



# CITY OF CANNON BEACH

## AGENDA

Meeting: City Council  
Date: Wednesday, August 9, 2023  
Time: 6:00 p.m.  
Location: Council Chambers, City Hall

### CALL TO ORDER AND APPROVAL OF AGENDA

### PUBLIC COMMENT

*The Presiding Officer will call for statements from citizens regarding issues relating to the City. The Presiding Officer may limit the time permitted for presentations and may request that a spokesperson be selected for a group of persons wishing to speak.*

### ACTION ITEM

- (1) **Continuation of Stanley A. Roberts, remand from LUBA of an approval of a type I development permit in conjunction with a building permit (164-22-000006-DWL) for the development of a new residence and accompanying road development. The property is located west of Hemlock at its intersection with the undeveloped Nenana Avenue right-of-way, just north of the 'S' curves. The applicant is requesting to construct a new single-family residential structure, with a driveway extension over the Nenana Avenue right-of-way servicing the residence. Tax lot 51031AA00600 abuts the ocean shore and requires an oceanfront setback line to locate the ocean yard and appropriate building envelope.**
- (2) **Good of the Order**

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**Public Comment:** If you wish to provide public comment via Zoom for this meeting please use the raise your hand Zoom feature. Except for a public hearing agenda item, all Public to be Heard comments will be taken at the beginning of the meeting for both Agenda and Non-Agenda items. If you are requesting to speak during a public hearing agenda item, please indicate the specific agenda item number as your comments will be considered during the public hearing portion of the meeting when the public hearing item is considered by the Council. All written comments received by 3:00 pm the day before the meeting will be distributed to the City Council and the appropriate staff prior to the start of the meeting. These

written comments will be included in the record copy of the meeting. Written comments received at the deadline will be forwarded to Council and included in the record, but may not be read prior to the meeting.

*Please note that agenda items may not be considered in the exact order listed. For questions about the agenda, please contact the City of Cannon Beach at (503) 436.8052. 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: 2023.08.04



## MEMORANDUM

### RE: Issues for Council Resolution of Roberts Application – DP #22-06

August 4, 2023

#### I. Procedural Issues.

##### A. Roberts Request for Councilor Kerr to Recuse.

###### 1. Process set out in code:

*“A party to a hearing may challenge the qualifications of a member of the hearing body to participate in the hearing and decision regarding the matter. The challenge shall state the facts relied upon by the challenger relating to a person’s bias, prejudgment, personal interest, ex parte contact or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner. The hearing body shall deliberate and vote on such a challenge. The person who is the subject of the challenge may not vote on the motion;”*

- a. Roberts attorney stated facts and provided supporting emails;
- b. Councilor should have an opportunity to respond;
- c. Council votes on challenge and whether Councilor Kerr should be recused.

###### 2. Standard for recusal:

- a. A member of a governing body should not participate in a decision if he or she has an actual bias regarding the application. “Actual bias” means prejudice or prejudgment of the facts to such a degree that he or she is incapable of rendering an objective decision on the merits of the case. *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76, 742 P2d 39 (1987).
- b. The courts have been very reluctant to overturn a local government decision based upon an allegation of bias. The reasons are essentially two: First, elected officials are not judges and are expected to exercise some political judgment – within the bounds of the law. Second, while you can easily replace a judge, disqualifying city councilors or county commissioners can create quorum and minimum vote problems, making it difficult for the governing body to even make a decision. *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 754, 588 P2d 640 (1978).
- c. In reviewing claims of bias, the Supreme Court has been clear that elected local officials must maintain impartiality “only towards the parties and issues ‘in the matter,’ not toward all individuals and all competing interests in the community generally, and similarly, that the disqualifying contacts must be ‘concerning the question at issue.’” *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76 at 81.

d. In *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014), the most recent appellate court case about bias, the Court of Appeals explained how to address bias as follows:

- “The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's “intense involvement in the affairs of the community” or “political predisposition” is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.
- “In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. First, the scope of the ‘matter’ and ‘question at issue’ is narrowly limited to the specific decision that is before the tribunal. Second, because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And third, the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.”

3. Based on its understanding of Oregon law regarding bias, Staff recommends that, unless Councilor Kerr discloses that she is “incapable of determining its merits on the basis of the evidence and arguments presented,” Oregon law does not require her recusal.

B. Is an Application Before Council?

1. Haystack makes several arguments regarding whether an application is even before the Council.
  - a. Completeness is not an issue – the question is whether criteria are met.
  - b. Burden is on applicants – if they have not submitted sufficient information to demonstrate criteria are met, Council doesn't find incomplete, but denies application.
2. Staff recommends that Council proceed on reviewing and deciding on applications.

C. Request to Re-Open Record.

1. A party has requested that the Council re-open the record.
  - a. That request has not been included in the record, as it includes new information that was submitted after the date that would allow its submittal.
2. Staff recommend not re-opening the record because there is significant risk of violating 120-day rule if we re-open the record.

D. Must the City Only Apply Clear and Objective Criteria?

1. ORS 197.307(4) requires cities to apply only “clear and objective” criteria to applications for housing:

*“a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing.”*

- a. LUBA and the Court of Appeals have concluded that the requirement for “clear and objective” standards applies to all applications for residential development and is not limited just to needed housing.
- b. A standards is not objective if it imposes “subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on the property to be developed or the adjoining properties or community.” *Roberts v. City of Cannon Beach*, 316 Or App 305, 311 – 12, 504 P3d 1249 (2021).
- c. Several standards in the City’s code may not be clear and objective, in particular, the geologic hazard standard, requiring a determination of whether the proposal includes specific “engineering and construction methods which will eliminate the hazard, or will minimize the hazard to an acceptable level,” may not be clear and objective.

2. Staff recommends that the Council consider geologic hazard concerns and determine whether the standard is met. If the standard is not met, the Council may note that, even if it cannot be applied to the application.

#### E. Can the City Change its Mind?

1. Roberts argues that the City cannot change its mind, citing to a 1998 court case – *Holland v. City of Cannon Beach*, 154 Or App 456, 962 P2d 701 (1998).
  - a. The *Holland* case involved a very specific scenario – in that case, the City had treated a particular standard as having been repealed, both in the application at issue and in other applications. The City Council then reversed itself after a remand and concluded the standard was applicable to the application.
    - The Court of Appeals rejected that approach.
  - b. In this case, the matter has not been brought to the Council previously,
    - And the application was never subject to public comment or hearing
    - It was initially approved by staff without notice or opportunity to comment
    - Several issues were brought to the City’s attention only after the decision was issued, whether through the LUBA briefing process or through testimony provided to the City.
    - In this situation, the issues are being raised to the Council for the first time.

2. Staff recommends that the Council apply the standards and criteria in the City's code as written.

F. Opportunity to Submit Amendments/Conditions.

1. Should the Council decide that the application does not meet the City's land use regulations, the applicants have requested opportunity under ORS 197.522(3) to submit amendments or to propose conditions of approval:

"If an application is inconsistent with the comprehensive plan and applicable land use regulations, the local government, prior to making a final decision on the application, shall allow the applicant to offer an amendment or to propose conditions of approval that would make the application consistent with the plan and applicable regulations."

- In these circumstances, statute also authorizes City to extend 120-day deadline.

2. ORS 197.522(2) earlier references that it applies to "application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land for needed housing." Relatively new provision and not much guidance.

- a. Haystack Rock argues it only applies to an "application for . . . needed housing," as defined in ORS 197.303, which includes an exemption for cities with population less than 2,500.

- b. Roberts argues that:

- ORS 197.522(3), by its terms, isn't limited to ones for "needed housing;"
- The definition of "needed housing" in ORS 197.303 includes "all housing":

*"all housing on land zoned for residential use or mixed residential and commercial use that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes."*

- The County has adopted a study that identifies "single-family housing" as a needed housing type.
3. This issue is not an easy one to decipher and there is no guarantee but, on balance, staff believes that the Council is not required to allow the applicants to offer amendments or propose conditions of approval.

- a. However, Council could consider allowing such an approach if the applicants were to grant an extension of the 120-day deadline.

## II. Substantive Issues.

### A. Does the Property Have Required "Access"?

1. CBMC 17.90.020 provides as follows:

"Every lot shall abut a street, other than an alley, for at least twenty-five feet. Lots which were created prior to adoption of the zoning ordinance which do not meet this provision may be accessed via an irrevocable recorded easement of a minimum of ten feet in width."

2. Issues:

- a. Does "street" mean one opened for vehicular access?

- 17.04.535 defines "street" as follows:

"'Street' means the entire width between the right-of-way lines of every way for vehicular and pedestrian traffic and includes the terms 'road,' 'highway,' 'lane,' 'place,' 'avenue,' 'alley' and other similar designations."

- b. Does the property "abut" Nenana Avenue right-of-way?

- Dictionary defines "abut" as "next to or have a common boundary with"
- Does the vertical separation between Roberts' property and the proposed access result in lack of the two abutting?

3. Staff recommend that the Council find that the applicants comply with this access criterion, however, the Nenana Avenue right-of-way is not improved and is not accessible by vehicular or pedestrian traffic.

### B. Does Access Have Sufficient "Clear Vision" Areas?

1. CBMC 17.90.040 requires:

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

2. Haystack argues that the clear vision analysis was done only for the elevated roadway, not for the at-grade driveway.
3. Staff recommends that the Council find that the applicants may comply with this criterion, however, engineered plans will need to be submitted to City staff in the future to verify this criterion is indeed met.

C. Does Application Propose Development in Oceanfront Setback?

1. As confirmed by the LUBA and the Court of Appeals, the City’s oceanfront setback is a “clear and objective” standard.
2. The oceanfront setback is measured in relation to structures on adjoining property and the applicants have identified the setback on its drawings. The drawing show that the setback line trends southeast as it moves south, such that the southwestern facade of the proposed residence is on the setback line and that the setback line continues south of the residence in a southeasterly fashion.

3. Two portions of the application may be impacted by the oceanfront setback.

a. Development in the Nenana Avenue right-of-way.

- Both the elevated road and the at-grade driveway show significant development westward of the oceanfront setback and that development would not be allowed if the oceanfront setback were applicable to the right-of-way.
- Staff is unaware of this issue ever having been raised regarding any development elsewhere in the City.
- The City’s Oceanfront Management Zone, Chapter 17.42., clearly regulates activities in the right-of-way.
- 17.42.030 identifies the uses and activities permitted in the zone and that section identifies that the uses are permissible “for lots or right-of-way,” not just on lots.
- The oceanfront setback is found in the general standards section of the chapter in 17.42.050(A)(6), which provides as follows:

**17.42.050 General standards.**

*A. The uses and activities permitted in all areas contained in the OM zone are subject to the following:*

*\*\*\*\*\**

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

- 17.42.050(A) applies to “all areas contained in the OM zone.” As noted above, the other terms of the chapter show it applies to rights-of-way.



- However, 17.42.050(A)(6) only indicates the method of determining the setback “for all lots” abutting the oceanshore.
- The oceanfront setback applies to development in the right-of-way and staff recommends that the applicant needs to meet these criteria.

b. Development on applicants’ lot.

- The application also proposes development within the oceanfront setback on the applicants’ lot.
- In particular, under either the elevated roadway or the at-grade driveway, the applicants include an elevated areas with structural support for the driveway and vehicle parking spaces.
- The applicants acknowledge that the oceanfront setback applies to the lot.
- The only structures allowed in the ocean yard by 17.54.060(9) are short fences, decks, and beach access stairs; however, the applicants argue that neither the driveway nor its retaining wall are “structures”
- 17.04.540 defines a “structure” as follows:

*“Structure’ means any man-made assemblage of materials extending above the surface of the ground and permanently affixed or attached, or where not permanently affixed or attached to the ground not readily portable, but not including landscape improvements such as rock walls, retaining walls less than four feet in height, flag poles, and other minor incidental improvements similar to those described above.”*

- It is clear that the elevated driveway and retaining wall are a “man-made assemblage of materials extending above the surface of the ground.”
- Applicants argue that its structure is exempt as a retaining wall less than four feet in height.
- However, applicants do not account for the rest of the definition and, in particular, which exempts “landscape improvements such as rock walls, retaining walls less than four feet in height, flag poles, and other minor incidental improvements similar to those described above.”
- The retaining wall here is not landscaping improvements or minor incidental improvements.
- The retaining wall also appears to exceed 4 feet in height. The code does not specifically identify how to measure the height of a retaining wall, but in measuring building heights, it specifies that height is “measured as the vertical distance from the average elevation of existing grade to the highest point of a roof surface of a flat roof.”

- Reviewing the applicants' material, in particular page 2 of Exhibit A-66, it appears that the retaining wall is at least 4'3" in height, and may be taller.
- The application proposes development in the oceanfront setback which is not permitted and violates the City's oceanfront setback requirement.

D. Does Application Eliminate Geologic Hazards or Minimize Them to Acceptable Level?

1. 17.50.040(3)(b) requires an application to provide geologic investigation and engineering reports that include engineering and construction methods that will "eliminate the hazard, or will minimize the hazard to an acceptable level."

a. Applicants submitted multiple reports from various engineers and geologists that address the significant geologic hazards on the site.

- All parties agree that the lot and access are located on a currently active landslide – the "S-Curves Landslide" – that has had significant movement, both at the toe of the slope and upslope.
- Movement has slowed significantly with the de-watering system installed by the City to protect Hemlock Street, but land continues to move.
- According to the City's expert, the applicants have proposed an engineering solution that will protect the site to a "factor of safety" of 1.3. Exhibit C-15.
- But only as to the toe of the S-Curves landslide and not the broader block that is also subject to movement.
- The applicants' expert explicitly acknowledges that the system is not designed to address stability of entire slope:

*"[The] system is designed to provide slope stability and support for the home site under an extreme scenario of failure and movement of the oversteepened toe wedge portion of the S-Curve landslide. The Western Pile Stability Improvement System is not designed or expected to substantially influence overall global slope stability of the larger S-curve landslide area."*

- Applicants object to the use of the geologic hazard standard for several reasons:
  1. That the standard was not similarly applied to other development,
  2. Applicants particularly single out the recent approval of 124 Nazina
  3. However, as noted in the memo from the City's expert, that property is not part of the mapped landslide and the expert report submitted with that development concluded that the property is generally stable.

4. Applicants also point to several other homes, but as demonstrated in the memorandum from the City Planner at C-13, many of those were developed some time ago and those that were developed more recently included geologic reports that were not challenged.

- In sum, staff conclude that the applicants have not satisfied the City's standard at 17.50.040(3)(b) in that they have not eliminated the hazard or minimized it to an acceptable level.
- The engineering and construction techniques will not address the broader S-Curves landslide.
- In fact, applicants' expert acknowledges that the elevated roadway will actually result in a decrease the factor of safety (albeit a small decrease), meaning the area would be less safe after development than it was before. Exhibit A-72.
- As far as the at-grade driveway, the City's expert concluded that the applicants have not submitted a slope stability analysis for this approach to access. Exhibit C-12.

b. However, as noted above, state law prevents the city from applying standards that are not clear and objective and, because 17.50.040(3)(b) requires value judgments regarding what is an "acceptable level," the City is prohibited from applying this provision.

### **III. Conclusion.**

A. Procedurally, staff recommends that the Council:

1. Allow Councilor Kerr to participate,
2. Not re-open the record,
3. Apply clear and objective standards,
4. Apply the standards as written, and
5. Does not need to allow the applicants to propose amendments or conditions of approvals.

B. Substantively, staff recommends that the Council find:

1. Applicant meets the access criterion.
2. Appears there may be sufficient clear vision areas – Will need engineered plans for the actual access selected to verify.
3. It is staff's interpretation that oceanfront setback includes the right of-way.

4. The application proposes development in the oceanfront setback which is not permitted and violates the City's oceanfront setback requirement - a retaining wall used to support parking spaces located within the oceanfront setback.
5. That the applicants have not shown that the geologic hazards are not eliminated or minimized to an acceptable level,
6. But state law prohibits the City from applying that conclusion to the application.

## **RECOMMENDATION**

If the Council believes that the applicants have failed to carry their burden regarding several criteria an appropriate motion to deny the application would be as follows:

I move to **DENY** Application DP#22-06, proposing a residence and accompanying development in the Nenana Avenue right-of-way and direct staff to develop final written findings to bring back to the Council for final adoption.

To the extent the Council believes the applicants have carried their burden and that the application complies with the City's land use regulations, staff has included a set of recommended conditions below that should be included with the approval. An appropriate motion to approve the application would be as follows:

I move to **APPROVE** Application DP#22-06, proposing a residence and accompanying development in the Nenana Avenue right-of-way and direct staff to develop final written findings to bring back to the Council for final adoption.

## **SUGGESTED CONDITIONS OF APPROVAL**

1. The approval of this Development Permit is not dependent on any other permits, nor are any other permits dependent on this permit.
2. Prior to construction the applicants shall delineate the Tree Protection Zone (TPZ) by hi-visibility fencing a minimum of three and one-half feet tall, which shall be retained in place until completion of construction. Vehicular traffic, excavation and storage of materials shall be prohibited within the TPZ.
3. The applicants shall follow all recommendations contained in the arborist reports from Ecologic Tree, LLC, dated June 14, 2020, July 9, 2020, and February 5, 2022.
2. The applicants shall submit a Tree Replacement Plan showing the location of up to three trees, for any trees that fail, due to construction, over the subsequent three years from the issuance of the Certificate of Occupancy. Staff will perform a yearly inspection and the applicants shall replace any tree deemed failing on the property per Chapter 17.70.040 per 17.70.030(G).
3. The applicants shall provide surveyed elevation points at time of structural inspection, conforming to CBMC 17.90.070 and 17.10.040(E).

4. The applicants shall install a fire suppression system meeting the residential requirements of Cannon Beach Rural Fire District.
5. The applicants shall obtain an approved Right-of-Way Permit for construction staging and timing, through the City of Cannon Beach Director of Public Works prior to beginning any work authorized by this permit.
6. Prior to any construction activity pursuant to this permit, Applicants shall obtain final approval for design and construction of an extension of Nenana Avenue from the Cannon Beach Director of Public Works.
7. No tree removal or grading of city right-of-way is permitted as part of this development permit until an approved Right-of-Way Permit is issued.
8. All work authorized by this permit shall be completed under the Public Works approved construction staging and timing schedule and any ground disturbance of exposed surfaces during the wet season (November 1 through April 30) should be temporarily planted with grasses, or protected with erosion control blankets, hydro-mulch, or hand broadcast straw a minimum of 3 inches thick and punched into the soil.
9. Exposed sloped areas steeper than 3 horizontal-to-1 vertical should be protected with a straw erosion control blanket (North American Green S150, or equivalent) to provide erosion protection until permanent vegetation can be established. Erosion control blankets should be installed as per the manufacturer's recommendations.
10. The use of motorized equipment shall be limited to the hours between 7:00 AM and 7:00 PM per Municipal Code Section 8.18.040(F).
11. Existing city infrastructure shall not be disturbed, and any damages shall be repaired by the City, and charged back to the applicants and, applicants hereby agree to pay any such charges.
12. A certified geo-tech should monitor the pile installation during construction to verify that the structure's design objectives have been achieved, and notice will be provided the City at least five days prior to site disturbance.
13. The applicants shall comply with all recommendations contained in the geotechnical reports provided by the applicants, including those contained in the following:
  - August 2, 2021 – Geotechnical Engineering Consultation – Nenana Tax Lot 600 – Stability System Location (2022 LUBA Record p 738);
  - November 5, 2020 – GS Geotechnical Engineering Consultation – Purpose of Stability Pile System (2022 LUBA Record p 720)
  - September 2, 2020 – GS Geotechnical Engineering Consultation – Plan Review of Western Stability Pile (2022 LUBA Record p 719)
  - June 30, 2020 – EEI Geotechnical Investigation Report – Proposed Nenana Avenue and Tax Lot 600 Private Driveway Construction (2022 LUBA Record p 928);
  - June 6, 2020 – GS Geotechnical Engineering Consultation – House Foundation Support and Stability Analyses (2022 LUBA Record p 740);

- April 5, 2020 – GS Report of Geotechnical Engineering Services – Proposed Residence at Tax Lot 600 (2022 LUBA Record p 680);
- July 2, 2019 – GS Geotechnical Engineering Consultation – Planning Phase (2022 LUBA Record p 671);

14. The access shall be restricted to right-in/right-out to ensure sight distance standards are met. The applicants shall design, subject to City approval, a barrier to prevent left turns into or out of the access to the property. The access shall have a grade of not more than 4.8% in the portion preceding its intersection with S. Hemlock Street.

The complete record, including all of the submissions of the applicant, as well as all comments from the public, for the 2023 LUBA Remand of Development Permit DP#22-06 at Tax lot #51031AA00600 is available on the City's website at the following address:

<https://www.ci.cannon-beach.or.us/planning/page/2023-luba-remand-development-permit-dp22-06-taxlot-51031aa00600>