Cannon Beach Planning Commission

Staff Report:

PUBLIC HEARING AND CONSIDERATION OF **AA 20-02, 3 & 4**, STANLEY AND REBECCA ROBERTS APPEAL OF A THE CITY'S ADMINISTRATIVE DECISION TO APPROVE, WITH CONDITIONS, A DEVELOPMENT PERMIT DP#20-04 OF TAX LOT 51031AA00600. THE APPLICANTS HAVE FILED MULTIPLE APPEALS OF THE SAME DECISION CHALLENGING THE CITY'S APPLICATION OF THE OCEANFRONT SETBACK UNDER SECTION 17.42.050(A)(6), INCLUDING CHALLENGING A CONDITION OF APPROVAL REQUIRING (1) THE PERFORMANCE OF AN OCEANFRONT SETBACK SURVEY AND COMPLIANCE WITH THE SAME OR (2) OBTAINING A SETBACK REDUCTION PURSUANT TO CHAPTER 17.64 OF THE MUNICIPAL CODE TO ACCOMMODATE THE SITING OF A NEW SINGLE-FAMILY RESIDENCE. THE PROPERTY IS A VACANT LOT LOCATED NORTH OF NENENA AVE (TAX LOT 00600, MAP 51031AA), AND IN A RESIDENTIAL LOWER DENSITY (RL) ZONE. THE APPEALS WILL BE REVIEWED PURSUANT TO MUNICIPAL CODE, SECTION 15.04.150 AND SECTION 17.88.180, REVIEW CONSISTING OF ADDITIONAL EVIDENCE OR DE NOVO REVIEW AND APPLICABLE SECTIONS OF THE ZONING ORDINANCE.

Agenda Date: October 22, 2020 **Prepared By**: Jeffrey S. Adams, PhD

GENERAL INFORMATION

NOTICE

Public notice for this October 22nd Public Hearing is as follows:

A. Notice was posted at area Post Offices on October 1, 2020;

B. Notice was mailed on October 1, 2020 to surrounding landowners within 100' of the exterior boundaries of the property.

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 September 4, 2020 unless otherwise noted.

"A" Exhibits – Application Materials

A-1 Administrative Appeal Application of Administrative Decision (Development Permit) by Jeff Adams, dated September 4, 2020, received September 4, 2020;

A-2 Precautionary Appeal Application of Administrative Decision (CBMC 15.04.150) by Jeff Adams, dated September 4, 2020, received September 4, 2020;

A-3 Precautionary Appeal Application of Administrative Decision (CBMC 17.92.010) by Jeff Adams, dated September 4, 2020, received September 4, 2020;

A-4 Appeal of Development Permit Decision DP# 20-04 (AA# 20-02, 3 & 4) PowerPoint Presentation, received October 12, 2020;

"B" Exhibits – Agency Comments

None received as of this writing;

"C" Exhibits – Cannon Beach Supplements

C-1 Staff Report, dated October 22, 2020;

"D" Exhibits – Public Comment

D-1 October 22, 2020 Planning Commission Meeting mailer, Miller, Nash, Graham & Dunn, Attorneys at Law, received October 13, 2020;

D-2 William and June Lattin, Email correspondence, received October 14, 2020;

D-3 Maria Goodrich and Jack Fischer, letter sent via email, dated October 15, 2020, received October 15, 2020;

I. BACKGROUND

Stan & Rebecca Roberts (the "Applicants") have filed an application with the City to construct a new residence on Tax Lot #51031aa00600, located immediately to the west of the 'S' curve on Hemlock Street. The application sought several permits simultaneously, and the building permit portion of the application remains under consideration by the Building Official. However, on September 4, 2020, the Community Development Director issued a Type I Development Permit (the ("CDD Decision") approving the proposed residence, subject to several conditions to ensure that the proposed residence conformed to the City's land use standards.

One of the conditions in the CDD Decision addressed the City's Oceanfront Setback requirement, found at CBMC 17.42.050(A)(6). The application did not include a survey demonstrating compliance with this requirement, but from the material that was submitted to the CDD, it appeared that it could be possible that the proposed residence could comply with the Oceanfront Setback. Accordingly, the CDD Decision approved the Type I development permit, subject to several conditions of approval, including "Condition 2," a condition requiring compliance with the City's Oceanfront Setback through either a survey demonstrating compliance or a setback reduction approval from the Planning Commission:

"2. Prior to the issuance of a building permit, the applicant shall provide [an] Oceanfront Setback Survey confirming that all proposed structures conform to Chapter 17.42.050(A)(6), or a Setback Reduction approval from the Cannon Beach Planning Commission, under Chapter 17.64 authorizing a setback reduction for the structures on the site."

The applicant has now filed three appeals seeking review of the CDD Decision each of the appeals, although filed under different code provisions, seek review of identical issues related to the application of the Oceanfront Setback.

The appeals are lengthy and discuss a large variety of state statutes and local code provisions; because of the length and intricacy of the appeals, the staff report will necessarily also be lengthy and intricate. The staff report addresses each of the issues raised in the appeals; however, for ease of understanding, the staff report does not follow the order the issues are raised in the appeal, but follows the following general outline:

A. Recommendation

B. Procedural Issues

C. Substantive Issues

1. The Oceanfront Setback Requirement
    a) The Requirements of the Oceanfront Setback are Clear and Objective
        1) State Requirements for Clarity and Objectiveness
            i) Oregon Coordinate Line
            ii) Buildable Lot
            iii) Buildings
            iv) Average
            v) Process and Procedures
    b) Setback Reduction Requirement
2. State Law Requirements
    a) The CDD Decision Does Not Impermissibly Reduce Density
    b) The City's Decision Did Not Unreasonably Add Significant Cost or Delay

c) The Requirement to Comply With Setbacks is Not an Unconstitutional Condition

d) The Oceanfront Setback Serves a Public Interest

C. Conclusion.

II. DISCUSSION

A. Recommendation

As noted above, the CDD Decision found that the proposed residence could conform with the City's land use regulations by complying with several conditions, including a condition requiring the applicant to either provide a survey demonstrating compliance with the Oceanfront Setback or obtain a setback reduction under CBMC Chapter 17.64. As discussed further below, the Applicants have now submitted a survey demonstrating that, in fact, the proposed residence does not comply with the Oceanfront Setback, which changes the nature of the decision the Planning Commission should make on appeal.

As the Applicants note repeatedly in their appeal, state law allows the City to apply only "clear and objective" standards, conditions, and procedures to an application for residential development. The Applicants have submitted a survey demonstrating that the current proposal does not meet the Oceanfront Setback and, therefore, the only path to approve their proposed residence is with a condition requiring a setback reduction, which is not a clear and objective process.

If the Planning Commission agrees with the analysis in this staff report, the Planning Commission must now deny the proposed development permit because there is no way to provide a clear and objective condition that would allow the proposed residence to be built. However, a denial would not prohibit development of the site; the Applicants may either reconfigure their proposed residence to comply with the Oceanfront Setback, or the Applicants may seek a setback reduction pursuant to CBMC Chapter 17.64 for their residence as currently designed. Accordingly, the Staff Report's recommendation, based on the evidence and arguments submitted to date is to deny the proposed Type I development permit requested by the Applicants.

B. Procedural Issues.

The City processed the application, and among other things, reviewing it for compliance with the City's building codes under CBMC Chapter 15.04 and compliance with the standards in the City's land use regulations under CBMC 17.92.010. CBMC 17.92.010 requires a "Type I development permit" for any structure or building that requires a building permit. The Type I development permit review is to determine if the proposed "application conform[s] to the requirements of this title," i.e., the City's land use regulations. This administrative review allows the City to confirm that outright permitted uses comply with basic development code standards such as setbacks, height limitations, number of dwellings, and similar concerns.

In most cases the review is simple and straightforward and – as authorized under CBMC 17.92.010(A)(2) – the Type I development permit is typically part of the city issued building permit. However, that is not always the case and, at the request of the Applicants in this case, the City issued a Type I development permit separate from the building permit and the Applicants have now appealed that Type I development permit.

As noted above, the Applicants filed three different appeals, one each under the following provisions:

- CBMC 15.04.150[1]

[1] CBMC 15.04.150 provides in pertinent part as follows:

- CBMC 17.88.140(A)[2]
- CBMC 17.92.010(C)(1)[3]

One of the appeals, the one filed under CBMC 18.88.140(A), was explicitly labeled as a "precautionary 'Permit' appeal," apparently in recognition that it did not appear that this was the correct procedure. Although three separate appeals were filed, each of the appeals identified the same specific grounds for appeal.

As the application was one that sought the construction of a building under the State of Oregon Structural Specialty Code (a portion of the Building Code, See CBMC 15.04.110, adopting the various state codes as part of the City's building code), the review of land use regulations was, by definition, a Type I Development Permit under CBMC 17.92.010(A)(1)(a) and the appeal was authorized by CBMC 17.92.010(C)(1). Accordingly, the Planning Commission should move forward considering the appeal filed under that provision.

As for the other two appeals, the Planning Commission should dismiss them. CBMC 15.04.150 authorizes appeal of only actions "taken pursuant to any section of this code," and CBMC 15.04.010 defines the term "this code" as meaning the City of Cannon Beach Building Code. Because the CDD Decision applied the Oceanfront Setback requirements, which are not part of the City of Cannon Beach Building Code, the appeal filed pursuant to CBMC 15.04.150 was not authorized and should be dismissed. As for the appeal filed under CBMC 17.88.140, that appeal was unnecessary. CBMC 17.92.010(C)(1) explicitly states that an appeal of a Type I development permit "may be appealed to the planning commission in accordance with Section 17.88.140." In other words, CBMC 17.92.010(C)(1) authorizes the review, and CBMC 17.88.140 provides the method to do so. The separate appeal under CBMC 17.88.140 is superfluous and should also be dismissed.

> "A. A person, firm, corporation or other entity however organized aggrieved by an administrative action of the building official taken pursuant to any section of this code that authorizes an appeal under this section may, within fifteen days after the date of notice of the action, appeal in writing to the building official.
>
> "* * * * *
>
> "C. Unless the appellant and the city agree to a longer period, an appeal shall be heard by the city manager or the designee within thirty days of the receipt of the notice of intent to appeal. At least ten days prior to the hearing, the city shall mail notice of the time and location thereof to the appellant."

[2] CBMC 17.88.140(A) provides as follows:

> "A. A decision on the issuance of a permit concerning a land use matter, or a development permit may be appealed to the planning commission by an affected party by filing an appeal with the city manager within fourteen consecutive calendar days of the date that written notice of the decision was mailed. In the case of a permit, the notice of appeal that is filed with the city shall indicate the nature of the interpretation that is being appealed. The matter at issue will be a determination of the appropriateness of the interpretation of the requirements of this chapter. In the case of a development permit, the notice of appeal filed with the city shall contain the information outlined in Section 17.88.150."

[3] CBMC 17.92.010(C)(1) provides as follows:

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

Accordingly, the Planning Commission should move forward to consider a singular appeal filed by the Applicants under CBMC 17.92.010(C)(1) through a hearing process as set forth in CBMC 17.88.160, which requires that an appeal of a development permit be heard as a *de novo* hearing, meaning that any party may introduce new evidence and issues.[4]

C. Substantive Issues.

A. The Oceanfront Setback Requirement.

CBMC 17.42.050(A)(6) provides for a special setback for all structures constructed on lots that abut the oceanshore, as defined by the City code. The code language provides specific details for calculating the setback and is set out below but, generally, the Oceanfront Setback requires an applicant to setback any new structure by an amount equal to the average setback of other structures along the oceanfront.

The specific code language is as follows:

6. Oceanfront Setback. For all lots abutting the oceanshore, the ocean yard shall be determined by the oceanfront setback line.

a. The location of the oceanfront setback line for a given lot depends on the location of buildings on lots abutting the oceanshore in the vicinity of the proposed building site and upon the location and orientation of the Oregon Coordinate Line.

b. For the purpose of determining the oceanfront setback line, the term "building" refers to the residential or commercial structures on a lot. The term "building" does not include accessory structures.

c. The oceanfront setback line for a parcel is determined as follows:

i. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines.

ii. Determine the setback from the Oregon Coordinate Line for each building identified in subsection (A)(6)(c)(i) of this section.

iii. Calculate the average of the setbacks of each of the buildings identified in subsection (A)(6)(c)(ii) of this section.

d. If there are no buildings identified by subsection (A)(6)(c)(i) of this section, then the oceanfront setback line shall be determined by buildings that are located two hundred feet north and two hundred feet south of the parcel's side lot lines.

e. Where a building identified by either subsection (A)(6)(c)(i) of this section or subsection (A)(6)(d) of this section extends beyond one hundred feet of the lot in question, only that portion of the building within one hundred feet of the lot in question is used to calculate the oceanfront setback.

f. The setback from the Oregon Coordinate Line is measured from the most oceanward point of a building which is thirty inches or higher above the grade at the point being measured. Projections into yards, which conform to Section 17.90.070, shall not be incorporated into the required measurements.

g. The oceanfront setback line shall be parallel with the Oregon Coordinate Line and measurements from buildings shall be perpendicular to the Oregon Coordinate Line.

h. The minimum ocean yard setback shall be fifteen feet.

The CDD decision concluded that this criterion could be met and, in addition to Condition 2 quoted in the introduction, the decision included the following finding regarding the criterion:

[4] The Applicants also discuss a number of concerns about how to classify the CDD Decision. Regardless of those issues, appeal to the Planning Commission is the identified avenue to address any such concerns, which the Planning Commission may now do on appeal.

"Applicant has provided plans adhering to the base zoning setbacks, treating the property at the corner of unimproved Ocean Ave. and Nenana St., as a lot not abutting an oceanshore. The applicant has submitted arguments that the lot is not subject to the oceanfront setback, but the City concludes otherwise. The applicant has stated that the Ocean Ave. platted right-of-way is a 'buildable' lot, when it has historically never been interpreted in that manner by the City of Cannon Beach. This is also supported by context elsewhere in Chapter 17.42 where it refers to "lots or right-of-way" as distinct areas. In addition, the City's records reflect that the City has required other property owners, including properties fronting on Ocean Avenue between W. Harrison and W. Adams Streets, to comply with the oceanfront setback requirements.

"As discussed above, this property is subject to the oceanfront setback, but the application did not include a survey indicating the oceanfront setback line, as required by CBMC 17.42.050(A)(6). Nonetheless, it appears that it may be possible to comply with the oceanfront setback, or that the development may comply with the applicable setback through an approved setback reduction granted by the Planning Commission under CBMC 17.64."

The Applicants make several arguments regarding this standard and why they believe that Condition 2 is inappropriate. Although, as discussed above in the Recommendation, Staff no longer believes such a condition is appropriate, the arguments also apply to the application of the Oceanfront Setback as well, so the arguments will be addressed.

1) State Requirements for Clarity and Objectiveness.

As the appeal notes, several state statutes require that the City's standards, conditions, and procedures applied to residential development be "clear and objective." Appeal, p 4. This requirement has existed in state law in some fashion for a number of years, but recently has been expanded to apply to any and all housing. However, because it has been in existence for some time, a significant body of law has developed around the requirement.

In particular, LUBA has generally noted that a provision is not "clear and objective" when it "requires the kind of 'subjective, value-laden analyses' that are the hallmark of a non-clear and objective standard we set out in *Rogue Valley Realtors v. City of Ashland*, 35 Or LUBA 139, 155 (1998), *aff'd* 158 Or App 1, 970 P2d 685 (1999)." *SE Neighbors Neighborhood Ass'n v. City of Eugene*, ___ Or LUBA ___ (2013). LUBA has also held that, where a standard or condition is ambiguous such that "it can be interpreted to support either of two diametrically opposed conclusions," it is not clear and objective. *Group B LLC v. City of Corvallis*, 72 Or LUBA 74, *aff'd* 275 Or App 577 (2015). Moreover, LUBA has held that "where the purpose of a standard is clear from the text of the standard, that standard is more likely to be a 'clear and objective' standard." *Piculell Living Tr. v. City of Eugene*, __ Or LUBA ___ (LUBA No. 2019-067; opinion issued November 19, 2019) (citing *Walter v. City of Eugene*, 73 Or LUBA 356, 362, *aff'd*, 281 Or App 461, 383 P3d 1009 (2016)). Finally, LUBA has held that the fact that a particular standard "requires some interpretation" does not necessarily mean that a standard is not clear and objective, if it does not "require[] a subjective, value-laden analysis." *See SE Neighbors Neighborhood Ass'n v. City of Eugene*, ___ Or LUBA ___ (2013) (*citing Rudell v. City of Bandon*, 249 Or App 309, 319, 275 P3d 1010 (2012). In other words, what are prohibited are standards that require "subjective, value-laden analyses" or that can support "two diametrically opposed conclusions." If the purpose of a standard is clear from the text of the standard, it is more likely to be "clear and objective," even if it requires some level of interpretation.

In this case, the Oceanfront Setback provisions call for a mathematical determination – identify the residences or commercial structures within 100 feet of the property (200 feet if there are no buildings within 100 feet), take the average setback of those buildings from the Oregon Coordinate Line of those buildings, and that is the Oceanfront Setback of the lot. That calculation does not require a "subjective value-laden" analysis; there is no requirement that the structure "be compatible with the character of the neighborhood," "not create excessive traffic congestion," or that the site "be appropriate for the particular use," the type of considerations that come into play in reviewing, e.g., a request for a variance. CBMC 17.80.110. Moreover, the purpose of the standard is clear – it is to ensure that buildings in any particular area have similar setbacks from the oceanfront.

Notwithstanding that understanding, the Applicants attack individual provisions of the Oceanfront Setback and assert that they are not clear and objective. Each of those provisions will be addressed in turn.

i) Oregon Coordinate Line

Applicants first argue that the term "Oregon Coordinate Line" is too ambiguous to be clear and objective. Applicants are correct that the term "Oregon Coordinate Line" is not directly defined in the code, but as they acknowledge, the line is readily calculable from other provisions of the code and state law.

In particular, the setback itself is from the "ocean front," and there is only one coordinate line that runs the full length of the City of Cannon Beach ocean front – the surveyed vegetation line established in ORS 390.770. This understanding is confirmed in other code provisions, most pertinently, the definitions found in CBMC Chapter 17.04. First, CBMC 17.04.060 defines the term "Beach" as follows:

"'Beach' means gently sloping areas of loose material (e.g., sand, gravel, cobbles) that extend landward from the low water line (extreme low tide) to a point where there is a definite change in the material type or landform or to the line of year-round established vegetation. In most cases, t**he line of vegetation is followed by the Oregon Beach Coordinate or zone line, as defined by ORS 390.770**. Where the vegetation line is eastward or landward of the coordinate line, the eastward line of the beach shall be the actual line of vegetation." (Emphasis added.)

In other words, this definition confirms that the coordinate, or zone, line is that line defined by ORS 390.770. Additionally, CBMC 17.04.320 defines a "lot abutting the oceanshore" as "a lot which abuts the Oregon Coordinate Line or a lot where there is no buildable lot between it and the Oregon Coordinate Line." CBMC 17.04.325 exempts from the definition of "lot area" those portions of a lot "west of the Oregon Coordinate Line." There are similar call-outs in the definition of a "front yard," "rear yard" in CBMC 17.04.580, "side yard" in 17.04.585, and "ocean yard" in CBMC 17.04.578. Although it would have been better to have defined the term "Oregon Coordinate Line" in the code, in context, there can be no doubt that the line being referred to is the statutory vegetation line found in ORS 390.770.

The Applicants' argument does not really focus on whether they or the City can properly identify the Oregon Coordinate Line; instead their focus is on the ambiguity in,the state definition of the term "ocean shore" is defined to be that "land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS 390.770 or the line of established upland shore vegetation, *whichever is farther inland*." (Emphasis added.) However, whatever ambiguity there may be in state law, it is not present in CBMC 17.42.050(A)(6), because it does not regulate based on distance to the "ocean shore," but on distance from the "Oregon Coordinate Line" i.e., that definite and described line, which is not dependent on the line of established vegetation, but a line created pursuant to the Oregon Coordinate System and which can be precisely determined.[5] There is no basis on which to find that the Oregon Coordinate Line is not clear and objective.

ii) Buildable Lot

The Applicants next argue that the term "buildable lot" is not "clear and objective." This term is important because the Oceanfront Setback is applicable to all "lots abutting the oceanshore" and CBMC 17.04.320 defines such a lot as "a lot which abuts the Oregon Coordinate Line or **a lot where there is no buildable lot between it and the Oregon Coordinate Line**." (Emphasis added.) In this case, the lot in question does not directly abut the Oregon Coordinate Line; instead, the dedicated public right-of-way known as Ocean Avenue is in between the lot and the Oregon Coordinate Line. Thus, if Ocean Avenue is a "buildable lot," the lot in question is not subject to the Oceanfront Setback.

First, as discussed in the CDD Decision, the Ocean Avenue right-of-way is not a lot. CBMC 17.42.030(A) – (F) distinguish between rights-of-way and lots in the oceanfront management zone. If right-of-way was considered a "lot," there would be no reason to include the term "right-of-way" as separate and distinct from a "lot," thus, supporting the idea that the term "lot" does not include right-of-way. The Applicants challenge that assertion, pointing to CBMC 17.42.030(A), which provides that existing streets may be maintained on both "lots

5 It is worth noting that, even if the City had used the state definition of the "Ocean Shore," it would not be any less clear – the "line of established vegetation" is objectively determinable and subject to verification, so neither one would fail the "clear and objective" requirement.

and rights-of-way." The fact that streets can be located on right-of-way or as private streets on privately owned lots does not change the fact that the code treats right-of-way as something distinct from a lot.

In addition, although the Applicants are correct that the code does not define what lots are "buildable," that determination can be made pursuant to state law. ORS 197.286 defines "buildable" lands as "lands in urban and urbanizable areas that are suitable, available and necessary for residential uses." In this case, the Ocean Avenue right-of-way is in an urban area, the City of Cannon Beach, but it is not "available" for residential uses.

The Applicants cite ORS 197.779(2), which was adopted in 2019, and states that a government "may allow development of housing on public property." Accordingly, the Applicants argue, Ocean Avenue is available for residential uses. Appeal, p 7. The difficulty with Applicants' argument is that Ocean Avenue is a dedicated public street and, under Oregon law, it is not "available" for residential use. Oregon law is clear that, when property is "dedicated" to a particular use, a city is without power to change the use of that property without the consent of the dedicator. *Raley v. Umatilla County,* 15 Or 172 (1887); *City of Klamath Falls v. Flitcraft*, 7 Or App 330 (1971). S*ee also Hyland v. City of Eugene*, 179 Or 567, 572-73, 173, P2d 464 (1946) ("[T]he municipality, by accepting the dedication, becomes a trustee to carry out the terms of the grant and it has no power to sell or lease the property for purposes foreign to the dedication.") If, in fact, if the City were to ever determine that vacating Ocean Avenue were in the public interest, the eastern portion of the Ocean Avenue would be controlled by the Applicants, or their successors, not the City. In short, Ocean Avenue is not a "buildable" lot.

At the end of the day, the Ocean Avenue right-of-way is neither buildable or a lot and, therefore, the Applicants' property abuts the oceanshore, is subject to the Oceanfront setback, and that setback complies with the state law requirements for clear and objective standard.[6]

iii) Buildings

The Applicants assert that "identifying the 'buildings' that must be counted in the [Oceanfront Setback] exercise... is not clear and objective and is not guided by clear and objective standards." Appeal, p 7. It is hard to imagine a more clear and objective standard than the following:

"i. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines. Determine the affected buildings; the affected buildings are those located one hundred feet north and one hundred feet south of the parcel's side lot lines."

"b. For the purpose of determining the oceanfront setback line, the term 'building' refers to the residential or commercial structures on a lot. The term 'building' does not include accessory structures."

No "subjective, value-laden" analysis is required and the purpose of the standard is simple to determine; in fact, there is very little analysis required at all in determining what are "residential or commercial structures" or what is "one hundred feet" from a side lot line. Nonetheless, the Applicants assert that this standard is not clear and objective.

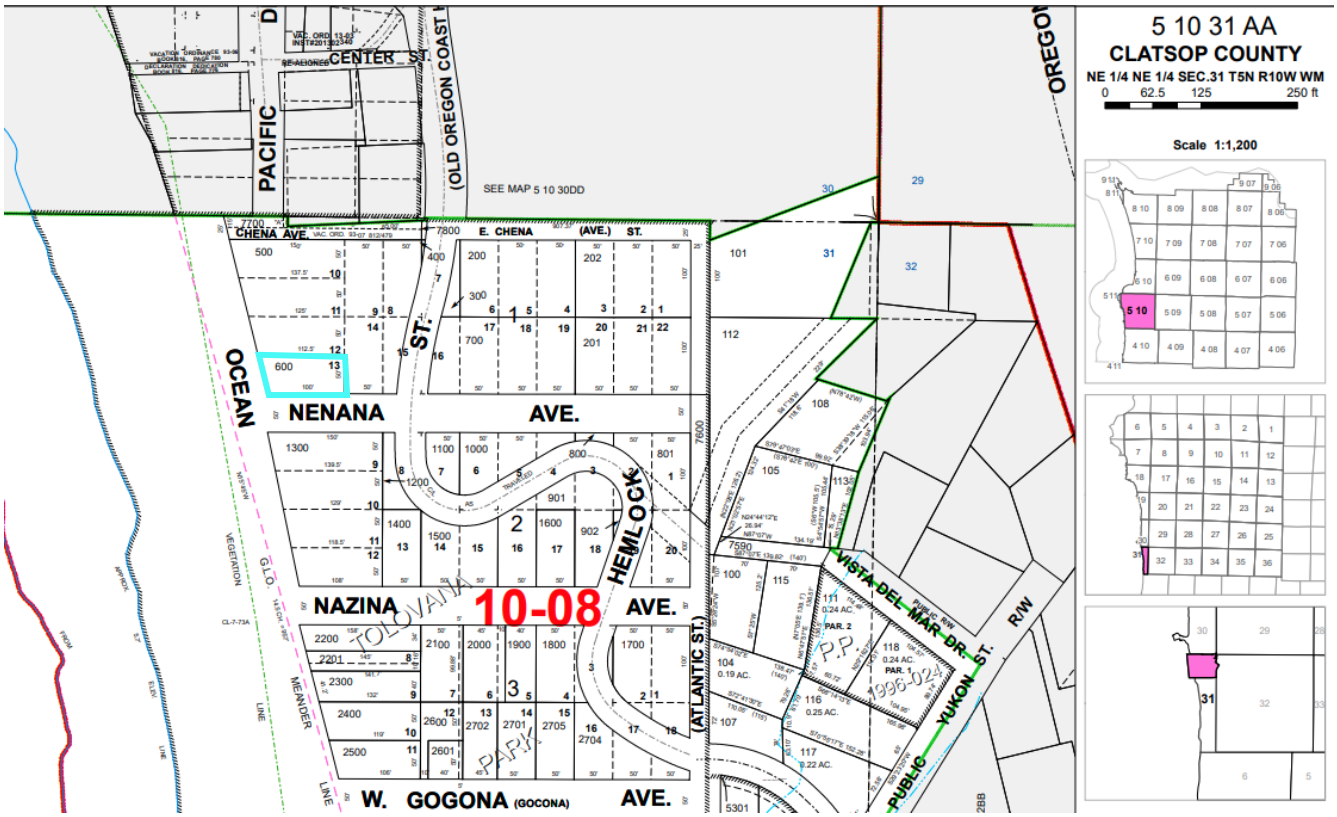
First, the Applicants make the same argument as above (i.e., that the "affected buildings" required for the calculation are not on lots abutting the ocean shore) in regard to the Haystack LLC property to the north, known locally as the Oswald West cabin. They argue that the only structure within the required distance, the

[6] In their appeal, the Applicants argue that, "in a meeting with several other individuals in attendance," the Community Development Director advised the Applicants' planning consultant that, because the property abutted Ocean Avenue, it was not subject to the Oceanfront Setback. In the first case, it is not clear that the representations of the Community Development Director in such a situation are the types of statements on which an applicant can rely. *See Loosli v. City of Salem*, 215 Or App 502, 170 P3d 1084 (2007) and *Wild Rose Ranch Enterprises v. Benton County*, 210 Or App 166, 175, 149 P3d 1281 (2006), *rev den*, 342 Or 504 (2007). More importantly, the Applicants have not identified the meeting in question or provided any indication what was or the context of that discussion. In contrast, the Community Development Director has written documentation that the City's position on the Oceanfront Setback has been clear to the Applicants and their consultants for some time.

residence on the Haystack LLC lot to the north, is on a lot that is not "abutting the oceanshore," because it abuts Ocean Avenue. That argument is without merit as explained above.

Moreover, Applicants argue, that the Haystack LLC residence does not "abut the oceanshore" because it is separated from the oceanshore by a "plot" of land[7] Appeal, p 8-9. It appears that the Applicants have created their own potential partition of land and use that to argue that there is an "area of land" that could be developed with a separate residence and, therefore, the property to the north does not abut the oceanshore. Such an argument is creative, but wrong. No such plot currently exists and the property to the north remains one lot of land that abuts the oceanshore, as that term is defined in CBMC 17.04.320.

[7] CBMC 17.04.315 provides the following definition of the term lot: "'Lot' means a plot, parcel, or tract of land."



iv) Average

The Applicants also argue that the term "average" is not clear and objective. Again, it is difficult to understand how a simple mathematical function would not be clear and objective, but the Applicants try. First, it is important to note that the Applicants do not argue that the "standard" or function at issue – to create an average – is somehow not clear and objective. Instead, they argue that, in the context of this particular application it is ambiguous. They argue that the standard "obviously contemplate[] that there be more than one data point to consider." Appeal. P 10. That simply is not true; an average is calculated by taking the sum of a group of values and dividing the sum by the number of values in the group. There is absolutely no reason why the number of values in a group cannot consist of one, meaning the sum of the group is equal to the single value, which is divided by one, resulting in an average that equals the sole value in the group, or multiple numbers that are added and divided by that same multiple unit. Although the Applicants may not like that value, there is nothing unclear or subjective about the outcome or how it is calculated.

v) Process and Procedures

The Applicants next argue that the process and procedures for obtaining a Type I development permit are not clear and objective. Appeal, p 10-11. However, the process and procedures are set forth clearly and succinctly in CBMC 17.92.010:

"A. Permit Required.

"1. A development permit is required for:

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

"* * * * *

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

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

"C. Administrative Review of Development Permits.

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

Under those provisions, any person applying for a building permit in the City also requires a Type I development permit to ensure the proposed structure complies with the City's land use regulations, which are contained in Title 17.

As noted in CBMC 17.92.010(B), a person applies for such a Type I permit by filing an application for the permit on the forms provided by the City, which the Applicants did in this case. The City then reviews the application and, in almost every Type I development review situation, the City makes a determination on straightforward, clear and objective standards, such as height limitations, setback requirements, lot coverage, and similar provisions that do not require interpretation or the exercise of policy judgment and are not considered "land use decisions." Typically, as noted in CBMC 17.92.010(A)(2), those determinations are made as a part of the building permit and the Type I development permit is approved when the building permit is issued.

To the extent a party believes that the City made the wrong call on its review of the provisions of Title 17, it can appeal that issue to the City's Planning Commission pursuant to CBMC 17.92.010(C)(1), as the Applicants have done here. To the extent the Applicants believe that the Type I development permit was issued in error, or that the process does not comply with local code or state law, it can make that argument to the Planning Commission, but the process itself is clear and objective.

c) Setback Reduction Requirement

Finally, the Applicants assert that the portion of the condition offering a setback reduction review as an option to reduce the Oceanfront setback requirement is not clear and objective. Appeal, p 9-10. As noted above in the "Recommendation" portion of this Staff Report, the Applicants have now submitted a survey demonstrating that their proposed residence would not comply with the City's Oceanfront Setback. Accordingly, there is no way to make that condition clear and objective and staff recommends that the Planning Commission deny the Type I development permit. Nonetheless, it may still be possible for the Applicants to build their proposed residence by obtaining a setback reduction; alternatively, the Applicants may re-design their residence so that it complies with the Oceanfront Setback.

2. State Law Requirements

a) The CDD Decision Did Not Impermissibly Reduce Density

ORS Chapter 227 address City Planning and Zoning and regulates a variety of actions that cities can take in the review and approval of potential development of land. Some of the issues identified in that statutory chapter are straightforward and easy to understand; some concepts are more complex. One of the those regulations is ORS 227.175(4)(c), which says that "[a] city may not condition an application for a housing development on a reduction in density," and goes on to define "Authorized density level" as "the maximum number of lots or dwelling units or the maximum floor area ratio that is permitted under local land use regulations."

The first important issue is whether this Type I development permit is even subject to this statute. Generally, ORS 227.175 applies to statutory "permits," which is defined as the "discretionary approval of a proposed development of land." However, it does not appear that, in issuing a Type I development permit, the City exercises policy or legal judgment and, in fact, the Type I development permit may not be subject to this particular requirement. Moreover, the definition of "authorized density levels" to include floor area ratio does not necessarily mean that the maximum floor area ratio possible is the floor area ratio that must be allowed.

Notwithstanding the various reasons this criterion may not apply, to the extent this provision is applicable to the City, and a reduction in the size of the residence is a "reduction in density," the Applicants' arguments is still in error. Condition 2 does not require any reduction in floor area ratio or density whatsoever. Instead, the result of complying with Condition 2 would result in the very floor area that the Applicants applied for. Compliance with Condition 2 would have resulted in the exact size residence the Applicants proposed, not a reduction in size or floor area ratio. Accordingly, Condition 2 in the CDD Decision fully complied with ORS 227.175(4)(c).

In any event, as discussed above in the recommendation, Staff is now recommending that the application be denied because the proposed residence as designed cannot comply with the Oceanfront Setback. Accordingly, no condition should be applied to the decision and since there is no condition imposed, ORS 227.175(4) does not apply to the decision. Nonetheless, it is worth noting that, as stated in Condition 2, the Applicants may still seek a setback reduction to construct the residence as proposed.

b) The City's Decision Did Not Unreasonably Add Significant Cost or Delay

ORS 197.304(4)(b) provides that the City's "standards, conditions, or procedures... may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." As LUBA noted in *Home Builders Association of Lane County v. City of Eugene*, ___ Or LUBA ___ (LUBA No. 2001-059; opinion issued February 28, 2002), "although the statute prohibits "unreasonable costs or delay, [t]he statute does not prohibit *reasonable* cost or delay." (Emphasis in original). The City processed this Type I permit expeditiously and even separated the development permit from the building permit at the Applicants' request in order to allow this process to move more quickly. There simply is no basis to conclude that the review of this permit went through anything other than the reasonable cost and time similar to any other application for a residence in the state of Oregon generally, and the City of Cannon Beach in particular.

c) The Requirement to Comply With Setbacks is Not an Unconstitutional Condition

The Applicants also asserts that Condition 2 and the Oceanfront Setback "result[] in an all but total wipeout of the Roberts' property." Appeal, p 14-16. That argument goes on to note that 71% of the property is undevelopable[8] and "[w]hat is left is not capable of supporting any reasonable dwelling." This argument is apparently based on the letter from the Applicant's architect stating that application of the Oceanfront Setback "reduces the available maximum floor area to less than 1,399 sq. ft. This is significantly less than the 2,712 sq. ft. of the house submitted in the permit." According to the Applicants, this leaves them "with no economically beneficial use" or results in the "substantial interference with the owners investment backed expectations."

It is important to note that the Oceanfront Setback has been in effect for at least twenty-six years (Ord 94-8) and the Applicants acquired their property after it went into effect. Thus, any investment backed expectations should have included development consistent with the setback. In addition, the Applicants appear to acknowledge that the property would be subject to at least some setback, which should reduce the percentage of the property that is unusable by the Oceanfront Setback. Finally, as made clear in Condition 2, there is a process available to the Applicants that would allow them to address any impact of the setback on their property through a setback reduction pursuant to CBMC 17.42, but they have not availed themselves of that opportunity.

[8] It appears that the 71% number is based on a review without subtracting out the setbacks that the Applicants believe should apply. The City has not done its own calculations of this number.

As far as their arguments that there is no economically beneficial use, that argument appears to be belied by the size of other homes in Cannon Beach. The median home size in Cannon Beach is 1,498 sq. ft. A 1,399 sq. ft. residence would place this residence in the 45th percentile of home size in Cannon Beach, so that nearly half of the residences in the City have less area than the size of the residence the Applicants can build and still comply with the Oceanfront Setback. The Oceanfront Setback does not eliminate all value from the property and, even with full compliance with the Oceanfront Setback, it will allow the construction of a residence that is consistent with the size of most other homes in the City.

The Applicants go on to argue that "there are no impacts from the proposed dwelling that justify Condition 2 demanding that the Roberts' property be set aside for the benefit of a single neighbor." Appeal, p 15. That argument misunderstands the nature of the Oceanfront Setback requirement. As noted in CBMC 17.64.010(A)(4), the purposes of setbacks are "to provide for a reasonable amount of privacy, drainage, light, air, noise reduction and fire safety between adjacent structures." In such a situation, setbacks are mutually beneficial – what benefits one property, also benefits the other property. Just as this proposed residence must comply with the setback, so did other buildings and, so too will other oceanfront buildings. It is worth noting that the property to the south, although currently owned by the City, could result in additional development and, as with this property, any future development would also be subject to the Oceanfront Setback. Thus, the setback is not just to benefit one neighboring property, but provides mutual benefits to all property owners.

Moreover, the Oceanfront Setback is found in the Oceanfront Management Overlay Zone, which identifies the purposes of its regulations as follows:

"To: ensure that development is consistent with the natural limitations of the oceanshore; to ensure that identified recreational, aesthetic, wildlife habitat and other resources are protected; to conserve, protect, where appropriate develop, and where appropriate restore the resources and benefits of beach and dune areas; and to reduce the hazards to property and human life resulting from both natural events and development activities." CBMC 17.42.010.

In other words, the oceanfront setback is intended to serve additional purposes, including reducing hazards to development – including this proposed development. Ocean front land is more susceptible to hazards, including wind, rain, and storm damage, which is part of the reason for the additional setbacks in this area. To the extent nearby development is setback, it likely recognizes those additional hazards. Moreover, if a particular development is further seaward than other development, it would likely receive even more potential damage from such events and, thus, the Oceanfront Setback is designed to mitigate potential hazards. In addition, there is an aesthetic component. As the Applicants note, the Oceanfront Setback does work to protect the views of their neighbor. It also will work to protect the views of this development, should additional development happen, whether to the south or, as the Applicants noted in their appeal, should the property to the north develop further by partitioning off additional lots.

In addition, there is also a significant public aesthetic concern to the Oceanfront Setback. In addition to the purposes in CBMC 17.42.010 to protect "aesthetic" resources, Oregon is unique in that the beaches belong to the public. ORS 390.615. The legislature has declared that "it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore." ORS 390.610(4). The Oceanfront Setback is intended to protect the aesthetic and scenic resources of the ocean shore by ensuring that development does not come too close and intrude on those resources. In appropriate locations, development may be allowed closer to the ocean shore, but when all other buildings are set back, new development should not be allowed special privileges that are not available to other development.

The Applicants argue that the City has not made a showing that Condition 2 is "roughly proportional" under *Dolan v. City of Tigard*, 512 US 374 (1994), or that there is an "essential nexus" under *Nollan v. California Coastal Comm'n*, 435 US 825 (1987). Appeal p 16. In the first instance, as discussed in the recommendation section of this Staff Report, Staff's current recommendation is to deny the current application, although the Applicants would have the ability to re-submit for the same residence with a setback reduction, or seek to build a smaller home. Thus, there is no condition to justify under those cases and, as the court found in *Nollan*, a governmental entity can deny a permit so long as "'substantially advance[s] legitimate state interests'" and does

not 'den[y] an owner economically viable use of his land,' *Agins v. Tiburon*, 447 U. S. 255, 447 U. S. 260 (1980). *See also Penn Central Transportation Co. v. New York City*, 438 U. S. 104, 438 U. S. 127 (1978) " *Nollan*, 435 US at ___. The legitimate state interests are discussed above and, in addition, as discussed further above, the Applicants have not been denied economically viable use of their land.

d) The Oceanfront Setback Serves a Public Interest

Finally, the Applicants argue that the Oceanfront Setback serves only the interests of the neighbor to the north. Appeal, p 17. As explained above, that is inaccurate; the Oceanfront Setback serves the interests not just of the neighbor to the north, but all property owners along the ocean front, including the Applicants, as well as the public as a whole. The setback is fully constitutional.

C. Conclusion

In conclusion, the CDD Decision was correct based on the information that had been submitted the CDD. However, the Applicants have provided additional information indicating that, in fact, the proposed residence cannot meet the Oceanfront Setback. Accordingly, Condition 2 is no longer feasible and, instead Staff recommends that the Planning Commission deny the application as it is currently proposed based on the findings and conclusions in this Staff Report. The applicant has the option of either seeking a setback reduction under CBMC Chapter 17.64 to construct the residence as proposed, or re-designing their development to comply with the Oceanfront Setback.

APPLICABLE PROCEDURE

17.88.180 Review consisting of additional evidence or de novo review.

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

1. The additional testimony or other evidence could not reasonably have been presented at the prior hearing; or

2. A hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action; and

3. The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.

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

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

DECISION AND CONDITIONS

Motion: Having considered the evidence in the record, upon motion by Commissioner _____, second by Commissioner _____, and by a vote of ___ to ____, the Cannon Beach Planning Commission hereby (approves/approves with conditions/or denies) the Administrative Appeal of DP# 20-04 as discussed at this public hearing (subject to the following conditions):