BANDON HEARINGS OFFICIAL

DAVID REED **Applicant**	)	**File No. 22–030**
JOE LIVELY **Appellant**	)	**FINAL DISPOSITION AND ORDER**

Application Summary

On March 2, 2022, an application for a plan review of a proposed new two–story single family residence with a three–car garage was submitted by David Reed, an agent for Tim Coan. The proposed house will be located on the oceanfront and per Section 17.78.020.C of the Bandon Municipal Code (BMC), it will be located within a Hazards Overlay Zone. New development within the Hazards Overlay Zone requires a geologic assessment review, which is subject to the requirements for plan review under Section 16.04 of the BMC.

On March 23, 2022, staff deemed the application complete and on May 8, 2022, the Planning Manager approved the application. Notice of the determination was mailed to surrounding property owners. A timely appeal was submitted by the appellant on May 19, 2022.

Parties of Record

David Reed	Joe Lively (Sr?)	T&C Coan Living Trust (Bill Kloos)
Joe Lively (Jr?)	Tim Coen	

Appeal Decision History

Hearing Dates:	June 28, 2022, November 2, 2022
Record Closed:	December 16, 2022
Decision Date:	December 20, 2022

Appeal Deadline

Table 16.04.020 makes the Hearings Officer the hearing body for the appeal of a Type II Plan Review decision by planning staff. The appeal of the Hearings Officer's decision is to the Oregon Land Use Board of Appeals. The appeal must be filed with the Board within 21 days of the decision being final.

Statement of Criteria

Bandon Municipal Code (BMC) Chapter 17.78.

Findings of Fact

1. The property subject to this application, hereinafter referred to as the "subject property," can be identified as Tax Lot 2000, Map No. 29S–15W–01B. The parcel is approximately 0.49 acres in size and is located on Beach Loop Drive, Bandon, Oregon. The property is zoned CD–1 Controlled Development 1.

   The appellant lives on the property adjacent to the south of the subject property. Based upon prior stormwater runoff events, the appellant is concerned that during and/or after the construction of the proposed home, additional stormwater runoff will encroach upon his property. However, the subject property and adjacent properties to the north and south are relatively flat and are well vegetated with grass. The applicant's engineer recommends that construction excavation occur during the dry summer months to minimize the need for erosion and sediment control.

2. The subject property is located on the oceanfront of the Pacific Ocean. That is, it extends to the shore of the Pacific Ocean. It lies within the Johnson Creek drainage channel and is within the 100–year floodplain. Johnson Creek is 140 feet south of the site of the proposed dwelling. Borings of the soil on the property were done in December of 2021. At that time, the borings encountered groundwater at about two feet below the surface. The February 18, 2022, Geotechnical Site Evaluation of the site conducted by Cascadia Geoservices, Inc. opined that water levels were likely to rise to the surface during periods of sustained rainfall and that localized flooding was possible.

   During a 100–year flood event everything at or below the base flood elevation (BE) of 21 feet above mean sea level (AMSL) will flood. Both the subject property and the appellant's property lie within the Johnson Creek flood plain. Johnson Creek, the primary source of flood water, is located about 140 feet south of the appellant's property and the construction of the proposed dwelling is not anticipated to divert water to the appellant's property if FEMA guidelines for building in a floodplain are followed and there is no grading of the subject property that would redirect the flow of surface waters.

3. The proposed dwelling and associated pavement will create 6,946 square feet of impervious surface. Storm water runoff from the proposed single–family dwelling and pavement was initially proposed to be handled by a drywall system that was sized to accommodate a 25–year storm event. Section 17.78.060(F)(7) of the BMC

requires that drainage provisions be designed to adequately carry existing and potential surface runoff from a 20–year storm frequency. The drywell system, which was designed by a professional engineer, was to include clean–outs for long term maintenance.

Because of issues related to the height of the groundwater during wetter months, the applicant proposed that the drywall system be replaced with an onsite infiltration system. The infiltration system is comprised of three components; an underground storage tank, a gravity flow tightline, and an infiltration field located in the northwest corner of the subject property. The system is independent of groundwater levels and is designed to accommodate a 25–year stormwater event. It will discharge stored stormwater to the northwest.

Justification for the Decision (Conclusion)

As noted in the findings of fact, the Applicant proposes to construct a new single–family dwelling with a three–car garage on the property; which is zoned CD–1 Controlled Development 1. The subject property is located on the oceanfront.

The appellant, Mr. Joe Lively, is concerned that the modification of the subject property in the construction of the proposed dwelling and garage(s) will further exacerbate stormwater runoff from Beach Loop Drive. He contests the adequacy of the proposed drywell stormwater system, since replaced by an onsite infiltration system, for handling of runoff from new impervious surfaces and is concerned about the changes to the contour of the subject property during and after construction. This latter concern is addressed under the Section 17.78.060.F.5, below.

Section 17.78.020 Applicability

Section 17.78.020.C of the BMC states that the Hazard Overlay District applies to all lands along the oceanfront. Section 17.78.030.A of the BMC states that any new development or substantial improvements with the Hazard Overlay District requires a Geologic Assessment Review. Section 15.28.050 of the BMC defines “development” as “any man–made change to improve or unimproved real estate, including but not limit to buildings or other structures …” In the present case, a single–family dwelling and garage constitute ‘new development.’

The applicant has pointed to recent legislative changes that require local governments to apply clear and objective standards in its regulation of housing. [ORS 197.307(4) and ORS 227.173(2)] In specific, the applicant argues that a development permit for the proposed residence is not required because the regulations of the hazard overlay district do not apply. The applicant’s position is that the term “lands along the oceanfront” in Section 17.78.020.C is not clear and objective.

It is true that the term "oceanfront" is not defined in the BMC. Nor is the term used in OAR 660–015–0010(2), which defines coastal shorelands. However, the term "ocean shore" is used as a definitive reference where the rule explains the extent of coastal shorelands.[1] It seems that 'oceanfront' is also self–explanatory term. If property borders the Pacific Ocean it is oceanfront property. In the present case, there is no property between the subject property and the shore of the Pacific Ocean. I find the term "lands along the oceanfront" to be clear and objective. However, I do concede that perhaps a majority of the provisions of Chapter 17.78 contain language that is not clear and objective on their face.

The hearings official agrees with the sentiments expressed in the applicant attorney's October 28, 2022 letter that the 'recommendations' contained in the geologic assessment review make common sense for development of a dwelling on the subject property. ORS 197.307(6) provides that an applicant may choose an alternative approval process adopted by the local government that complies with applicable statewide land use planning goals and rules and where the approval criteria do not limit the residential density authorized in the base zoning district. The hearings official takes official notice that Chapter 17.78 of the BMC was acknowledged by the Land Conservation and Development Commission as being consistent with the statewide planning goals and the geologic assessment review does not reduce the density allowed by the Controlled Development Zone, which allows a single–family dwelling on lots that are a minimum of 5,400 square feet.

Because the hearings official has determined that the applicant has complied with the relevant provisions of Chapter 17.78 of the BMC, no further analysis of its provisions for language that is not clear and objective shall be addressed. However, I believe that the Planning Department is aware that a complete review of section of the zoning code is warranted. The following is a review of the application for consistency with the applicable provisions of Chapter 17.78:

Section 17.78.030 Geologic Assessment Review

Section 17.78.030.A of the BMC provides that any new development or substantial improvements with the Hazard Overlay District requires a Geologic Assessment Review.

Section 15.28.050 of the BMC defines "development" as "any man–made change to improve or unimproved real estate, including but not limit to buildings or other structures …" The definition of "development" is clear and objective in the sense that the term clearly encompasses the placement of a new dwelling and garage on the subject property.

[1]Statewide Planning Goal 17 notes that "[T]he extent of shorelands shall include at least: 1. Areas subject to ocean flooding and lands within 100 feet of the ocean shore or within 50 feet of an estuary or a coastal lake."

Section 17.78.030.B of the BMC list nine development activities that are exempt from the requirement for a geologic assessment. These activities are listed in a clear and objective manner and the applicant has not suggested that any of them apply to the current application. The Hearings Official concurs with this assessment.

Section 17.78.030.C of the BMC states that the "application, review and appeals" of a geologic assessment review must be in accordance with the plan review requirements of BMC 16.04. BMC 16.04 assigns a procedural review Type to each form of land use application. The designated Type determines notice procedures; who reviews the application; and review procedure, including appeals. In the present case, the application for hazard overlay development permit was assigned as a Type II procedure.

Section 17.78.030.D. states that a Geologic Assessment Review shall be accompanied by a Geologic Report prepared by a qualified geoprofessional.

A "geoprofessional" may be a registered geologist, a certified engineering geologist, a professional engineer or a geotechnical engineer. (Section 17.02 of the BMC.) The applicant is relying upon a February 18, 2022 Geotechnical Site Evaluation conducted by Cascadia Geoservices, Inc., written by Eric Oberbeck, a registered Oregon geologist and a certified engineering geologist. Adam Fulthorpe, geologist, also participated in the evaluation. *This criterion has been met.*

Section 17.78.040 Geologic Report Standards

A. The Geologic Report shall include the required elements of this section and one of the following:

1. A statement that the use and/or activity can be accomplished without measures to mitigate or control the risk of geologic hazard to the subject property resulting from the proposed use and/or activity;

The evaluation did not come to this conclusion.

2. ***A statement that there is an elevated risk posed to the subject property by geologic hazards that requires mitigation measures in order for the use and/or activity to be undertaken safely sited on the property; or***

The Geotechnical Site Evaluation (Pg. 13) found that Section 17.78.040.A.2 was applicable because mitigation measures were required due to the elevated risk posed by geologic hazards. In specific, the evaluation found that the subject property was marginally suitable for the siting of a residence. The identified geologic hazards were the presence of the floodplain, the loose and saturated nature of the soils beneath the surface that were susceptible to settlement due to liquefaction during a seismic event, and the location within a tsunami inundation area. To mitigate these conditions and to raise the proposed structure one foot

above the base flood elevation, the evaluation recommended that the structure be supported by bored pilings sunk at least 30 feet beneath the surface.

3. ***A certification that there are no high or very high geological hazards present on site. If such is certified by a licensed professional, then a Geologic Hazard Review application is not required. The City of Bandon is not liable for any type of certification that a geologic hazard is not present on site.***

   The evaluation did not certify that there were no high or very high geological hazards present on the site.

The applicant's experts have found Section 17.78.040.A.2 of the BMC to be applicable. The hearings official concurs. *This criterion has been met.*

B. Geologic Reports required pursuant to this section shall be prepared consistent with standard geologic practices employing generally accepted scientific and engineering principles, and shall at a minimum contain the applicable provisions of "Guideline for Preparing Engineering Geologic Reports," 2nd Edition, 5/30/2014, published by the Oregon Board of Geologist Examiners.

The Geotechnical Site Evaluation notes (Pg. 14) that it was prepared in accordance with the Guideline for Preparing Engineering Geologic Reports," 2nd Edition, 5/30/2014, published by the Oregon Board of Geologist Examiners. *This criterion has been met.*

C. For oceanfront property, reports shall also address the "Geological Report Guidelines for New Development on Oceanfront Properties," prepared by the Oregon Coastal Management Program of the Department of Land Conservation and Development, in use as of the effective date of this section.

The Geotechnical Site Evaluation notes (Pg. 14) that it was prepared in accordance with the "Geological Report Guidelines for New Development on Oceanfront Properties," prepared by the Oregon Coastal Management Program of the Department of Land Conservation and Development. *This criterion has been met.*

D. Geologic Reports required by this section shall include a statement from the preparer of the report that all of the applicable content requirements of this subsection have been addressed or are not applicable to the review. The report shall also include a description of the qualification of the licensed professional or professionals that prepared the report.

The Geotechnical Site Evaluation does not contain a statement that all of the applicable requirements of Subsection 17.78.040 have been addressed. However, the Hearings Official has reviewed the evaluation and has found that it has addressed all of the applicable requirements of Subsection 17.78.040. The evaluation contains the

vitae of Eric Oberbeck, the principal geoprofessional who prepared the report. *This criterion has been met.*

E. For the purposes of Section 17.78.040, a Geologic Report refers to both engineering geologic reports and geotechnical engineering reports.

The Geotechnical Site Evaluation has elements of both an engineering geologic report and a geotechnical engineering report. *This criterion has been met.*

G. Geologic Reports required by this section shall be valid for a period of five years from the date of preparation of such report. No extensions to this timeline shall be granted. The city assumes no responsibility for the quality or accuracy of such reports.

The revised Geotechnical Site Evaluation states that it can be relied upon for five years from its issue. *This criterion has been met.*

Section 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.

As noted above, the geologic report **(**Geotechnical Site Evaluation) meets all of the standards of Section 17.78.040. *This criterion has been met.*

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.

The Planning Manager's Final Order has included a condition that the engineer of record be located on–site during all ground disturbance and shall provide progress reports to the City of Bandon. The Hearings Official concurs with this requirement. *This criterion has been met.*

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.

There is no evidence in the record that suggests that additional review measures of the geologic report are necessary to determine compliance with Section 17.78.04 of the BMC. *This criterion has been met.*

Section 17.78.060 Development Standards for Uses Subject to Review

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.

The subject property is not located in an Historic–Cultural Overlay District. The Coquille Indian Tribe was sent notice of the application as the property may be close to known cultural resources. The tribe has responded and noted that the subject property is located within a known cultural site (35–CS–60). Because the development will be on a known archaeological site, an archaeological permit is required. A Cultural Resource Monitor will be required to be on–site during ground disturbance. The need for an archaeological permit and the requirement of a cultural resource monitor on site during construction should be informational items associated with the approval of this permit. *This criterion has been met.*

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.***

A hazard disclosure statement has been made a condition of approval. (Condition of Approval #3) *This criterion has been met.*

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.

Mitigation measures identified in the geologic report include bored pilings and a drywell stormwater system. The pilings shall be at least 30 feet deep; actual depth dependent upon additional exploratory boring and the requirement for five feet of core at the bottom of the boring. The city engineer has expressed no concerns about the adequacy of this mitigation measure.

Storm drainage has been an issue in the area, primarily due to elevation contours, the proximity of Johnson Creek, and the elevation of Beach Loop Drive. Serious questions have arisen as to the efficacy of the proposed drywell system given water table levels and the applicant has replaced this mitigation measure with an onsite infiltration system that is independent of groundwater levels and which can accommodate a 25–year storm event.

Finally, because the subject property is located in the floodplain, the lowest living area of the dwelling must be raised at least one foot above the base flood elevation.

This criterion has been met.

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.***

Condition of Approval #1 requires that all recommendations of the geologic report (Geotechnical Site Evaluation) be followed. *This criterion has been met.*

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 Planning Manger's Condition of Approval #4 requires that the footprint of all new development must be setback from the ocean shore a minimum of twenty–five feet from the top of the bank. This condition has not been adopted as the applicant's plans comply with this standard. *This criterion has been met.*

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;***

   The appellant has consistently voiced concern about topography changes on the subject property created during and after construction and how those changes might increase stormwater runoff onto his property. This concern is different from the present state of affairs where the appellant believes that current runoff from the subject property adversely affects his property to the south. Neither the development permit nor this decision is the proper forum to address that issue.

   To clarify, this provision of the Hazard Overlay Zone is only applicable to development authorized by the permit. Thus, the Planning Manager's authority through this provision only addresses the control of runoff created during the construction of and after the effects of the proposed development. I believe that this concern can be adequately addressed through conditions of approval that require a grade/fill permit that to be implemented during construction and which ensure that there is no net increase in off–site surface runoff caused by the proposed development. As noted in the findings, the subject property and adjacent properties are relatively flat and are vegetated with grass, thus minimizing the creation of erosion problems during construction. Further, construction excavation will occur during the dry summer months. These factors support a conclusion that a formal erosion and sediment plan is not required although the grade/fill permit application should address the techniques that will be used to prevent erosion and the flow of surface waters onto adjacent properties during construction.

   These criteria have been met.

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 proposed onsite infiltration system is designed to address a 25–year frequency storm. The system will reroute storm runoff away from the property to the south and to an area consistent with the historical drainage pattern. Groundwater issues will not affect the capacity of this system.

The appellant has agreed that the proposed onsite infiltration system will be adequate but still has concerns about the impact the proposed development will have on surface water flow towards his property. He proposes a preliminary grading plan to show how the property will be graded. In this regard, the applicant has suggested a condition that requires that a fill/grade permit be obtained from the City. The permit application should describe the methods that will be used to prevent stormwater runoff and erosion onto property to the south during construction and a general design that displays the contours of the property after construction. The conditions of approval require that the engineer of record must be located on site during construction and this obligation should ensure the adherence to erosion control measures.

This criterion has been met.

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.***

No drainage swales are proposed. The grading permit application required by Condition of Approval #4.d. will address proposed erosion and sediment control measures and the permit will not indicate how spoil material and stockpiled topsoil will be prevented from eroding into streams and drainageways. Non–erosion pollution is addressed by required DEQ regulations. *The above criterion have been met.*

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

This standard prohibits final approval of the proposed development 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. This is required by Condition of Approval #1. *This criterion has been met.*

IN THE MATTER OF THE APPEAL OF THE PLANNING MANAGER'S DECISION IN FILE NO. 22–030 IT IS HEREBY ORDERED THAT THE APPEAL IS DISMISSED AND THE PLANNING MANAGER'S DECISION IS AFFIRMED, SUBJECT TO THE FOLLOWING MODIFIED 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.

    d. A fill/grade permit shall obtained from the City of Bandon. The permit application shall generally outline the erosion control methods proposed during construction, shall indicate how spoil material and stockpiled topsoil will be prevented from eroding into streams and drainageways, and

shall indicate how the resulting contours of the subject property will not substantially increase historical stormwater runoff onto adjacent property to the south.

5. As–built plans shall be provided to the City of Bandon prior to the issuance of Certificate of Occupancy.

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. the 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.

Respectfully Submitted,

Gary Darnielle
Bandon Hearings Official