



# CITY OF BANDON

P.O. BOX 67  
BANDON, OREGON 97411

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## NOTICE OF FINAL DECISION

**DATE MAILED:** June 4, 2019  
**PROPERTY OWNER:** Steere Bandon Associates, LLC  
**REPRESENTATIVE:** Robert S. Miller III for Chris Keiser, Agent  
**FILE NUMBER:** 18-132  
**LOCATION:** 1090 Portland Ave.  
28-15-25CC / Tax Lot 1600, 4100, 4800 & 4900

**IN THE MATTER OF:** **Planning Application 18-132;** A Conditional Use Permit to construct a new 32-unit hotel with a small ground floor café and 60 spaces of off-site parking, on property within the Controlled Development One (CD-1) Zone in the City of Bandon.

### CONCLUSIONS AND DECISION:

On April 9th, 2019 the Bandon City Council conducted a public hearing upon the appeal of the Bandon Planning Commission's decision to approve a Conditional Use Permit. The Bandon City Council upheld the decision of the Bandon Planning Commission, approving a request for a Conditional Use Permit to allow the construction of a 32-unit hotel with a small ground floor café and 60 spaces of off-site parking, on property zoned CD-1 in the City of Bandon. After reviewing the application materials, testimony, comprehensive plan and Title 16 and 17 of the Bandon Municipal Code, the City Council found that the proposal satisfied the criteria for the request.

Materials concerning this decision, including the Findings of Fact and Conclusion of Law, dated June 3rd, 2019, are available for review during the regular office hours of 8:00 a.m. to 5:00 p.m. Monday through Friday at the Bandon City Hall, Planning Department located at 555 Highway 101, Bandon, or copies may be purchased at a reasonable cost from Bandon City Hall.

**This is the City's final action on this matter. Any further appeals must be made to the Land Use Board of Appeals (LUBA) within 21 days of this notice pursuant to ORS 197.830.**

Dennis Lewis  
Planning Director

June 4, 2019

**BEFORE THE BANDON CITY COUNCIL**

In the matter of planning action #18-132, a request for	)	
a Conditional Use Permit to construct a	)	FINDINGS OF
new 32-unit hotel at 1090 Portland Avenue SW with a	)	FACT AND
small ground floor café and 60 spaces of off-site	)	CONCLUSIONS
parking on property within the Controlled	)	OF LAW
Development 1 (CD-1) Zone in the City of Bandon.	)	

**Background**

On February 28 the Bandon Planning Commission issued its decision approving a conditional use permit for a hotel at the address above. The Commission’s decision identified the relevant standards, considered the issues raised, and made findings based on the evidences submitted by the parties.

On March 11 an appeal of that decision was filed by attorney Sean Malone on behalf of Bob and Carol Fischer and Oregon Coast Alliance. An appeal hearing was noticed and held on April 9, at which time the representatives for the applicant and the appellant made arguments related to the appeal issues. At the close of the appeal hearing the record was closed, the City Council conducted its deliberations, and it tentatively voted to deny the appeal and affirm the Commission decision.

At the date set forth below the City Council continued its deliberations and made a final decision to approve the use and adopt these findings. This decision is the final decision of the City on this matter.

**Scope and procedure for this appeal**

This appeal is subject to the appeal provisions in the Bandon Municipal Code (BMC) Chapter 124.

BMC 17.124.010.D. provides that the Council will determine whether to conduct the appeal on the record, subject to new evidence on some issues, or *de novo*. The appellants requested a *de novo* hearing in the appeal letter. The City Council decided to conduct the appeal on the record.

Therefore, as provided in BMC 17.124.020, this appeal was based on the evidence in the record made before the Commission. No new evidence was allowed in the appeal statement or at the appeal hearing. There were some objections during the appeal hearing that new evidence was being stated during argument and in response to questions from the City Council. This appeal decision is strictly limited to evidence already in the record.

This appeal is also limited to issues adequately stated in the appeal letter by Attorney Malone dated March 11. BMC 17.124.010.C.3. provides that an appeal shall contain “[t]he specific grounds upon which the review and appeal are being based.” The Council reads this code provision to mean that the only issues that the Council is required to consider are those that are specifically stated in the



appeal letter, in this instance the March 11 appeal letter from Attorney Malone. The Malone appeal letter includes a request, at page 2, to incorporate by reference as “specific grounds for appeal \* \* \* all testimony of their own and others contained in the record in opposition to the application as if set forth in full here.” To the extent that this request in the appeal letter is an attempt to include as appeal issues more than the issues specifically listed in the appeal letter, that request is contrary to the code. To be an issue that is among “[t]he specific grounds upon which the review and appeal are being base” the issue must be specifically called out in the appeal letter. In this instance, there are 11 pages of appeal issues stated in the Malone letter of March 11.

In summary, the appeal issues considered by the City Council here are the issues listed in pages 2 through 12 of the March 11 appeal letter.

### **Incorporation of Planning Commission Findings and Staff Reports**

The Planning Commission adopted nine pages of findings in support of its decision approving this application. Those findings are incorporated here. These findings supplement those of the Commission in order to address the issues on appeal. These finding control over the findings of the Commission to the extent of any inconsistencies.

Similarly, there were several Staff Reports issued in the course of this application. Each addressed standards for the decision based on the record. The Staff Reports are adopted as findings of the Council to the extent those Staff Reports are not inconsistent with the findings made here.

### **Decision**

The appeal is denied, and the decision of the Planning Commission is affirmed, based on the restated list of conditions and detailed findings below.

### **Restated Conditions of Approval**

The appeal statement takes issue with some of the conditions imposed by the Planning Commission. The decision addresses those issues and amends the conditions imposed by the Commission. For clarity, a complete restatement of the conditions of approval, as amended by the City Council, is provided here:

1. Plans submitted for Plan Review and for the actual construction of the Bandon Beach Hotel shall be in substantial compliance with the plans dated October 15, 2018 and submitted October 17, 2018 and as supplemented with plans dated January 2019 and submitted January 3, 2019 and approved as a part of the Conditional Use Permit application.
2. All signage placed on the subject property must meet the standards and procedures of Chapter 17.90 of the Bandon Municipal Code; specifically for the CD-1 zone the provisions of 17.90.080.

3. A full landscaping plan shall be required as part of the Plan Review application. Plants shall be chosen for successful growth in the localized micro-climate of the Coquille Point area. Local landscaping professionals should be consulted to select landscaping plant species that are known not to spread or naturalize into natural areas unless they are locally native species not considered invasive. The landscaping plan shall conform to the requirements of the Bandon Municipal Code.
4. A complete lighting plan for the property will be prepared and submitted as a part of the Plan Review application. The plan shall follow the Best Practices suggested by USFWS and avoid unnecessary perimeter lighting and ensure all exterior lights are fully shielded. The plan will meet the design objectives submitted by the applicant in the January 3, 2019 supplemental materials.
5. Final plans for the hotel shall incorporate all the bird friendly Best Practices recommended by USFWS and shall meet the bird friendly design objectives stated in the January 3, 2019 supplemental materials. All exterior materials and finishes shall be specified in the plans submitted for Plan Review. Natural materials and muted colors are encouraged.
6. The parking lots shall be developed consistent with the submitted site plan and shall be fully paved and striped and with landscaping and lighting installed prior to the issuance of a Certificate of Occupancy. Parking lot lighting shall be included in the overall project lighting plan and shall not directly illuminate adjacent residential properties. The parking lots shall be fenced along adjacent residential properties in accordance with the requirements of Chapter 17.104.025 Fence and Wall standards.
7. The applicant is required to record, in a form acceptable to the City, that the parking as proposed in the plan would be the specified parking that is required for this development. In the future, they could ask for a modification of their permit if they created additional parking elsewhere, and that request would have to go through a hearing process.
8. The applicant shall prepare and implement a solid waste management plan and integrated pest management plan that assures that trash and food waste is contained and handled in a way to be unavailable to rodents, gulls, and other scavenging animals.
9. A Public Works Permit is required for all work in the city right-of-way. All work done in the right-of-way will require an Engineer's Certificate upon completion and a two-year warranty bond on the improvements.
10. A certified engineering geologist must be present to observe and advise on general excavation, soil stripping, fill placement, footings subgrades, and subgrades and base rock for footings, floor slabs, and pavements to ensure that the applicant follows all recommendations included in the geotechnical report prepared by Cascadia Geoservices dated July 31, 2017.



11. The Plan Review application shall include engineering plans for the provision of water and sanitary sewer services which must be approved by the City Engineer.
12. The Plan Review application shall include an Erosion and Sediment Control Plan which must be approved by the City Engineer.
13. An equipment and material staging plan will be required as a part of the Plan Review application to assure that at all times such equipment and material is located on private property and not in the public right of-way.
14. Any Systems Development Charges due must be paid prior to approval of the Plan Review application.
15. The applicant is required to file all reporting and accounting requirements of the transient occupancy tax ordinance.
16. Any violation of conditions of approval may cause the Planning Commission to hold a public hearing to consider revoking the Conditional Use Permit.
17. The City of Bandon has the right and authority to prosecute any violation of these conditions of approval as allowed by the Bandon Municipal Code.
18. The applicant must adhere to all other City, State and Federal rules and regulations, and to the operational rules established by the Memorandum of Understanding between the Coquille Indian Tribe and the City of Bandon.
19. Building construction must be commenced within two years of approval of the applicant obtaining all land use approvals required and exhaustion of any appeals.

**General findings related to Statewide Planning Goal issues on appeal:**

Although each issue raised in this appeal is addressed separately below, it is efficient to make some general points here that will apply to issues that recur in the appeal.

Many appeal issues assert that the Statewide Planning Goals must be applied directly to this decision. That is not correct.

As a general rule, the Goals do not apply directly to site specific land use decisions such as this after the comprehensive plan has been acknowledged. *Byrd v. Stringer*, 295 Or 311, 666 P2d 1332 (1983). Bandon's comprehensive plan is acknowledged for the Coastal Goals. It is also acknowledged for Goal 5. The appellants have not explained why this general rule, that the goals do not apply directly after acknowledgment, is not applicable here.

Because the plan and code are acknowledged for the coastal goals, the Statewide Planning Goals are now implemented via the comprehensive plan and the zoning code. The plan and zoning code potentially apply to any site, depending on its location.

**Coastal Goals:** Those lands in the City that are subject to the city’s program for implementing the Coastal Goals have been assigned a related base zone or overlay zone. There are two related overlay zones – the Shoreland Overlay (SO) Zone (BDC 17.76) and the Beaches and Dunes Overlay (BDO) Zone (BDC 17.84). There is one related base zone – the Natural Resource and Open Space (NR) Zone (BDC 17.68).

The stated purpose of the NR base zone is stated in BDC 17.68.010:

“The purpose of the NR zone is to protect important natural resources, such as open space areas, significant fish and wildlife habitats, outstanding scenic views and sites, ecological and scientific natural areas, wetlands and watersheds, historical areas and structures, and areas necessary to maintain or protect the quality of air, land and water resources from inappropriate or incompatible development. In an NR zone uses shall be limited to those uses that are consistent with protection of natural values.”

The stated purpose of the SO overlay zone is stated in BDC 17.76.010:

“The purpose of the shoreland overlay zone is to implement the provisions of the shoreland management units adopted in the city’s comprehensive plan. The uses for each shoreland management unit are shown in Table 17.76.130, Shoreland Uses/Activities Matrix. These management units are shown on the city’s zoning map.

“The requirements of this overlay zone are applied in addition to the requirements of the underlying zone. In cases where the requirements of this zone overlap or conflict with the requirements of the underlying zone, the more restrictive shall apply.”

The stated purpose of the BDO overlay zone is stated in BDC 17.77.010:

“The purpose of the Beaches and Dunes Overlay (BDO) Zone is to implement the provisions of the Beaches and Dunes Section of the Coastal Resources Chapter of the City of Bandon Comprehensive Plan and Statewide Planning Goal 18 (Beaches and Dunes). The BDO boundary is identified by the City of Bandon utilizing preliminary ocean flood analysis maps developed by the Oregon Department of Geology and Mineral Industries (DOGAMI) in 2010 on behalf of FEMA for the purposes of identifying the 1% flood zone and the most landward extent of potential ocean flooding associated with the 1% storm. The purpose of the Beaches and Dune Overlay is to identify areas subject to ocean overtopping and wave undercutting that would be subject to Statewide Planning Goal 18 development restrictions.”



The Bandon zoning map shows that the subject property does not carry any of these three zones. The zoning map shows the base zone is CD-1, Controlled Development 1, BDC 17.20.

**Goal 5 Scenic Resources:** The city’s Goal 5 program for scenic resources is discussed in Chapter 12 of the comprehensive plan. Plan at 173. The plan explains that the Goal 5 program for scenic resources was adopted by Ordinance 1512 (Oct. 6, 2003).

The comprehensive plan identifies three “Geographic Viewsheds, one of which is the “Bluff/Beach Loop Area.” Plan at 173. This resource is discussed in detail beginning at page 177 of the plan. That discussion ends with a determination of significance. The plan discusses the ESEE analysis at page 178 and determined to limit the conflicting uses at page 179.

The “Conclusions” section for this resource is at page 178, and it summarizes the ESEE and states the program to achieve the goal by limiting the conflicting uses.

### “CONCLUSIONS

The area of primary concern in this viewshed is the west side of Beach Loop Drive. The north-south orientation of Beach Loop Drive allows access for the public at a number of sites identified in the Inventory that are publicly-owned and accessible for various ocean views. There are also secondary drive-by glimpses of the ocean and rock formations. While these secondary views contribute to the overall significance and importance of the viewshed, most occur over private property. These secondary view opportunities are partially protected by the dimensional standards required in the zone.

The preceding analysis identifies the economic, social, environmental, and energy (ESEE) consequences of fully allowing, prohibiting, and limiting conflicting uses within the viewshed. In the case of the Bluff/Beach Loop viewshed, the consequences of prohibiting conflicting uses would entail the condemnation/purchase of property not already developed in order to ensure unobstructed views over these properties. If conflicting uses were fully allowed, the result would most likely be detrimental to the viewshed as a whole, particularly without meaningful height and setback regulations. By limiting conflicting uses, a balance of view access, preservation of the resource, and assurance of development rights, although slightly constrained, will be achieved as proposed below.

#### *Actions to protect and/or ensure access to the resource*

Encourage voluntary view/conservation easements, secure right of first refusal for the sale of publicly-owned property, limit street vacations, enhance existing public sites, and limit lot coverage.”

The subject property is within this Viewshed because it, and the surrounding existing development, are located west of Beach Loop Road.

### **Findings related to specific issues.**

The appeal as filed has extensive, generalized and somewhat redundant allegations of error. It would be risky to try to synthesize the allegations or shrink them to a more coherent list. Therefore, to be confident that the City Council address all issues that are adequately raised, the balance of these findings restate each allegation of error and then address it. The specific issues from the appeal letter are quoted below in *italic* with related findings following.

### **Compliance with Code Standards:**

*The applicant has not met the burden of proof under Section 17.20.040(c) because the proposal is not safe to build, and the conditions do not avoid endangering life and property and fails to minimize erosion. Moreover, the City misconstrues and/or ignores the degree of hazard present, and fails to recommend appropriate precautions to avoid endangering life and property and minimize erosion. The allegation that the author of the GeoScience, Inc. report does not appear to have the credentials and professional licensing required by the Bandon Municipal Code for a geotechnical report misconstrues the code and is not supported by substantial evidence. GeoSciences has provided geologic evaluations on numerous land use applications and has specifically been relied upon by the Land Use Board of Appeals in their decisions. A geology report is a report required by the City of the applicant, not of any other member of the public submitting a review of the geologic report. The City has misconstrued section 17.20.040(c) by concluding that the development will not endanger life and property and will minimize bluff erosion. The findings are also inadequate because the findings do not address the issues raised by GeoSciences and fail to explain why those issues are not material or relevant to Chapter 17.20.040(c)'s requirement to satisfactorily evaluate the degree of hazard present and recommends appropriate precautions to avoid endangering life and property and minimize erosion."*

1. This allegation is largely duplicative of the error alleged below in the section title "Geologic Hazard Issues." Those findings are incorporated here.
2. The applicant's experts reached the ultimate professional conclusion, based on their research, that the project is safe to build. The appellants' expert did not state a contrary conclusion – that the project is not safe to build.
3. The Council agrees that the code does not state minimum professional requirements for persons who wish to take issue with the applicant's experts' conclusions. When there are conflicting expert opinions on any issue, the city decision maker must ultimately conclude whether the reports are satisfactory and which conclusions to believe. The City finds that the applicant's studies provide a satisfactory evaluation to support the required findings on life and safety and erosion and to meet the ultimate standard that the project is safe to build.



4. The City does not question the credentials of Gunnar Schlieder, Ph.D., CEG as a qualified engineering geologist. We simply observe that to prepare a full geotechnical report meeting the requirement of the code also requires the work of a professional civil engineer.

*The City's conclusion that the applicant has satisfied the maximum allowed impervious surface area is not supported by substantial evidence. There is no substantial evidence to demonstrate that the total impervious surface area is 64.9%*

The City of Bandon accepts the applicant's calculations, as expressed on the maps entitled "Site Area Assessment – Parcel 1600" (01.02.2019) and "Site Area Assessment – Parcels 4100, 4800 & 4900" (01.02.2019) that the maximum impervious surface area for the hotel site considered individually is 64.9%, the parking lot site considered individually is 48.3%, and that therefore the impervious surface area for the full project site will not exceed 65%.

*The findings for sections 17.94.060, .070, 080, and .090 (commercial design standards) are inadequate in that they do not identify the criteria and the facts relied upon to find the provisions are satisfied. Absent any actual analysis, appellants cannot identify the legal basis for finding compliance.*

In these three sections of the code there are a total of about 39 separate standards that govern landscaping, lighting, and sight design/building design/massing/materials. This allegation is not sufficiently specific to create an issue on appeal. The allegation amounts to nothing more than a broadbrush allegation that the findings on these 39 standards are inadequate.

*The City misconstrued section 17.20.090 and 16.42.010 in determining the native grade. By averaging, as well as other errors, the City has misconstrued its code and made findings not based on substantial evidence.*

The relevant code provisions are:

"17.20.090 Height of Buildings and Structures.

In order to maximize the ocean view potential of lots in the CD-1 zone:

A. West of Beach Loop Drive or north of Seventh Street SW, except as otherwise permitted in 17.20.100 Exceptions to height limitations, no portion of any building or structure shall exceed a height of twenty-four (24) feet, measured as provided in 16.42.010 Definitions, "Height of building or structure."

\* \* \* \*

"16.42.010 Definitions.

"Height of building or structure" means the vertical distance from the native grade to the highest point of the roof. On slopes, the height of the structure shall be

determined by taking the height of each side of the building measured from grade at the center of the wall to the highest point of the roof and divided by the number of measured sides.

\* \* \*

"Native grade" means the level of the ground prior to alteration."

1. The Planning Commission found that the native grade based on 1973 maps "was an average of at least 86 feet." The only error alleged with specificity is that the finding contains a statement that the measurement is an "average."
2. The "native grade" issue is discussed at page 9 of the February 7 letter from Robert Miller. That discussion is incorporated here.
3. The record shows that this is a sloped site and the proposed building has many sides. Data on the elevation of the native grade was taken from the center of each side of the building, and the average was calculated. Calculating the average native grade using this methodology is a reasonable way to resolve any ambiguity associated with variations in the native grade around a many-sided building.

*The City misconstrued and made findings not based on substantial evidence regarding the conditional use criteria at section 17.92.040(A)-(H). The applicant and the City's findings fail to demonstrate that there will be no adverse impact to on the function of the refuge and otherwise. Increasing the number of visitors to the upland area will result in more disturbance to wildlife, to both the upland area and the lowland area. There is simply no evidence to support the finding that the existing motel has not had a demonstrated adverse impact on the function of the Refuge. Regardless, the focus is not an existing motel but rather the new hotel. Moreover, the upland area's purpose as a buffer will be lost with the current proposal. The City further misconstrues policy no. 2 by concluding that the applicant will set the hotel further back to the east to open an expanded view corridor to the north. This conclusion fails to account for the greater size of the hotel and the obstructed views from siting the hotel in its proposed location. Moreover, the allegation that an inventoried scenic resource (BL-2) has been affected means that the City must carry out an ESEE analysis to determine the extent of the impact. Next, and rather incredulously, the City's findings conclude that the commitment of land along the south side of 11th street to surface parking preserves a view corridor to the ocean from Beach Loop drive. Appellants contend that a parking lot does not enhance a scenic resource. Parking lots detract from scenic resources; they do not enhance scenic corridors. The City has misconstrued the meaning of "enhance/" as well as an "identified scenic resource."*

1. This allegation of error begins with a conclusory statement that the City misinterpreted and made inadequate findings on each of the eight standards for conditional use permits. Without more specificity, that summary allegation is not adequate to state an issue under the test for an adequate appeal.



2. There are nine sentences that follow the opening sentence with its general allegation that none of the standards is met. None of these nine sentences references a specific code subsection (A through H). Based on this lack of specificity, no part of this allegation has sufficient specificity to state an issue that must be considered in this appeal.
3. Looking to each of the nine sentences, the subject matter of those sentences is addressed in other findings in this decision – findings that address specific standards. Those other findings are incorporated here.

*As set forth below and in testimony submitted before the Planning Commission, Appellants also assign error to the conclusion that the City's conclusion that the proposal is consistent with the purpose of the zone and dimensional standards; that the proposal has an adequate area for the use; that the proposal has adequate size and dimensions for the needs of the proposed use; that the site size and dimensions provide adequate area for aesthetic design treatment to mitigate adverse effects from the use of surrounding properties and uses; that the characteristics of the site are suitable for the proposed use considering the size, shape, location, topography and natural features; that the proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs or precludes the use of surrounding properties.*

As with the allegation immediately above, the allegations made here do not reference a specific code standard. They also do not state with any specificity what the Planning Commission did wrong. These allegations do little more than restate approval standards in the negative. Allegations that are as content-free as these are not adequately specific to raise an issue for appeal.

*Simply because a hotel existed at the location of the proposal does not, in and of itself, demonstrate that there has been no limitation on development or use of surrounding properties for permitted uses.*

The allegation being made here is not independently sufficiently specific to be considered, absent a reference to a standard in the code and an explanation of why the Planning Commission erred. Guessing a bit at what the appellants are trying to say, the City is not saying in this decision that the mere fact that this motel is replacing an existing motel obviates the need to address impact standards for the proposal.

*The site is not suitable for the use because the applicant's geologic report is deeply flawed, as set forth below. The applicant and the City have not accounted for the shortcomings in the geologic report as set forth below and in testimony before the Planning Commission.*

1. These sentences standing alone and not sufficiently specific to state an issue for appeal.
2. The adequacy of the applicant's geologic report is addressed in detail in the findings below.

### **Challenge to conditions:**



*Appellants also contend that the City has not identified all relevant criteria, as identified below.*

This does not independently state a separate issue on appeal.

*Condition of approval 2 does not identify any actual condition except to say that the all proposals of the applicant will be made conditions of approval. The public is entitled to know what those conditions are and the City misconstrues applicable law by not identifying the conditions.*

Condition 2 has been eliminated as unnecessary.

*Condition 3 requires a signage plan as part of the Plan Review application. The public is entitled to review that plan at this time. If not, a hearing that affords the same procedural and substantive rights as the current process must be provided upon consideration of the signage plan because it may contain discretionary decision-making or decision-making that requires the legal, factual, or policy judgment. Without seeing the plan, it is impossible to know the substance of the proposed condition. The same is true of the landscaping plan, lighting plan, the solid waste management plan, the erosion and sediment control plan, and the equipment and material staging plan in conditions 4, 5, 10, 15 and 16. It is impossible to determine how these plans will affect the applicable criteria in the absence of being able to review the plans.*

As conditioned above, the signage plan will subject to public comment and potential public hearing at a later time, consistent with the code.

*Condition 12 also entails discretionary decision-making and/or the exercise of legal, factual, and/or policy judgment, which requires that the City provide the same procedural and substantive rights as the current process when comparing subsurface conditions are observed and compared and in determining that the significant differences have been adequately addressed. The same deficiencies exist with regard to condition 13. The public has not yet seen or reviewed a hydrology study to determine how that study affects the conditional use criteria and other approval standards. In the absence of providing that hydrology study now, the City must make a condition requiring the same procedural and substantive process as has been provided here.*

This condition has been amended to eliminate discretionary decision making in connection with construction.

*The site size and dimensions are not adequate for the needs of the proposed use. The proposal is adjacent to the Coquille Point of the Oregon Islands National Wildlife Refuge. While a previous motel existed in the location of the proposal, that does not mean that a new proposal may not satisfy the standards. The needs of the proposed use, considering the refuge, would require an obstruction to block light from the hotel to the refuge. Because the hotel would face the refuge directly and contain glass and lights, the site size and dimensions are not adequate. Furthermore, geologic issues exist on the subject property that endanger the hotel, as indicated in other testimony. If the size and dimensions were greater and not subject to geologic issues, then the proposal could*



*likely satisfy this standard. However, because of the inherent problems on the site, this standard cannot be satisfied.*

*The site size and dimensions do not provide adequate area for aesthetic design treatment to mitigate possible adverse effect from the use of surrounding properties and uses. Again, the overriding concern is the impact to the adjacent Coquille Point portion of the Oregon Islands National Wildlife Refuge. The same reasons the applicant cannot satisfy the standard immediately above, the applicant cannot satisfy this standard. There is little aesthetic design that can mitigate the adverse impacts to the Coquille Point.*

*The characteristics of the site are not suitable for the proposed use considering size, shape, location, topography and natural features. As with the two standards above, the impact to the nationally significant natural feature at issue is inconsistent with the proposed use. The glass facade and lighting proposed for the hotel are plainly inconsistent with surrounding natural features.*

*The proposed use will alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the permitted uses listed in the underlying zoning district. The property will allegedly be placed in a different area than the existing motel, resulting in views of the ocean being blocked. Beyond that basic issue, again, there is potential for the hotel to significantly affect the refuge, as noted above.*

1. The allegations above are not sufficiently specific to raise an issue on appeal, as they fail to reference code standards, and they fail to explain why any standard is not met.
2. The potential impacts on the Refuge are discussed elsewhere in these findings.
3. The adequacy of the geologic studies is addressed in detail elsewhere in these findings.

### **Comprehensive Plan Issues:**

Appellants quote parts of the Comprehensive Plan, allege that these are policies that apply to this decision, and assert noncompliance. In the findings below, each excerpt from the comprehensive plan is identified as to its location; then the findings explain, based on the text of the excerpt and its context in the plan, why that language does not state a mandatory policy that applies to a site-specific proposal such as this.

*The proposal is not consistent with the comprehensive plan. The Comprehensive Plan and its policies are overwhelmingly implicated by the proposal. There are a number of applicable policies, as well as protected goal 5 inventoried sites. Applicable policies include the following, many of which were not addressed by the City or the applicant:*

*"The fourth important natural area is the Oregon Islands National Wildlife Refuge administered by the United States Fish and Wildlife Service. The numerous sea stacks of the*

*Oregon Coast comprise this refuge. Bandon has many, very beautiful offshore rocks which are part of the refuge. Even though the rocks are not within the city limits, they are still an integral part of the City and its outstanding natural setting."*

*"The above mentioned four areas of natural importance are significant fish and wildlife habitats with characteristics similar to Oregon estuaries in general."*

1. This language is from Chapter 9: Natural Resources, at page 158 of the plan.
2. This section of the plan is a list of four areas that the plan describes as "Ecologically and Scientifically Significant Natural Areas." Plan page 158.
3. This language, while stating the importance of the specific resources, does not state a policy that can be applied as a standard in this decision.

*Wildlife and Scenic Waterways: "Inventoried areas are the National Wildlife Refuges (Oregon Islands and Bandon Marsh), and riparian areas."*

1. This language is also from Chapter 9: Natural Resources, at page 162 of the plan.
2. This language describes areas that are inventoried natural resources in the plan, more specifically under the category of "Wildlife and Scenic Waterways."
3. This language does not state a policy that can be applied as a standard in this decision.

*"Immediately offshore from Bandon is a group of rocks, all of which are included as a part of the Oregon Islands National Wildlife Refuge. This refuge system is administered by the United States Fish and Wildlife Service USF&W). The refuge is dedicated to the wildlife found on it and for management of the wildlife habitat and protection and preservation of endangered or rare wildlife.*

*The rocks off Bandon are used by several endangered species. The California Brown Pelican appears in the area from about August to November. This species suffered a very large population loss and is now beginning to recover. Bald Eagles and Peregrine Falcons have been observed in the area. Other commonly observed species include Double Crested Cormorants, Pigeon Guillemots and the Common Murre. The offshore rocks represent vital habitat to many seabirds who nest there. Burrow nesting species, such as Tufted Puffins and Leach's Storm Petrels, require areas that are inaccessible because their burrows are easily*



*trampled. Human disturbances have been known to cause panic and destruction of young birds in breeding areas. For these reasons, the rock islands are off-limits to humans."*

1. This language is also from Chapter 9: Natural Resources, at pages 168-169 of the plan.
2. This language describes areas that are inventoried natural resources in the plan, more specifically under the category of "Marine Birds."
3. This language does not state a policy that can be applied as a standard in this decision.

*"The City shall also strive to reduce the hazard to human life and property, and the adverse effects upon water quality and fish and wildlife habitat resulting from the use and enjoyment on the Coastal Shorelands of the Coquille Estuary."*

1. This language appears in plan Appendix C: Coastal Resources Research Material, at page 272 of the plan. More specifically, it is under a subheading titled: Coastal Shorelands, Statewide Planning Goal 17.
2. There are three Appendices attached to the plan. The text of the plan makes no specific reference to Appendix C. Therefore, there is no guidance in the plan as to how the information in the plan is to be used. For this reason there is no basis for applying this language as a policy to a specific decision.
3. In addition, this language on its face is not mandatory. It is limited by the phrase "strive to reduce." Because it is not mandatory, it need not be applied.
4. In addition, and most importantly, this language is directed to City, suggesting direction to the initiatives that the City should take on its own. It is not phrased in terms that apply to site-specific applications like this one.

*"[E]xisting views may be obstructed by larger residential structures, and more and larger tourist commercial uses.... The purpose of this Goal 5 process is to ensure that public interests related to scenic resources quality and access are fully addressed. This process is not intended to ensure private property owners any rights or privileges beyond what is afforded in the Zoning Ordinance." (emphasis in original).*

1. This language appears in Chapter 12: Scenic Resources of the plan Appendix C: Coastal Resources Research Material, at page 174, under a subheading Geographic Viewsheds. The plan language chosen by the

appellants starts with the last half of a sentence, then skips a sentence, then captures the next sentence.

2. Looking at the entirety of the paragraph from which the appellants have borrowed selectively, the language makes several points: (1) there is pressure to develop houses in scenic areas; (2) however, the view sites identified in the Goal 5 Inventory are already “generally well protected;” (3) the Goal 5 process ensures fully addressing the public interests related to scenic resources; and (4) private property owners are intended to get the protections stated in the zoning ordinance.
3. This plan language explains how the Goal 5 process has been used in Bandon to protect important view sites. It does not trigger a new Goal 5 process. It does not establish any standards for protection that are not already present in the zoning code.

*"The potential conflicting activities and uses identified are those currently contained in the zoning ordinance as permitted or conditional uses, as well as the construction, reconstruction and enlargement of buildings and structures on the west side of Beach Loop Drive, on the Jetty, and on the Waterfront north of 1st Street. Statewide Planning Goal 5 requires the City to protect or conserve significant scenic resources."*

1. This language appears at page 173 of the plan, in Chapter 12: Scenic Resources, under the heading Geographic Viewsheds.
2. The discussion of Geographic Viewsheds explains that “there are three identified viewsheds” in the plan. The *quoted* language then follows the description of the three viewsheds, one of which is the “Bluff/Beach Loop Area.” The quoted language explains how the Goal 5 process works and what kinds of uses, listed in the zoning ordinance, are potential conflicting uses with the identified viewshed resources. The very next paragraph in the plan explains that the Goal 5 process has not been completed for Viewshed resources, and explains how the City will comply with Goal 5 in the interim. It says:

“The Goal 5 process will be completed when the City and its residents determine which viewshed sites are significant, and where conflicting uses will be limited, prohibited, or fully allowed. Alternatively, the City may conduct an ESEE analysis each time a proposal conflicts with scenic views as its existing policy requires. However, this approach is onerous and leaves too much uncertainty for landowners and citizens alike. It is proposed that this be removed entirely.” Plan at 173.



\* \* \* \*

“When the scenic resources process is completed and significant resources protected, the City will have complied with Goal 5.” Plan at 174.

3. Since the time the language quoted by appellants was put into the Plan the City has completed the Goal 5 process for Viewsheds. Therefore, the language quoted by the appellants above does not trigger a new Goal 5 analysis. Instead, because the Goal process is complete, the applicant is required to comply with the acknowledged Goal 5 program as it is implemented through the zoning ordinance.

*The ranking of significant viewpoints also includes several applicable viewpoints, including the "[e]nd of 8th St. SW west of Beach Loop," "Coquille Point NWR," etc.*

1. The phrases in quotes above are found at page 175 of the Plan. They are in a Table that reports the results of a preference poll of 160 persons. The information in the Table is explicitly qualified with the statement that the information is “not a direct determinant of potential protective measures” for anything listed in the Table.
2. This excerpt from the Plan does not create a standard that applies in this decision.

*"The City shall also manage these coastal shorelands in a way that is compatible with the characteristics on the adjacent estuary."*

1. This language appears in plan Appendix C: Coastal Resources Research Material, at page 272 of the plan. More specifically, it is under a subheading titled: Coastal Shorelands, Statewide Planning Goal 17.
2. There are three Appendices attached to the plan. The text of the plan makes no specific reference to Appendix C. Therefore, there is no guidance in the plan as to how the information in the plan is to be used. For this reason there is no basis for applying this language as a policy to a specific decision.
3. In addition, and most importantly, this language is directed to City, suggesting direction to the initiatives that the City should take on its own. The City has implemented this language through its acknowledged program for Goal 17. This language does not apply directly to land use decisions. It is implemented through the city zoning ordinance.

*Statement of Significance of Beach Viewshed, provides that the "scenic qualities of the Beach viewshed are derived from the view of the Pacific Ocean to the west and the bluffs and dunes to the east. The perspective gained from observing both the ocean and the bluffs*

*rising to the east is unlike the experience of the Bluff/ Beach Loop viewshed or the Coquille River viewshed, and qualifies it as a significant scenic resource.*

1. This language is from Chapter 12: Scenic Resources, under the heading Beach Viewshed, at page 183 of the Plan.
2. This language is embedded in a two-page description of the “Beach Viewshed” as a significant resource that is the subject of both state and local protection. Plan at 183-184. The Plan explains at page 183: “City and State Law control development on the foredunes and the bluff, which is implemented through comprehensive plan policies and the zoning ordinance.”
3. The Plan discussion of Beach Viewsheds ends with this description what resources will be protected and how:

“Any beach views which are determined to be of exceptional significance, and whose significance is affected by development on the foredunes and the bluff, require protection by policies and ordinance provisions adopted in compliance with the Goals and Administrative Rules. These will be reflected in policies and ordinance provisions which relate to the Beach Loop/Bluff Viewshed Area and the Coquille River Viewshed Area.” Plan at 184.

4. This language means that policies and implementing measures that are to be applied directly to views that have been determined to be of “exceptional significance” are to be found in plan policies and code provisions that “relate to the Beach Loop/Bluff Viewshed Area and the Coquille River Viewshed Area.” The language quoted by the appellants here, standing alone, is not a standard to be applied in individual decisions.

#### **Goal 5 Issues:**

*Goal 5 is implicated here because the proposal will affect an inventoried Goal 5 resources, as noted above and the identification of the NWR as inventoried wildlife habitat. The Comprehensive Plan acknowledges that "The potential conflicting activities and uses identified are those currently contained in the zoning ordinance as permitted or conditional uses, as well as the construction, reconstruction and enlargement of buildings and structures on the west side of Beach Loop Drive, on the Jetty, and on the Waterfront north of 1st Street. Statewide Planning Goal 5 requires the City to protect or conserve significant scenic resources." Comprehensive Plan, Page 173. Here, the City failed to conduct an ESEE analysis. Because the proposed enlargement of height, width (i.e., reduced setbacks), and so forth, there admitted conflicts with Goal 5. Enlarging the existing development will result in greater adverse impacts to species that use the adjacent NWR as habitat.*



1. This allegation asserts that the City must conduct an ESEE analysis because the proposed use, as a use allowed in the zone, is a use that conflicts with the Goal 5 resource. This allegation reflects a misunderstanding of how the Goal 5 process works.
2. Appellants are correct in saying that the type of development that is proposed here is identified in the Goal 5 ESEE analysis as a use that conflicts with the Viewshed resource. In this instance, the significant Goal 5 resource that is protected by the acknowledged Goal 5 program is “Beach Loop/Bluff Viewshed. As discussed above, that includes everything west of Beach Loop Road, which includes the site of this proposal.
3. The existing Goal 5 program for Beach Loop/Bluff Viewshed includes an ESEE analysis. The City determined to adopt a program to “limit the conflicting uses.” The mechanism to limit the conflicting uses is, among other things, the lot coverage standards in the zoning code. As quoted from the plan in the “General findings related to Statewide Planning Goal issues on appeal” above, the Goal 5 program for this Viewshed is:

*“Actions to protect and/or ensure access to the resource*

Encourage voluntary view/conservation easements, secure right of first refusal for the sale of publicly-owned property, limit street vacations, enhance existing public sites, and limit lot coverage.”

4. Thus, under the acknowledged Goal 5 program, a proposed use that is allowed in the Viewshed area by the zoning is sufficiently limited in the zone that applies if it complies with the lot coverage limits stated in the zone. This proposal complies with the lot coverage standard. Therefore, it is consistent with the acknowledged Goal 5 program.
5. Looking to the specifics of the error alleged above, the Appellants excerpted out of context one sentence from plan, which describes how the ESEE analysis was done in the plan, and asserts that it triggers the need for a new ESEE. Actually, the ESEE has already been done, as documented in the balance of Chapter 12, and this conflicting use was determined to be allowed, subject to the limitation in the code on lot coverage. No new ESEE is triggered.
6. This allegation also references the National Wildlife Refuge (NWR), asserts it is a protected Goal 5 wildlife resource, asserts that this proposed use will increase adverse impacts on wildlife in the NWR, and this triggers the need for a new ESEE. The only plan language referenced in this allegation comes from the Goal 5 program for Viewsheds. Appellants’ allegation about NWR wildlife impacts and an ESEE is not referenced to plan language about wildlife. This allegation is not sufficiently developed to be addressed.

*A goal 5 ESEE analysis is warranted because the proposal will affect scenic views and the quality of goal 5 resources. An original goal 5 ESEE analysis exists but a new analysis is necessary because the proposal will affect goal 5 resources. The NWR is a goal 5 resource, and the adverse*



*effects to that resource from the construction and operation of the hotel, which must be addressed through a goal 5 ESEE analysis. Indeed, the comprehensive plan acknowledges that whether there is construction, reconstruction or enlargement, then those are conflicting activities that must be addressed.*

1. Here the appellants concede that the plan contains an ESEE analysis as a part of the acknowledged Goal 5 program. However, they allege that a new ESEE analysis is needed because the NWR is in a protected Viewshed, and they allege the new development will increase impacts on the Viewshed.
2. See findings directly above. As noted above, Appellants misunderstand the acknowledged program, which anticipates the potential for greater impacts on the Viewshed but has limited the conflicts by imposing lot coverage standards in the zoning code. No new ESEE is needed if the proposed use complies with the zoning.

**Goal 17:**

*Goal 17 (Coastal Shorelands) is also implicated, as set forth above, but there has been no attempt to find consistency with Goal 17 and the Comprehensive Plan's implementing provisions. Indeed, Coastal Shorelands Criteria includes Coquille Point as a headland. Comp Plan at 195 of 327. Coastal Shorelands, Policy M requires as follows: "The City shall protect major marshes and significant wildlife habitat located within the Coquille River Coastal Shorelands Boundary. The Policy recognizes that special protective consideration must be given to key resources in coastal shorelands over and above the protection afforded such resources elsewhere in this Plan."*

1. Goal 17, Coastal Shorelands, does not apply directly to this decision because the city's program for the Coastal Goals is acknowledged. See general discussion about the Goal 17 program above. As noted above, the program for the Coastal Goals uses two overlay zones and the NR base zone to apply the protections that the City, as an ultimate policy choice, has determined are appropriate to limit the conflicting uses.
2. The quoted Policy M appears at several locations in the plan, specifically pages 46, 227, and 286. This policy statement reflects the city's general obligation under state law and commitment to adopt a program implementing Goal 17. The City adopted such a program, which determines the degree to which the resources will be protected and conflicting uses will be limited. This policy, therefore, is implemented through the zoning code; it is not independently applicable.

*The proposal is inconsistent with Section 17.68. Because the NWR is covered by section 17.68 of the Bandon Municipal Code, the applicant must demonstrate that the proposal is consistent with section 17.68. The purpose of the Natural Resource and Open Space Zone is to protect important natural resources, such as open space areas, significant fish and wildlife habitats, outstanding scenic views and sites, ecological and scientific natural areas, wetlands and watersheds, historical areas and structures, and areas necessary to maintain or protect the quality*



*of air, land and water resources from inappropriate or incompatible development. Here, the proposal allows for not only inappropriate but also incompatible development.*

1. The NR zone applies to land adjacent to the subject property. It does not apply to the subject property.
2. Appellants have not provided any legal basis for asserting that the provisions of the NR zone apply to land that is not subject to the NR zone. There is nothing to support that assertion, either in the Purpose section or the permitted uses in the zone.

*As noted above, the proposal must be Consistent with Ordinance No. 1335. Ordinance No. 1335, passed in August of 1994 by the Bandon City Council requires that development be compatible with the refuge, amongst other requirements:*

*"[t]he privately owned properties in the vicinity are available for development under the controlled Development provisions of the Bandon Zoning Ordinance. The establishment of the Wildlife refuge necessitates that when the neighboring private lands are proposed for development activity that special consideration occur. (Coquille Point included by Ord. 1335, August 15, 1994)"*

1. The quoted language is from Ordinance 1335, most of which has been codified in the comprehensive plan, specifically in Section II of the plan, which deals with Inventories. See Chapter 2, Land Use. Chapter 3 discusses land uses in the City by area. The discussion of the West Bandon area begins at page 77. "Coquille Point" in the West Bandon area is the subject of a separate discussion beginning at page 78. What follows is a detailed chronology of planning for the Coquille Point area, including a recap of the federal acquisition and city efforts to coordinate planning for Coquille Point with US Fish and Wildlife Service.
2. The quoted language above explains that the Controlled Development zone applies to development near Coquille Point. The CD zone incorporates the degree of protection determined to be appropriate under the city's program for implementing the goals. The quoted language does not impose an independent requirement for review.
3. In summary, this proposal is consistent with Ordinance No. 1335 (as it has been incorporated into the plan) because this proposal is subject to the provisions of CD-1 zone.

*"These private lands benefit from the proximity of the refuge, development may only occur in a manner that is compatible with the refuge. The development process must include a review of (but not limited to) the scale of development proposed in relation to the refuge; view protection and enhancement for the refuge along with the other public areas and right of ways, exterior lighting, vehicular traffic, vegetation and landscaping."*

1. This language is the last sentence of Ordinance No. 1335. It does not appear in the codification of the comprehensive plan.
2. This language does not create an independent standard for review of site-specific applications such as this. It is implemented through Special Policy 2 and the provisions of the zoning code.
3. Compliance with the standard is demonstrated by the findings addressing Special Policy 2 and the provisions of the zoning code.

*Because the subject property falls within Ordinance No. 1335, the local government must demonstrate compatibility, as well as view protection and enhancement. By allowing a larger development than already exists, it is unclear how the applicant purports to demonstrate compatibility or to protect and enhance views. A larger motel will restrict views. This is another instance the City not identifying all relevant criteria for the proposal.*

1. Ordinance No. 1335 was a vehicle for amending the comprehensive plan. The substantive provisions from the Ordinance have been incorporated into the Plan and are implemented through the zoning code.
2. The relevant protections for the National Wildlife Refuge are contained in the terms of the NR zone and the terms of the CD-1 zone, which applies to the subject property. As discussed elsewhere, the proposed use complies with the CD-1 zone.

*Also applicable is the following special policy: "The Coquille Point Wildlife Refuge (Oregon Islands): When property within 100 feet of the Refuge boundary is proposed for development, the applicant shall demonstrate that the proposal will have no adverse impact on the function of the Refuge. This shall be accomplished by supplying detailed plans that include proposed landscaping and vegetation, shielded exterior lighting, and noise minimization. In addition, the applicant shall demonstrate how the proposal enhances an identified scenic resource."*

*As noted above, there is little ability to demonstrate that there will be no adverse impact on the function of the refuge. The proposal contains western-facing windows on practically the entire facade, which will result in bird strikes and impacts.*

1. Special Policy 2 appears at page 12 of the Plan.
2. **"No adverse impact"**: With respect to the "no adverse impact" part of this policy, the Planning Commission determined that the function of the upland portion of the Refuge, which is closest to the proposed use, is to provide access to the Coquille Point headland so that the public may view and enjoy the resource. It provides a buffer between the urban development to the east and the bluff, beach and off-shore rocks to the west. The



area of the Refuge that is beyond the public access area is quite remote from the proposed development. The proposed motel redevelopment will not have an adverse impact on the part of the refuge that provides public access for viewing the balance of the Refuge. The public access facilities and the motel improvements are adjacent compatible forms of development. The Planning Commission finding of no adverse impact is affirmed.

3. More importantly, the scope of the phrase “no adverse impact” by the terms of the policy. The second sentence of the policy provides meaning to phrase. The City Council interprets the policy as limiting the range of issues that are relevant to the potential for adverse impact to several types of potential impacts – landscaping and vegetation, exterior lighting, and noise. These issues are to be the subject of detailed plans, which are to be submitted by the applicant.
4. The applicant applied the “no adverse effect” standard to the evidence in the record beginning at page 14 of the February 7, 2019 letter from its attorney, Robert Miller. That letter explained:

“This is actually a very straightforward standard to meet. Even “noise” is permitted; the applicant just has to demonstrate minimization. The standard does not even require a demonstration “bird friendly” design attributes or special visual appearances. We have met this standard by supplying a landscaping and vegetation plan with a select list of perennials, plants, and trees suitable friendly to the USF+W land, agreeing to shield all exterior lighting, and minimizing noise in close consultation with USF+W authorities by programming all parking off-site from the Bandon Beach Hotel, away from USF+W land, programming the entry, lobby, and café to the Portland Avenue side, away from USF+W land, and showing a high level of acoustic separation and shielding between rooms and in exterior walls in our plans.

The good news is that the Bandon Beach Hotel application goes farther than the code- minimum required in making sure there are no adverse effects on the function of the Refuge. We refer to the USF+W *Comprehensive Conservation Plan and Wilderness Stewardship Plan* (hereinafter, the “CCP”) published in September 2009 following significant public involvement, including five public meetings, two interagency meetings, three planning updates, and opportunities for public review and comment throughout. This CCP comprehensively and authoritatively spells out the function and scenic value of the Coquille Point Unit. We introduced the CCP in our original application back on October 17, 2018 and our neighbor Nancy Evans on January 31, 2019 added the CCP in its entirety to the record, an action which we wholeheartedly encouraged and endorsed.

We learn from the CCP that –

the resource intended to be protected is the offshore rocks and islands, and the vertical bluff itself;

the flat headlands themselves, east of the vertical bluff, are intended to be a buffer zone, to insulate the vertical bluff and offshore rocks from City of Bandon development, “to reduce negative interactions between the public and wildlife;” and

a secondary function of the flat headlands is to provide viewing and photographing opportunities for the public – not of the flat headlands themselves, but rather of the birds and wildlife on the far offshore rocks and islands.

The CCP makes it clear that it is only the offshore rocks which carry Wilderness Designation – Table Rock, North Coquille Point Rock, Middle Coquille Point Rock, Elephant Rock, and the innumerable smaller offshore and nearshore rocks. The flat plateau of the headlands and even the bluff itself are specifically excluded from Wilderness Designation. See Figure 2-6 on a following page; the rocks (red) is Wilderness Designation, the headland (blue) is excluded from Wilderness Designation.

The CCP explicitly says that the flat headlands have “limited wildlife use” (P-38) and explains at E-32 that this is why we are okay with turning it over to people and their dogs, and covering it with concrete and asphalt walking trails:

The Coquille Point Unit is the only unit of the Oregon Islands National Wildlife Refuge with a specific on-site public use purpose. Initially the unit served to protect headland and beach access, and it now serves as a buffer from human activities that would disturb wildlife. The public comes to Coquille Point with several objectives: (1) to view wildlife; (2) to walk their dogs while enjoying the open wildlands and wildlife on the interpretive paved trail; and (3) to access the beach using the refuge stairs. . . . The relatively low wildlife value and sparse vegetative cover surrounding the interpretive trail at Coquille Point indicate that disturbance to wildlife from dogs on leash is likely to be low.

In summary, as per the USF+W governing document itself, we show the Bandon Beach Hotel will not have any adverse effects on the function of the Refuge. The site is too far away to have any effect whatsoever on the Wilderness Designated offshore rocks, there will to be no development or effect on the bluff (and in fact, we help safeguard the bluff by dewatering the slope), and the public and their dogs retain full and untrammelled



access to the interpretive trails without any effect on their protected views.”

5. The City Council adopts the applicant’s analysis as its own, and we conclude that, based on the detailed plans provided, this proposed use will meet the no adverse effect standard in the policy, as that policy is correctly interpreted in the context of the larger policy statement.
6. **Enhance Identified Scenic Resources:** Here, again, we summarize the applicant’s evidence and explanation as to why this standard is met here. The explanation begins on page 20 of the February 7, 2019 letter from its attorney, Robert Miller.

“Not only are there no *adverse* effects, the Bandon Beach Hotel will *enhance* the function of the Refuge. Staff being on hand means there are human resources to help with crime deterrence, casualty and fire prevention, and medical emergencies. The “indoor refuge” of a warm and inviting café for public meetups, refreshments, and customer restrooms means a more genuine opportunity for the public to access, enjoy, and be edified by the Refuge resource.

The applicant only has to make a demonstration. To enhance is “to increase or improve in value, quality, desirability, or attractiveness,” according to a common dictionary reference. Interestingly, the policy goes beyond the limited set of officially inventoried Goal 5 scenic resources and allows the applicant to make its demonstration among whichever scenic resources it may choose to identify. The choice of scenic resources which the applicant may nominate for enhancement is therefore broad and inclusive.

This is actually a very straightforward standard to meet. The Bandon Beach Hotel application meets this standard by at least five different demonstrations, and each demonstration is independently sufficient to meet the standard.

Demonstration (1): By programming the parking off-site, along the south bank of Eleventh Street, we open up a beautiful new view corridor opening new glimpses of the ocean from Beach Loop Drive along privately-owned property. Such voluntary, private initiative is encouraged by the Bandon Comprehensive Plan (BCP at 178). Conventional development of these parcels with new dwellings, duplexes, accessory dwelling, motels, hotels, or vacation rental dwellings will block this new scenic resource opportunity. Please see the conceptual illustration on a following page, to see how this new view corridor adds value to the public view experience along Beach Loop Drive.

Demonstration (2): Public testimony is overwhelmingly critical of the design and construction quality of the present-day Bandon Beach Motel, and is overwhelmingly supportive of the proposed replacement design, construction, and operational specifications. In this demonstration, the identified scenic resource being enhanced is the site itself.

Demonstration (3): The offshore “Face Rock” rock formation is a popular and iconic view for Bandon. The “staggered” design of the new Bandon Beach Hotel allows many more rooms to enjoy and be edified by the view of Face Rock over the present motel design. In this demonstration the identified scenic view being enhanced is Face Rock.

Demonstration (4): USF+W has explained, in its CCP, that a function of the flat headlands is to provide the public with convenient and accessible views of the offshore rocks, nesting seabirds, and associated wildlife. The City of Bandon has inventoried these same public views in its BL-2 inventory designation. The Bandon Beach Hotel enhances this scenic resource by providing an “indoor refuge” of a warm and inviting café for public meetups, refreshments, and customer restrooms, which provides a more genuine opportunity for the public to access, enjoy, and be edified by the Refuge resource.

Demonstration (5): The Bandon Beach Hotel opens a new view corridor from Masonic Viewpoint stretching to the northwest. This new view corridor is illustrated on a succeeding page. This view corridor comes from the voluntary, private initiative of “staggering” the foundation of the new design back away from the bluff, further back from the present foundation of the squarish “concrete bunker” motel. Nearby private property owners on the east side Portland Avenue will also benefit from this new view corridor across the flat headlands of USF+W land.

7. The City Council adopts the applicant’s analysis as its own, and we conclude that, based on the detailed plans and explanation provided, this proposed use will meet the “enhance” standard in Special Policy 2.

*The application is premature because, under section 17.92.100, a conditional use permit becomes void after one year without construction. The applicant has no intention of beginning construction for several years. There is no reason to extend the period for the applicant in this particular instance. Instead, the applicant should be subject to the requirements that are*



*applicable to everyone else. The applicant should apply for the conditional use within a year of the time the applicant expects to begin construction.*

This argument does not allege an error in the Planning Commission decision. Instead, it states an argument about what the City should find and should approve, rather than what the City must find in order to approve the use. The applicant applied for conditional use approval; the applicant is entitled to an approval if it demonstrates that the standards are met. There is no basis in the review standards for denying the application because the City or a party believes that the application should be made at a different time.

*The site plan must be attached to the findings. The project is continually evolving and it is difficult to pin down the site plan until one is set forward. The changes to the parking lot site and the issues related to drainage, including a storage tank for run-off is not necessarily included in the site plan, amongst other issues.*

The City Council will approve the proposed use, as reflected in the Site Plans submitted with the original October 17, 2018 application and in the supplemental application materials submitted January 3, 2019 and as amended by the conditions of approval stated above. The site plan need not be physically attached to the findings.

*Drainage for Stormwater. BMC 17.96.040.H(6) requires that details of "grading, drainage, surfacing and subgrading" be provided and addressed for the proposed parking. The City failed to consider BMC 17.96.040(H) in its FINDINGS. At the Feb. 7, 2019 deliberations staff advised the planning commission that only two sections B.1 and E of BMC 17.96.040 required compliance. Further, the 64% impervious coverage described by Applicant in response to BMC 17.20.080 Lot Coverage does not include the parking lot. It only includes the roof and other paved surfaces associated with the hotel building. The Applicant indicated only that the parking lot will have impervious surface. That guidance failed to address the standard. There was testimony about rainwater, storm water and drainage management at the Jan. 24, 2019 planning commission hearing and in the full record, and this was only addressed by the applicant orally at the hearing, amounting to guesswork and no plans.*

1. BMC 17.96.040.H.6. does not apply directly to this application. It deals with plans for off-street parking. Subsection H requires: "A plan, drawn to scale, indicating how the off-street parking and loading requirements are to be met shall accompany any application for a building permit." Nine items of information are required, including item 6; however, none is needed until the time of building permit application.
2. The record shows that the off-street parking area, considered individually, is planned to have 48.3% impervious surface, as explained elsewhere in these findings. However, because the detailed plans for the off-street parking are to be reviewed at the building permit stage, a finding of compliance with the impervious surface standard for the parking area need not be made at this time.



*The City failed to follow Plan guidance for Conditional Uses. See Comp plan page 174. "In its discussions the Planning Commission has raised... What is relevant is what is constitutionally allowed as established through case law. In Bandon, the only uses promised to landowners are those identified in the zoning ordinance as permitted. Conditional uses are just what the term implies, they are "conditional." The City has considerable discretion in determining if such uses will be approved. For example, a conditional use must first comply with the comprehensive plan. Further, the City must determine if the conditional use will alter the character of the surrounding area in a manner which substantially limits, impairs or precludes the use of surrounding properties for the permitted uses listed in the underlying zone. The purpose of the Conditional Use Permit criteria are to ensure that a proposed use is fully reviewed and assessed for conformance with applicable Comprehensive Plan and Zoning standards."*

The language quoted by appellants from the comprehensive plan does not state a standard for this decision. The quoted language is embedded in a discussion of how the City approached planning for Goal 5 scenic resources.

*The City failed to comply with the Comp Plan at page 222: "The south jetty and the bluff contain the most unique and attractive areas for residential, tourist commercial, and recreation within the City. These areas have been zoned for "Controlled Development", in which only one- or two-family dwellings are permitted outright, and then only under rather strict conditions..." Instead of "strict conditions," the City finds that "an existing motel has occupied the site for decades and has not had a demonstrated adverse impact on the described function of the Refuge. The Commission makes a conclusory finding that this replacement hotel [false] will not have an adverse impact on the function of the Refuge." (2/28/19).*

1. Page 222 of the Plan is one page of the plan's "Inventory of Coastal Resources." the coastal resource discussed at this page is "The South Jetty and the Bluff."
2. Inventory information does not constitute a standard this decision. Anything included in the Inventory section of the Plan is for the purpose of identifying significant resources, and is not intended for decision making on site-specific development proposals.

*The City failed to consider the Chapter 10 Coastal Resources and Chapter 12 Scenic Resources of the Plan. No findings were made related to Chapter 10 of the Plan, the purposes, one of which is: "The Plan and related implementing actions and permit reviews shall consider the critical relationships between shorelands and estuarine resources, and the geologic hazards associated with shorelands. The City shall, within the limit of its authority, maintain the diverse environmental, economic and social values of coastal shorelands, and maintain estuarine water quality, which shall include minimizing man induced sedimentation."*

Chapters 10 and 12 are part of the plan's Inventory of resources. These chapters are intended to organize data relating to the specific resources and place those data in the context of the Statewide Planning Goals framework. Furthermore, to the extent any language in the Inventory chapters is sufficiently directive about what the City shall or



should do, that direction is to the City. It is intended to set the framework for more detailed policy making in the plan and the implementing regulations.

*Appellants also incorporate the findings, allegations, and report of GeoSciences and Gunnar Schlieder as if set forth here in full.*

This allegation does not state a separate allegation that is sufficient for review. The code requires that an appeal contain “[t]he specific grounds upon which the review and appeal are being based.” Section 17.124.010.C.3. This allegation does not allege a specific ground for appeal.

*The findings do not address the scale of the lot in relation to the refuge, including the number of cars that are appropriate or the height and bulk of the RV parking.*

This allegation is not sufficient to state an issue for appeal. It does not identify a standard in the plan or code that is alleged to be violated.

*The Staff Report addresses Special Policy No. 2 and relies upon a USFWS letter that provides little detail and would appear to promote development "near natural areas." Regardless, the USFWS letter does not address the actual standard at issue. The USFWS letter appears to be a series of questions from the applicant, which results in questionable answers. The questions are clearly intended to steer the USFWS official in the desired direction, and the USFWS largely defers to the local government's authority because the USFWS does not have jurisdiction over private development. It is plainly evident that USFWS understands outdoor lighting to have "negative impacts on the adjacent nesting colonies of seabirds." Indeed, the USFWS refused to say that the proposal would complement the USFWS mission and purpose of the refuge.*

1. The decision under review by the City Council is the decision of the Planning Commission, not the Staff Report to the Planning Commission.
2. The decision of the Planning Commission reflects it having made its own decision based on all the evidence, including information provided by the USFWS.
3. As discussed above, the City Council has made its own findings, based on the record, that Special Policy No. 2 has been applied as a standard, and the proposal has been found to comply with the standard. There is no error, therefore, in how the USFWS comments have been used in this decision.

*The Café will clearly entail food waste that will attract scavengers, which will threaten the native wildlife. The applicant has not demonstrated how this is consistent with Special Policy 2, and similarly fails to demonstrate how attracting scavengers will enhance the NWR.*

1. This allegation is premised on the assumption that the café will operate in a way that would violate city health and safety regulations. There is no factual basis for this assumption.

2. If the proposed café were to be operated in a way that attracted scavengers to accumulated and uncontained food wastes, the city code explicitly states that such a situation could be abated by the City as a nuisance. See BMC 9.04.050.

*The actual construction impacts (as well as impacts related to razing the existing motel) have not been addressed by the applicant. Because the proposal is so close to the NWR impacts are likely to be significant, but the applicant has not proposed any mitigation measures to address those issues.*

1. This is a generalized allegation that is not specific about the nature of the impacts that the appellants are asserting or the way in which the demolition and construction activities will cause those impacts. Neither does this allegation identify a plan or code criteria that is relevant here.
2. See the findings above that describe the character of the uses in that part of the Refuge closest to the proposed motel. Generally, those are uses that involve the comings and goings of the general public to view the protected resource further to the west. The appellants have not alleged how typical demolition and construction activities might conflict with the nearby uses.
3. This allegation is not sufficiently specific to state an issue to be addressed in this appeal.

#### **Geologic Hazard Issues:**

1. The relevant code provisions are found in section 17.20.040.C., "Limitations on use" in the CD-1 zone.

"Plans shall be reviewed to assess the possible presence of any geologic hazard. If any part of the subject lot is in an area designated as a moderate or severe hazard area on the Bandon Bluff Inventory Natural Hazards Map or if any geologic hazard is suspected, the planning commission shall require a report to be supplied by the developer which satisfactorily evaluates the degree of hazard present and recommends appropriate precautions to avoid endangering life and property and minimize erosion. The burden of proof is on the landowner to show that it is safe to build.

1. The following identifies the reports which may be required:
  - a. Soils Report. This report shall include data regarding the nature, distribution and strength of existing soils, conclusions and recommendations for grading, design criteria for corrective measures, and options and recommendations covering the carrying capabilities of the sites to be developed in a manner imposing the minimum variance from the natural conditions. The investigation and report shall be prepared by a professional civil engineer currently registered in the state



of Oregon.

b. Geology Report. This report shall include an adequate description as defined by the city manager or designate of the geology of the site, conclusions and recommendations regarding the effect of geologic conditions in the proposed development, and opinions and recommendations as to the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional geologist currently registered in the state of Oregon.

c. Hydrology Report. This report shall include an adequate description, as defined by the city manager or designate, of the hydrology of the site, conclusions and recommendations regarding the effect of hydrologic conditions on the proposed development, and options and recommendations covering the carrying capabilities of the sites to be developed. The investigation and report shall be prepared by a professional civil engineer currently registered in the state of Oregon.

d. The planning commission may waive any of these reports if it decides that they are irrelevant to the site.”

2. The meaning of this standard and the related evidence from the applicant’s and the appellants’ witnesses is discussed beginning at page 4 of the February 7, 2019 letter from the applicant’s attorney, Robert Miller. The Miller letter weighs the competing evidence and explains why the ultimate standard in this code section is met. The City Council adopts Mr. Miller’s explanation of the standard, his weighing of the evidence, and conclusion that the code standard is met as its own.
3. The core of this standard is: a “satisfactory” evaluation of the degree of hazard present; a recommendation of appropriate precautions to avoid endangering life and property and minimize erosion; and an ultimate conclusion that the proposal is “safe to build.” As explained in the Miller letter, all three parts of this test have been met based on the submissions by the applicant’s experts.
4. Under part 1.d. of this standard the decision maker has broad discretion to waive the need for any elements of these reports if that information is not relevant to reaching the ultimate conclusion with respect to this site. The City is satisfied that the applicant’s report contains the information that is relevant and material to reaching the required conclusions, including the ultimate standard that the project is safe to build. Any information that the appellants assert is needed but not present is waived.

*Because of the geologic characteristics at and surrounding the site, the proposal is not suitable. The applicant is incredulously asking to place portions of the hotel below ground level and within an area of geologic slope movement. The applicant's consultant alleges that the site is*

*geologically stable, but that allegation is undermined by the submission of Gunnar Schlieder of GeoScience, Inc., as well as historic movement at Coquille Point.*

1. The ultimate conclusion that must be made is that the proposal is “safe to build,” not that it is “suitable.”
2. The applicant’s experts made the “safe to build” conclusion and explained why that is so. In the opinion of the Council, the appellant’s competing witness did not provide evidence that would negate that ultimate conclusion. The appellants’ witness did not conclude that the site is not safe to build.
3. The applicant’s expert witness concluded that the site is “geologically stable with no visible landslides, earthflows or other geologic hazards impacting the site” and “will remain stable for the next 100 years.” Although the appellants’ witness challenged that conclusion, the Council finds that the opinion of the applicant’s experts to be more credible.

*The GeoScience report first identifies the characteristics of the site, including examinations not previously performed by the Applicant's consultant. [Sic] demonstrates the significant shortcomings in the Applicant's report, prepared by Cascadia GeoServices. For example, GeoScience notes that "Landslides have been mapped directly adjacent to the stair case (AGS 1970 and along the coastline," and the bluff contains springs, with water issuing from it during a dry spell. Tension cracks exist in the pavement at the parking lot from the pavement. GeoScience encountered a blow count reversal which is "typical for the base of a slide deposit where the shear strength of the soil has been decreased by the disruption caused by the movement."*

The appellants’ witness conducted a detailed critique of the applicant’s technical reports. The details of the alleged deficiencies are listed and discussed in the Miller letter beginning on page 5. The Miller letter also summarizes the applicant’s rebuttal testimony. For the reasons explained in the Miller letter, the Council concludes that the evidence of the applicant’s expert witnesses is more credible. The appellants have not fatally undermined the conclusion of the applicant’s experts that the proposal is safe to build.

*GeoScience also notes in its discussion several problem and shortcomings with the current proposal. First, the plan shows a sunken elevator pit but the depth is not provided, as is the case with other similar failures for the Garden Level and 1st Floor. Until these depths and elevations are provided, the application is incomplete.*

1. This alleged error relates to the completeness of the application. Allegations of the completeness of the information in the application relate to information requirements, or more accurately, information that appellants believe should or must be included in the application prior to a decision.



2. The code does not state minimum requirements for any kind of information as a prerequisite for applying the safe to build standard. Allegations about completeness of the application are not a basis for finding that a substantive standard is not met.

*GeoScience goes on to identify several constraints, which are troubling from a development perspective. First is the presence of active slope movement. Second, it is unquestionable that the building is proposed in an area of documentable high groundwater levels with the garden level and the elevator extending further down to an unknown depth. Third, the slope movements on the beach bluff are clearly a result of significant groundwater pore pressures.*

1. These allegations, like those discussed above, point to points of contention raised by the appellants' witness to evidence and conclusions in the technical reports submitted by the applicant's expert witnesses. These points relate to slope movement and groundwater allegations.
2. These points are addressed generally in the Miller letter. None of the points raised here is a challenge to the ultimate conclusion required that the project is safe to build.

*The Applicant's consultant ignores the presence of the slope movement. Ignoring slope movements is a matter of public safety and the applicant (as well as City) would be well advised to rely on a sufficient geotechnical investigation. The effect of ignoring the slope movement is that there have been no conditions or mitigating measures taken to address the slope movement, assuming mitigation is even possible.*

1. The applicant's experts have not ignored the allegations of slope movement, as explained in the Miller letter.
2. The Council finds that the geotechnical investigation is sufficient because it provides a satisfactory evaluation of the degree of hazard present and recommends appropriate precautions.

*The Applicant's consultant also apparently did not follow-up on measuring the water level on the bluff at other times of the year (i.e., outside of the summer). Regardless of that shortcoming, the applicant's consultant has not addressed how the below ground Garden Level and sunken elevator pit would not be constrained by groundwater table.*

1. As discussed in the Miller letter at page 5, the applicant's experts stated their opinion "that the site is geologically suitable for the proposed structure and that the structure can be supported on conventional spread footings provided the site is prepared in accordance with our recommendations."
2. The Council finds that it can rely on the expert opinion stated above, as further elaborated upon in the applicant's technical reports. Based on that opinion and the supporting work,

the City finds that it can rely upon the conclusion that the proposal is “safe to build” as the code requires.

*GeoScience also notes that the applicant's consultants ignored Cascadia GeoServices boring logs in determining the where native grade is located at the site. GeoScience concludes that "it is apparent that the average elevation of native ground in the vicinity of the west side of the building is 76.75', a far cry from the purported 86.3'. The effect is that the applicant's elevation of native grade is incorrect.*

As discussed in the Miller letter at page 9, the City finds that it accepts the City’s own 1973 topographical record as the evidence of native grade, and accepts the evidence in the record as to why the test borings included sidecast fill from construction.

*GeoScience's conclusion summarizes the basic problems with the existing proposal: "It appears quite clear that the current Bandon Beach Hotel design is not fully thought out, and moreover, lacks correct quantification of at least two essential design factors (maximum elevation of the seasonal high groundwater table and elevation of Native Grade) at the site." Until these issues are remedied, this application cannot move forward.*

The City disagrees with appellant and accepts the applicant’s expert evidence for all the reasons cited above.

Dated: June 3, 2019.

  
Mary Schamehorn, Mayor

**THIS IS THE FINAL DECISION OF THE CITY OF BANDON IN THIS MATTER.  
THIS DECISION IS APPEALABLE TO THE LAND USE BOARD OF APPEALS  
UNDER THE STATUTES THAT APPLY. SEE ORS 197.830 AND RELATED  
STATUTES.**