

LAW OFFICE OF BILL KLOOS PC

OREGON LAND USE LAW
375 W. 4TH AVENUE, SUITE 204
EUGENE, OR 97401
TEL: 541.343.8596
WEB: WWW.LANDUSEOREGON.COM

BILL KLOOS
BILLKLOOS@LANDUSEOREGON.COM

November 16, 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 Final Argument

Dear Mr. Darnielle:

This the applicant's final argument, to accompany the rebuttal evidence submittal for the post-hearing open record period.

I. Summary

This appeal should be denied. The HO should find: (1) that the property does not meet the applicability standards of BMC 17.78 for inclusion in the Hazard Overlay Zone; (2) that the City lacked authority to impose the regulations of BMC 17.78 and BMC 17.20 on this application, based on ORS 197.307(4) and ORS 227.173(2); and (3) the remaining Type I (ministerial) request for Zoning Compliance, is approved as proposed.

II. Discussion

1. As a practical matter, dwelling development on the subject property will not impact drainage on the Lively property.

If the HO could look at the drainage issue on the Lively property, the evidence shows that there are three scenarios possible, and none leads to a conclusion that development of this site, as proposed, will have drainage impact on the Lively property.

Scenario One – Normal Conditions: As explained in the geologic report, this site has good draining soils. Stormwater collected on impervious surfaces will be directed to a dry well, which has been expanded at the request of the City to handle a larger storm. The stormwater Mr. Lively is concerned about will be collected and discharged to the ground.

Scenario Two – Groundwater at the Surface: On those occasions during wet weather when the groundwater is at the surface, no drywell will be fully effective when the next storm comes; there is no place in the ground for the water to in the drywell to go

immediately. It will flow to the west by pipe and discharge to the surface. Under these conditions all stormwater on the subject property and the Lively property will behave the same way. It will not be able to percolate. It will be sheet flow, as there is no storage in the ground. No storm water on either lot will be able to percolate.

Scenario Three – Base Flood: During the base flood event the Lively property and the subject property will be inundated by the flooding of Johnson Creek. The increment of storm water from the subject property will not be a factor in that event.

2. The code does not contain standards for erosion and drainage that may be applied, as they are not clear and objective.

The standards relevant to erosion and drainage in conjunction with GARs are in BMC 17.78.060.F.

The code standards in BMC 17.78.060.F. that apply to the erosion and drainage issues relevant to this application contain terms that are not clear and objective, and, therefore, may not be applied to this decision. They are ambiguous or require judgment. All the standards in BMC 17.78.060.F. are listed below. Each listed item contains multiple provisions that are not clear and objective. This is fatal to their applicability here. The most egregious terms in the provisions below are highlighted in **bold font**.

“17.78.060. Development Standards for Uses Subject to Review

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

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;
2. Development plans shall **minimize cut or fill operations so as to prevent off-site impacts**;
3. Temporary vegetation and/or mulching shall be used to **protect exposed critical areas during development**;
4. Permanent plantings and **any required structural erosion control and drainage measures** shall be **installed as soon as practical**;
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**;

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**;

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;

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;

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**;

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

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.”

3. Compliance with the development standards in BMC 17.78.060.F. are not a basis for making a decision under BMC 17.78.050.

BMC 17.78.050 sets three bases for the HO’s decision:

“17.78.050 Decisions of Geological Assessment Reviews A decision on a Geologic Assessment Review shall be based on the following standards:

A. The Geologic Report shall meet the content standards set forth in Section 17.78.040

B. In approving a Geologic Assessment Review, the decision maker may impose any conditions which are necessary to ensure compliance with the provisions of this section or with any other applicable provisions of the City of Bandon Land Use and Development Code.

C. In the event the decision maker determines that additional review of the Geologic Report by an appropriately licensed and/or certified professional is necessary to determine compliance with this section, the City of Bandon may retain the services of such a professional for this purpose. The applicant shall be responsible for all costs associated with the additional review. The results of that evaluation shall be considered in making a decision on the Geologic Assessment Review.”

Review standard A. inquires into the contents of the GAR. It does not call for an evaluation of the conclusions or recommendations. The appellant has not challenged compliance with this standard for the HO decision.

Review standard B. invites discretionary conditioning by the HO. This is an invitation for the HO to exercise their judgment as to: 1) what conditions are needed to comply with the provisions of BMC 17.78; and also 2) any other “applicable provisions” of the code. This is a broad invitation to decide what provisions are “applicable” and what conditions are “necessary.” These kinds of judgments are not allowed under ORS 197.307(4).

Review standard C. allows invites the HO to determine whether a second professional opinion “is necessary to determine compliance” with the relevant standards. This is a judgment call that is beyond what the HO is permitted to do under ORS 19.307(4).

Sincerely,

Bill Kloos

Bill Kloos

Cc: Tim Coan
Megan Lawrence
David Reed