proceeding, it must provide participants the opportunity to address the reinterpretation and, in some circumstances, must re-open the evidentiary record to allow the parties the opportunity to present new evidence with respect to whether the application complies with applicable approval standards, as reinterpreted. *Gutoski v. Lane County*, 155 Or App 369; *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).”

In sum, except as explained by LUBA in its decision regarding the use of PUD criteria, the planning commission is not necessarily bound by any decision made in the prior proceeding by the city. However, to the extent the planning commission reaches a different conclusion than it did previously, it would be well served to provide an explanation of why the different conclusion is not adopted by design to frustrate this particular application.

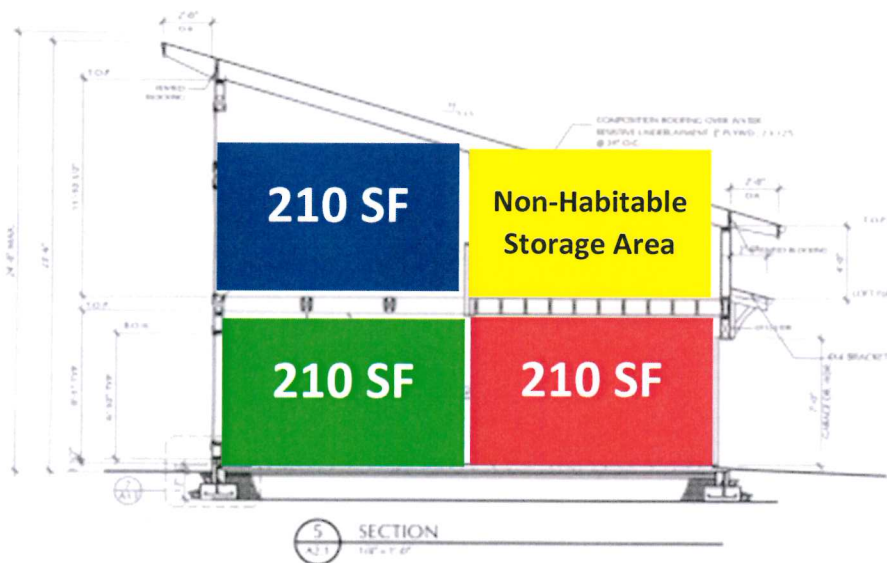
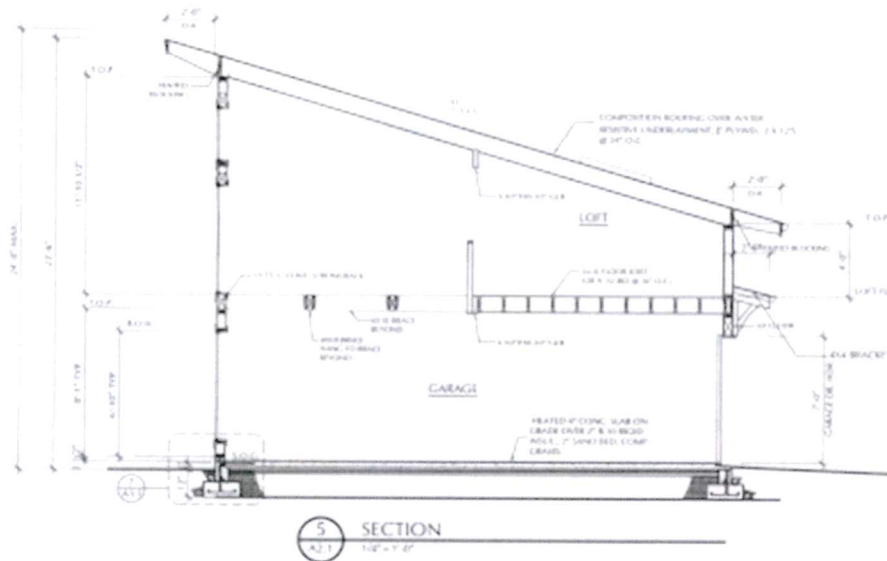
MAIN MOTION:

If the Commission wishes to review the Findings prior to final approval:

TENTATIVE MOTION: Having considered the evidence in the record, I move to ***tentatively*** (affirm/modify in whole or part/reverse) the Jeff and Jennifer Harrison appeal of an administrative decision to approve Development/Building Permit for 544 N. Laurel St., taxlot# 51019AD070000, Cannon Beach Planning Commission application number **AA#21-01**, as discussed (subject to the following modifications) and request staff to draft findings for review and adoption, at a special called meeting, next Thursday at 6PM, December 2nd at City Hall:

If the Commission does not wish to review the Findings prior to final approval:

MOTION: Having considered the evidence in the record, I move to (affirm/modify in whole or part/reverse) the Jeff and Jennifer Harrison appeal of an administrative decision to approve Development/Building Permit for 544 N. Laurel St., taxlot# 51019AD070000, Cannon Beach Planning Commission application number **AA#21-01**, as discussed (subject to the following modifications) and request staff to draft findings for review and adoption, at a special called meeting, next Thursday at 6PM, December 2nd at City Hall:



Harding Accessory Structure, Elevations, dated March 22, 2019

17.04.283 Gross floor area.

“Gross floor area” means the sum, in square feet, of the gross horizontal areas of all floors of a building, as measured from the exterior walls of a building, including supporting columns and unsupported wall projections (except eaves, uncovered balconies, fireplaces and similar architectural features), or if appropriate, from the center line of a dividing wall between buildings. Gross floor area shall include:

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

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

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

Gross Floor Area Definition, CBMC

Appendix

Worksheet - Floor Area Ratio

- I. The maximum FAR in the R1, R2, RAM, R3 and RM zones is .6.
 The maximum FAR in the RVI zone is .5.
 The maximum FAR in the RL zone for a lot 5,000 square feet or less is .6.
 The maximum FAR in the RL zone for a lot 5,000 square feet or more is .5.
- II. Calculation of FAR
- A. Lot Size, 7500 sq. ft. (A)
- A. Gross Floor Area: (see definition below)
- | | | |
|---|-------------|--------------------|
| 1. Basement | | sq. ft. |
| 2. 1 st Story | 1314 | sq. ft. |
| 3. 2 nd Story | 1376 | sq. ft. |
| 4. Loft | | sq. ft. |
| 5. Garage or Carport | 604 | sq. ft. |
| 6. Habitable Accessory Structures (e.g. accessory dwelling) | 420 | sq. ft. |
| TOTAL | 4174 | sq. ft. (B) |
- C. Divide Total (B) by (A)
- 56 FAR** **.58**

Definition of Gross Floor Area

OK 7/15/2021

Gross Floor Area is the sum, in square feet, of the gross horizontal areas of all floors of a building, as measured from the exterior walls of a building, including supporting columns and unsupported wall projections (except eaves, uncovered balconies, fireplaces and similar architectural features), or if appropriate, from the center line of a dividing wall between buildings.

Gross floor area includes:

- ✧ Garages and carports
- ✧ Entirely enclosed porches
- ✧ Basement or attic areas determined to be habitable by the City's Building Official, based on the definitions in the building code.
- ✧ Uninhabitable basement areas where the finished floor level of the first floor above the basement is more than three feet above the average existing grade around the perimeter of the buildings foundation.
- ✧ All portions of the floor area of a story where the distance between the finished floor and the average of the top of the framed walls that support the roof system measures more than 15 feet shall be counted as 200% of that floor area.

Revised FAR Worksheet, dated July 15, 2021

[Type here]

Good evening,

Jeff Harrison, PO Box 742, Cannon Beach. Tonight, I represent myself and my wife, Jennifer Harrison. Our home is on N. Laurel, directly across from the Nicholson PUD.

We are disappointed another appeal of another administrative decision was necessary. This is not what City Council envisioned when they approved this PUD. And it is not what is right for our neighborhood, or Cannon Beach.

Although I know I may disappoint those of you who were looking forward to another lengthy presentation from me on this, I will be brief tonight.

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. Virtually everything we warned of re: the Nicholson PUD is being allowed.

We applaud your work to tighten our building code, limit house sizes, and eliminate loop holes in the floor area ratios. That is largely what our appeal tonight is about. We are also asking you to uphold PUD conditions and honor promises made.

I only want to give you a few brief points:

1. Re: the FAR calculation and the Harding garage loft floor area.
 - a. The first floor of this building is now being counted properly in the Floor Area Calculation worksheet. The area under the vaulted ceiling is now being counted at 200%. The total of the 1st floor is now 630 sq ft. But the 2nd story, as shown on our Exhibit 18, is not being counted at all. There is 210 sq ft of floor area on the 2nd floor.
 - b. There has been a great deal of discussion re: the floor space of the 2nd story and it been confused and incorrectly conflated with the irrelevant issue of habitability. The habitable status of the 2nd story or "loft" floor area is not a factor in including or excluding this loft from FAR.
 - c. What is a factor is our code. Our definition of gross floor area says garages are to be included. Period. That same code piece does

[Type here]

reference habitability but only for basements and attics. This 2nd story loft floor space is neither.

- d. For diligence, we did look up the definition of attic. The Oregon Residential Specialty Code defines an attic as, “The **unfinished** space between the ceiling assembly and the roof assembly”. Unfinished is the key term here.
 - e. Last year, even though the Planning Commissioners did not discuss it, a blurb somehow made it into your findings that referenced this area as an attic. We are not sure who wrote this, because to my knowledge the Planning Commission has never referenced this space as an attic.
 - f. Staff says they see no changes from last year’s look at this and therefore no reason for a different outcome. We disagree. We do see a reason and a difference. The difference is this time is that you have pictures, our exhibits 4, 5, 6, 7 and 8, of this floor space. Now, you can see the finished walls, finished ceilings, finished floors, skylights, windows, and electrical. These finishing features disqualify this space as an attic. You get to make the determination that this is not attic space and therefore habitability is not a factor.
 - g. It is floor space and it must be counted in the floor area ratio. There is no exclusion for this space.
 - h. During Council proceedings last year, Planner Adams even said habitability had nothing to do with FAR when asked by Councilor Risley. Please see our Exhibit 17, which was submitted today.
2. Re: the 2nd garage
- a. The existing garage represents at least one zoning code violation.
 - b. For now, the existing garage is there and PUD condition #16, while not written as clearly as it could have been, does clearly reference garages in the singular 5 times. It never references multiple garages. It’s only one garage per lot.
 - c. Last year, Commissioner Newton stated that he did read condition #16 as limiting each lot to one garage. We agree with Commissioner Newton and hope the rest of you do, too.
 - d. But even if this was not a PUD, how many garages do you want to allow on any lot in Cannon Beach? If 2, why not 3? Or 5?

[Type here]

3. Re: the non-living wall

- a. Sword ferns and a home-grown effort aren't going to cut it. The time has long passed for the city to do what it promised: enforce the approval condition. Where is the executed contract with a landscape professional?
- b. One brief correction, Planner Adams refers to the document submitted by Nicholson as an "invoice". It clearly shows as "Estimate". Please see our Exhibit 12.

We recently read the City's charter and noted in Chapter 5, Section 22, our City Manager is, "(d) ...responsible for the enforcement of all ordinances; and (e) [is]responsible for the enforcement of the ... permits and privileges granted by the city". Mr. St Denis, we would like to see you do that here.

Lastly, we have a question for Planner Adams. It is a question we have asked numerous times with no answer, but since we are talking tonight about the plans to build on Lot 1 of the Nicholson PUD, we'll ask again. Mr. Adams, where is the required rear yard for Lot 1?

Thank you for your service to Cannon Beach. Please uphold our appeal of this administrative decision. Please don't allow any more decisions that don't follow our code and please uphold the promises made during approval of the PUD.

I would be happy to answer any questions you may have. Thank you.

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

In the Matter of the Appeal of the issuance of Building Permit No. 164-21-000179-DWL for Property located at 544 N. Laurel Street by Petitioners Jeff and Jennifer Harrison.

Written Argument and Proposed Findings and Conclusions of Law

I. Introduction.

Your Planning Commission conducted a hearing regarding the above-entitled appeal on October 28, 2021. At the conclusion of the hearing, your Planning Commission adopted the procedures offered by your Land Use City Attorney pursuant to ORS 197.763 as follows:

November 4, 2021: The introduction of evidence and/or argument by any person or party filed with the City by the end of business.

November 11, 2021: The introduction of rebuttal evidence or argument in response to any evidence and/or argument introduced by any person or party on November 4, 2021, filed by the end of business.

November 18, 2021: The introduction of a Final Written Closing Statement by Mr. Najimi's legal representative filed by the end of business with the caveat that it does not include any new evidence.

This Written Argument and Proposed Findings and Conclusions of Law is in accord with the procedures established by your Planning Commission at the October 28th hearing.

II. Summary of Appeal Issues and Argument.

Petitioners appeal the City's issuance of Building Permit No. 164-21-000179-DWL for property located at 544 N. Laurel Street owned by Mr. Najimi. Petitioners reside across the street from Mr. Najimi's property.

As presented in Petitioners' Notice of Appeal ("Appeal") and at your October 28th hearing, and as described below, Building Permit No. 164-21-000179-DWL ("Building Permit") either violates the Cannon Beach Municipal Code (CBMC) (hereinafter referred to as the "City's Code") or the conditions of approval of the Nicholson PUD. As a result, it is Petitioners' position in their Appeal that the Building Permit must be revoked.

There are three overriding principles that govern your Planning Commissions' review of Petitioners' Appeal:

(1) Your Planning Commission 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 request, 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 your consideration of the Appeal.

As a result, your Planning Commission 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 your Planning Commission from considering the Appeal. LUBA did caution the City in its decision, however, that it could not apply PUD standards to a subsequent building permit request from Mr. Najimi.

Petitioners agree with LUBA's ruling that your Planning Commission cannot apply PUD standards in considering their Appeal. However, Petitioners are not requesting your Planning Commission to apply PUD standards in this Appeal, but instead, requesting your Commission to

determine whether the issued Building Permit complies with the Nicholson PUD “Conditions of Approval”.

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 to the request. As a result, your Planning Commission is not precluded from determining whether the issued Building Permit complies with any PUD conditions of approval.

(3) City Staff and your 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.

As set forth in the Appeal, and as presented at the hearing, and described below, the Building Permit does not comply with the City’s Code

and several of the Nicholson PUD Conditions of Approval. As a result, your Planning Commission must revoke the issued Building Permit and grant the Appeal.

Petitioners offer the following summary of their argument regarding the issues identified in their Appeal:

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 the existing two-story garage owned by the Harding's 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) presumably

because Staff determined that the finished loft was not habitable. Staff is wrong.

Whether the finished loft area is habitable or not is irrelevant when counting the Gross Floor Area of the loft. In fact, it appears no one disputes the fact that the Harding's loft area is not habitable. The issue is whether the loft is a finished area and within the definition of Gross Floor Area requiring the area to be counted. The definition of Gross Floor Area is clear: a finished area is required to be counted in determining FAR. In contrast, an "attic" area is defined as "unfinished" space.

Petitioners' pictorial Exhibits A5 through A9 clearly demonstrate that the Harding's loft area is "finished" and, therefore, does not qualify as an "attic". As a result, Staff was required to count 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.

Based on the foregoing, Petitioners respectfully request the Planning Commission to determine 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 stated above, the City is required to ensure that the issued Building Permit complies with all applicable conditions of approval. It is Petitioners' position 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.

Based on the foregoing, Petitioners' respectfully request the Planning Commission to interpret PUD Condition No. 16 and determine that any Nicholson PUD lot is limited to one garage. Petitioners further respectfully request the Planning Commission to determine that Mr. Najimi's proposed attached garage violates PUD Condition No. 16 since his lot already contains the Harding's two-story garage.

3. The proposed attached garage is not permitted as an accessory use in the R-2 Zoning District since the property already contains an existing garage.

Notwithstanding Petitioners' argument above that PUD Condition No. 16 limits the Najimi lot to one garage, it is Petitioners' position that the Najimi lot is only entitled to one "accessory" garage under the City's Code (CBMC 17.14.020). As a result, it is Petitioners' position that the proposed attached garage to Mr. Najimi's detached single-family residential dwelling is not allowed as an accessory use under CBMC 17.14.020 since the Najimi lot currently contains the Harding's two-story garage.

The Planning Commission has several available options to address this Appeal issue. First, this Appeal issue is moot, should the Planning Commission determine that PUD Condition No. 16 limits the

Najimi lot to one garage as argued above. If so, the proposed attached garage is not allowed whether it qualifies or not as an accessory use under CBMC 17.14.020.

Second, the Planning Commission could interpret CBMC 17.14.020 and determine that the City's Code only allows one accessory garage on lots within Cannon Beach. If so, the proposed attached garage is not permitted since the Harding's garage exists on the Najimi lot.

Third, the Planning Commission could determine that the Harding's two-story garage is not accessory to Mr. Najimi's primary use, and, therefore, his proposed attached garage is allowed as an accessory use in the R-2 Zoning District. It appears such a determination is obvious since admittedly the Harding's garage is not accessory to Mr. Najimi's primary use of his property, i.e., his detached single-family residential dwelling. In other words, the Harding's garage serves the Harding's and not Mr. Najimi's proposed single-family detached residential dwelling.¹

¹ The City has previously discussed the issue whether the Harding's garage is a lawful use under the City's Code. See Exhibit A-10 (City Council Work Session transcript dated January 14, 2020).

Based on the foregoing, Petitioners respectfully request that the Planning Commission determine that the proposed attached garage is not allowed because of PUD Condition No. 16 and/or CBMC 17.14.020 that allows one accessory garage per lot. In the alternative, Petitioners respectfully request the Planning Commission determine that the Harding's garage does not constitute an accessory use on the Najimi lot, and, therefore, the proposed attached garage is allowed as an accessory use.²

4. The City cannot approve the Building Permit until all applicable conditions of approval of the Nicholson PUD are met. The PUD is in violation of Condition No. 17 regarding the Living Wall.

PUD Condition No. 17 requires the Living Wall to be installed and maintained by a landscape professional. The evidence in the record demonstrates that there is no contract with a landscape professional and no timeline when the Living Wall will be installed in compliance with PUD Condition No. 17. As a result, the Building Permit cannot be issued until PUD Condition No. 17 is satisfied.

² It is Petitioners' position that the Harding's garage constitutes a zoning violation since it does not serve Mr. Najimi's primary use, and, therefore, does not qualify as an accessory use pursuant to CBMC 17.14.020. Petitioners intend to pursue this issue with the City separate and apart from their Appeal.

Based on the foregoing, Petitioners respectfully request the Planning Commission to deny the Building Permit until PUD Condition No. 17 is satisfied.

5. Petitioners withdraw their appeal issue regarding the lack of formation of a Homeowners Association ("HOA").

As stated at your hearing, Petitioners withdraw their appeal issue regarding the formation of an HOA. Petitioners agree with Staff that the City did not condition the Nicholson PUD on the formation of an HOA. However, it remains Petitioners' position that the Nicholson PUD is in violation of State law (ORS 94.625) until an HOA is formed.³

III. Proposed Findings and Conclusions of Law.

Based on the foregoing, the following proposed Findings and Conclusion of Law can be adopted by the Planning Commission in support of the Appeal.

FINDING NO. 1: The Harding's finished loft area (210 sq. ft.) was required to be counted in the City's calculation whether the Building Permit met the City's FAR requirements regardless of whether the finished

³ Petitioners reserve the right to enforce the provisions of ORS 94.625 requiring the Nicholson PUD to form an HOA.

loft area was habitable or not. If counted, the FAR lot coverage for the Najimi lot of 61.25% exceeds the City's 60% maximum FAR specified in CBMC 17.14.040.D.

Therefore, the Planning Commission concludes that the issued Building Permit violates the City's FAR requirements in the R-2 Zoning District.

FINDING NO. 2: Nicholson PUD Condition No. 16 limits the Najimi lot to one garage as interpreted by the Planning Commission.

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.

FINDING NO. 3: In the alternative to Finding No. 2 above, the Planning Commission interprets CBMC 17.14.020 as limiting lots in Cannon Beach to one accessory garage. The Planning Commission finds the issued Building Permit authorized an attached accessory garage notwithstanding that the Najimi lot currently contains an existing two-story garage owned by the Harding's.

Therefore, the Planning Commission concludes that the issued Building Permit unlawfully allowed a second garage in violation of the City's Code.

FINDING NO. 4: In the alternative to Finding No. 3 above, the Planning Commission determines that the Harding's garage located on the Najimi lot does not constitute an accessory use under the City's Code since it does not serve Mr. Najimi's single-family detached residential dwelling. The Planning Commission determines that the Harding's garage serves the Harding's and not Mr. Najimi.

Therefore, the Planning Commission concludes that the Harding's garage is not an accessory use on the Najimi property, and that Mr. Najimi's proposed attached garage is an accessory use in the R-2 Zoning District under the City's Code and permitted.

FINDING NO. 5: The Planning Commission finds that PUD Condition No. 17 regarding the Living Wall has not been satisfied. The evidence in the record demonstrates that there is no contract with a landscape professional and no timeline when the Living Wall will be installed in compliance with PUD Condition No. 17.

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

IV. Conclusion.

Petitioners respectfully request the Planning Commission to adopt the above Findings and Conclusions of Law and revoke the City's issuance of the Building Permit. Other than testimony from Mr. Najimi's attorney and the Harding's, all other testimony received by the City supports the Harrison's Appeal.

DATED this 4th day of November 2021.

HATHAWAY LARSON LLP

By: /s/Gregory S. Hathaway
Gregory S. Hathaway, OSB # 731240
1331 NW Lovejoy Street, Suite 950
Portland, OR 97209
Of Attorneys for Petitioners

11/04/2021

Jeff & Jennifer Harrison
P.O. Box 742
Cannon Beach, OR 97110

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

Re: Appeal of Building Permit No. 164-21-00179 (544 N. Laurel Street)

Dear Planning Commissioners,

We wanted to respond to a few things we heard on 10/28/2021.

1. **Camera.**

- a. The Hardings alleged we monitor them 24x7 with a camera. This is simply not true. Security and privacy are sacrosanct; we all deserve to feel secure in our homes and that our privacy is not infringed upon. We do not have a camera recording their building(s). We do have an inexpensive camera surveying our driveway because of damage we have incurred. After Nicholson's contractor (McEwan) damaged our driveway with his big trucks, we asked Planner Adams to enforce PUD Approval Condition #1 to have Nicholson repair the damage. After multiple months of asking, Planner Adams declined. We then contacted McEwan, and he responded (angrily) that if, "we didn't have pictures, it didn't happen". It didn't matter that we had submitted pictures (provided by neighbors) to Planner Adams. We hired an asphalt company and paid for the repairs ourselves. Because we knew more big trucks would be rolling to this property, we then installed an inexpensive camera to keep an eye on our driveway. As most of you probably know, these cameras don't even have the capacity to capture detail very far away. The Harding's privacy is not at issue here because their buildings are beyond the capacity of the unit.
- b. It was "interesting" to hear the complaint about cameras because the complainer has had a camera and sign ("SMILE! YOU'RE ON CAMERA) on their "garage". The sign has now been removed but we are not sure if their camera was removed. It has never been a concern for us.

2. **The habitability status of the "2nd floor loft".**

- a. It was also interesting to note who was speaking about the habitability status of the Harding "garage" 2nd story loft floor space...and who wasn't. Planner Adams, Mr. Alterman, and the Hardings, all spoke to the habitability status of this space. Attorney Hathaway and I did not. We didn't because with respect to what is counted in the Floor Area Ratio (FAR), the loft habitability is irrelevant. What does matter is the loft space determination. It can't be called an "attic", which is defined as unfinished space. This is very finished space. It counts as floor area. The total of sq footage should reflect a total of 4,594, not 4,384. The maximum for this 7,500 sq ft lot is 4,500 sq ft.

3. **Location of the required rear yard of Lot 1**

11/04/2021

- a. During the hearing, we again asked Planner Adams where the required rear yard for Lot 1 of the Nicholson PUD is oriented. Planner Adams promised to answer when everyone else had spoken. We wanted to remind him we would still like an answer in case this slipped his mind.

Finally, we are reminded of an old saying. We're not sure of the author, but it goes something like this:

"If you are complicit in snookering Council and then fool the Planner into approving an illegal structure....you don't get to play the victim when it doesn't work out with your neighbors and the legal system." ~ author unknown

Thank you for your continued attention to this seemingly never-ending problem and thank you for your service to Cannon Beach.

Jeff & Jennifer Harrison
539 N Laurel
Cannon Beach, OR 97110

11/11/2021

Jeff & Jennifer Harrison
 P.O. Box 742
 Cannon Beach, OR 97110

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

Re: Appeal of Building Permit No. 164-21-00179 (544 N. Laurel Street)

Dear Planning Commissioners,

We wanted to respond to a few things in Mr. Alterman's letter of 11/4/2021.

1. Mr. Alterman states, "Mr. Najimi's house plan complies with all requirements applicable to the structure itself." While this is untrue on its face (the plan exceeds the maximum allowable FAR for the lot and includes an unallowable 2nd garage), Mr. Alterman appears to forget that this requested house is not in a regular subdivision and therefore cannot be treated as one. It is in a Planned Unit Development, and therefore the conditions of approval must also be met for this request, which includes a development permit. Two items re: PUD condition 17 have not been submitted (e.g., the missing contract with a landscape professional and equally absent timeline for the living wall) thus condition 17 has not been met. Therefore, the building permit for the house cannot be approved. Planned Unit Developments with conditions have different rules than a regular housing development. This cannot be treated as a regular housing subdivision because it is not.

- a. Moreover, in his Respondent Brief for *Najimi v. Cannon Beach* Mr. Kabeiseman stated the following:

"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."

2. Mr. Alterman asks, "What happens to this subdivision ... if the City repeals the code chapter that authorizes planned developments?" We submit that the parcel would simply become non-conforming lots, although the PUD conditions would remain binding.
3. Mr. Alterman cites the minutes from City Council's hearing last year where in response to a question about the Hardings' right to build on the easement Planner Adams states, "it says for accessory uses". We disagree, because the easement does not say that. It does say,

*"The Grantee Parking Area may be used, maintained, and improved by only Grantee Benefitted Parties **for parking**. Grantee may build any improvements on the Grantee Parking Area **as permitted by local ordinance**."* (emphasis added).

Two things are clear:

- a. The Parking Easement is “for Parking” and that this over-sized 2-story structure, built in the required rear yard of Lot 1 was built as more than a parking structure. Cars do not need heated floors, etc. In fact, the building is advertised for sale as, “office potential”.
 - b. Local ordinance **did not** permit this. Local ordinance does not allow an accessory structure on lot with different ownership and that does not serve the primary use/structure, which is the future Najimi primary residence.
-
4. Re: the “living wall” and condition #17, Mr. Alterman states, “The city must have found the developer complied with the requirement to submit a contract and a timeline. This could not be further from the truth.
- a. Please see Exhibit A-13. This is an unsigned estimate (not an invoice, as incorrectly labelled by staff). The estimate was not done by landscape professional and there is no contract or timeline.
 - b. Please see our two new exhibits (attached). These demonstrate two separate occasions where we have demonstrated to the city that condition 17 remains unsatisfied: City Council 06/05/2018 (oral, Good of the Order) and Planning Commission 06/25/2020 (written letter).

Thank you again for your continued attention to this seemingly never-ending problem and thank you for your service to Cannon Beach. Please uphold this appeal and deny this building permit until the submitted plans are under the FAR maximum, the plans have removed the 2nd unallowed garage, and the “living wall” is under contract with a landscape professional with a timeline.

Jeff & Jennifer Harrison
539 N Laurel
Cannon Beach, OR 97110

Jeff and Jennifer Harrison
 P.O. Box 742
 Cannon Beach, OR 97110

06/25/2020

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

Dear Cannon Beach Planning Commission,

It has been over 4 years since City Council approved the Nicholson PUD. As we predicted, our Cannon Beach experience continues to be degraded as a result. The ugliest component by far is of course the 125 foot long, 12 foot tall, interlocking concrete, industrial-looking wall. The wall was among the very top concerns we had then, and our fears and intuitions were well founded. We appreciate the Planning Commissioners reviewing this issue.

From our perspective, directly across the street from this PUD, here is what has happened since the approval.

1. We were threatened by Nicholson's lawyer with a demand letter, declaring our driveway a hazard. Our driveway has been in its present configuration for 20+ years, and has never been an issue. Nicholson withdrew the letter, but reserved the right to re-instate his threat.
2. Nicholson's big trucks damaged our driveway, so we asked Jeff Adams for relief under PUD Approval Condition #1. After 2 months and 4 emails, we were told we were on our own. We had to pay to fix the damage caused by Nicholson.
3. The PUD was approved for 4 buildings by City Council, but Jeff Adams administratively approved a 5th building, 24 feet tall, with 2 stories and 860 sq feet.
 - a. The easement that is being used here was passed out, with small print, to Councilors during the final hearing. It was not disclosed.
 - b. Many of the questions we posed to the City about this structure remain unanswered.
 - c. Our view of the west sunsets is even more obstructed than it should have been.
 - d. Despite CBMC 17.40.080 requiring PUD changes to go through PC, Jeff Adams approved this building administratively.
 - i. It is notable that Bruce St Denis told the Planning Commissioners that when the applicants presented Jeff Adams with a list of 7 approval conditions (which were preliminary), Jeff "wisely went to the files" and discovered the full list of final Approval Conditions. This just isn't true. Jeff Adams initially accepted the incorrect list of 7 preliminary conditions as gospel and issued permits for a garage and studio apartment. It was only when Adams was looking into my complaint re: our driveway

damage that he somehow discovered the LUBA file and the final list of Approval Conditions. See attached email (Adams to St Denis, dated 4/17/2019).

- e. Despite Approval Condition #16, which states no 2 story garages are allowed on the PUD, and none with living space, Jeff Adams approved this 24 ft tall “garage. Does anyone believe a 2-story, 860 sq ft, ocean view structure, with tall picture windows, finished drywall interior (including ceilings), skylights, 100K BTU furnace, heated floors, over-sized ceiling fan, shower, and toilet, and dryer vent is to be used to park a car and for storage?
 - f. Despite approval condition #15 clearly stating a geo-tech report is required prior to building permits being issued, Jeff Adams approved the building permit without requiring a geo-tech report.
 - g. Accessory structures are not supposed to be allowed on a vacant lot. Councilor Ogilvie was forced to tear down his garage when he divided his property, leaving a garage on a vacant lot. Jeff Adams approved this accessory structure on a vacant lot.
 - h. Despite our code requiring accessory structures to be limited to 120 sq ft and be only 12 ft tall when in a rear yard, Jeff Adams determined the garage was not in the rear yard, even though Approval Condition #16 requires the future house on Lot 1 to face South. How does it make sense for this lot (544 N Laurel St) to have the yard facing N Laurel be the “rear” yard?
 - i. Despite our code requiring accessory structures to be located on the same lot as the “main use”, Jeff Adams approved it to be built on a lot with different ownership. The “main use” for this accessory structure is on a different lot with different ownership. CBMC 17.04.010
 - j. Despite the PUD “Shared Access and Maintenance Agreement” stating that common space is to be usable by all owners, the Harding’s easement states that anyone on their easement can be cited for trespassing....including the owner of the lot.
4. The 125 ft long, industrial looking concrete abomination referred to as the “Living Wall” is exactly what we feared and predicted. Nicholson promised that you wouldn’t even be able to see it because it would be all green. It isn’t. It is an ugly concrete eyesore and is a visual testament to Council’s approval. As we said then, it won’t fit the character of our neighborhood, or any neighborhood, in Cannon Beach. It is a scar on what was once a beautiful neighborhood. Imagine if YOU had to live next to it.
- a. Our Comprehensive Plan says, “the characteristics of a village are fostered and promoted”. It also says we will foster, “A rustic streetscape”. How could anyone think a massive concrete wall fits these descriptors?
 - b. PUD Approval Condition #17 reads as follows:
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 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.

- i. Here is what has happened instead.
 - 1. Nicholson was required to submit an executed agreement.
 - a. Instead, he submitted, and the City accepted, an unsigned estimate. The City issued the permit to build the wall using an estimate....not an executed contract.
 - 2. Nicholson was required to execute an agreement with a landscape professional. When Mayor Sam asked Nicholson who would do the landscaping, Nicholson stated Beth Holland was to be the landscaper. Mayor Sam said, "Well, that's good enough for me!", and Nicholson got Mayor Sam's vote. (audio, 3/1/2016)
 - a. Instead, the City accepted an unsigned estimate, from a lawn care person, who didn't even have a business license.
 - 3. Nicholson's signed agreement was required to have a timeline for the establishment of plantings.
 - a. Instead, there is no timeline because there is no executed agreement.
- c. The wall was built in 2016.
 - i. In June of 2018, I appeared before City Council asking for relief because NO plantings had been planted. Soon after, "some" plants appeared.
 - ii. It is now 2020, and we still see mostly concrete.
 - iii. When I asked Jeff Adams about this, he told me he believes they wall WILL be all green in 2-3 more years. We were promised 9 months. Now he is suggesting that we wait a total of 7 years.

We have been disappointed, but not surprised, that Nicholson did not keep so many promises. What has truly been surprising and even more disappointing is the failure of the hired City employees and contractors to enforce even the approval conditions or follow our code on multiple issues for this property. We think the citizens of Cannon Beach deserve better.

Jeff Adams wrote the following in his staff report for this meeting:

Considering the limited details given in the Conditions of Approval and Shared Access & Maintenance Agreement, and the condition of the planted materials, there appears to be little grounds for any enforcement actions. Planning staff will continue to monitor the site annually, with a planting audit of each of the plant cells, and document with photos for at least another three seasons. If the wall continues to show a successful trajectory, the City can downgrade its monitoring status.

We felt betrayed by our City when this development was approved, and we have been continually disappointed re: decisions involving this property ever since.

Those of us who were paying close attention during the Nicholson PUD proceedings remember Nicholson promising what you hear on the attached audio. He said the wall would be all green in 9 months, and we wouldn't even see any concrete. Almost four years later, that is far from the truth. We still see mostly concrete.

On 1/14/2020, Bill Kabeiseman (city land use attorney and principal architect of the Nicholson PUD) said,

"Certain developments that get tagged for whatever reason early on, and this seems like it was one of them for a variety of different reasons."

We find it inconceivable that he still doesn't seem to understand why this was just a very bad idea to begin with, and has been compounded by broken promises and little to no enforcement follow-through. The result is just a mess, and we have to live with it.

Tonight, we are asking our Planning Commission to do what our hired officials will not. Fix this wall. It's been almost 4 years. Enough is enough.

Please enforce Approval Condition #17, and require Nicholson or the current PUD owners to submit an executed agreement with a professional landscaper.

If the concrete cannot be covered up by plantings, as promised, within 9 months, please declare it a blight.

In general, what we are frequently seeing from our hired officials these days is "approval by omission": "if our code doesn't specifically say you can't do it, then we're going to let you do it." We are also seeing slippery-slope arguments as to why our code somehow doesn't apply. We think that's a big change from the stewardship that used to keep CB special, and we think it's dangerous.

Thank you,

Jeff & Jennifer Harrison
539 N Laurel St
PO Box 742
Cannon Beach, OR 97110

Attachments:

- Audio from CC 2/10/2015
- Email (Adams to St Denis) dated 4/17/2019

*** Please include this in the public record ***

Jeff Nicholson speaking to CC, 2/10/2015, regarding the “wall”

“ . . . in terms of the retaining wall, there is going to be sections of the driveway that feeds the homes and also will go up to Victor and Jane’s home also. On that driveway there will be sections where there will be retaining walls. There is some sections where they are going to be a couple . . . sections – at least there was one section that was 8 or 9 feet which in a middle of a big space, at first glance, it sounds huge plopped in the middle next to a driveway in the middle of large open space. I went down there with a stick that was that tall and it is amazing how scale has a way of shrinking when in you’re in a big open space. Not only that – there is examples of retaining walls that are that tall in the area around . . . closer to . . . office they have the retaining wall that’s taller than that. **One unique, I plan on living at this site – retiring there. I care about what it looks like. The site retaining wall unlike . . . Oak Street in Chapman Point where it is like a cement wall that’s 5 feet tall, the type of retaining that I would use in the sections that need to have the retaining wall adjacent to the driveway is a wall that has literally built in planters . . . nine months the whole thing is going to be green. Literally just meant to just be. . . green with planting. . . . unlike anywhere else in nine months I think it is going be green – not going be any cement . . . anything else.** Basically I want it to look nice because that’s where I am going to live.”

Good evening,

My name is Jeff Harrison, and I'm here on behalf of myself and my wife, Jennifer Harrison. Our mailing address is 11445 NW Permian Dr, Portland, OR, 97229. We also have a home on N Laurel, directly across from the Nicholson Planned Unit Debauch. I'm here tonight to ask you about that issue.

I'm not going to give you a history lesson. On March 8, 2016, you gave your final approval for phase 3 of the development despite vociferous, widespread, and extensive opposition, excepting the pink-haired lady and the ship captain. You wrote and approved 17 conditions of approval for the project.

Over 2 years later, where there once a beautiful treed property, that fit the character of our neighborhood, we now see a neglected and mostly denuded lot, with rubble strewn from the demolished 101 year old "historic" cottage, the orange "protective" tree netting lying on the ground, and plastic pipe left out for months. But by far the ugliest component is the 125 foot long, 12 foot tall, interlocking concrete, industrial-looking wall. The wall was and is among the very top concerns we had then, and our fears and intuitions were well founded.

Nicholson promised this would be a living wall, that it would be planted and landscaped, and that you wouldn't even be able to see it. It hasn't been landscaped, it isn't living, and it is now a concrete focal point to the area and a visual testament to your approval. As we said then, it won't fit the character of our neighborhood, or any neighborhood, in Cannon Beach. It is a scar on what was once a beautiful neighborhood. Imagine if you lived next to it.

You yourselves wrote an approval condition for this wall. It is # 17. It reads as follows:

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 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.

While we were never given an explanation on why the city chose to go such great lengths to accommodate Nicholson's wishes, at a minimum, we expected you to keep your word and fulfill your promises.

Here are the salient points, and what has happened:

1. Nicholson was to submit an executed agreement with a landscape professional. Mayor Steidel, you may recall the applicant stating that Beth Holland was to be the landscaper. Your response was, "Well, that's good enough for me".
2. Instead, you accepted an unsigned estimate, from a lawn care person, who had no business license.

I think it's pretty fair and reasonable that we should at least be able to expect that you would enforce your own approval conditions and that Nicholson would at least have to follow some of the rules like the rest of us.

I don't want to hear about current letters, or the concept of giving him more time. We have lost confidence. I am here tonight to ask why the permit was issued to build this abomination, when the requirements of your own approval condition, that you wrote, and that you approved, were so clearly not met.

Thank you.

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

In the Matter of the Appeal of the issuance of Building Permit No. 164-21-000179-DWL for Property located at 544 N. Laurel Street by Petitioners Jeff and Jennifer Harrison.

Proposed Revised Findings of Fact and Conclusions of Law

I. Introduction.

Petitioners previously submitted their Written Argument and Proposed Findings of Fact and Conclusions of Law on November 4, 2021, in accord with the Planning Commission's schedule and procedures established at the Appeal hearing on October 28, 2021.

Dean Alterman, the attorney for Mr. Najimi, submitted a letter on November 4, 2021, rebutting the issues identified in Petitioners' Notice of Appeal and the arguments presented by Petitioners at the October 28, 2021, Appeal hearing. As explained below, in the Proposed Revised Findings of Fact and Conclusions of Law, none of Mr. Alterman's arguments sufficiently rebut any of Petitioners' Appeal issues or arguments and should be rejected.

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW

Based on Mr. Alterman's letter, Petitioners respectfully submit Revised Proposed Findings of Fact and Conclusions of Law for your consideration that address the issues and arguments contained in his letter dated November 4, 2021.

II. Revised Proposed Findings of Fact and Conclusions of Law.

Petitioners respectfully request your Planning Commission's consideration of the following Revised Proposed Findings of Fact and Conclusions of Law. These Revised Proposed Findings of Fact and Conclusion of Law can be adopted by the Planning Commission in granting the Harrison's Appeal.

FINDING NO. 1: The Harding's finished 2nd story loft area (210 sq. ft.) was required to be counted in the City's calculation whether the Building Permit met the City's FAR requirements, regardless of whether the finished loft area was habitable or not. If counted, the FAR lot coverage for the Najimi lot of 61.25% exceeds the City's 60% maximum FAR specified in CBMC 17.14.040.D.

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW

Response to Mr. Alterman: 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 request, 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 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.

FINDING NO. 2: Nicholson PUD Condition No. 16 limits the Najimi lot to one garage as interpreted by the Planning Commission.

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW

Response to Mr. Alterman: 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 while 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.

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW

FINDING NO. 3: In the alternative to Finding No. 2 above, the Planning Commission interprets CBMC 17.14.020 as limiting lots in Cannon Beach to one accessory garage. The Planning Commission finds the issued Building Permit authorized an attached accessory garage on the Najimi lot when the Najimi lot already contains an existing two-story garage owned by the Harding's.

Therefore, the Planning Commission concludes that the issued Building Permit unlawfully allowed a second garage in violation of the City's Code.

FINDING NO. 4: In the alternative to Finding No. 3 above, the Planning Commission determines that the Harding's garage located on the Najimi lot does not constitute an accessory use under the City's Code since it does not serve Mr. Najimi's proposed single-family detached residential dwelling. The Planning Commission determines that the Harding's garage serves the Harding's and not Mr. Najimi.

Response to Mr. Alterman: Based on Finding No. 4, the Planning Commission agrees with Mr. Alterman that it can find that the

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW

Harding's garage is not Mr. Najimi's garage, and, therefore, does not constitute an accessory use under the City's Code since it does not serve Mr. Najimi's proposed single-family detached residential dwelling. If the Planning Commission makes such a FINDING, the Planning Commission finds that it could conclude that Mr. Najimi's proposed attached garage is an accessory use in the R-2 Zoning District and permitted.

While the Harding's garage may constitute a zoning violation since it does NOT serve the primary use of the Najimi lot, the Planning Commission finds that Mr. Alterman's representation that Mr. Najimi is suing the Harding's has no bearing on the Planning Commission's Findings of Fact and Conclusions of Law in the Harrison Appeal.

Therefore, as an alternative finding to Finding No. 3 above, the Planning Commission concludes that the Harding's garage is not an accessory use on the Najimi property, and that Mr. Najimi's proposed attached garage is an accessory use in the R-2 Zoning District under the City's Code and permitted.

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW

FINDING NO. 5: The Planning Commission finds that PUD Condition No. 17 regarding the Living Wall has not been satisfied. The evidence in the record demonstrates that there is no contract with a landscape professional and no timeline when the Living Wall will be installed in compliance with PUD Condition No. 17.

Response to Mr. Alterman: Mr. Alterman asserts that the Planning Commission cannot use a building permit application as a “guise” to enforce PUD Condition No. 17. The Planning Commission rejects Mr. Alterman’s position that the Planning Commission cannot enforce PUD Condition No. 17 in its review of the City’s issuance of Mr. Najimi’s Building Permit. The Planning Commission also rejects Mr. Alterman’s position that no City Code provision authorizes the Planning Commission to withhold a building permit because a condition of a PUD is not satisfied. To the contrary, the Planning Commission finds that City Staff and the Planning Commission are legally obligated pursuant to CBMC 17.92.010 C.1. to ensure that any applicable City Code provision and applicable condition of approval are met when issuing a building permit.

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW

The Planning Commission also rejects Mr. Alterman's position that the City "must have found that the developer complied with the requirement to submit a contract and a timeline" as required by PUD Condition No. 17 since the City issued a permit to Lucie's Cottages to build the retaining Wall. The Planning Commission finds there is no evidence in this record that Condition No. 17 has been satisfied and that there is an executed contract with a landscape professional responsible for the installation and maintenance of plant material on the living wall with a timeline for the establishment of planting on the wall. There is evidence in the record, however, that Mr. Harrison has raised this issue previously with the City and that the City has not provided any evidence that would demonstrate that Condition No. 17 has been satisfied. The only evidence regarding Condition No. 17 is an unsigned "estimate" from Vasquez Yard and Tree Work, Inc. that does not constitute substantial evidence demonstrating compliance with PUD Condition No. 17. [See Exhibit A-13].

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

III. Conclusion.

Petitioners respectfully request the Planning Commission to adopt the above Proposed Revised Findings and Conclusions of Law and revoke the City's issuance of the Building Permit. Other than testimony from Mr. Najimi's attorney and the Harding's, all other testimony received by the City supports the Harrison's Appeal.

DATED this 11th day of November 2021.

HATHAWAY LARSON LLP

By: /s/Gregory S. Hathaway
Gregory S. Hathaway, OSB # 731240
1331 NW Lovejoy Street, Suite 950
Portland, OR 97209
Of Attorneys for Petitioners

PROPOSED REVISED FINDINGS OF FACT AND CONCLUSIONS OF
LAW



Cannon Beach Planning Commission

Staff Report Addendum

(New materials received prior to Close of Business, November 4th, 2021)

AA# 21-01 Hathaway Administrative Appeal on behalf of Jeff & Jennifer Harrison, of a Building/Development Permit for the Najimi Residence at 544 N. Laurel St.

Agenda Date: October 28, 2021
continued to November 23, 2021

Prepared By: Jeffrey S. Adams, PhD

GENERAL INFORMATION

AA# 21-01 Hathaway Administrative Appeal on behalf of Jeff & Jennifer Harrison, of a Building/Development Permit for the Najimi Residence at 544 N. Laurel St.

“A” Exhibits – Application Materials

- A-20** Harrison prepared statements for October 28th, received November 3, 2021;
- A-21** Written Argument and Proposed Findings and Conclusions of Law, Hathaway, received and dated November 4, 2021;
- A-22** Jeff & Jennifer Harrison Letter of Response, received and dated November 4, 2021;

“D” Exhibits – Public Comment

- D-7** Kent Suter & Family, Email correspondence, dated October 27, 2021;
- D-8** Betty Gearen, Email correspondence, dated November 3, 2021;
- D-9** Darrell Cluckey & Susan Glarum, letter undated, received November 4, 2021;
- D-10** Dean Alterman letter, on behalf of M.J. Najimi, received and dated November 4, 2021, with attached photograph of the retaining wall, taken October 2021 and copy of Complaint, *Najimi v. Harding*, Clatsop County Circuit Court case no. 21CV39140, dated and received, September 30th, 2021;



Cannon Beach Planning Commission

Staff Report Addendum (November 12, 2021):

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;

DISCLOSURES

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

EXHIBITS

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

"A" Exhibits – Application Materials

A-1 through 17 provided in October 28th packet

- 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 through 26 provided in October 28th packet;

“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;

Staff Comments:

There are a couple of issues that are brought up repeatedly by both the applicant, the Najimis, and the appellant, the Harrisons. This addendum is intended to respond to those issues and identify City staff's approach.

Calculating the FAR and the Discrepancy Between the City, Applicant, and Appellant.

The first issue raised by the appellant is that “the Floor Area Ratio worksheet calculation used to approve the Building Permit is in error.” This memorandum will explain how the Floor Area Ratio (FAR) is calculated and explain the misunderstanding embedded in this appeal issue.

The term FAR is defined in CBMC 17.04.245 as follows:

“‘Floor area ratio’ means the gross floor area divided by the lot area and is usually expressed as a decimal fraction.”

Thus, in calculating the FAR, you must begin with the “gross floor area” which is also defined by the code in CBMC 17.04.283:

“‘Gross floor area’ means the sum, in square feet, of the gross horizontal areas of all floors of a building, as measured from the exterior walls of a building, including supporting columns and unsupported wall projections (except eaves, uncovered balconies, fireplaces and similar architectural features), or if appropriate, from the center line of a dividing wall between buildings. Gross floor area shall include:

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

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

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

In this case, the Cannon Beach Building Official reviewed the plans and made a determination under the state building code regarding what areas are “habitable,” consistent with CBMC 17.03.283(3), and that calculation was used to determine that the “gross floor area” of the structure is 4,384 square feet and the lot area is 7,500 SF, meaning the FAR is .58.

This is important because CBMC 17.14.040(D) provides that the maximum FAR in the R2 zone is .6 (or, expressed in a different way, the maximum amount of gross floor area cannot exceed 60% of the area of a lot). Thus, under the City’s code, using the definition from the code, the proposed residence fully complies with the FAR.

This straightforward application of the City’s FAR requirements becomes muddled because Condition 3 of the final approval of the Planned Development contains conflicting criteria for calculating the square-footage under consideration in relation to ‘habitable’ space. Condition 3 provides as follows:

“3. The total square footage of habitable space on the site shall not exceed 9,000 square feet. Habitable space includes 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 spaces. 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 total square footage of habitable space on the site to exceed 9,000 square feet.”

The argument presented by the appellants revolves around the 210 square-feet of ‘loft’ area of the Harding Garage (Shown in yellow in the diagram below), which, according to the Cannon Beach Building Official and the state building code, is ‘non-habitable.’ As the diagram below shows, the 210 SF in question has no stairs or other fixed forms of access. The diagram’s blue square, the vaulted space above the garage floor, has been double-counted under CBMC 17.04.283(4). The fact that the PUD conditions of approval provide for a different definition of “habitable space” in a limitation of overall square footage in the PUD does not change the requirement for the City to use the definitions in the code in calculating the FAR under CBMC 17.14.040(D).

This disjunction between the definition of “habitable space” in the Conditions of Approval and the code’s FAR requirements, both put limits on what can be built on the lot and, because the terms don’t align, there are ripple effects on other considerations. For instance, the Conditions of Approval exclude garages from habitable space calculations and yet, under the code, GFA and thus, FAR, include garages. For instance, if we are to take the maximum habitable space as defined by Condition 3, the habitable square footage for Lot 1 comes to 3,090 SF, while the GFA is calculated at 4,384 SF, leading to a FAR of .58 (or 58%).

In any event, as explained above, the ‘habitability’ determination for purposes of determining FAR is based on the state building code and under the jurisdiction of the Cannon Beach Building Official. The appellant’s argument that the area in the Harding Garage should be treated and calculated as ‘sleeping’ loft, or ‘habitable’ space simply because it is ‘finished,’ rather than a ‘storage’ loft, and ‘non-habitable,’ seems to run contrary to his concern that this accessory structure remain a garage and not a guest house or some form of ‘habitable’ space, which would require a certificate of occupancy and which would then be required to meet the Oregon Building Code for ‘habitable’ space. It appears the appellants would like the City to treat this as ‘habitable’ space so that it exceeds the ‘maximum’ habitable space allowed under Condition 3 for the lot and exceed the permitted FAR, and yet, not allow it to actually be habitable space. Should the City determine the loft area is, in fact, habitable, it would likely be difficult to prevent the owner from seeking a certificate of occupancy and then the City would have no grounds to prohibit someone from ‘occupying’ the space overnight.

As the Hardings stated at the previous hearing, the City has been asked to visit the property, to investigate just such complaints, and on December 8th, 2020, the City found no evidence that the storage loft was being utilized for any other purpose but storage. The ‘new evidence,’ or appellant’s pictures taken from inside the Harding garage, highlight what they claim to be the ‘finished’ nature of the accessory structure, pointing out electrical outlets, skylights, and other features; however, many accessory structures in Cannon Beach have electrical outlets, windows, and skylights. In fact, many accessory structures are utilized as secondary office spaces or workspaces for home occupations or hobbies. Garages across America have been the birthplace for companies ranging from Amazon to Apple, serving a wide range of needs and many are in some state of ‘finished’ space. When the appellant goes further to state that only one garage is permitted according to the zoning code, that simply is not consistent with the R2 Zoning district language, CBMC 17.14.020, which states under ‘uses permitted outright, that ‘In an R2 zone the following uses and their accessory uses are permitted outright,’ it doesn’t limit each unit to just one structure or one use, or one garage (emphasis added). In fact, the R2

district is for medium density residential uses, for up to eleven dwelling units per net acre, where two-family dwellings are permitted outright and thus, two or more accessory structures, including garages, can be found across the city.

The Effect of the LUBA Decision on the Previous Application.

Both the appellants and the applicants make arguments about the previous LUBA decision and its effect on the new application for the development of a house on this property. The Harrisons essentially argue that this is an entirely new application and the City is free to consider any issue and make any appropriate decision on this applicant. In opposition, the Najimis argue that the City already made a decision about an almost identical house (with a turret) and that any issue that was resolved in that decision and was not appealed was conclusively decided and cannot be revisited by the City in this decision. While both positions have some appeal, the correct position is likely somewhere in the middle.

There is one position that all parties appear to agree on. In the previous LUBA decision, LUBA was clear that the City was not to apply any standards from the PUD chapter and could not deny an application for failing to comply with those provisions:

“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.”

Beyond that, the impact of LUBA decisions has been laid out in opinions from LUBA and the Court of Appeals.

In a case from this city, *Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998), the Oregon Court of Appeals laid out some limitations on the City’s ability to change its mind on how to apply a criteria from its code, but that case was significantly different from this one, and the facts of the case are important. The *Holland* case involved the application of certain “slope and density” design standards. Before Mr. Holland filed his application, the then city attorney had concluded that the slope/density provisions had been implicitly repealed and the city did not apply them to Mr. Holland’s application. Nonetheless, the city concluded the application violated other provisions of its plan and rejected it. The city’s decision was appealed to LUBA and the Court of Appeals, which remanded the city’s decision, concluding that the city was wrong in applying those other plan provisions.

When the matter came back to the city on remand, the city council concluded that, in fact, the slope/density standards had not been repealed, applied them to Mr. Holland’s application, and denied the application. Mr. Holland again appealed to LUBA and the Court of Appeals overturned the decision on remand. LUBA has explained the ruling as follows:

“With respect to ORS 227.178(3), we understand *Holland* to hold that, once a local government has taken a position in the course of a permit proceeding that a land use

regulation is not an approval criterion, the local government cannot change that position on remand, which the court viewed as part of the same permit proceeding and apply the regulation to approve or deny the permit application. To do so is a de facto 'shifting of the goal posts' contrary to the statute, because it effectively allows the local government to approve or deny a permit application based on standards that the local government deemed were not applicable at the time the permit application was filed." *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004) (emphasis added).

In other words, the city cannot change its interpretation of the applicability of a criterion "in the course of a permit proceeding." However, the matter before the Planning Commission now is not part of the same "permit proceeding" as the Najimis' initial application. The city denied that application, the applicant appealed to LUBA, which affirmed the city, and LUBA's decision was not appealed further. Therefore, the city is not bound by any interpretation it may have made in the applicant's first application.

However, that does not mean that the City has free reign to make any interpretation it may like. The LUBA case cited above, *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004), provides some additional limitations on the City adopting new interpretations. In *Bemis*, the city of Ashland had interpreted its code in one way, but changed its interpretation when a new application was submitted. LUBA first acknowledged the language in *Holland* that the Court of Appeals accepted "at least as an abstract proposition, the premise that a local government may 'correct' its earlier interpretations of its legislation." But LUBA then noted additional limitations on a city changing its interpretations:

"A local government may not change an existing interpretation where such reinterpretation is 'the product of a design to act arbitrarily or inconsistently from case to case[.]' *Alexanderson v. Clackamas County*, 126 Or App at 552. Finally, where a local government changes a pre-existing interpretation in the course of a permit proceeding, it must provide participants the opportunity to address the reinterpretation and, in some circumstances, must re-open the evidentiary record to allow the parties the opportunity to present new evidence with respect to whether the application complies with applicable approval standards, as reinterpreted. *Gutoski v. Lane County*, 155 Or App 369; *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995)."

In sum, except as explained by LUBA in its decision regarding the use of PUD criteria, the planning commission is not necessarily bound by any decision made in the prior proceeding by the city. However, to the extent the planning commission reaches a different conclusion than it did previously, it would be well served to provide an explanation of why the different conclusion is not adopted by design to frustrate this particular application.

The Living Wall.

The appellants continue to argue that this application must be rejected because of the living wall and the perceived violation of Condition 17 of the PUD. That condition provided 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 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”

As noted previously, City staff found this condition satisfied pursuant to the material from Mr. Vasquez, of Vasquez Yard & Tree Work, Inc. Whether that company qualifies as a ‘landscape professional,’ and whether Exhibit A-13 is an ‘executed contract,’ with timeline, is a question related to the installation of the driveway retaining wall, as the condition explicitly states that the condition must be satisfied “[b]efore permits for the driveway retaining wall are approved...” there is no authority to re-word this condition of approval related to driveway and retaining wall permits to apply to a different building permit. Staff would note, as provided in a previous staff report, ‘to the extent that the planting is not successful, Condition 17 authorizes the City to ‘take any necessary enforcement actions.’” The review of this building permit is limited to CBMC Title 15, and the applicable parts of CBMC Title 17, as well as the applicable parts of the PUD conditions of approval. None of those provisions authorize the City to refuse to issue a building permit on this basis. The 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.

Figures

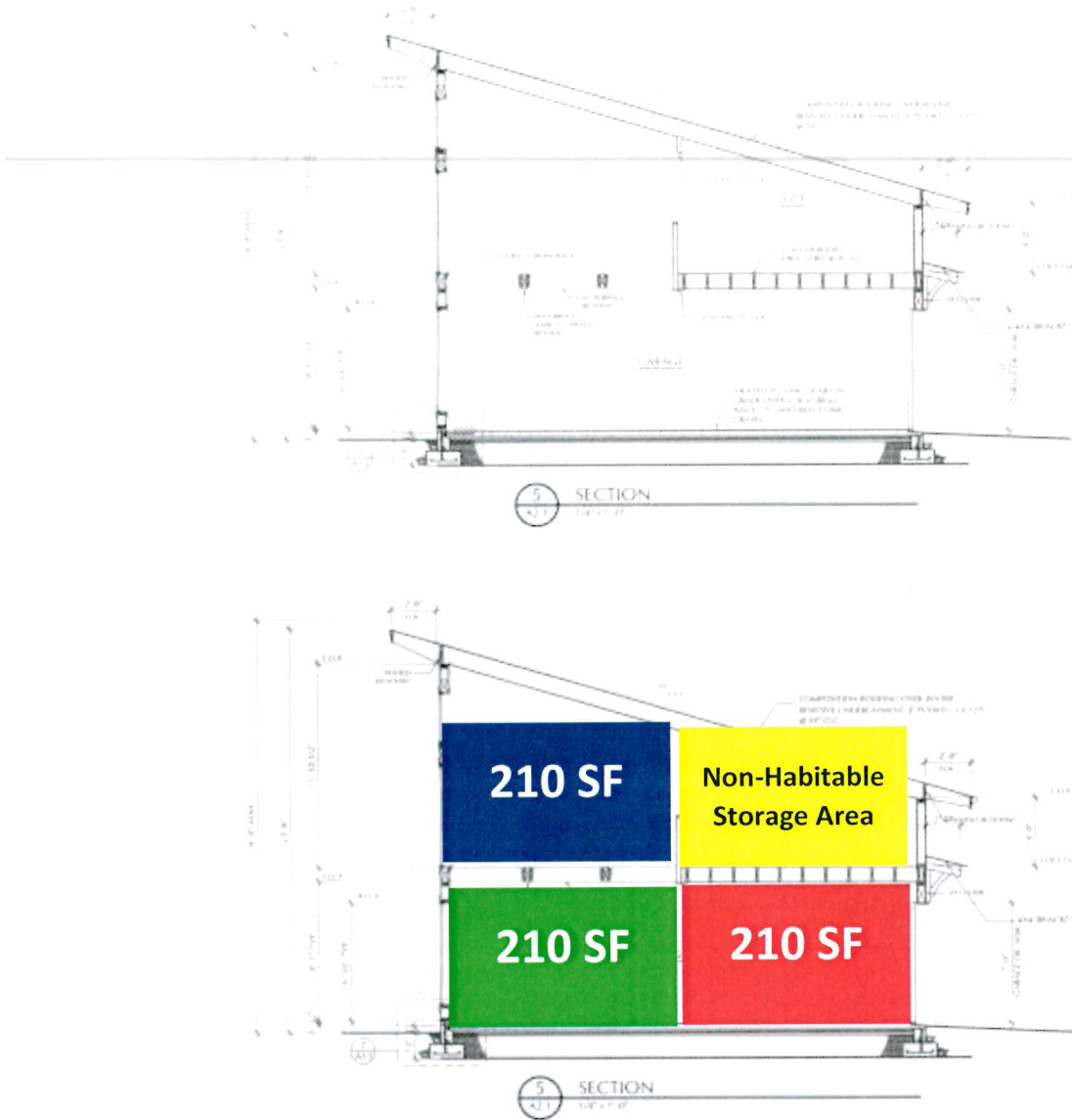


Fig. 1. Harding Accessory Structure, Elevations, dated March 22, 2019

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.

Condition 3, of the Conditions of Approval, p. 13 of 15, Findings PD 15-01, March 8, 2016

17.04.283 Gross floor area.

“Gross floor area” means the sum, in square feet, of the gross horizontal areas of all floors of a building, as measured from the exterior walls of a building, including supporting columns and unsupported wall projections (except eaves, uncovered balconies, fireplaces and similar architectural features), or if appropriate, from the center line of a dividing wall between buildings. Gross floor area shall include:

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

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

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

Gross Floor Area Definition, CBMC

2/18/20
B/15/2020

Worksheet Floor Area Ratio

- A Lot Size.

6. Habitable Accessory Structures (e.g., accessory dwelling) $\frac{1}{2}$ acre - 100,000 sq. ft.

630-SF

4384 SF

25- .58

OK 7/15/2021

- ❖ Garages and carports
- ❖ Entirely enclosed porches
- ❖ Basement or attic areas determined to be habitable by the City's Building Official, based on the definitions in the building code.
- ❖ Uninhabitable basement areas where the finished floor level of the first floor above the basement is more than three feet above the average existing grade around the perimeter of the buildings foundation
- ❖ All portions of the floor area of a story where the distance between the finished floor and the average of the top of the framed walls that support the roof system measures more than 15 feet shall be counted as 200% of that floor area.

Revised FAR Worksheet, dated July 15, 2021

Jeffrey Adams

From: Kent Suter <Kent-Suter@comcast.net>
Sent: Wednesday, October 27, 2021 12:20 PM
To: Jeffrey Adams
Subject: Nicholson appeal to build

Hello. Thanks for all the work you do for Cannon Beach from our family.
We live in the North end 7 months out of the year in a 60's cabin.

This communication concerns the Nicholson property in N Cannon Beach and the purposed build permit. One that changes little with numerous out of compliance requests, omitted details, and, basically has previously been denied by LUBA, the Planning Commission, and our City Council.

- 1) the plans are out of compliance with FAR. The loft needs to be included in the calculation thus exceeding max allowed space on lot size. Oops.
- 2) the new permit includes two garages, the existing and purposed new build. Hmmm....
- 3) the 'Living' retaining wall. Still a blight on the neighborhood with no evident attempt to rectify with proper landscape plan as promised. The ferns deemed not to suffice by CB already, and they don't.
- 4) simply put, the proposal is too big for our neighborhood, too big for the lot. As to other structures around Cannon Beach overbuilt on given lots, this should only serve as reasons to preserve restrictions, not to loosen them.

Build within guidelines, codes, variance allowances, & restrictions - as those without means to repeatedly appeal in attempt to circumvent said compliance's, must do.

Thank you for your vote to reject the new permit as submitted.

Sincerely, Kent Suter and family.

PS- Had a friend visit our cabin in the North end a few years back and he remarked: "They should rename this town 'Cottage Beach'." I rather liked that.

Sent from my iPhone

Jeffrey Adams

From: Betty Hawaiiintel <bettygearen@hawaiiintel.net>
Sent: Wednesday, November 03, 2021 3:05 PM
To: Jeffrey Adams
Subject: Harrison Appeal to the Planning Commission of the Nicolson PUD Lot 1

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Commissioners and Mr. Adams:

RE: Planning Commission Appeal of Nicholson PUD Lot 1 on N Laurel St.

I am writing this letter in favor of the Harrison's appeal and agree with them that there is a Floor Area Ratio FAR violation* and that a single family home should only be allowed one garage per lot. This appeal is in keeping with the City's attempts to reign in overbuilding and this property owner's proposal is an example of what the City is trying to prevent.

Keeping the character of Cannon Beach means living within the limitations which have been laid out in our Comprehensive Plan. These rules address private home size limitations, height limitations, tree removal, and usable green space, all focused on the good of the shared community and not of the wishes of individual homeowners or developers.

Please uphold this appeal and keep the promises made upon the approval of the PUD. Thank you for your time and consideration and all the work you do for our City.

**(At 3,745 sq ft, the 2-story house would be too big and on a lot that already contains a 2-story, 630' "garage/loft/studio". The FAR is beyond the maximum of 60% because the "loft" area in the existing "garage" is not being counted.)*

Sincerely,

Betty Gearen
263 S. Laurel St.
Cannon Beach, Oregon 97110
PO Box 137
808 927-2678
