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October 28, 2022

Gary Darnielle
Bandon Hearings Official
c/o Lane Council of Governments
859 Willamette Street, Suite 500
Eugene, OR 97401-2910
Email: GDARNIELLE@lcog.org

Sent by email only

Re: File 22-030; T&C Coan Living Trust; Geologic Assessment Review (GAR)
Applicant Statement for Continued Hearing

Dear Mr. Darnielle:

This matter is set for a continued hearing on November 2. This letter provides the applicant's Big Picture approach to resolving this application.

I. In summary:

1. A GAR application is a request for a statutory permit, as defined by state law, authorizing the development of land for housing. ORS 227.160(2).¹
2. As a permit for housing, the City is prohibited from applying any standards that are not clear and objective on the face of its ordinances. ORS 197.307(4). ORS 227.173(2)²

¹ ORS 227.160(2):

“Permit” means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation.”

² ORS 197.307(4):

Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing. The standards, conditions and procedures:”

ORS 227.173(2):

“When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.”

3. The threshold triggers for needing a GAR permit, and the standards to be applied in making the permit decision are replete with provisions that are not clear and objective on their face; hence, there is no basis for denying the permit.
4. Notwithstanding all of the above, the applicant concurs in the recommendations of the GAR and consents to those conditions being applied to the issuance of the building permit for the proposed dwelling.
5. If you should find that the City may apply the GAR standards, the application should be approved, as conditioned to comply with the recommendations of the GAR.
6. This application also meets, or can be conditioned to meet, the “Development Standards for Uses Subject to Review” stated in BMC 17.78.060.

In Part II we address each of these six points in detail.

In Part III we summarize proposed conditions of approval.

II. Discussion

1. A GAR application is a request for a statutory permit, as defined by state law, authorizing the development of land for housing. ORS 227.160(2).

This is the starting point for the inquiry here, not a remarkable statement or a question with an answer in dispute. The “Purpose” and “Applicability” language for the “Hazard Overlay (HO) Zone require a study and set discretionary standards for development approval if the subject property is caught in the net.

2. As a permit for housing, the City is prohibited from applying any standards that are not clear and objective on the face of its ordinances. ORS 197.307(4). ORS 227.173(2).

This proposition has made its way into the Book of Well-Settled Law. The requirement for clear and objective standards for housing, which was launched in 1981, and tuned up persistently over the years (most significantly with the Legislature making the mandate more direct and more forceful in response to LUBA and the courts applying it with too gentle a hand) is now plain and direct, as quoted in footnote 2. The most recent tune up of the statute in 2017 affords the right to clear and objective standards to all housing, which would include the proposal here.

When local governments offend the statute, say by applying an ambiguous standard to deny a housing application, the statutory scheme puts the responsibility for the attorneys fees spent to defend the statutory right on the offending local government, for the reason that they have made a decision that is beyond their discretion under their plan and code. *See, e.g., Walter v. City of*

Eugene, 74 Or LUBA 671 (2016)(awarding attorney fees under ORS 197.835(10)(a)(A) following reversal of denial of denial and order to approve housing).

It is sometimes a hard call whether a standard in a code is clear and objective and may be applied or is ambiguous or calls for judgment and may not be applied. Most of the time, however, it is not a hard a call. For the most recent LUBA case summarizing the basics, see *Husk v. City of Bend*, __ Or LUBA __ (LUBA No. 2022-052, Oct. 21, 2022)(“as close as possible” in a standard flunks the clear and objective test).

There is nothing about the clear and objective test that is peculiar to any particular jurisdiction. There is, however, one notable case from Bandon. See, e.g., *Rudell v. City of Bandon*, 62 Or LUBA 279, 288-289 (2010)(BMC 17.24.040(C) standard requiring a showing that dwelling is “safe to build” is not clear and objective; neither is “minimize erosion”).

3. The threshold triggers for needing a GAR permit and the standards to be applied in making the permit decision are replete with provisions that are not clear and objective on their face; hence, there is no basis for denying the permit.

There are several exit ramps in the BMC for avoiding the need for or the effects of a GAR in the first place. Some of these exit ramps invoke standards that are not clear and objective in the meaning of the statute. They either involve applying terms that are ambiguous or that require the exercise of judgment, professional or otherwise. These standards may not be applied. More specifically:

(a) The “applicability” triggers for a GAR in BMC 17.78.020 do not apply or are not clear and objective; hence a GAR is not needed.

This BMC section states three triggers for a BMC. The first two reference status to DOGAMI maps; this site meets neither of the mapping requirements.

The **first trigger** is:

“All lands partially or completely within “high” or “very high” landslide susceptibility areas as mapped in DOGAMI OPEN FILE REPORT 0-16-02, “Landslide susceptibility overview map of Oregon.”

This site is mapped as “moderate.” See coastalatlus.com/coos-all-hazards.

The **second trigger** is:

“All lands partially or completely within “high” or “very high” liquefaction susceptibility as mapped in DOGAMI OPEN-FILE REPORT O-13-06, “Ground motion, ground deformation, tsunami inundation, co-seismic subsidence, and damage potential maps for the 2012 Oregon Resilience Plan for Cascadia Subduction Zone Earthquakes.”

This site is mapped as “moderate.” See coastal.atlas.com/coos-all-hazards.

The **third trigger** is “[a]ll lands along the oceanfront.” This standard is ambiguous and may not be applied. What does “along the oceanfront” mean? The westernmost tax lots? West of the coast highway? All land in the county? Land within a certain distance from the water? At high tide; at low tide? “We know it when we see it?”

In summary, there are just three triggers in BMC 17.78/020 for what areas “are considered potentially geologically hazardous and are therefore subject to the requirements of this section” - that is, requiring a GAR. The first two do not apply, based on their plain language and the maps. The third one is ambiguous and thus may not be applied based on ORS 197.307(4). The inquiry must end here. The Director erred in putting this development proposal the GAR process in the first place.

(b) The exemption from a GAR in BMC 17.78.030B.9. and BMC 17.78.040A.3. that is triggered by a certification from a licensed professional that “there are no high or very high geologic hazards present” is not clear and objective; hence, the City may not conclude that the proposal does not qualify for this exemption.

BMC 17.78.030.B.9. and 17.78.040.A.3. exempt areas for which a geologist certifies “there are no high or very high geologic hazards present.” These exemptions call for a judgment, which makes it not clear and objective. The City may not apply these standards to say that the site does not qualify for an exemption.

4. Notwithstanding all of the above, the applicant concurs in the recommendations of the GAR and consents to those conditions being applied to the issuance of the building permit for the proposed dwelling.

The recommendations in the GAR are common sense measures for development of a dwelling on this site. Even though they may not be required by the City as a result of a GAR, the applicant consents to the conditions recommended in the Director’s decision, and as suggested below in our response to development standards stated BMC 17.78.050, and consents to their being included with the building permit.

5. If you should find that the City may apply the GAR standards, the application should be approved, as conditioned to comply with the recommendations of the GAR.

As conditioned in the Director decision, and supplemented in our proposed findings and conditions addressing the BMD development standards as 17.78.060, the Hearings Official should find that this application is approved under the code standards for a GAR.

6. This application also meets, or can be conditioned to meet, the “Development Standards for Uses Subject to Review” stated in BMC 17.78.060.

The discussion that follows explains how this development proposal meets, or can be conditioned to meet, all of the “Development Standards” in BMC 17.78.060.

17.78.060. Development Standards for Uses Subject to Review

In addition to the conditions, requirements and limitations imposed by a required Geologic Report, all uses subject to a Geologic Assessment Review shall conform to the following requirements:

- A. Historical, Cultural, and Archaeological Resources: All activities and uses subject to Geologic Assessment Reviews proposed for areas of historical, cultural, or archaeologically sensitive areas, as identified in the City of Bandon Comprehensive Plan, shall require consultation with the appropriate Tribe prior to the commencement of any and all ground disturbing activity. Proof of this consultation shall be provided as a part of application submission.*

On October 19, 2022 the Coquille Indian Tribe provided comments on the subject application and development request, requiring an archeological permit be obtained for the subject property prior to any ground disturbances. The property owner acknowledges this requirement and will obtain the necessary permits, as well as comply with all requirements of the archeological study.

- B. Hazard Disclosure Statement: All applications for new development or substantial improvements subject to Geologic Assessment Review shall provide a Hazard Disclosure Statement signed by the property owner that acknowledges:*

- 1. The property is subject to potential natural hazards and that development thereon is subject to risk of damage from such hazards;*
- 2. The property owner has commissioned an engineering geologic report for the subject property, a copy of which is on file with City of Bandon Planning Department, and that the property owner has reviewed the Geologic Report and has thus been informed and is aware of the type and extent of hazards present and the risks associated with development on the subject property;*
- 3. The property owner accepts and assumes all risks of damage from natural hazards associated with the development of the subject property.*

The original approval of this application was conditioned to require a Hazard Disclosure Statement prior to issuance of Zoning Compliance. The applicant agrees to provide this statement prior to issuance of Zoning Compliance.

- C. Mitigation measures: If on-site structural mitigation measures are required as a condition*

of approval, the applicant shall, prior to the issuance of zoning compliance, record on the title to the subject property a notification that includes a description of the measures or improvements and that also specifies the obligation of the property owners to refrain from interfering with such measures or improvements and to maintain them.

The subject property is ineligible for a Goal 18 exception; no on-site structural mitigation measures are permissible under state law. Construction of the dwelling will be completed in compliance with the recommendations of the provided geologic report, to the specifications of future engineered construction documents by licensed structural engineer in the State of Oregon. The applicant agrees to record on the title of the subject property a notification that includes a description of measures or improvements, and that also specifies the obligation of the property owners to refrain from interfering with such measures or improvements, and to maintain them.

D. Safest site requirement: All new construction shall be limited to the recommendations, if any, contained in the Geologic Report; and

1. Property owners should consider use of construction techniques that will render new buildings readily moveable in the event they need to be relocated; and

2. Properties shall possess access of sufficient width and grade to permit new buildings to be relocated or dismantled and removed from the site.

The property owner will consider use of construction techniques that will render new buildings readily moveable in the event they need to be relocated. The subject property is approximately 95-feet in width and 206-feet in length with access from Beach Loop Drive SW.

E. Minimum Oceanfront Setbacks: In areas subject to the provisions of this section, the building footprint of all new development or substantial improvement subject to a Geologic Assessment Review shall be set back from the ocean shore a minimum twenty-five (25) feet from the top of the bank or greater if recommended by the Geologic Report.

The subject property is not oceanfront or in close proximity to the ocean shore, and greatly exceeds a 25 foot minimum setback. The subject property is also not located on an ocean cliff or bluff.

F. Erosion Control Measures: A certified engineering geologist, geotechnical engineer, or qualified civil engineer shall address the following standards:

Eric Oberbeck, Cascadia Geoservices, is a Certified Engineering Geologist.

1. Stripping of vegetation, grading, or other soil disturbance shall be done in a manner which will minimize soil erosion, stabilize the soil as quickly as practicable, and expose the smallest practical area at any one time during construction;

The subject property was previously graded and contains no vegetation beyond native grass. Soil disturbances will be done in compliance with the requirements of the Coquille Indian Tribe and State Historic Preservation Office (SHPO), to the minimum extent necessary for the construction of the proposed development.

2. Development plans shall minimize cut or fill operations so as to prevent off-site impacts;

Excavation and structural fill for the proposed development will comply with the requirements of FEMA, the Coquille Indian Tribe, and SHPO. Excess soil will be removed from the subject property to prevent a change in native grade or change in natural drainage.

3. Temporary vegetation and/or mulching shall be used to protect exposed critical areas during development;

The subject property is topographically flat and not located on an ocean bluff or cliff, there will be no critical areas exposed during development.

4. Permanent plantings and any required structural erosion control and drainage measures shall be installed as soon as practical;

The location and topography of the subject property does not warrant permanent planting for structural erosion control or drainage measures. Further, the subject property is bordered to the west by a stabilized sand dune. The proposed dwelling is set back approximately 163 feet from the western, rear property line.

5. Provisions shall be made to effectively accommodate increased runoff caused by altered soil and surface conditions during and after development. The rate of surface water runoff shall be structurally retarded where necessary;

The applicant has provided plans for an engineered private drainage system to retain all development related runoff. Permeable surfaces have been incorporated into the design of the proposed driveway to maximize natural soil drainage.

6. Provisions shall be made to prevent surface water from damaging the cut face of excavations or the sloping surface of fills by installation of temporary or permanent drainage across or above such areas, or by other suitable stabilization measures such as mulching, seeding, planting, or armoring with rolled erosion control products, stone, or other similar methods;

The subject property is topographically flat and not located on an ocean cliff or bluff.

7. All drainage provisions shall be designed to adequately carry existing and potential

surface runoff from the twenty year frequency storm to suitable drainageways such as storm drains, natural watercourses, or drainage swales. In no case shall runoff be directed in such a way that it significantly decreases the stability of known landslides or areas identified as unstable slopes prone to earth movement, either by erosion or increase of groundwater pressure;

The applicant has provided engineered plans for a drywell, designed for a 25 year storm event with overflow outlet directed to the natural watercourse at the western most point of the subject property. There are no know landslides or areas identified as unstable slopes prone to earth movement on the subject property.

8. Where drainage swales are used to divert surface waters, they shall be vegetated or protected as necessary to prevent offsite erosion and sediment transport;

No drainage swales are proposed in the development request. No offsite erosion or sediment transport is anticipated.

9. Erosion and sediment control devices shall be required where necessary to prevent polluting discharges from occurring. Control devices and measures which may be required include, but are not limited to:

- a. Energy absorbing devices to reduce runoff water velocity;*
- b. Sedimentation controls such as sediment or debris basins. Any trapped materials shall be removed to an approved disposal site on an approved schedule;*
- c. Dispersal of water runoff from developed areas over large undisturbed areas;*

The applicant does not believe erosion and sediment control devices are necessary to prevent polluting discharges from occurring, but is amendable to an condition of approval deemed necessary.

10. Disposed spoil material or stockpiled topsoil shall be prevented from eroding into streams or drainageways by applying mulch or other protective covering; or by location at a sufficient distance from streams or drainageways; or by other sediment reduction measures; and

The applicant intends to remove excavated earthen material the site, in compliance with FEMA floodplain development standards, and the requirements of the Coquille Indian Tribe and SHPO.

11. Such non-erosion pollution associated with construction such as pesticides, fertilizers, petrochemicals, solid wastes, construction chemicals, or wastewaters shall be prevented from leaving the construction site through proper handling, disposal, site monitoring and

clean-up activities.

The applicant agrees to prevent pollution of waters from construction chemicals with proper handling, disposal, site monitoring, and clean-up activities.

G. Certification of compliance: Permitted development shall comply with the recommendations in the required Geologic Report.

No development requiring a Geologic Report shall receive final approval (e.g. certificate of occupancy, final inspection, etc.) until the planning director receives a written statement by an appropriately licensed and/or certified professional indicating that all performance, mitigation, and monitoring measures contained in the report have been satisfied. If mitigation measures involve engineering solutions prepared by a licensed professional engineer, then the City of Bandon must also receive an additional written statement of compliance by the design engineer.

The applicant agrees to provide the City of Bandon with certification of compliance by the engineers of record upon completion of development.

III. Summary of Proposed Conditions of Approval:

1. All proposals of the applicant and recommendations of the associated geotechnical report shall become conditions of approval.
2. The applicant shall obtain all local, state, and federal permits required.
3. Prior to commencement of construction, the applicant shall submit a Signed Hazard Disclosure Statement on forms provided by the City of Bandon.
4. The engineer of record shall be located on-site to inspect development and provide a report to the City of Bandon for the following items:
 - a. Inspection and installation of tests, pile boring, and finished pile design.
 - b. Observation of excavation, stripping, fill placement, footing subgrades, and subgrades and base rock for floor slabs and pavement.
 - c. Inspection of finished building pad and pavement for conformance with drainage requirements.
5. As-built plans shall be provided to the City of Bandon prior to the issuance of Certificate of Occupancy.

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6. Prior to the issuance of a Certificate of Occupancy, the applicant shall submit a Certification of Compliance from the engineer of record, per the requirements of 17.78.070(G), indicating that all measures and recommendations listed in the report have been satisfied.

7. As required by BMC 17.78.040.F. this city approval based on the Geologic Report submitted shall be valid for five years from the date of the report. No extensions of time for the validity of the Report shall be granted.

Thank you.

Sincerely,

Bill Kloos

Bill Kloos

Cc: Tim Coan
Megan Lawrence
David Reed