



February 28, 2022

Land Use Board of Appeals
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Re: Botts Marsh, LLC v. City of Wheeler (LUBA 2022-002)

Dear Clerk:

Please find enclosed for filing an original and one copy of Botts Marsh, LLC Petition for Review.

Very truly yours,

A handwritten signature in black ink, appearing to read "Sarah Stauffer Curtiss", with a long, sweeping horizontal line extending to the right.

Sarah Stauffer Curtiss

SSC:pjn
Enclosures
cc: Service List

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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

BOTTS MARSH, LLC,
Petitioner,

v.

CITY OF WHEELER,
Respondent.

and

OREGON COAST ALLIANCE,
Intervenor-Respondent.

LUBA No. 2022-002

**PETITIONER BOTTS MARSH, LLC'S
PETITION FOR REVIEW**

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I. PETITIONER’S STANDING

Petitioner Botts Marsh, LLC (“Petitioner” or “Applicant”) has standing pursuant to ORS 197.830(2). Petitioner was the Applicant and appeared orally and in writing through its counsel, Jennie Bricker, before Respondent City of Wheeler (“City”) during the local proceedings for the land use decision challenged here. (Rec. 129-131, 352-354; 10/7/21 audio; 11/16/21 audio.) On January 7, 2022, Petitioner timely filed a Notice of Intent to Appeal the City’s final decision in City Casefiles #0701-21-1 DR (the “Decision”), attached as Exhibit A.

II. STATEMENT OF THE CASE

A. Nature of Land Use Decision and Relief Sought

Petitioner appeals the City’s Decision denying a design review application (“Application”). Petitioner seeks reversal or, in the alternative, remand of the Decision.

B. Summary of Arguments

1. First Assignment of Error

The City failed to follow the “procedures applicable to the matter before it” and Petitioner’s substantial right to a full, fair, and impartial hearing was prejudiced as a result. At the Planning Commission, the proceedings were infected with bias, the Commissioners who voted to deny the Application falsely claimed that the Application was incomplete, and members of the public were permitted to speak with no opportunity for rebuttal from Petitioner. At the City Council, none of the bases for denial in the final Decision were raised or discussed, and Petitioner was given no opportunity to rebut an *ex parte* contact that occurred after adjournment.

1 **2. Second Assignment of Error**

2 The City’s Decision misconstrued applicable law in applying the design
3 review guidelines in Wheeler Zoning Ordinance (“WZO”) Section 11.050.4 and
4 by creating evidentiary standards that do not exist in the ordinance.

5 **3. Third Assignment of Error**

6 In denying Petitioner’s design review Application, the City imposed
7 requirements not found in the WZO and thus acted outside its range of
8 discretion.

9 **4. Fourth Assignment of Error**

10 With respect to Petitioner’s property (also referred to as the “Property”),
11 the City has imposed an illegal moratorium on development through its practice
12 or pattern of denying all permits.

13 **5. Fifth Assignment of Error**

14 The City’s Decision is unconstitutional because it violated Petitioner’s
15 rights under the Due Process Clause and because it appropriated Petitioner’s
16 property without compensation in violation of the Takings Clause.

17 **C. Summary of Material Facts**

18 Petitioner’s property is located in Wheeler, Oregon, adjacent to Nehalem
19 Bay and within Wheeler city limits. Botts Marsh, an intertidal wetland adjacent
20 to Nehalem Bay, lies to the north of the subject property. Petitioner conveyed
21 the Botts Marsh property to the North Coast Land Conservancy in March 2019.
22 Part of an ecologically significant estuarine complex, Botts Marsh is now
23 owned by the Lower Nehalem Community Trust and is managed for permanent
24 conservation. (*See* Rec. 337-38.) The management plan for the estuary
25 contemplates development of the adjacent upland, creates a 50-foot buffer area,
26 and provides for cooperation between the developer/applicant and the Lower

1 Nehalem Community Trust to ensure that development would not threaten the
2 ecology of the wetlands.

3 For the first phase of development on the upland, Petitioner submitted
4 two conditional use applications in August 2019, which were approved by the
5 City in 2020. Opponents appealed the decisions to the Land Use Board of
6 Appeals (“LUBA” or the “Board”). In LUBA Nos. 2020-064/065, the Board
7 remanded the decisions on two narrow findings issues. On May 18, 2021, the
8 City Council, which included three new council members and a new mayor,
9 voted to deny the conditional use applications. The City issued its final written
10 decisions on July 6, 2021. Those decisions are on appeal in LUBA Nos. 2021-
11 072/073.

12 Following the conditional use denials, Petitioner revised its development
13 plans to include uses permitted outright in the Water-Related Commercial or
14 WRC and Water-Related Industrial or IND Zones. On July 1, 2021, Petitioner
15 submitted a design review application (“Application”), seeking design review
16 approval of a commercial building for fish and shellfish sales on the WRC
17 parcel, and a connected fish processing plant on the IND parcel. (Rec. 816-62.)
18 City staff deemed the Application complete on August 27, 2021. (Rec. 58.)

19 The Planning Commission held a special meeting on September 23,
20 2021, to consider the Application. The City Manager and contract planner
21 summarized the applicable design review criteria and the staff report, which
22 recommended design review approval with conditions. During the four-hour
23 hearing, the Planning Commission deliberations and public testimony raised the
24 following categories of issues: First, compliance with design review criteria.
25 Second, the quality and completeness of the plans submitted with the
26 Application. Third, concerns about the proposed use itself, and whether the

1 Application really should be characterized as design review of a use permitted
2 outright.

3 Commissioner Doni Mitchell described himself as a “design
4 professional” and raised concerns about the east-facing building entrance and
5 whether it “looks like an entrance” as opposed to a warehouse. (9/23/21 audio
6 1:17:50, 1:20:00.) He mentioned that he lives on Hemlock Street, “just one
7 house up” from the proposed building location, and that therefore the building
8 design was “important to me.” (*Id.* 1:17:50.)

9 Some Commissioners criticized the quality of the plans submitted with
10 the Application, including Commissioner Mitchell and Commissioner St. John
11 (9/23/21 audio 3:36:25, 3:35:40.) Commissioner St. John stated that she could
12 not read Exhibit 5 because the print was too small. (*Id.* 1:32:30.) The City
13 Manager explained that the City had addressed that issue by obtaining, from the
14 Applicant, an electronic version of Exhibit 5 that could be enlarged on a
15 computer screen. (*Id.* 1:33:20.)

16 The Commission’s deliberations included extensive discussion related to
17 the proposed fish processing and sales *use*, although Commission President
18 Mike Anderson attempted to limit that discussion to the proposed design and
19 keep the focus on design review criteria. For example, Commissioner St. John
20 asked whether chemicals would be used or odors produced from fish
21 processing. (*Id.* 2:05:20, 2:06:36.)

22 After discussion among the Commissioners, the Planning Commission
23 opened the hearing to public testimony. With the exception of one commenter
24 who raised the issue of riparian setbacks, public opposition testimony focused
25 not on design review criteria but on the proposed use itself. Written testimony
26 from the Oregon Coast Alliance (“ORCA”) contended that the uses—fish

1 processing and fish and shellfish sales—were not permitted outright but must be
2 treated as conditional uses because they were not water-related. (Rec. 369-93.)
3 Consistent with that position, commenter Carl Whiting insisted that the
4 Planning Commission must separately evaluate the use to determine whether it
5 was water-related. (9/23/21 audio 2:19:15, 2:39:50.) Other commenters
6 reiterated the same points and also spoke about geotechnical risks, waste
7 products, and odor. (*Id.* 3:28:20, 3:33:28, 3:39:23.)

8 At ORCA’s request, the Commission voted to keep the record open for
9 seven days, followed by a seven-day rebuttal period for the Applicant. (*Id.*
10 3:16:57.) The Planning Commission indicated it would re-open the hearing
11 during its regular meeting on October 7, 2021, allow public testimony limited to
12 five minutes per person, allow a response from the Applicant, and then close all
13 testimony, deliberate, and decide. (*Id.* 3:19:45.)

14 The Planning Commission met again on October 7, 2021. On October 6,
15 2021, at the request of the Planning Commission President and in response to
16 comments at the prior hearing, Petitioner provided additional materials (Rec.
17 126, 96-100.) During the meeting, public testimony focused on the same issues
18 brought up at the September 23, 2021 hearing. (10/7/21 audio.)

19 Public testimony was limited to five minutes. Carl Whiting, however,
20 spoke for more than five minutes in his initial remarks (*id.* 00:35:45) and then
21 testified a second time, ostensibly to make a “point of order” but actually to
22 offer further opposition testimony (*id.* 1:15:26; *see also* Rec. 340). After the
23 close of public testimony, opponents Karen Matthews and Carl Whiting
24 repeatedly interrupted the Planning Commission deliberations by calling out
25 remarks from the audience. Karen Matthews interrupted nine times and Carl
26 Whiting, five times. (10/7/21 audio 1:33:20, 1:34:10; Rec. 340.) Petitioner was

1 not given an opportunity for rebuttal following these interruptions, many of
2 which were substantive critiques of the Application or Petitioner.

3 During the Planning Commission discussion, Commissioners questioned
4 Petitioner about issues outside design review criteria. For example,
5 Commissioner Judy Stone-Aean wanted to know, “What are you going to do
6 with the guts?” (10/7/21 audio 1:09:36.) Commissioner Anna St. John
7 expressed frustration that she did not know specifically what Petitioner was
8 “planning to do” inside the facility. (*Id.* 1:06:00.)

9 In response to these comments, City Planner Walt Wendolowski
10 reiterated that the outright permitted uses were incorporated into their
11 respective zones and were consistent with implementation of the City’s
12 comprehensive plan policies. (*Id.* 1:38:20.) Commission President Mike
13 Anderson pointed out that Goal 17, Policy 5 of the Comprehensive Plan stated
14 that there were no sites in Wheeler that were especially suited for water-
15 dependent development. (*Id.* 1:33:20.)

16 In terms of design review, Commissioner Doni Mitchell and
17 Commissioner Chantelle Hylton questioned whether the front of the building
18 was inviting enough. (*Id.* 1:13:30, 1:49:40.) However, neither offered specific
19 design suggestions or requirements for improvement.

20 Petitioner’s Application had been deemed complete on August 27, 2021.
21 (Rec. 58.) Nevertheless, Commissioners St. John, Stone-Aean, and Hylton
22 complained that the site plans were not complete. (*See id.* 1:42:18 (St. John),
23 1:51:39 (Stone-Aean: “I just don’t think the plans are complete.”), 1:58:32 (St.
24 John).) Petitioner’s counsel responded that the Application had been deemed
25 complete in August and “We relied on that.” (*Id.* 2:55:00.)

26

1 On September 23, 2021, the City Manager had explained how Exhibit 5
2 could be viewed on-screen so that all parts were legible. (9/23/21 audio
3 1:33:20.) Despite that resolution, Commissioner St. John again complained that
4 she could not read Exhibit 5. (*Id.* 1:05:55, 2:20:20, 2:25:55.) Commissioner
5 Hylton agreed that “there are things that are not legible.” (*Id.* 2:30:15.)

6 In the vote that followed, Commissioners Joe Datillo, Doug Proctor, and
7 Mike Anderson voted to approve the Application. Commissioners Hylton, St.
8 John, and Stone-Aean voted to deny. Commissioner Mitchell, despite having
9 participated in two hearings and having voiced his opinions about the building’s
10 design, said he had a direct personal interest and would abstain. (*Id.* 3:05:05.)
11 The tie vote meant that the Application was denied.

12 The Planning Commission issued its final decision the following day,
13 October 8, 2021. (Rec. 344-45.) The Decision did not contain findings or an
14 explanation for the denial. On October 11, 2021, Petitioner requested an appeal
15 to the Wheeler City Council, arguing that the Commissioners who voted against
16 approval did so for pretextual reasons; that Commissioner Mitchell’s abstention
17 was improper under Article IV of the Planning Commission Bylaws, pages 2-5;
18 and that the public’s free-for-all participation in the October 7, 2021 hearing
19 had violated Petitioner’s rights to a fair and impartial review. (Rec. 337-43.)

20 The Wheeler City Council conducted a *de novo* hearing on November 16,
21 2021.¹ Mayor Honeycutt began the design review hearing by reading a
22 statement that the Application would be “evaluated against the design review
23 standards” in WZO Sections 1.050 and 11.110 and the standards in the WRC

24 _____
25 ¹ Petitioner prepared an informal transcription of the November 16, 2021
26 City Council meeting; references to “Transcript” are to that document, which is
attached as Exhibit C.

1 and IND Zones,² and that “what I just read is what the council is to consider
2 tonight. And that’s what they will be voting on.” (Transcript 3.)

3 After Mayor Honeycutt’s introduction, City Planner Walt Wendolowski
4 summarized his staff report, which recommended approval with conditions.

5 Councilor Clif Kemp questioned Mr. Wendolowski about whether the
6 uses had to be evaluated to determine whether they were water-related;
7 Mr. Wendolowski answered no, that the zoning ordinance “implements these
8 plan policies” by listing the uses as permitted outright. (*Id.* 15.) Councilor
9 Kemp and Mayor Honeycutt then questioned Mr. Wendolowski about the
10 design review standards. Mr. Wendolowski and City Manager Tim Grossnickle
11 confirmed that they believed all standards were satisfied. (*Id.* 15-18.)

12 Petitioner’s counsel made a statement to the Council, after which the
13 hearing was opened to public testimony, both in support of and in opposition to
14 the Application. The proponents urged the Council to apply design review
15 criteria and to approve. The opponents restated the same arguments they had
16 presented to the Planning Commission. Planning Commission members Anna
17 St. John and Judy Stone-Aean spoke about their objections to the use, the
18 Application, and Petitioner; Commissioner Stone-Aean warned the Council that
19 if they “pass this project which stands to pollute, mar the view of our
20 waterfront, cause truckload jams and traffic congestion and many other negative
21 effects, those things will be with us for the next 100 years.” (*Id.* 34.)

22 Carl Whiting, Deanne Ragnell, and Cameron LaFollette argued, as they
23 had before the Planning Commission, that the proposed use was not water-

24

25

26 ² The relevant WZO provisions are attached as Exhibit B.

1 dependent, was not allowed outright, and should be evaluated as a conditional
2 use instead. (*Id.* 34-40.)

3 After public testimony concluded, Petitioner’s attorney and Petitioner
4 provided closing remarks, and then the Council began its deliberations.

5 Councilor Mike Glowa questioned the “status of the application” as
6 design review; he stated, “I just don’t see this as being water-related.” (*Id.* 46.)
7 Councilor Gordon Taylor appeared to agree: “It would seem to me that this
8 concept was logically based on processing seafood that’s coming in off of a
9 boat. That’s what would make it water-related and we’re making a bit of a
10 stretch here by returning it on a truck.” (*Id.* 47.) Councilor Clif Kemp read from
11 the IND Zone description of purpose “to encourage development of marine-
12 oriented industrial and commercial uses which are compatible with the
13 community setting and natural values in the Wheeler area.” Citing the City’s
14 Vision Plan, he stated, “I am going to submit to you this evening that this
15 building and design are not compatible with the community and natural
16 settings.” (*Id.* 49.) Councilors Jim King and Jay Verburg stressed the narrow
17 criteria for design review. (*Id.* 49-50.)

18 Councilors King and Verburg voted to approve the Application.
19 Councilors Kemp, Taylor, and Glowa voted to deny. Following the vote, City
20 Planner Walt Wendolowski offered to prepare findings:

21 “Hate to interrupt Mayor, but you’ve effectively
22 denied a decision and this, if appealed, there needs to
23 be findings for the basis for the denial. I’m not trying
24 to create any problems here but just from a legal
25 standpoint, ***you need to establish reasons behind the
denial.*** I could create, I’m suggesting the following:
Provide reasons for the denial allow me to create an
order of decision for the Council.”

1 (*Id.* 53 (emphasis added).) Mayor Honeycutt agreed and said he would set up a
2 meeting with staff to discuss those findings. (*Id.*) He adjourned the meeting. (*Id.*
3 54; 11/16/21 audio 3:31:42.)

4 Carl Whiting approached the council table to tell the mayor that the
5 “Planning Commission should be incorporated in there, because Walt didn’t ask
6 for the reasons for their denial.” (Transcript 54; 11/16/21 audio 3:31:50.)
7 Whiting was still speaking to the Council when the audio ended. (11/16/21
8 audio 3:32:20.) At a City Council meeting on December 15, 2021, the Council
9 voted to approve Mr. Wendolowski’s draft decision.³

10 The City issued its notice on December 17, 2021, of the Decision dated
11 December 15, 2021. (Rec. 1-20, 21-38.) As discussed in more detail below, the
12 Decision was identical to the staff report, except that the word “courtyard” in
13 the staff report was replaced with the term “covered entrance,” and the Decision
14 included findings of noncompliance rather than compliance with WZO Sections
15 11.050.4.a.(6) and 11.050.4.b.(1), (2), (3), and (5). Petitioner filed a Notice of
16 Intent to Appeal on January 7, 2022.

17
18 **III. JURISDICTION**

19 LUBA has jurisdiction over “land use decision[s].” ORS 197.825(1). The
20 Decision is a land use decision subject to the Board’s jurisdiction, because it is
21 a final decision by the City that concerns the application of the City’s
22 comprehensive plan and land use regulations. ORS 197.015(10).
23

24 _____
25 ³ See December 15, 2021 Minutes, available at:
26 https://www.ci.wheeler.or.us/sites/default/files/fileattachments/city_council/meeting/6614/minutes_12-15-21_draft.pdf.

1 LUBA’s jurisdiction is limited to cases where the petitioner has
2 exhausted all remedies available by right before petitioning the Board for
3 review. ORS 197.825(2)(a). Here, Petitioner appealed the initial decision by the
4 Planning Commission to the City Council. Accordingly, Petitioner exhausted all
5 available local remedies, and the Board has jurisdiction to hear this appeal.

6 IV. ANALYSIS OF DECISION

7 At the conclusion of the November 16, 2021 City Council hearing,
8 Mayor Honeycutt and contract planner Walt Wendolowski arranged to meet the
9 following morning so that Mr. Wendolowski could prepare “reasons for the
10 denial” and “create an order of decision for the Council.” (Transcript 53.) The
11 City Council held two executive sessions on December 1, 2021, and
12 December 8, 2021. The Council voted to approve Mr. Wendolowski’s draft
13 decision on December 15, 2021.

14 The Decision was identical in formatting to Mr. Wendolowski’s staff
15 report. (Rec. 1-20, 101-117.) The Decision preserved, verbatim, the following
16 conclusions:

17 “1. The proposed seafood processing plant and
18 seafood retail sales outlet are outright permitted uses in their
19 respective zones.

20 “2. As outright permitted uses in the WRC and
21 Industrial zones they are only subject to the design review
22 process and compliance with the shoreland development
23 standards.”

24 (Rec. 6-7, 103.)

25 Also identical was the language in Section IV.C of the Decision and
26 Section IV.C of the staff report: “Section 11.050.3., established the application
requirements. FINDINGS: The applicant submitted sufficient information to
proceed with the request.” (Rec. 9, 105.)

1 Section IV.D of the Decision and Section IV.D of the staff report
2 describe the Site Design review guidelines in WZO Section 11.050.4.a. The text
3 addressing subsections (1), (2), (3), (4), (5), (8), and (10) is identical between
4 the two documents. (Rec. 9-10, 12, 13, 106, 107, 108, 109.) For subsection (7),
5 the text is identical, except that Mr. Wendolowski replaced the word
6 “courtyard” in the staff report with “entrance” in the Decision. (Rec. 11, 107.)
7 For subsection (9), Mr. Wendolowski removed a paragraph in the staff report
8 suggesting a “reciprocating access and parking easement” between the separate
9 parcels. (Rec. 12, 108.)

10 Subsection (6) formed the basis for the first ground for denial.
11 Mr. Wendolowski revised the staff report to change the word “courtyard” to
12 “entrance” and to insert two additional paragraphs with findings of
13 noncompliance, discussed further in Part VI.C below. (Rec. 10-11, 107.)

14 Section IV.E of the Decision and Section IV.E of the staff report analyze
15 the Building Design review guidelines in WZO Section 11.050.4.b. Of the
16 11 subsections, the Decision concluded that the Application satisfied
17 subsections (4), (6), (7), (8), (9), (10), and (11). From the staff report to the
18 Decision, the only changes to the text for these subsections include replacement
19 of the word “courtyard” with “entrance” for subsection (11), and the omission
20 of the following stricken sentence from subsection (7)’s finding:

21 FINDINGS: These provisions apply to the commercial
22 storefront located on the WRC portion of the site. Based on
23 the submitted information, at least 54% of the storefront
24 contains windows and glass doors. ~~While these provisions
are limited to storefront entrances, it must be noted the
industrial portion facing the parking lot also contains
windows which help break up the monotony of the exterior
wall.~~

25
26 (Rec. 16, 111.)

1 The Decision uses subsections (1), (2), (3), and (5) as the remaining
2 bases for denial. As discussed in Part VI.C below, the Decision analyzed each
3 guideline as a hard requirement, as though the Applicant were obligated to
4 provide specific evidence, argument, and draft findings to demonstrate
5 compliance. (*See, e.g.*, Rec. 13.)

6

7 **V. FIRST ASSIGNMENT OF ERROR: THE CITY FAILED TO**
8 **FOLLOW PROPER PROCEDURES**

8

9 **A. Preservation of Error**

9

10 Petitioner’s counsel raised issues of procedure and due process in writing
11 on October 11, 2021 (Rec. 337-343), and orally on October 7, 2021 and
12 November 16, 2021. (Rec. 337-40; Transcript 43.)

13 **B. Standard of Review**

13

14 Under ORS 197.835(9)(a)(B), LUBA will reverse or remand the decision
15 of a local government if “[t]he local government * * * [f]ailed to follow the
16 procedures applicable to the matter before it in a manner that prejudiced the
17 substantial rights of the petitioner.”

18 **C. Discussion**

18

19 Since August 2018, Petitioner has attempted to develop its property, first
20 with uses allowed conditionally, and now with uses permitted outright. After
21 LUBA’s remand in LUBA Nos. 2020-064/065 and the election of a new mayor
22 and three new City Council members, Petitioner’s applications have been
23 denied at every turn. The majority of the current City Council opposes *any*
24 development on Petitioner’s property. The Decision is a set of after-the-fact,
25 pretextual justifications for the Council’s vote to prohibit a use permitted
26 outright.

1 Design review is a limited land use decision. ORS 197.015(12). In
2 Wheeler, as in other jurisdictions, the design review process is iterative and
3 collaborative: the decision-making body reviews an applicant’s proposed site
4 and building design, makes suggestions or expresses preferences, and the
5 applicant changes the design or provides explanations in response. *See, e.g.,*
6 *M&T Partners, Inc. v. City of Salem*, LUBA No. 2018-143 (Aug. 14, 2019)
7 (describing limited land use decision-making process). That iterative process
8 occurred in this case, between the September 23 and October 7 Planning
9 Commission hearings, when Commission President Mike Anderson provided
10 “suggestions for improving application to [City Manager] Tim Grossnickle for
11 Ken [Ulbricht] to consider before Oct. 7.” (Rec. 126.) In response, Petitioner
12 provided additional drawings. (Rec. 96-100.)

13 The iterative nature of the design review process is apparent from the
14 language in WZO Section 11.050, which sets forth guidelines, suggestions, and
15 design preferences rather than hard requirements. For example, the Planning
16 Commission must use the “guidelines” listed in Section 11.050 in the
17 “evaluation of proposals.” WZO Section 11.050.4. Of the guidelines that
18 follow, many use permissive terms such as “should” or “encouraged,” rather
19 than mandatory language. WZO Section 1.070.1 (“The word shall is mandatory
20 and the words should or may are permissive.”); *see* WZO
21 Section 11.050.4.a.(1), (2), (7); WZO Section 11.050.4.b.(1), (2), (5) (impact on
22 views will be “taken into account”), (11).

23 ORS 197.195 requires local governments to make limited land use
24 decisions by “follow[ing] the applicable procedures contained within its
25 acknowledged comprehensive plan and land use regulations and other
26 applicable legal requirements,” ORS 197.195(3)(a); however, the local decision

1 maker may not base its decision on any comprehensive plan provisions that
2 have not been incorporated into its land use regulations, ORS 197.195(1).
3 Neither the Planning Commission nor the City Council complied with the
4 “applicable procedures” for design review.

5 In its September 23 and October 7 hearings, the Planning Commission
6 failed to “follow the procedures applicable to the matter before it in a manner
7 that prejudiced the substantial rights of the petitioner.” ORS 197.835(9)(a)(B).
8 Those hearings were infected with bias and other procedural problems that
9 deprived Petitioner of his substantial right to a fair and impartial hearing.
10 *Fasano v. Bd. of Cnty. Comm’rs of Wash. Cnty.*, 264 Or 574, 588, 507 P2d 23
11 (1973); *Cossins v. Josephine Cnty.*, 77 Or LUBA 240, 249 (2018).

12 Planning Commission President Mike Anderson opened each hearing by
13 asking for disclosures of bias, conflict of interest, or *ex parte* contacts. (9/23/21
14 audio 0:17:10; 10/7/21 audio 0:11:28.) Commissioner Doni Mitchell did not
15 disclose any bias or conflict. Instead, he participated freely in both hearings and
16 made numerous comments about the Application and building design. Only
17 during the vote on October 7 did he disclose a “direct personal interest” and
18 abstain. (10/7/21 audio 3:05:05.) His abstention resulted in a tie vote and, thus,
19 denial.

20 Commissioner Mitchell’s abstention was improper. Article IV.A of the
21 Planning Commission Bylaws⁴ provide an applicant a “procedural entitlement”
22 to an impartial review, which obligated Commissioner Mitchell not to
23 “participate in a discussion of the proposal or vote on the proposal” when he

24 _____
25 ⁴ Final Bylaws for the City of Wheeler Planning Commission (July 26,
26 1995), attached as Exhibit B. Under WZO 13.110, the Planning Commission
Bylaws also govern City Council proceedings.

1 had a direct private interest. Planning Commission Bylaws at 2-3. Instead of
2 participating, he should have vacated his seat at the Commission table after
3 making a full disclosure of his personal interest. *Id.* at 4. His participation in the
4 hearings prejudiced Petitioner’s substantial right to a fair and impartial review.

5 The Commission members who voted against approval did so for
6 illegitimate reasons. For example, they insisted that the Application was not
7 complete, even though the City had deemed it complete, in writing, on
8 August 27, 2021. (Rec. 58; 10/7/21 audio 1:58:32 (St. John); *id.* 1:51:39 (Stone-
9 Aean).) Another example, and one that underscores the pretextual basis for the
10 no votes, is Commissioner St. John’s repeated complaint, in the October 7
11 hearing, that “Exhibit 5” was not legible. (*Id.* 1:05:55, 2:20:20, 2:25:55.) She
12 had raised the same concern on September 23, 2021, and the City Manager
13 explained to her that the Applicant had re-submitted Exhibit 5 electronically
14 and that it could be viewed on-screen so that all parts were legible. (9/23/21
15 audio 1:33:20.) If Commissioners St. John, Hylton, and Stone-Aean failed to
16 review available materials or otherwise prepare for the hearing on October 7,
17 that is no basis for denial of a complete Application. Indeed, their complaints
18 about the Application’s incompleteness were pretexts for their opposition to the
19 development. As Petitioner’s counsel stated, the Application “was deemed
20 complete in August. We relied on that.” (10/7/21 audio 2:55:00.)

21 Public participation at the October 7, 2021 hearing was unmanaged.
22 Project opponents Carl Whiting and Karen Matthews called out comments from
23 the audience after public testimony was closed, those comments were
24 substantive, and Petitioner did not have an opportunity to rebut them. (Rec.
25 337-39.) When Commissioner St. John complained about inconsistencies in the
26 plan drawings, for example, Karen Matthews called out, “Keeps changing!”

1 (10/7/21 audio 1:55:19.) When Commissioner St. John raised questions about
2 site elevations, Matthews called out, “But he doesn’t have a survey!” (*Id.*
3 1:56:30.) When Commissioner Stone-Aean requested more documents,
4 Matthews called out, “Submit a new application that’s complete!” (*Id.* 2:35:28.)
5 During the discussion about site elevation, Carl Whiting interjected, “Does base
6 flood elevation come into play?” (*Id.* 2:02:50.) Although the Planning
7 Commission responded to some of the comments, Petitioner was given no
8 opportunity to respond. (*See, e.g., id.* 2:03:30 (lengthy discussion in response to
9 “base flood” comment).)

10 During the November 16, 2021 City Council meeting, the City Council
11 also failed to “follow the procedures applicable to the matter before it.” ORS
12 197.835(9)(a)(B). In essence, the Council did not provide design review. Rather
13 than conduct a *de novo* design review hearing, the City Council members who
14 voted no focused on the *use*.

15 During deliberations, Councilors Glowa, Kemp, and Taylor each made it
16 clear they believed the proposed development was not water-related and
17 therefore, as ORCA had argued (Rec. 154-78, 369-93), it should be subject to
18 conditional use review (Transcript 46-50 (Councilor Glowa, stating, “This
19 certainly isn’t water-related. It shouldn’t be permitted outright, it should be a
20 conditional use”). Thus, three of the five City Council members voted based on
21 their understanding that the Application was not eligible for design review. *See*
22 *M&T Partners*, LUBA No. 2018-143 at 6 (“[T]he question of whether the use is
23 permitted on the site is arguably not a question that the city council may
24 consider.”).

25 The meeting adjourned at 10:30 p.m. (Transcript 54; 11/16/21 audio
26 3:31:42.) Immediately after adjournment, Carl Whiting stepped up to the

1 council table to speak with the mayor and council members about what should
2 be included in the final written decision. (11/16/21 audio 3:31:50.) He also
3 made additional remarks that were inaudible on the audio/video recording. (*Id.*
4 3:32:20.) Petitioner, who had left the room after adjournment, was given no
5 opportunity to respond to Whiting’s remarks.

6 As the hearing concluded, the Council and the contract city planner, Walt
7 Wendolowski, arranged to meet so that Mr. Wendolowski could “establish
8 reasons behind the denial.” (Transcript 53.) The result was the Decision, with
9 its five bases for denial, tied to the criteria in WZO Section 11.050.4. Petitioner,
10 who learned of those reasons when the Decision was issued, had no opportunity
11 to respond, to offer changes, or to provide explanations. Indeed, Petitioner is
12 even barred from resubmitting a new application for six months. WZO
13 Section 11.050.8.

14 In failing to conduct a design review hearing, in allowing public
15 testimony with no opportunity for rebuttal, and in creating justifications for
16 denial after the fact that gave Petitioner no opportunity to respond, the City
17 Council deprived Petitioner of its substantial right to a full and fair hearing. The
18 Decision must, on that basis, be reversed or remanded.

19 **VI. SECOND ASSIGNMENT OF ERROR: THE CITY**
20 **MISCONSTRUED APPLICABLE LAW IN APPLYING THE DESIGN**
21 **REVIEW GUIDELINES**

22 **A. Preservation of Error**

23 Petitioner raised the issue of the limited scope of design review both
24 orally and in writing. (Transcript 42-43; Rec. 129-131.) To the extent Petitioner
25 is responding to specific issues in the Decision, Petitioner could not have
26 preserved those issues because they were raised for the first time in the
Decision. A petitioner does not waive its right to assign error when the alleged

1 error occurred after the close of the evidentiary record. *Grahn v. City of*
2 *Yamhill*, 76 Or LUBA 258 (2017).

3 **B. Standard of Review**

4 ORS 197.835(9)(a)(D) requires LUBA to reverse or remand a land use
5 decision if the local government improperly construed applicable law.

6 **C. Discussion**

7 As discussed above, the City based its denial of Petitioner’s design
8 review Application on the Application’s alleged noncompliance with five
9 design review guidelines: WZO Section 11.050, subsections 4.a.(6), 4.b.(1),
10 4.b.(2), 4.b.(3), and 4.b.(5). The City’s analysis of each of these guidelines is
11 addressed in turn below.

12 **a) WZO Guideline 4.a.(6)**

13 The Decision concludes that the Application does not meet design review
14 guideline 4.a.(6) because there is no direct pedestrian connection between the
15 buildings and other activities, including direct pedestrian access from one side
16 of the building lot to the buildings. (Rec. 10.) The Decision explains that a
17 “direct pedestrian connection” is “frustrated by the loading area” which divides
18 the parking lot. (*Id.* 11.) The Decision also concludes that the Application does
19 not meet guideline 4.a.(6) because the building does not include a street facing
20 entrance or a courtyard. (*Id.*)

21 On the issue of “direct connection,” the City has misapplied the
22 guideline. Guideline 4.a.(6) provides that *primary building entrances* shall
23 “have walkways connecting them to the street sidewalk” and that the design
24 shall “[e]nsure a direct pedestrian connection between the street and buildings
25 on the site, and between buildings and other activities within the site.” As the
26 site and building plans show, there are sidewalks encircling the parking lot that

1 connect the building's primary entrances. (Rec. 94, 96, 97, 100.) There is also a
2 direct pedestrian connection "between buildings and other activities within the
3 site." Although the City suggests that the design fails to "connect buildings and
4 other activities within the site" due to the location of the loading zone, the
5 Decision does not explain *how* the loading area frustrates pedestrian
6 connections between the building and other activities on the site. As the site and
7 building plans show, all primary entrances to the building are accessible from
8 the sidewalk and the parking area, the only other activity on the site. (*Id.*)
9 Although the Decision mentions possible "safety problems" between people
10 and loading activities in the parking lot, speculative safety issues are not part of
11 the guideline and in any case pedestrians would be expected to walk around the
12 parking lot on the sidewalk instead of cutting across the parking lot in the path
13 of a forklift. This connectivity is confirmed by the City's findings elsewhere in
14 the Decision. WZO Section 11.050.4.a.(10) requires "a hard-surfaced, well-
15 marked and lighted pedestrian access system consistent with [accessibility
16 standards]." In response to this standard, the Decision notes:

17 Based on the site plan and supporting information, the paved
18 parking area will be surrounded by a concrete walkway
19 *which connects to both the commercial and industrial
 portions of the building.*

20 (Rec. 13, 109 (emphasis added).) Similarly, in response to guideline 4.b.(6) the
21 Decision notes that the "commercial storefront is readily visible from the
22 parking lot; *and, accessible via a concrete walkway.*" (Rec. 16 (emphasis
23 added).) Accordingly, substantial evidence in the record and the City's own
24 findings demonstrate that there is a direct pedestrian connection between the
25 main building entrances and between the building and the parking lot. There are
26 no other activities proposed on the site.

1 On the issue of the “street facing entrance” or courtyard, the City has
2 again misapplied the guideline. The site and building plans clearly show a
3 courtyard/plaza surrounding the commercial entrance, and Petitioner indicated
4 in the Application that it was providing a courtyard. (Rec. 68-69.) The staff
5 report acknowledged the courtyard proposal, noting that the “entrance to the
6 commercial portion includes a covered courtyard.” (Rec. 107.) A separate
7 finding in the Decision itself notes, “This structure does not ‘face’ a street in the
8 typical sense.” (Rec. 16.)

9 Despite clear evidence of a courtyard and staff’s statement that a
10 courtyard was indeed included in the design, the Decision states that a courtyard
11 is “generally defined as an unroofed area that is completely or mostly enclosed
12 by a large building” and goes on to conclude that “there does not seem to be
13 any such place on the site plans.” Notably, the introductory findings in the
14 Decision related to guideline 4.a.(6) are identical to the findings in the staff
15 report, except that the Decision replaces the word “courtyard” with “entrance.”
16 (Rec. 10-11, 107.)

17 “Courtyard” is not defined in the WZO, but the City’s definition would
18 frustrate the intent of guideline 4.a.(6), which is to provide a *direct pedestrian*
19 *connection* to the entrance. If the proposed courtyard were “completely or
20 mostly enclosed by a large building,” the storefront would no longer be visible
21 and easily accessible as the guideline requires. In addition, the Decision ignores
22 the word “plaza.” See ORS 174.010 (In statutory construction, one must not
23 “omit what has been inserted.”). A plaza is an “open square” and thus consistent
24 with the entrance area depicted on Petitioner’s site plans. (Rec. 94, 96, 98, 100.)
25 The evidence in the record demonstrates that a “courtyard/plaza” is provided
26 outside the main entrance and therefore guideline 4.a.(6) is met.

1 ***b) WZO Guideline 4.b.(1)***

2 In the Decision, the City concludes that Petitioner failed to carry its
3 “burden of proof” demonstrating how guideline 4.b.(1) was met. The guideline
4 contains three “soft” requirements or suggestions for building design:

- 5 ▪ “The height and scale of the buildings ***should*** be compatible with
6 the site and adjoining buildings.”
- 7 ▪ “Use of materials ***should*** promote harmony with the surrounding
8 structures and site.”
- 9 ▪ “The materials shall be chosen and constructed to be compatible
10 with the natural elements and applicable city ordinances.”

11 WZO Section 11.050.4.b.(1) (emphasis added); *see also* WZO Section 1.070(1)
12 (“The word shall is mandatory and the words should or may are permissive.”).

13 The Decision analyzed each “requirement” as though the Applicant were
14 obligated to provide specific evidence, argument, or draft findings
15 demonstrating “compatibility” and “harmony.” The Decision states:

- 16 ▪ “[T]he applicant has not proposed how the height and scale of the
17 proposed buildings will be compatible with the site or adjoining
 buildings.”⁵
- 18 ▪ “[T]he applicant has not indicated how the materials proposed will
19 promote harmony with the structures and site.”
- 20 ▪ “[T]he applicant has not demonstrated how the materials are
 compatible with the natural elements.”

21 (Rec. 13.)

22 The remaining text of the subsection (1) finding creates an impossible
23 burden, far beyond any possible intent of WZO Section 11.050.4.b.(1):

24 _____
25 ⁵ The parcels to the north and south of Petitioner’s property are vacant.
26 Nehalem Bay bounds the property to the west and Highway 101 to the east.
(Rec. 101.) There are no “adjoining buildings.”

1 The City Council is unable to discern the applicant's
2 rationale for the applicant's proposal. Without some
3 **argument and evidence** in the record to demonstrate how
4 the materials chosen are compatible and promote harmony,
5 the Council cannot find that this provision has been
6 satisfied. Moreover, the applicant has not included in the
7 record any **information on the "natural elements" that are
8 identified in this criterion and for which there must be a
9 finding of compatibility**. As such, the applicant **has not
10 carried its burden of proof** in demonstrating how this
11 criterion is satisfied.

12 (Rec. 13 (emphasis added).)

13 There are several problems with the City's interpretation. First, the
14 guideline specifies not just "structures" but "surrounding structures." See ORS
15 174.010 (in statutory construction, it is impermissible to "omit what has been
16 inserted"). In fact, there are no "surrounding structures" or "adjoining
17 buildings" because the parcels adjacent to Petitioner's property are vacant.

18 (Rec. 96.)

19 Second, Petitioner did supply substantial evidence to support
20 compatibility and harmony with the site and its natural elements. For example,
21 the site plans show that the footprint and configuration of the building and
22 parking lot fit into the site by following the curved Marine Drive alignment to
23 the east and the sinuosities of the Nehalem Bay shoreline to the west. (Rec. 86,
24 97.) In addition, the site's "natural elements" include water, vegetation, sky
25 (normally gray), and dirt. (Rec. 96.) The Application specifies compatible
26 materials such as dark grey and black roofing, brown board-and-batten wood
siding, grey metal siding, and black window and door trim. (Rec. 67, 70, 98, 99,
100.)

Third, the City's conclusion that the Application does not meet guideline
4.b.(1) is based exclusively on Petitioner's alleged failure to provide argument
or draft findings relating to compliance with the design review guidelines

1 (Rec. 31-33), and that burden is not consistent with the language and purpose of
2 the design review criteria.

3 Petitioner acknowledges that a design review applicant is responsible for
4 demonstrating compliance with the applicable guidelines, but there is simply
5 nothing in the WZO to suggest that the site plan, building elevations, and plot
6 plan—all of which are required by WZO Section 11.050.3—cannot provide the
7 necessary evidence to show compliance with the City’s design review
8 guidelines. Indeed, Planning Commission members have a duty to “visit all
9 sites relative to applicant requests.” Planning Commission Bylaws Section
10 II.B.(5) (page 1). Arguably, that places at least some of the “burden of proof”
11 for knowledge of the site and surrounding areas on the City. In addition, WZO
12 Section 11.050.2 provides that “[w]hen design review is required, no permit
13 will be issued until *site plans* have been reviewed and approved under
14 Comprehensive Plan Policies and Ordinance Provisions.” (Emphasis added.) To
15 suggest that the required plans are insufficient for the City to review the *design*
16 of the development against the guidelines is inconsistent with the provisions of
17 the WZO and the purpose and intent of the City’s design review.

18 ***c) WZO Guideline 4.b.(2)***

19 With respect to guideline 4.b.(2), the City again based its finding of
20 noncompliance on Petitioner’s alleged failure to provide argument or draft
21 findings explaining “how the proposed development does, or does not, use the
22 identified styles and, to the extent a proposal does not use ‘styles characteristic
23 of Wheeler and the coastal area,’ or other identified features * * * explain how
24 the design was arrived at and why its relationship to its surroundings [sic].”

25 (Rec. 12.)

26

1 The City’s interpretation of guideline 4.b.(2) makes no sense in
2 relationship to the plain meaning of that provision, which reads:

3 “**Architectural style should not be restricted**[.] Evaluation
4 of a project should be based on quality of design and the
5 relationship to its surroundings. However, the use of styles
6 characteristic of Wheeler and the coastal area are **preferred**.
7 These include the use of natural wood siding such as cedar
8 shingles. The City **encourages** the use of pitched roofs, large
9 overhangs, wood fences and wood signs. Colors **should** be
10 earth tones harmonious with the structure, with bright or
11 brilliant colors used only for accent.”

12 WZO Section 11.050.4.b.(2) (emphasis added).

13 The Decision, however, converts this set of design suggestions into an
14 impossible evidentiary requirement:

15 “The City Council interprets this provision to require an
16 applicant to explain how the proposed development does, or
17 does not, use the identified styles and, to the extent a
18 proposal does not use ‘styles characteristic of Wheeler and
19 the coastal area,’ or the other identified features, the
20 applicant must explain how the design was arrived at and
21 why its relationship to its surroundings [sic].

22 “In this case, the applicant’s narrative and response simply
23 **allege** that the “Project design was influenced from
24 historical pictures of previous buildings in Wheeler” and
25 points to Exhibit III. Exhibit III is an elevation of the
26 building. The City Council finds that this approach is not
sufficient. * * * Without such photographs or pictures in the
record, the Council cannot make findings based on such
allegations. Without support in the record, there is no
evidentiary basis for the provision to use ‘styles
characteristic of Wheeler and the coastal area.’

“The applicant has similarly failed to provide **evidence of
the surrounding structures and sites**. While architectural
style is not restricted, this criterion and the design review
generally is also not a blank check in the City of Wheeler.
The applicant must make a sufficient showing in the first
place. Without sufficient information about the surrounding
area, the Council cannot make adequate findings based on
the provision for the surroundings, the City cannot find
sufficient evidence about the ‘quality of design and the
relationship to its surroundings.’ The Council interprets
‘surroundings’ as broader than ‘abutting’ and ‘adjacent.’

1 The surroundings could include the nearby wetlands and the
2 waterway, but *the applicant has not identified the*
3 *surroundings* as such, *nor has the applicant attempted to*
4 *make a connection between the surroundings and the*
5 *design of the building*. The site plans, in and of themselves,
6 do not demonstrate the design without relation [sic] to
7 buildings in the ‘surrounding’ area. The Council also
8 acknowledges that this criterion states that ‘[t]hese include
9 the use of natural wood siding such as cedar shingles,’ but
10 the Council finds that these features alone cannot fully
11 satisfy the requirement. And, in any event, the building itself
12 is overwhelmingly metal, with only minimal use of natural
13 wood and only outdoor services will be screened by a six-
14 foot cedar fence and no cedar shingles. As such, the
15 applicant has not carried its *burden of proof* in
16 demonstrating how this criterion is satisfied.”

17 (Rec. 14-15 (emphasis added).)

18 In contrast, the staff report analysis of subsection (2) provided the
19 following summary:

20 “This subsection notes the architectural style should not be
21 restricted. Given a majority of the building area is devoted to
22 industrial activity, it is difficult to match the design
23 expectations of this subsection with an industrial activity.^[6]
24 On balance, the design accommodates each use; does not
25 establish an unusual or unsightly structure; and, is in general
26 keeping with the expectations of this section.”

27 (Rec. 110.)

28 The City’s findings of noncompliance are inconsistent with the plain
29 language of WZO Section 11.050.4.b.(2) in the following respects:

30 First, the Decision minimizes the leading sentence and most salient
31 principle of the guideline: “Architectural style should not be restricted.”

32 Combined with the permissive language of the standards that follow—“should,”
33 “preferred,” “encourages”—these guidelines cannot be intended to require the

34 _____
35 ⁶ There are no industrial buildings in Wheeler. (9/23/21 audio 1:27:00
36 (remarks of Mike Anderson that “We don’t have any industrial buildings to
compare it to.”).)

1 level of strict adherence in the City’s interpretation. *See* WZO Section 1.070(1)
2 (“The word shall is mandatory and the words should or may are permissive.”).

3 Second, the second sentence of the guideline describes the general basis
4 for the City’s evaluation. It does not, by any plain-language, common-sense, or
5 conceivable reading, require an applicant to provide “evidence of the
6 surrounding structures and sites,” or “sufficient evidence about the ‘quality of
7 design and relationship to its surroundings,’” or a demonstration of “a
8 connection between the surroundings and the design of the building.” (Rec. 14.)
9 In any event, Petitioner *did* provide evidence about the surrounding sites (which
10 are vacant). (*See* Rec. 86, 96.)

11 Third, the guideline supplies a specific list of “styles characteristic of
12 Wheeler and the coastal area,” which are “preferred,” not mandatory. Petitioner
13 has submitted ample evidence of the use of every one of the listed styles,
14 including “natural wood siding,”⁷ “pitched roofs,” “large overhangs,” “wood
15 fences,” “wood signs,” and colors dominated by “earth tones.” (Rec. 67
16 (colors), 68 (cedar fencing), 70 (color, wood siding), 78 (signs), 83 (color,
17 wood siding), 94 (pitched roof, large overhangs), 96 (pitched roof, large
18 overhangs), 100 (wood siding, large overhangs, pitched roof).)

19 Nothing in the guideline, or in the design review criteria generally, either
20 expressly or implicitly requires an applicant to explain “how the design was
21 arrived at,” to make “a sufficient showing” about the “surrounding area,”⁸ or to

22 ⁷ The plain language of WZO Section 11.050.4.b.(2), “such as,” makes
23 “cedar shingles” an *example* of wood siding, not an independently listed style
24 element.

25 ⁸ Again, Petitioner notes that the duties of Planning Commission
26 members include “visit[ing] all sites relative to applicant requests.” Planning
Commission Bylaws Section II.B.(5) (page 1). Arguably, that places the
“burden of proof” for knowledge of surrounding areas on the City, not the
Applicant.

1 supply “sufficient evidence” on quality of design. For these reasons, the City’s
2 conclusion about compliance with guideline 4.b.(2) is at odds with the
3 provisions of the WZO and the purpose and intent of the City’s design review.
4 The City has misconstrued WZO Section 11.050.4.b.(2).

5 **d) WZO Guideline 4.b.(3)**

6 In its analysis of guideline 4.b.(3), “[m]onotony of design * * * shall be
7 avoided,” the City declares the building design monotonous and “finds that the
8 applicant has not carried its burden” to show otherwise. (Rec. 15.)⁹

9 The City’s findings on guideline 4.b.(3) are particularly perplexing when
10 compared with the analysis in the staff report, which concluded:

11 Overall, the building has a mix of features which avoid a
12 repetitive design. There is a break in the roof line as well as
13 different levels of roof elevations. The second floor of the
14 commercial portion has a wooden exterior finish contrasting
15 with the metal structure. The exterior industrial portion of
the building (facing the parking lot) has several windows
breaking up the monotony of the blank wall. This also
applies to the entrance (and second floor) of the commercial
side.

16 (Rec. 110.)

17 Petitioner acknowledges that the staff report does not constitute an
18 official City determination on the guideline. However, the Decision does not
19 even reference breaks in the roof line, windows and entrances; contrasting
20 exterior finishes on the first and second floors of the commercial side; or
21 contrasting wood finish around the bay doors on the industrial entrance. (*See*
22 Rec. 96, 100.) That omission illustrates two points: First, the City did not fairly
23 consider all elements of the proposed design when concluding that the

24 ⁹ The Decision also references “inconsistent information” from Petitioner
25 on window trim. However, Petitioner’s additional submittals on October 6,
26 2021, clearly show black window trim, with the caption, “BLACK TRIM, TYP AT
ALL WINDOWS AND DOORS.” (Rec. 98, 99.)

1 Application did not meet guideline 4.b.(3). Second, the City failed to consider
2 the language in guideline 4.b.(3) instructing that “[v]ariety of *detail, form,* and
3 *site design* shall be used to provide visual interest.” (Emphasis added.)
4 Petitioner provided substantial evidence of compliance with guideline 4.b.(3) by
5 showing variety of *detail* in the building’s exterior finishes, windows,
6 entrances, sheltered bay doors, and sheltered commercial entrance. (Rec. 83, 84,
7 87, 94, 98, 99, 100.) Petitioner also showed variety of *form* in the building’s
8 irregular shape and footprint, three contrasting rooflines, “canopy” over the
9 industrial entrance, and second-floor overhang creating a sheltered courtyard
10 for the commercial entrance. (Rec. 68-69, 85, 86, 94, 96, 97, 100.) Petitioner
11 demonstrated variety of *site design* in the configuration of the building and
12 parking lot, which fit into the site by following the Marine Drive alignment to
13 the east and the Nehalem Bay shoreline to the west, and also in exceeding the
14 landscaping requirement for the building’s east elevation. (Rec. 16, 86, 94, 97,
15 100.) The Decision failed to consider evidence in the record and failed to
16 account for language in the guideline. ORS 174.010 (statutory construction
17 must not “insert what has been omitted, or * * * omit what has been inserted”).

18 In addition, the Decision itself contradicts the conclusion of
19 noncompliance with guideline 4.b.(3). For example, the Decision states that the
20 “commercial portion of the structure has a distinct roof separation and exterior
21 finish (metal ground floor, wood second floor) which visually separates the two
22 floors,” and that “the improvements on the industrial portion of the site
23 effectively break up the monotony of a blank wall.” (Rec. 16, 17.) Those
24 findings are irreconcilable with the City’s finding that the building design is
25 monotonous. The City has undermined its own conclusion and offered no
26 explanation for the contradiction.

1 e) *WZO Guideline 4.b.(5)*

2 In response to guideline 4.b.(5), the City concluded that the guideline was
3 not met because there was evidence in the record that the proposed building
4 would block views of Nehalem Bay from a residence at 175 Nehalem
5 Boulevard; apparently the evidence consists solely of opposition testimony
6 from the owner of that residence, who wanted the Planning Commission to
7 preserve his view “forever,” unmarred by any development. (Rec. 289.) With
8 nothing more, this “evidence” is a thin reed to support a finding of
9 noncompliance with a design review guideline.

10 In addition, the City’s interpretation converts a soft, discretionary
11 guideline to “take[] into account” the “impact that structures will have on views
12 from adjacent or other areas” into a hard requirement that prevents all
13 development that may have *any* impact on another property owner’s views.
14 This rigid interpretation is apparent from the following statement in the
15 Decision:

16 “The applicant’s justification that ‘[t]he building will
17 be no taller than 24 feet, which is the allowable
18 height.’ The Council finds that this criterion is not
19 reduced to the maximum height allowed but rather
whether there will be *an impact* to structures that have
views.”

20 (Rec. 15 (emphasis added).) The intent of the design review guidelines is not to
21 prohibit structures from being built, but rather to review their design. The City’s
22 interpretation of guideline 4.b.(5) does the former, however, creating an absurd
23 result and far overreaching the provision’s intent by effectively forbidding any
24 development on Petitioner’s property. ORS 174.020 (legislative intent controls
25 meaning).

26

1 Petitioner provided substantial evidence of compliance with guideline
2 4.b.(5) by designing his building not to exceed the maximum height for the
3 zone, and by preserving approximately 90 percent of the site as open space.
4 (Rec. 63, 71, 86, 87, 96, 110.) Although it is clear from the wider context of
5 Wheeler’s regulatory scheme that preservation of views is important, it is
6 equally clear that that goal is to be accomplished through the enforcement of
7 height limitations. *See City of Wheeler Vision 2011* at 9 (“existing views” to be
8 protected by “[a]dopt[ing] and/or maintain[ing] strict height limits on any new
9 developments and structures”); *see also Portland Gen. Elec. Co. v. Bureau of*
10 *Labor & Indus.*, 317 Or 606, 859 P2d 1143 (1993) (use of text and context in
11 statutory construction). In discounting Petitioner’s evidence of compliance with
12 the zone’s height restrictions and instead interpreting WZO Section
13 11.050.4.b.(5) to forbid any development, the City misconstrued that guideline.

14 In sum, not only did the City misconstrue its design review guidelines
15 discussed above, it imposed application requirements on Petitioner that are
16 simply not written into the WZO. Accordingly, the Decision must be reversed
17 or remanded.

18 **VII. THIRD ASSIGNMENT OF ERROR: THE CITY ACTED OUTSIDE**
19 **ITS RANGE OF DISCRETION**

20 **A. Preservation of Error**

21 Petitioner raised the issue of the limited scope of design review both
22 orally and in writing. (Transcript 42-43; Rec. 129-131.)

23 **B. Standard of Review**

24 Under ORS 197.835(10), LUBA must reverse a local government
25 decision granting approval of an application if it finds that the local government
26

1 decision is outside the range of discretion allowed the local government under
2 its comprehensive plan or land use ordinances.

3 **C. Discussion**

4 Standards that have not been incorporated into the applicable land use
5 regulations do not provide applicable criteria and may not be relied upon as
6 reasons for denial. ORS 197.195(1); *Oster v. City of Silverton*, Or LUBA
7 No. 2018-103, 2019 WL 3205888, at *4-*5 (May 7, 2019). As the Decision
8 shows, the City based its findings of noncompliance with the design review
9 guidelines primarily on Petitioner’s alleged failure to provide argument or draft
10 findings relating to compliance. (Rec. 31-33.) For example, the Decision notes
11 that the design review Application simply provides the design and lists the
12 materials but does not provide argument or explanation or a “sufficient
13 showing” of compliance with the guidelines. (Rec. 32.) Similarly, the Decision
14 notes that the Applicant has not carried its “burden of proof” in demonstrating
15 how the guidelines are met. (Rec. 33.)

16 Although Petitioner acknowledges that the applicant is responsible for
17 demonstrating compliance with the applicable design review guidelines, there is
18 simply nothing in the WZO to suggest that the site plan, building elevations,
19 and plot plan—all of which are required by WZO Section 11.050.3—do not
20 provide the necessary evidence to show compliance with the design review
21 guidelines or that a design review applicant must provide extensive written
22 findings on each and every design guideline. Indeed, WZO Section 11.050.2.
23 provides that “[w]hen design review is required, no permit will be issued until
24 *site plans* have been reviewed and approved under Comprehensive Plan
25 Policies and Ordinance Provisions * * *.” (Emphasis added.) To suggest that
26 the required plans are insufficient for the City to review the *design* of the

1 development against the guidelines is inconsistent with the provisions of the
2 WZO and the purpose and intent of the City's design review.

3 Although the City has ostensibly cloaked its reasons for denial in the
4 applicable design review guidelines, a closer review of record and the Decision
5 demonstrates that the bases for denial are outside the range of discretion
6 afforded to the City under its comprehensive plan and WZO. The City has
7 denied the design review Application because Petitioner did not provide
8 detailed findings, a requirement that is not in the WZO. Accordingly, the
9 Decision must be reversed.

10 **VIII. FOURTH ASSIGNMENT OF ERROR: THE CITY'S PRACTICE**
11 **OR PATTERN OF DENYING PERMITS RELATED TO THE**
12 **PROPERTY AMOUNTS TO AN ILLEGAL DE FACTO MORATORIUM**
12 **ON DEVELOPMENT OF PETITIONER'S LAND**

13 **A. Preservation of Error**

14 Petitioner raised the issue of the City's unlawful prohibition of
15 development on Petitioner's development in the proceedings below. (Transcript
16 43.) Petitioner did not raise the precise issue of an illegal de facto moratorium
17 in the proceedings below because Petitioner did not anticipate that the City
18 would deny the design review Application, thereby continuing its practice or
19 pattern of denying permits related to Petitioner's property. A petitioner does not
20 waive its right to assign error when the alleged error occurred after the close of
21 the evidentiary record. *Grahn*, 76 Or LUBA 258.

22 **B. Standard of Review**

23 If LUBA finds that a land use decision flows from a de facto moratorium,
24 adopted in violation of the procedural and substantive requirements of Oregon's
25 moratorium statute, LUBA must reverse the decision. *Home Builders Ass'n of*
26 *Metro. Portland v. City of Wilsonville*, 30 Or LUBA 246 (1995).

1 **C. Discussion**

2 ORS 197.524(1) provides that when a local government “engages in a
3 pattern or practice of delaying or stopping the issuance of permits,
4 authorizations or approvals necessary for the subdivision or partitioning of, or
5 construction on, any land, including delaying or stopping issuance based on a
6 shortage of public facilities, the local government shall: (a) Adopt a public
7 facilities strategy under ORS 197.768; or (b) Adopt a moratorium on
8 construction or land development under ORS 197.505 * * *.”

9 Here, the City has engaged in such a pattern or practice with respect to
10 Petitioner’s property but has not adopted a moratorium as required by state
11 law. As described above, the City denied two conditional use permits for
12 Petitioner’s property in 2021. Those decisions are on appeal in LUBA
13 Nos. 2021-072/73. Following those denials, Petitioner revised its development
14 plans to proceed with uses that are permitted outright in the applicable zones,
15 subject only to the City’s design review process. As outlined in detail above, the
16 City’s evaluation of the design review Application focused primarily on the
17 proposed uses rather than the proposed design or development. Only after the
18 City Council voted to deny the design review Application did the City
19 generate reasons for the denial.

20 Although the Board has been clear that provisions of ORS 197.524(1) do
21 not apply where a local jurisdiction delays or stops the issuance of permits
22 because they are inconsistent with the local government’s comprehensive plan
23 or land use regulations (*see, e.g., Vista Constr. LLC v. City of Grants Pass*, 55
24 Or LUBA 590 (2008)), the City’s pattern or practice of denying permits related
25 to the Property demonstrates that the City’s intent is not to ensure compliance
26 with applicable land use standards but rather to prevent development altogether.

1 The City has drafted findings to connect its denial of the Application to the
2 City’s design review standards, but a review of the whole record demonstrates
3 that the City aims to prohibit all development of the Property. For example,
4 after the City Council voted to deny the Application, the City’s planner
5 reminded the Council that it needed “to establish reasons behind the denial.”
6 (Transcript 53.) That statement is material because, during the course of the
7 proceedings, the reasons for denial offered by the Councilors who voted to deny
8 the Application focused on the use itself rather than the proposed development
9 and design. (*See, e.g.*, Transcript 46-50 (“It shouldn’t be permitted outright, it
10 should be a conditional use.”).) For this reason, the City’s pattern or practice of
11 denying permits related to the Property amounts to an unlawful de facto
12 moratorium and therefore the Decision must be reversed or remanded.

13 **IX. FIFTH ASSIGNMENT OF ERROR: THE CITY’S DECISION IS**
14 **UNCONSTITUTIONAL**

15 **A. Preservation of Error**

16 Petitioner raised the issues of Due Process and the Takings Clause orally
17 and in writing. (Rec. 337-40; Transcript 43.)

18 **B. Standard of Review**

19 LUBA must reverse a local government’s decision if it is
20 unconstitutional. ORS 197.835(9)(a)(E); OAR 661-010-0071(1)(b).

21 **C. Discussion**

22 The City’s Decision is unconstitutional in two respects: First, the City’s
23 decision-making process violated Petitioner’s rights under the Due Process
24 Clause. Second, the City’s Decision, and its moratorium on all development,
25 created an unconstitutional taking of private property without compensation.

26

1 Under the Fifth Amendment of the United States Constitution, applicable
2 to states through the Fourteenth Amendment, a local government acting in a
3 quasi-judicial role must conduct itself to protect the procedural rights of those
4 affected by its decision, including the right to be heard, to present and rebut
5 evidence, and to appear before an impartial tribunal. *Fasano*, 264 Or at 588. For
6 all the reasons set forth in Part V.C, above, Petitioner was not afforded those
7 rights of due process. Accordingly, the City’s Decision denying Petitioner’s
8 Application is unconstitutional and must be reversed.

9 The Fifth Amendment of the United States Constitution is applicable to
10 Oregon through the Fourteenth Amendment; it prohibits the government from
11 taking private property for public use without just compensation. Similarly,
12 Article I, section 18 of the Oregon Constitution prohibits the taking of private
13 property for public use, without just compensation. Together, the federal and
14 state constitutional prohibitions are referred to in this Petition as the “Takings
15 Clause.”

16 The Decision violates the Takings Clause in two ways. First, the
17 Decision is the culmination of the City’s pattern and practice of blocking all
18 development of the Property, as set forth in Part VIII.C, above. Second, the
19 City’s interpretation of WZO Section 11.050.4.b.(5) creates a view easement
20 over the property and, in practical effect, makes any development impossible.

21 The City’s pattern of denying all permits for development of Petitioner’s
22 property not only constitutes an illegal moratorium under ORS 197.524, it is an
23 appropriation and a taking of Petitioner’s property because Petitioner has been
24 prevented from making any economically feasible private development or use
25 of the Property. *Brown v. City of Medford*, 251 Or App 42, 51-56, 283 P3d 367
26

1 (2012); *Lucas v. S. C. Coastal Council*, 505 US 1003, 1019, 112 S Ct 2886, 120
2 L Ed 2d 798 (1992).

3 In addition, and as an independent ground for violation of the Takings
4 Clause, the City’s interpretation of WZO Section 11.050.4.b.(5) creates an
5 exaction—specifically, a view easement on Petitioner’s property, as a basis for
6 denying all development. The language from the code is discretionary, stating
7 that the “impact that structures will have on views from adjacent or other areas
8 will be *taken into account*.” WZO Section 11.050.4.b.(5) (emphasis added).
9 However, the City treats the criterion as an absolute bar to development, giving
10 as an example a specific residential property across Highway 101: “This
11 criterion is intended to protect views, including those from adjacent structures
12 or structures in other areas. The Council finds that the residence at 175
13 Nehalem Boulevard is such a structure that would have its view of Nehalem
14 Bay adversely affected.” (Rec. 16.) Although the proposed structure complies
15 with the 24-foot height limitation in the WRC and IND Zones, the City gives
16 WZO Section 11.050.4.b.(5) a broader reach: “The Council finds that this
17 criterion is not reduced to the maximum height allowed but rather whether there
18 will be an impact to structures that have views.” (Rec. 15.) As the City has
19 interpreted the criterion, and as applied to Petitioner’s design review
20 Application, it is impossible to place *any* structure on the Property.¹⁰

21 When a local government imposes an exaction as a requirement of
22 development, or when it denies approval because the applicant refuses to “turn
23 over” a property interest, such an exaction must pass both parts of a two-part
24 test to be constitutional. *Nollan v. Cal. Coastal Comm’n*, 483 US 825, 107 S Ct

25 ¹⁰ Presumably, an underground bunker would not be feasible because of
26 the high water table.

1 3141, 97 L Ed 2d 677 (1987); *Dolan v. City of Tigard*, 512 US 374, 114 S Ct
2 2309, 129 L Ed 2d 304 (1994); *Koontz v. St. Johns Water Mgmt. Dist.*, 570 US
3 595, 606, 133 S Ct 2586, 186 L Ed 2d 697 (2013). First, there must be an
4 essential nexus between a legitimate governmental interest and the exaction.
5 *Nollan*, 483 US at 837. Second, the exaction must be roughly proportional to
6 the impact of the proposed development. *Dolan*, 512 US at 391. The Decision
7 fails both parts of the test and is unconstitutional.

8 A view easement is a real property interest subject to the Takings Clause,
9 and it qualifies as an exaction for purposes of the *Nollan/Dolan* analysis.
10 *Tonquin Holdings, LLC v. Clackamas Cnty.*; 64 Or LUBA 68, 87 (2011)
11 (conservation easement). The view easement imposed by the City, as a basis for
12 its decision to deny the Application, qualifies as an exaction.

13 The view easement fails the *Nollan* test because there is no legitimate
14 governmental interest at stake. The easement is not for a public purpose, but for
15 private benefit, as demonstrated by the City’s example of adverse effects on the
16 view from 175 Nehalem Boulevard. That residence is owned by John Lienert,
17 who submitted opposition testimony urging the City to deny the design review
18 Application in order to protect his view from across the highway. (Rec. 289.)

19 The view easement also fails the *Dolan* test because the exaction—a
20 prohibition of *all* development on the property—is not “related both in nature
21 and extent to the impact of the proposed development.” 512 US at 391.

22 For all the reasons explained above, the Decision is unconstitutional and
23 must be reversed.

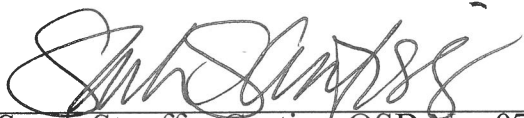
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X. CONCLUSION

Petitioner respectfully requests that LUBA reverse or remand the City’s Decision in accordance with ORS 197.835(9) and OAR 661-010-0071(1)(b).

DATED: February 28, 2022.



Sarah Stauffer Curtiss, OSB No. 076333
Jennie Bricker, OSB No. 975240

*Attorneys for Petitioner
Botts Marsh, LLC*

PETITIONER'S EXHIBIT A

Decision

NOTICE OF PLANNING COMMISSION DECISION

Planning File #0701-21-1 DR

December 17, 2021

I. BACKGROUND

- A. APPLICANT: Kenneth Ulbricht (for property owned by Bott's Marsh, LLC).
- B. LOCATION: The site is located on the west side of Highway 101 and the railroad tracks, approximately opposite Hemlock Street. There is no site address and the County Assessor places the site within Township 2 North; Range 10 West; Section 02BB; Tax Lot #400 and Township 2 North; Range 10 West; Section 02BC; Tax Lot #4800.
- C. PARCEL SIZE: Tax Lot 400 contains 0.45 acres; and Tax Lot 4800 contains 1.72 acres for a total of 2.17 acres.
- D. EXISTING DEVELOPMENT: The vacant lot fronts a public street. Services can be extended to the site.
- E. ZONING: Tax Lot 400: Industrial (IND); Tax Lot 4800: Water Related Commercial (WRC).
- F. REQUEST: The City Council reviewed the applicant's appeal of the Planning Commission to deny a Design Review application to construct a building that includes the processing, storage and retail sales of fish and shellfish.
- G. DECISION CRITERIA: Wheeler Zoning Ordinance, Section 11.50 (Design Review); Section 11.110 (Shoreland Development); Article 2 (WRC Zone); and Article 3 (Industrial Zone).
- H. CITY COUNCIL HEARING DATE: December 2, 2021.
- I. CITY COUNCIL ADOPTED FINDINGS: December 15, 2021.

II. DECISION

The City Council reviewed the application, heard testimony, and determined the Design Review application request cannot be supported.

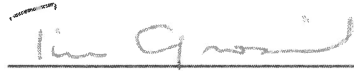
THEREFORE, it is the decision of the City Council of the City of Wheeler to **DENY** the applicant's appeal and uphold the Planning Commission decision.

III. APPEALS

This action will be official in 21 days, unless appealed. The appeal is to the Land Use Board of Appeals (LUBA) and must be submitted at the LUBA office (775 Summer Street NE, Suite 330; Salem, Oregon 97301-1283; 503-373-1265) by **5:00 PM., Friday, January 7, 2022.**

Should you have any questions regarding this case, please contact City Hall for further information.

Sincerely,



12-17-21

Tim Grossnickle, City Administrator

ATTACHMENT: City Council Order of Denial

BEFORE THE WHEELER CITY COUNCIL

In the Matter of the)
Application of) 1. Design Review
Kenneth Ulbricht)

**ORDER OF DENIAL
PLANNING FILE #0701-21-1 DR**

I. NATURE OF THE APPLICATION

This matter comes before the Wheeler City Council on an appeal of the Wheeler Planning Commission decision not to approve a Design Review application by Kenneth Ulbricht to construct a building that includes the processing, storage and retail sales of fish and shellfish on property located within the Industrial and Water Related Commercial zones.

II. GENERAL INFORMATION

A. Location

The site is located on the west side of Highway 101 and the railroad tracks, approximately opposite Hemlock Street. There is no site address and the County Assessor places the site within Township 2 North; Range 10 West; Section 02BB; Tax Lot #400 and Township 2 North; Range 10 West; Section 02BC; Tax Lot #4800.

B. Existing Development and Zoning

The vacant lot fronts a public street. Services can be extended to the site. Tax Lot 400 contains 0.45 acres and is zoned Water Related Commercial while and Tax Lot 4800 contains 1.72 acres and is zoned Industrial. The site contains a total 2.17 acres.

C. Adjacent Zoning and Land Use

Highway 101 and the railroad right-of-way border the property on the east and the Nehalem River to the west. Property to the north is located outside City limits while WRC zoned land to the south is vacant.

D. Background Information

The applicant is requesting the City Council overturn the Planning Commission decision and approve a Design Review application to construct a building that includes the processing, storage and retail sales of fish and shellfish.

III. PUBLIC HEARING

A. Planning Commission Action

A public hearing was duly held on this application before the Wheeler Planning Commission on September 23, 2021. Notice of the hearing was provided per requirements of the Wheeler Zoning Ordinance. Commission members indicated they were familiar with the location of the property. No objection was raised as to jurisdiction, conflicts of interest, bias, notice, evidence or testimony presented at the hearing. At the conclusion of the hearing, the Planning Commission deliberated on the issue and voted to continue the matter to October 7, 2021.

The public hearing was reopened on October 7, 2021 where the Commission received additional information and testimony. At the conclusion of the hearing, the Planning Commission deliberated on the issue and voted not to approve the application. A notice of the Commission decision was issued on October 8, 2021. The applicant subsequently filed an appeal.

B. City Council Action

A public hearing was duly held on the appeal of this application before the Wheeler City Council on November 16, 2021. Notice of the hearing was provided per requirements of the Wheeler Zoning Ordinance. Council members listed ex parte contacts, otherwise, no objection was raised as to jurisdiction, conflicts of interest, bias, notice, evidence or testimony presented at the hearing.

At the conclusion of the hearing, the City Council deliberated on the issue and voted to reject the appeal, thereby denying the application. The Council found the proposal did not comply with the applicable decision criteria contained in the Wheeler Zoning Ordinance for a Design Review. Further, the Council directed City staff to prepare an Order for Council adoption.

IV. FINDINGS OF FACT-GENERAL

The Wheeler City Council, after careful consideration of the testimony and evidence in the record, adopts the following general Findings of Fact:

- A. The applicant is Kenneth Ulbricht (for property owned by Bott's Marsh, LLC).
- B. The site is located on the west side of Highway 101 and the railroad tracks, approximately opposite Hemlock Street. There is no site address and the County Assessor places the site within Township 2 North; Range 10 West; Section 02BB; Tax Lot #400 and Township 2 North; Range 10 West; Section 02BC; Tax Lot #4800.

- C. Tax Lot 400 contains 0.45 acres; and Tax Lot 4800 contains 1.72 acres for a total of 2.17 acres.
- D. The vacant lot fronts a public street. Services can be extended to the site.
- E. ZONING: Tax Lot 400: Industrial (IND); Tax Lot 4800: Water Related Commercial (WRC).
- F. Highway 101 and the railroad right-of-way border the property on the east and the Nehalem River to the west. Property to the north is located outside City limits while WRC zoned land to the south is vacant.
- G. The applicant is requesting approval of a Design Review application to construct a building that includes the processing, storage and retail sales of fish and shellfish.
- H. This application will be evaluated against the design review standards listed in the Wheeler Zoning Ordinance, Section 11.50 (Design Review); Section 11.110 (Shoreland Development); Article 2 (WRC Zone); and Article 3 (Industrial Zone).

V. APPLICATION SUMMARY

- A. The applicant wishes to construct a building that will allow processing and retail sales of fish and shellfish. The project will feature the following:
 - 1. The project is in two distinct parts. An 8,780 square foot fish processing and warehousing facility will be located entirely on Industrial zoned portion of the site. Fish and shellfish will be cold-stored and shipped from this site along with some limited processing. Attached to this structure, and located entirely within the WRC zoned portion of the site, will be a 1,500 square foot retail market. This part of the structure includes a second floor to be used as an office and for storage.
 - 2. The Industrial side will feature a gray, vertical metal building along with a metal roof. Two bay doors will be located on the east side of the building (facing the parking lot) to receive/ship the product. The retail portion of the site will feature the same metal structure on the first floor, with a second floor finished in wood siding. This second floor runs perpendicular to the ground floor and includes large windows with views of the Nehalem River. The roof on the commercial side matches the industrial roof.
 - 3. Primary access to the site is off Highway 101 via Hemlock Street. A driveway serving both facilities will extend off of Hemlock Street/Marine Drive to access the project.

4. The driveway provides direct access to the site's parking. A total of 18 spaces were included on the site plan; six within the WRC zoned portion of the site and the remaining on the Industrial side. Each parking space is located next to the surrounding concrete walkway.
 5. Landscaping improvements are located on the south, west and north side of the site. The landscaping will primarily be fescue grasses and additional soil will be brought in as part of the improvements. Irrigation will be installed. Existing natural vegetation will border the site on the east. The applicant indicates all trees greater than 6" at a 4' height will remain.
 6. A lighting plan shows the exterior lighting to be dominated by gooseneck lamps which shine directly onto the ground. One light on the south side of the processing building is a cylinder-type lamp which shines both downward and skyward.
- B. The City sent notice of this application to affected agencies and area property owners. No agency submitted comments.

III. ADMINISTRATIVE PROCESS

- A. Pursuant to Wheeler Development Ordinance Section 2.020.7, "retail/wholesale fish and shellfish sales" is an outright permitted use in the WRC zone. Per Section 2.040, the new use must comply with the shoreland development standards in Section 11.110, and, comply with the design review requirements in Section 11.050. Within the Industrial zone, Section 3.020.7, allows "seafood processing" as an outright permitted activity. As with the WRC zone, Section 3.040 requires the new use to comply with the shoreland development standards in Section 11.110, and, design review requirements in Section 11.050.
- B. Neither the WRC or Industrial zone include any setback requirements. Effectively structures may be built right up to the property line. The only development limitation is building height, which at 24-feet, applies to both zones (Section 2.040.1 and Section 3.040.1). Without setback provisions, buildings may be physically connected provided they comply with applicable building and fire code requirements.
- C. This project encompasses two distinct zones. The Zoning Ordinance does not prohibit development in more than one zone. The only applicable requirement is that a proposed use must be identified as permitted or conditionally permitted in their respective zone.
- D. Based on these factors, the City Council concludes the following:
1. The proposed seafood processing plant and seafood retail sales outlet are outright permitted uses in their respective zones.

2. As outright permitted uses in the WRC and Industrial zones they are only subject to the design review process and compliance with the shoreland development standards.
 3. The buildings may be attached provided the improvements comply with building and fire code requirements.
 4. Nothing in the Zoning Ordinance prohibits an applicant from developing a single project that involves more than one zone.
- E. As noted, while two separate zones and uses, both are subject to the exact same review provisions. Therefore, this Order addresses the design review and shoreland development criteria for the combined facility instead of separate reviews for each use.

IV. CRITERIA AND FINDINGS –DESIGN REVIEW

- A. The requirements for design review are contained in Section 11.050. Subsection 1. require a design review for commercial and industrial development.

FINDINGS: A design review is required as the project involves both commercial and industrial development.

- B. Section 11.050.2., states “(W)hen design review is required, no permit will be issued until site plans have been reviewed and approved under Comprehensive Plan Policies and Ordinance Provisions by the Planning Commission.”

FINDINGS: The hearings before the Planning Commission, and Council appeal, are consistent with the public hearing requirement. Applicable Plan policies address commercial and industrial development generally, and, the shorelands area specifically. The policies and findings are noted below:

1. Goal 9 Policy #3 - Commercial and industrial development in any zone shall be subject to design review by the Planning Commission.

FINDINGS: This application, and the previous Commission reviews, are consistent with this Policy.

2. Goal 16 Policy 2 A. - The City of Wheeler, Oregon includes areas within the Estuary Natural Management Unit designated as Estuary Natural Zone (EN), and areas within the Estuary Development Management Unit designated as Estuary Development Zone (ED).

FINDINGS: The City implemented Estuary Development and Estuary Natural zones. Both the WRC and Industrial zones are subject to shoreland development requirements.

3. Goal 16 Policy 2.C.2.b. - The management objective in the Estuary Development Zone is to provide for the expansion or creation of other commercial, industrial or recreational facilities subject;

FINDINGS: The request would establish a new commercial/industrial enterprise, consistent with this Policy.

4. Goal 16 Policy 4.J.8. - Industrial uses shall be identified as water-related industrial uses on a case-by-case basis, with consideration given to the public loss of quality in goods or services which would result if the use were not offered adjacent to water. Water-related industrial uses could include:
 - a. fish or shellfish processing plants; and
 - b. warehousing and/or other storage areas for marine equipment or water-borne commerce.

FINDINGS: The Industrial zoned portion of this project includes a processing plant and warehousing, allowed in the zone, and consistent with this Policy.

5. Goal 16 Policy 4.J.9. - Commercial uses shall be identified as water-related commercial uses on a case-by-case basis with consideration given to the public loss of quality in goods or services which would result if the use were not offered adjacent to water. Water-related commercial uses could include:
 - a. fish or shellfish wholesale outlets;
 - b. marine craft or marine equipment sales establishments;
 - c. sport fish cleaning, smoking or canning establishments;
 - d. charter fishing offices;
 - e. retail trade establishments providing primarily products necessary for the commercial and recreational fishing industry, such as ice, bait, tackle, nautical charts, gasoline, or other products incidental to, or used in conjunction with a water-dependent use; or
 - f. restaurants which provide a waterfront view.

FINDINGS: In implementing this Policy, the City identified retail fish sales as a suitable permitted commercial use.

6. Goal 16 Policy 4.J.11. - Multipurpose and cooperative use of piers, wharves, parking areas, or handling and storage facilities shall be provided for, whenever practicable.

FINDINGS: Consistent with this Policy, the layout includes shared parking serving two separate operations.

7. Goal 16 Policy 4.J.12. Water-related and non-dependent, non-related industrial and commercial uses in Estuary Development zones shall be limited to those uses which:
 - a. do not require the use of fill; and
 - b. do not preclude the provision or maintenance of navigation and other needed public, commercial and industrial water-dependent uses.

FINDINGS: The facility does not require the use of fill nor precludes provisions for the maintenance of water-dependent uses.

8. Compliance with Zoning Ordinance provisions.

FINDINGS: The following Subsections address compliance with the Ordinance provisions.

- C. Section 11.050.3., establishes the application requirements.

FINDINGS: The applicant submitted sufficient information to proceed with the request.

- D. Subsection 4.a., establishes the guidelines to review the Site Design. Each guideline is reviewed below:

1. Subsection 4.a.(1) - Where existing natural or topographic features are present, they should be used to enhance the development. For example, incorporate small streams in the landscape design rather than placing them in a culvert and filling.

FINDINGS: The site is generally level and currently graded to allow development. There does not appear to be topographic features on-site that warrant retention.

2. Subsection 4.a.(2) - Existing trees should be left standing except where necessary for building placement, sun exposure, safety or other valid purpose. Landscaped vegetation buffers shall be provided along major streets or highways, or to separate adjacent uses. The use of native plants is encouraged.

FINDINGS: Based on the site plan and submitted information, all trees greater than 6" diameter at a 4' height will remain. Otherwise, except for a landscaped lawn, all remaining ground cover will be in natural vegetation.

3. Subsection 4.a.(3) - Graded areas shall be replanted as soon as possible after construction to prevent erosion. In areas where planting will not thrive, other materials such as wood fences, decorative rock, stone walls, and paving of brick or stone shall be used.

FINDINGS: For a site this size, a National Pollutant Discharge Elimination System (NPDES) 1200c permit is required through the Oregon Department of Environmental Quality.

4. Subsection 4.a.(4) - Exterior lighting shall be restrained in design, and shielded so as not to cast glare on adjacent private or public property or the night sky.

FINDINGS: As noted, the lighting plan shows the exterior lighting to be dominated by gooseneck lamps which shine directly onto the ground. One light on the south side of the processing building is a cylinder-type lamp which shines downward and skyward. On balance, these improvements appear to provide adequate lighting and security without interfering with adjacent properties. In addition, the plan complies with lighting provisions in Section 2.040.3 and Section 3.040.3.

5. Subsection 4.a.(5) - Storage or mechanical equipment shall be screened from view. Trash enclosures and screening shall be carefully located and treated to integrate with the appearance of the site/building design. Screen all outdoor storage. Roof top equipment shall be screened a minimum of 1 foot higher than the highest point on the equipment and shall be setback a minimum of 10 feet from the building edge.

FINDINGS: According to the applicant, outdoor services (e.g., trash) will be screened by a six-foot cedar fence and all trash areas covered. This also complies with the screening provisions in Section 2.040.2 and Section 3.040.2. The submitted plans did not identify roof top equipment.

6. Subsection 4.a.(6) - Primary building entrances shall open directly to the outside and shall have walkways connecting them to the street sidewalk. Create storefronts and entries that are visible and easily accessible from the street. Either orient the primary entrance to the building along a street facing property line or create an ADA accessible courtyard/plaza incorporating pedestrian amenities including street trees, outdoor seating and decorative pavers. Ensure a direct pedestrian connection between the street and buildings on the site, and between buildings and other activities within the site. In addition, provide for connections between adjacent sites, where feasible.

FINDINGS: Walkways will connect the parking area to each building entrance (commercial and industrial). Except for a break due to two garage entrances, pedestrian access will connect both parts of the facility. In addition, the entrance to the commercial portion includes a covered entrance.

However, the applicant must ensure a direct pedestrian connection between the buildings and other activities, including direct pedestrian access from the one side of the parking lot to the buildings. The site plan demonstrates that a direct pedestrian connection is frustrated by the loading area, placed in the middle of the building and on the eastside of the building facing the street, effectively dividing the parking lot and not allowing direct pedestrian access to the entrance for half of the parking spaces. This design would appear to create safety problems for patrons and workers accessing the building to have to navigate forklifts or trucks that are loading/unloading. Entryways on the west and north appear to be doors but no access to those doors via sidewalks. Effectively, those entryways do not connect to the street because the sidewalks do not even connect to the entryways. As such, the applicant has failed to carry its burden under this criterion, and this criterion is not satisfied.

In order to avoid having an entrance facing the street, the applicant alleges that “[t]he primary entrance will lead to a created ADA accessible courtyard.” A courtyard is generally defined as an unroofed area that is completely or mostly enclosed by the walls of a large building. There does not appear to be any such place on the site plans. However, even assuming that the applicant could satisfy such a definition, there does not appear to be any courtyard identified on any site plan in the record. Moreover, there is no evidence identifying what the applicant proposes as a courtyard or what such a courtyard would look like. At a very minimum, the applicant would have to identify a courtyard on the site plan, but the applicant has failed to make such a showing. In the absence of a courtyard, the applicant is required to place the entrance facing the street. Again, the site plans plainly show that the entrance does not face the street. Without evidence in the record of a courtyard and its location or a street-facing entrance, the applicant failed to carry its burden. Therefore, this criterion is not satisfied.

7. Subsection 4.a.(7) - Community amenities such as patio/seating areas, water features, art work or sculpture, clock towers, pedestrian plazas with park benches or other features located in areas accessible to the public are encouraged and may be calculated as part of the landscaping requirement. Benches in public areas on private property, adjacent to public right of way shall comply with design review standards for architectural style.

FINDINGS: This is a mixed commercial/industrial development. While designed to attract the public through retail sales, it is not designed nor intended to be a public park. However, the site will be landscaped and mature trees will be retained. In addition, the entrance to the commercial side of the facility includes a covered entrance which provides an additional amenity.

8. Subsection 4.a.(8) - A landscaping plan shall be submitted which shows existing and proposed vegetation, trees, landscaping materials, a timeline for installation and maintenance, and other features in order to permit the Planning Commission to review the plan. Landscaping shall be provided along project site boundaries where it does not interfere with access and clear vision. Landscaping is intended to soften the effects of built and paved areas. It also helps reduce storm water runoff by providing a surface into which storm water can percolate.

FINDINGS: The site is relatively flat with natural vegetation surrounding a large dirt/gravel area. A submitted plan identified existing significant trees that will be retained. Plans also showed a lawn surrounding the facility, that along with drainage improvements, will help reduce storm water run-off.

Section 3.040.4. states "(W)hen a use abuts a lot in a non-industrial zone, there will be an attractively designed and maintained buffer which can be in the form of vegetation, fencing, or walls." This requirement is certainly applicable when the abutting lots are under separate owners and uses. However, this project is under a single ownership with a shared access, parking area and purpose, effectively designed to work as a single unit. The buffering requirement is not applicable in this case.

9. Subsection 4.a.(9) - Parking lots shall be divided into groups of no more than 8 spaces with landscaping and walkways dividing the groups. A walkway or sidewalk shall be provided to separate the parking from public streets and adjacent property. Parking shall be designed to be as unobtrusive as possible, through site location and landscaping.

FINDINGS: The parking design complies with these requirements. The spaces are placed in groups containing no more than eight spaces and walkways connect the parking areas to facility.

In addition, specific parking requirements are contained in Section 11.090 of the Zoning Ordinance. Retail spaces require one space per 200 square feet of floor area plus one space per two employees. The 1,500 square foot retail space requires 7.5 spaces (1500/200) plus two employee spaces for a total of 9.5. A warehousing, storage, wholesale type of business requires one space per storage unit plus a space per employee during the largest shift. The applicant notes there are four storage spaces (although this is effectively a single storage unit) within the structure with a maximum of 3 or 4 employees on site. This requires a maximum of 8 spaces. Therefore, 17.5 spaces are required. The site layout identifies 18 spaces, thereby meeting this requirement.

10. Subsection 4.a.(10) - Uses shall provide a hard-surfaced, well-marked and lighted pedestrian access system consistent with the accessibility standards of the Americans with Disabilities Act Accessibility Guidelines.

FINDINGS: Based on the site plan and supporting information, the paved parking area will be surrounded by a concrete walkway which connects to both the commercial and industrial portions of the building. Building lighting is available to assist.

- E. Subsection 4.b., establishes the guidelines to review the building design. Each guideline is reviewed below:

1. Subsection 4.b.(1) - The height and scale of the buildings should be compatible with the site and adjoining buildings. Use of materials should promote harmony with the surrounding structures and site. The materials shall be chosen and constructed to be compatible with the natural elements and applicable city ordinances.

FINDINGS: The submitted plan information indicates the building will not exceed 24-feet, which complies with the Zoning Ordinance limitation. The building combines gray metal siding; a dark gray roof; wooden trim, including a board and batten exterior on the commercial second floor; and white window trim.

However, while the applicant's response to this criterion simply lists the materials proposed to be used, the applicant has not proposed how the height and scale of the proposed buildings will be compatible with the site or adjoining buildings. Similarly, the applicant has not indicated how the materials proposed will promote harmony with the structures and site. Instead, the applicant has simply listed the proposed materials. Finally, the applicant has not demonstrated how the materials are compatible with the natural elements. The City Council is unable to discern the applicant's rationale for the applicant's proposal. Without some argument and evidence in the record to demonstrate how the materials chosen are compatible and promote harmony, the Council cannot find that this provision has been satisfied. Moreover, the applicant has not included in the record any information on the "natural elements" that are identified in this criterion and for which there must be a finding of compatibility. As such, the applicant has not carried its burden of proof in demonstrating how this criterion is satisfied.

2. Subsection 4.b.(2) - Architectural style should not be restricted. Evaluation of a project should be based on quality of design and the relationship to its surroundings. However, the use of styles characteristic of Wheeler and the coastal area are preferred. These include the use of natural wood siding such as cedar shingles. The City encourages the use of pitched roofs, large

overhangs, wood fences and wood signs. Colors should be earth tones harmonious with the structure, with bright or brilliant colors used only for accent.

FINDINGS: This provision requires the City to review the overall design quality of a proposal, including its relationship to its surroundings. The criterion encourages certain types of design elements, but does not restrict architectural style. The City Council interprets this provision to require an applicant to explain how the proposed development does, or does not, use the identified styles and, to the extent a proposal does not use “styles characteristic of Wheeler and the coastal area”, or the other identified features, the applicant must explain how the design was arrived at and why its relationship to its surroundings.

In this case, the applicant’s narrative and response simply allege that the “Project design was influenced from historical pictures of previous buildings in Wheeler” and points to Exhibit III. Exhibit III is an elevation of the building. The City Council finds that this approach is not sufficient. It does not explain whether, in fact, the design incorporates the styles characteristic of Wheeler and the coastal area, nor does it use the identified design elements. To the extent the applicant relies on “historical pictures of previous buildings in Wheeler”, the applicant has not submitted any of those photographs or pictures of those previous buildings. Without such photographs or pictures in the record, the Council cannot make findings based on such allegations. Without support in the record, there is no evidentiary basis for the provision to use “styles characteristic of Wheeler and the coastal area.”

The applicant has similarly failed to provide evidence of the surrounding structures and sites. While architectural style is not restricted, this criterion and the design review generally is also not a blank check in the City of Wheeler. The applicant must make a sufficient showing in the first place. Without sufficient information about the surrounding area, the Council cannot make adequate findings based on the provision for the surroundings, the City cannot find sufficient evidence about the “quality of design and the relationship to its surroundings.” The Council interprets “surroundings” as broader than “abutting” and “adjacent.” The surroundings could include the nearby wetlands and the waterway, but the applicant has not identified the surroundings as such, nor has the applicant attempted to make a connection between the surroundings and the design of the building. The site plans, in and of themselves, do not demonstrate the design without relation to buildings in the “surrounding” area. The Council also acknowledges that this criterion states that “[t]hese include the use of natural wood siding such as cedar shingles,” but the Council finds that these features alone cannot fully satisfy the requirement. And, in any event, the building itself is overwhelmingly metal, with only minimal use of natural wood and only outdoor services will be screened by a six-foot cedar fence

and no cedar shingles. As such, the applicant has not carried its burden of proof in demonstrating how this criterion is satisfied.

3. Subsection 4.b.(3) - Monotony of design in single or multiple building projects shall be avoided. Variety of detail, form, and site design shall be used to provide visual interest. In a Planned Development, no more than 25% of all buildings in the development shall replicate the same roofline or footprint.

FINDINGS: The Council finds that the applicant has not carried its burden under WZO 11.050(4)(b)(3). The proposed structure is largely dominated by gray/black metal with only a small amount of wood proposed. The Council notes that other provisions of the zoning ordinance encourage natural wood siding. Here, there is only a relatively small amount of the structure devoted to natural wood. Monotony is defined as a lack of variety, tedious repetition, and routine. The Council finds that the use of two materials, with the exception of the roofing and windows, to lack variety and to be monotonous. The Council finds that it does not provide visual interest. The north and west elevations show nothing but the similar patterns of windows amidst gray/black metal siding and a single door. The Council finds the north and west elevations are particularly monotonous and lack detail. Given the site's location on the waterfront, the Council believes the requirements in this criterion are particularly important. The Council finds that the applicant has submitted inconsistent information regarding the window trim. On one hand, the vinyl windows are referred to as white in the narrative, yet they appear black in elevations and plans. The Council finds that the applicant has not satisfied this criterion.

4. Subsection 4.b.(4) - Restaurants or facilities with late entertainment shall not have an adverse noise impact on adjacent residential uses and shall employ appropriate sound-proofing techniques.

FINDINGS: This subsection does not apply as restaurant or facility with late entertainment is proposed.

5. Subsection 4.b.(5) - The impact that structures will have on views from adjacent or other areas will be taken into account.

FINDINGS: The City Council finds that there is evidence in the record that the proposal will block views from an adjacent or other area, including a residence across highway 101. The Council finds that the "adjacent" and "other areas" is broad enough to include the residence across from Highway 101. The applicant's justification that "[t]he building will be no taller than 24 feet, which is the allowable height." The Council finds that this criterion is not reduced to the maximum height allowed but rather whether there will be an impact to structures that have views. If the criterion could be satisfied

merely by complying with the height restriction, then the criterion would have no independent purpose from the height restriction, making it superfluous. This criterion is intended to protect views, including those from adjacent structures or structures in other areas. The Council finds that the residence at 175 Nehalem Boulevard is such a structure that would have its view of the Nehalem Bay adversely affected. The Council finds that this criterion has not been satisfied.

6. Subsection 4.b.(6) - The property owner shall establish one street facing entrance or store front with access acceptable to the City.

FINDINGS: This structure does not “face” a street in the typical sense. The commercial storefront is readily visible from the parking lot; and, accessible via a concrete walkway. On balance, this access is acceptable.

7. Subsection 4.b.(7) - The street facing entrance or store front shall provide windows or window displays a minimum of 4 feet in height along the ground floor street-facing frontage for a minimum of 50 percent of the horizontal length of the building. Glass doors may be credited toward the 50 percent requirement. This section shall not apply to multifamily dwellings.

FINDINGS: These provisions apply to the commercial storefront located on the WRC portion of the site. Based on the submitted information, at least 54% of the storefront contains windows and glass doors.

8. Subsection 4.b.(8) - Architectural features or landscaping shall be provided for at least 30 percent of the wall length on each street facing elevation.

FINDINGS: On the street facing portion of the structure, the applicant calculated that 48-feet of the 112-foot length is landscaped, primarily lawn. This amounts to 42.8% of the frontage, exceeding the 30% requirement.

9. Subsection 4.b.(9) - Multi-story commercial, mixed-use or multifamily dwellings shall have ground floors defined and separated from upper stories by architectural features that visually identify the transition from ground floor to upper story.

FINDINGS: The commercial portion of the structure has a distinct roof separation and exterior finish (metal ground floor, wood second floor) which visually separates the two floors. In addition, the second floor runs perpendicular to the ground floor.

10. Subsection 4.b.(10) - Provide recessed shielded lighting on street-facing elevations. Provide articulated facades for every 40 feet of building length. Articulated facades shall contain at least one of the following features: building offsets, projections, changes in elevation or horizontal direction, or

a distinct pattern of divisions in surface materials. Large expanses of blank walls shall only be located in areas that are not visible to the public.

FINDINGS: The lighting plan was previously reviewed, noting the number of shielded lighting fixtures. The north and west sides of the structure contain blank walls but are not visible from the street. The east of the structure shows two separate roof elevations, with a mix of windows and vehicle entrance doors. While these façade improvements are likely intended for commercial uses, the improvements on the industrial portion of the site effectively break up the monotony of a blank wall.

11. Subsection 4.b.(11) - New commercial or mixed-use residential/ commercial structures shall be encouraged to provide weather protection for pedestrians along street facing elevations.

FINDINGS: As noted, the commercial component includes a covered entrance.

- F. Subsection 5. - Performance Bond. The Planning Commission may require that the property owner furnish to the City a performance bond, cash or surety for the value of the cost of improvements that will be dedicated for public use in order to assure that the improvements are completed within the timeframe specified. These improvements may include open space, and infrastructure such as sidewalks, streets, water, sewer, and stormwater drainage.

FINDINGS: This subsection allows the City to require a performance bond for infrastructure improvements of an approved development. As such, this may be placed as a condition of approval. It is recommended a performance bond be required to ensure completion of any facility improvements.

- G. Subsection 6. - Compliance with Approved Plans Compliance with conditions of approval and adherence to the submitted plans, as approved, is required. Any departure from these conditions of approval and approved plans constitutes a violation of this ordinance.

FINDINGS: This subsection applies to an approved decision. Both the City and applicant are responsible to ensure provisions in this subsection are enforced.

- H. Subsection 7. - Time Limit for Design Review Approval of an application for design review shall be void after one year or such lesser time as the authorization may specify unless construction has taken place. The Planning Commission may extend authorization for an additional period not to exceed six months provided a written request is submitted to the City Manager at least 10 days prior to the expiration of the permit. The Planning Commission shall review the request at the next available Planning Commission meeting.

FINDINGS: This is an administrative process. Requirements in this subsection only apply to approved decisions and are not related to design elements of the current request.

- I. Subsection 8. - Limitations on Refiling of Application. Applications for which a substantially similar application has been denied will be heard by the Planning Commission only after a period of six months has elapsed from date of the earlier decision.

FINDINGS: Requirements in this subsection only apply to decisions that were denied and are not related to design elements of the current request.

V. CRITERIA AND FINDINGS
SHORELAND & ESTUARINE DEVELOPMENT STANDARDS

- A. Section 11.110 addresses the standards for shoreland and estuarine development standards. These standards apply to uses in the following zones: Water-Related Commercial (WRC), Water-Related Industrial (IND), Water-Dependent Development (WDD), Estuarine Natural (EN), and Estuarine Development (ED).

FINDINGS: This provision applies as the project includes land within Water-Related Commercial (WRC) and Water-Related Industrial (IND) zones.

- B. Section 11.111 establishes the general standards shall apply to all shoreland uses. Each standard is reviewed below:

1. Setback. The shoreline setback for non-water dependent uses shall be 30 feet. In cases where a proposed use would be located between two existing structures that infringe on the 30-foot setback line, the Planning Commission, after a public hearing, may allow the structure to extend up to the setback of the adjacent structures, but in no case less than ten feet from the shoreline. The setback shall be measured horizontally upland from the line of non-aquatic vegetation or mean higher-high water.

FINDINGS: Based on submitted information, the buildings will comply with the 30-foot setback requirement. This can be verified through the building permit process.

2. Riparian Vegetation. All uses and structures shall be set back fifteen (15) feet from Vosberg Creek unless direct water access is required in conjunction with a water-dependent use. All uses and structures shall be set back twenty-five (25) feet from the estuarine area located east of Highway 101, at the north end of the City (designated EN) unless direct water access is required in conjunction with a water-dependent use. Riparian vegetation shall be protected and retained within the required setback with the following exceptions:

- a. The removal of trees which pose an erosion or safety hazard;
- b. Vegetation removal necessary to provide direct water access for a water-dependent use; or
- c. Vegetation removal necessary to place structural shoreline stabilization when other forms of shoreline stabilization are shown to be inadequate.

FINDINGS: The site is not located near Vosberg Creek nor within the identified Estuary Natural area. Except for related site grading, there is no indication riparian areas will be disturbed.

3. Waterfront Access. Waterfront access for the public such as walkways, trails and landscaped areas will be provided, whenever possible and when consistent with public safety.

FINDINGS: The project includes both commercial and industrial activities and is not designed for public recreation. On the industrial side, public safety concerns with truck (and possibly forklift) traffic precludes public access to the waterfront and shore. However, the commercial side has a covered entrance from which customers can view the Nehalem River and adjacent shoreland.

4. Signs. Signs for commercial and industrial uses shall be constructed against a building.

FINDINGS: Sign permits are issued separately and would be required to comply with adopted sign regulations.

5. Lot Area. Marsh and other aquatic areas will not be used to compute lot area or density, except when a conditional use permit allowing filling or pilings has been granted.

FINDINGS: This subsection is not applicable as neither zone has a minimum lot size requirement.

6. Utilities. Whenever feasible, utility lines will be located underground and along existing rights-of-way. Above ground utilities are subject to design review by the Planning Commission. All above ground utilities should be designed to minimize view interference and the amount of land clearing.

FINDINGS: Submittal of engineering plans determines compliance with this provision. The applicant did not request the installation of above ground utilities.

7. Parking. Parking facilities shall not be located over the water, or within 20 feet of the line of non-aquatic vegetation.

FINDINGS: The location of the parking lot complies with these provisions.

8. Architectural Design. All proposals for structural development will be subject to design review standards of Section 11.050.

FINDINGS: The City Council previously addressed the criteria in Section 11.050.

9. Erosion Control. Non-structural solutions to erosion and flood control problems will be used whenever practical.

FINDINGS: The site plan identified storm drainage improvements which will also be augmented by the planting of the lawn. In addition, a NPDES 1200c permit from DEQ will be required prior to construction.

VI. CONCLUSION AND DECISION

Based on the above findings, the City Council of Wheeler concludes the application failed to comply with all the relevant decision criteria. The appeal is therefore DENIED.

PASSED BY THE CITY COUNCIL this 15th day of December, 2021.

AYES: 5 NAYS: 0

APPROVED BY THE MAYOR:

Doug Honeycutt
Mayor Doug Honeycutt

12-15-2021
Date

FILED IN THE OFFICE OF THE CITY RECORDER:

ATTEST: Tim Grossnickle
Tim Grossnickle, City Manager

12-15-2021
Date

PETITIONER'S EXHIBIT B

Local Ordinances, Plans, and Other Law

1. Wheeler Zoning Ordinance (Excerpts)
2. Final Bylaws for the City of Wheeler Planning Commission (Complete)
3. Wheeler Vision Document (Excerpts)

City of Wheeler, Oregon Zoning Ordinance

Adopted December 1979
Amendments through September 28, 2018

CITY OF WHEELER, OREGON ZONING ORDINANCE

ORDINANCE NO. 79-2

AN ORDINANCE PROVIDING FOR THE ESTABLISHMENT OF ZONING REGULATIONS FOR THE CITY OF WHEELER, OREGON

The City of Wheeler, Oregon, ordains as follows:

ARTICLE 1. INTRODUCTORY PROVISIONS

Section 1.010. Title.

This ordinance shall be known and may be cited as the "Wheeler Zoning Ordinance".

Section 1.020. Purpose.

This ordinance is to establish zoning districts and regulations within the city, consistent with the Wheeler Comprehensive Plan, and for the following purpose:

1. To promote appropriate uses of land and orderly development of the city;
2. To facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements;
3. To protect land uses from geologic hazards, pollution, floods and other dangers;
4. To provide adequate light, air quality and provisions for fire protection;
5. To promote the public health, safety, convenience and welfare;
6. To conserve and stabilize the value of property;
7. To protect and enhance the appearance of the city.

Section 1.030. Rules of Application.

1. No building or other structure shall be erected, reconstructed, altered, enlarged or moved, nor shall any building, structure or land be used for any purpose except as specifically (or by necessary implication) authorized by this ordinance. No lot shall be reduced in area so as to be smaller than the allowable minimum lot sizes authorized by this ordinance, and if already less, the area shall not be further reduced.
2. Issuance of building permits, property divisions and other uses of land authorized by this ordinance shall require written certification by the City Recorder and Planning Commission Chairman that the

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proposal is consistent with the provisions of the City Zoning Ordinance, City Comprehensive Plan, and other local ordinances. A decision may be appealed to the City Council.

Section 1.040. Classification of Zones.

For the purpose of this ordinance, the following zones are hereby established:

ZONE	PRIMARY SYMBOL	ARTICLE
Water-Related Commercial	WRC	2.010-2.040
Water-Related Industrial	IND	3.010-3.040
General Commercial	GC	4.010-4.040
Residential 1	R1	5.010-5.040
Residential 2	R2	6.010-6.040
Public Land Areas	P	7.010-7.040
Estuarine Natural	EN	8.020-8.050
Estuarine Development	ED	8.070-8.090
Flood Hazard Overlay	FHO	9.010-9.130

Section 1.050. Mapping of Zones.

1. The boundaries of zoning districts within the City limits are shown upon the maps entitled "City of Wheeler Zoning Maps."
2. Boundaries of zoning districts shall be the same as boundaries of the Comprehensive Plan Land-Use Map.
3. The City shall maintain an up-to-date copy of the City Zoning Map, revised when necessary, so that it accurately portrays changes of the district boundaries. Adjacent to any zoning map revisions, the City Recorder shall endorse the change with the ordinance number authorizing the zone map amendment.
4. Unless otherwise specified, zone boundaries are section lines; subdivision lines; lot lines; center lines of streets; or such lines extended.

Section 1.060. Zoning of Annexed Areas.

Areas annexed to the City shall automatically be classified consistent with the Comprehensive Plan.

Section 1.070. Definitions.

As used in the Ordinance the following words and phrases shall mean:

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1. The word shall is mandatory and the words should or may are permissive.
2. Access. Means the way or means by which pedestrians and vehicles enter and leave property.
3. Accessory Use and Structure. A use of structure incidental and subordinate to the main use of the property and located on the same lot as the main use.
4. Alley. A street which affords only a secondary means of access to property.
5. Aquaculture. The raising, feeding, planting and harvesting of fish and shellfish, including associated facilities necessary to engage in the use.
6. Bed and Breakfast. An owner-occupied dwelling where no more than three (3) rooms are available for transient lodging and where a morning meal is provided.
7. Bridge Crossing. The portion of a bridge spanning a waterway not including support structures or fill located in the waterway or adjacent wetlands.
8. Bridge Crossing, Support Structures. Piers, piling, and similar structures necessary to support a bridge span but not including fill for causeways or approaches.
9. Building. A structure, other than a mobile home, built for the support, shelter or enclosure of persons, animals, chattels, or property of any kind and having a fixed connection to the ground.
10. Condominium. A part of a property consisting of a building or one or more rooms occupying one or more floors of a building or a part or parts thereof, intended for any type of independent ownership, the boundaries of which are described pursuant to ORS Chapter 91, and with a direct exit to a public street or highway or to a common area or areas leading to a public street or highway.
11. Condominium, Time-Share. A condominium similar to a hotel in which rooms are individually owned and in which some or all rooms are available to transients for rent or on an exchange basis.
12. Cottage Industry. A small business activity which may involve the provision of services or manufacture and sale of products, is carried on by a member of the family living on the premises with no more than one other person employed by the family member, and is not detrimental to the overall character of the neighborhood.
13. Open Space within a Planned Development or Subdivision. Open space within a Planned Development or Subdivision shall be dedicated specifically for the purpose of providing places for recreation, conservation, landscaping, or preservation of natural features. Open space is not occupied by buildings, structures, parking areas, streets, alleys, or driveways. In the open space calculation, the following cannot be included: wetlands, waterways, ponds, marshes, and tidal marshes. See also Section 1.070(57) Open Space.

CITY OF WHEELER, OREGON ZONING ORDINANCE

ARTICLE 2. WRC ZONE - WATER-RELATED COMMERCIAL

Section 2.010. Intent.

The water-related commercial zone, designated by the primary symbol WRC, is established along the water-front to provide land space for marine-oriented commercial uses.

Section 2.020. Permitted Principal Uses/Activities.

The following uses, their accessory uses and activities are permitted out-right:

1. Low-intensity marine research and/or education;
2. Navigational aids;
3. Marinas and/or shallow water port facilities and shipping activities;
4. Piers and wharves;
5. Low-intensity water-dependent recreation facilities and public access points, including parks, waysides and boat ramps;
6. Marine services;
7. Retail/wholesale fish and shellfish sales.
8. Boat, canoe, kayak sales and / or rentals.

Section 2.030. Conditional Uses/Activities.

The following conditional uses, their accessory uses and activities are permitted in the WRC zone subject to the provisions of Article 15:

1. Fill and dredge material disposal.
2. Aquaculture or hatchery sites.
3. Permanent recreation facilities other than boat ramps, including public rest rooms, and other developed recreation facilities.
4. Shoreline stabilization.
5. Railroad development.

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6. Medium- or high-intensity research and/or educational activities.
7. Bicycle paths.
8. Dry boat storage.
9. Hotels and motels.
10. Restaurants.
11. Educational facilities such as museums, interpretive centers, and aquariums.
12. Residential use in conjunction with a permitted or conditional use where the street level shall be maintained as a commercial use.
13. Bed and Breakfast when in conjunction with a permitted or conditional use where the street level is maintained as a commercial use.

Section 2.040. Development Standards.

In the WRC zone, the following standards shall apply:

1. The maximum building height shall be 24 feet.
2. Outdoor storage areas shall be enclosed by suitable vegetation, fencing or walls.
3. Exterior lighting shall not adversely affect the livability of property in nearby residential zones.
4. All development shall be in accordance with shoreland development standards, Section 11.110.
5. Landscaping standards in accordance with Section 11.050.
6. All commercial developments shall be subject to design review, Section 11.050.
7. Parking shall be in accordance with Section 11.090.
8. Signs shall be in accordance with Section 11.100.

Section 2.050. Special Use Standards.

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A conditional use allowed in the WRC zone shall meet #1 below and either #2 or #3 of the following criteria:

1. The use is not an Especially Suited to Water Dependent (ESWD) use which means that it can be carried out on land that is not adjacent to the water and the water location or access is not needed for:
 - a. Uses especially suited for water-dependent uses.
 - b. Uses especially suited for water-related uses.
 - c. Uses which retain flexibility of future use and do not inalterably commit shorelands for more intensive uses.
 - d. Uses which maintain the integrity of estuaries and coastal waters.
2. The use does not require filling or dredging of the estuary; or
3. The use is approved by the Planning Commission in accordance with Article 2, Section 2.040, Article 11, Section 11.050 and Section 11.110, and Article 15 of this Ordinance.

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ARTICLE 3. IND ZONE - WATER-RELATED INDUSTRIAL

Section 3.010. Intent.

The water-related industrial area, designated by the primary symbol IND, is established to encourage development of marine-oriented industrial and commercial uses which are compatible with the community setting and natural values in the Wheeler area.

Section 3.020. Permitted Principal Uses/Activities.

In an IND zone the following uses and their accessory uses and activities are permitted outright:

1. Shallow-water port facilities.
2. Marinas, piers and wharves.
3. Navigation improvements.
4. Boat ramps.
5. Hatchery site and aquaculture uses.
6. Boat building.
7. Seafood processing.
8. Other water-related industry.
9. Marine services.
10. Dry boat storage.
11. Log storage and processing.

Section 3.030. Conditional Uses/Activities.

The following uses, their accessory uses and activities are permitted in an IND zone subject to provisions of Article 15:

1. Non-water-related industry.
2. Retail/wholesale fish and shellfish sales.
3. Other water-related commercial uses.

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- D. Aquaculture and water-dependent portions of aquaculture facilities.
- E. Other water-dependent uses. A use is determined to be water-dependent when it can be carried out only on, in, or adjacent to the water, and the location or access is needed for:
 - 1. Water-borne transportation.
 - 2. Recreation
 - 3. A source of water (such as energy production, cooling of industrial equipment or wastewater, or other industrial processes).
- F. Water-related industrial uses not requiring the use of fill, including, but not limited to:
 - 1. Fish or shellfish processing plants.
 - 2. Warehouse and/or other storage areas for marine equipment or water-borne commerce.
- G. Water-related commercial uses not requiring the use of fill, including, but not limited to:
 - 1. Fish or shellfish retail or wholesale outlets.
 - 2. Marine craft or marine equipment sales establishments.
 - 3. Sport fish cleaning, smoking or canning establishments.
 - 4. Charter fishing offices.
 - 5. Retail trade facilities in which the majority of products are products such as ice, bait, tackle, nautical charts, gasoline or other products incidental to or used in conjunction with a water-dependent use.
 - 6. Restaurants which provide waterfront views and which are in conjunction with a water-dependent or water-related use such as a seafood processing plant or charter office.
- H. In-water sorting, storage and handling of logs in association with water-borne transportation of logs.
- I. Other water-related uses not requiring the use of fill. A use is determined to be water-related when the use:
 - 1. Provides goods and/or services that are directly associated with water-dependent uses (supplying materials to, or using products of, water-dependent uses).

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2. If not located near the water, would experience a public loss of quality in the goods and services offered. Evaluation of public loss of quality will involve a subjective consideration of economic, social and environmental consequences of the use.
- J. Accessory uses or structures in conjunction with a conditional use listed in A-H above limited in size to a maximum of 10% of the lot or parcel size.
- K. Mining and mineral extraction.
- L. Storm water and sewer outfalls.
- M. Non-water-dependent and non-water-related uses not requiring the use of fill.
- N. New dike construction if:
1. Required for a water-dependent use for which a substantial public benefit is demonstrated, the use or alteration does not unreasonably interfere with public trust rights and for which no practicable upland locations exist.
 2. Adverse impacts are avoided or minimized to be consistent with the purposes of the area.
- O. Water-related or non-dependent, non-related uses requiring the use of fill, provided that a Goal 16 exception has been approved and included as an amendment to the Tillamook County Comprehensive Plan or Wheeler Comprehensive Plan.

Section 8.090. Regulated Activities (RA)

The following regulated activities are permitted within the ED zone, provided that the requirements of Section 11.110 have been met. Regulated activities shall be reviewed by the procedure provided in Section 11.115.

- A. Regulated activities in association with on-site maintenance and repair of existing structures or facilities.
- B. Dredging for:
1. Maintenance of existing facilities.
 2. Navigational improvements.
 3. Water-dependent portions of aquaculture facilities or operations.
 4. Water-dependent uses.
 5. Mining and mineral extraction.
 6. Bridge crossing support structure installation.
 7. Outfall installation.

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8. Water, sewer, gas or phone line installation.
 9. Electrical distribution line installation.
 10. Tidegate installation in existing functional dikes adjacent to ED zones.
- C. Fill for:
1. Water-dependent uses.
 2. Water-dependent portions of aquaculture facilities.
 3. Navigational structures or navigational improvements.
 4. Structural shoreline stabilization.
 5. Bridge crossing support structures.
 6. New dike construction.
 7. Water-related or non-water-dependent uses in areas where Goal 16 exceptions have been taken and approved as part of the Tillamook County Comprehensive Plan or Wheeler Comprehensive Plan.
- D. Piling and dolphin installation in conjunction with a Permitted with Standards or Conditional Use within this zone.
- E. Rip-rap for structural shoreline stabilization or protection of utility lines allowed in this zone.
- F. Dredged material disposal in an approved DMD site or in conjunction with an approved fill project, subject to state and federal permit requirements for dredged material disposal.
- G. Regulated activities in conjunction with an approved active restoration or estuarine enhancement project.
- H. Flow-land disposal of dredged material, subject to State and Federal permit requirements.
- I. Incidental dredging for harvest of benthic species or removal of in-water structures such as stakes or racks.
- J. Regulated, activities in conjunction with temporary alterations.

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Section 11.040. Manufactured Dwelling Standards.

1. The manufactured dwelling shall be multi-sectional and enclose a space of not less than 1,000 square feet.
2. The manufactured dwelling shall be placed on an excavated and backfilled foundation and enclosed at the perimeter such that the manufactured dwelling is located not more than 18 inches above grade.
3. The manufactured dwelling shall have a pitched roof with a nominal pitch of at least three feet in twelve feet.
4. The manufactured dwelling shall have exterior siding and roofing material commonly used on residential dwellings within the community or which is comparable to the predominant materials commonly used on surrounding dwellings as determined by the City Recorder.
5. The manufactured dwelling shall be certified by the manufacturer to have an exterior thermal envelope, meeting performance standards, which reduce levels equivalent to the performance standards required of single family dwellings constructed under the State Building Code as defined in ORS 455.010

Section 11.050. Design Review.

1. All commercial and industrial development in any zone, any multifamily dwelling in any zone, is subject to design review by the Planning Commission.
2. When design review is required, no permit will be issued until site plans have been reviewed and approved under Comprehensive Plan Policies and Ordinance Provisions by the Planning Commission.
3. The site plan shall be drawn to a measureable scale and shall show the pre-construction or excavation condition of the site, and indicate any trees over 6 inches diameter at 4 feet above ground level, streams, lowlands, rock outcroppings, slopes, or other natural features. Building elevations shall indicate the type of materials to be used for roofing, siding, or other treatment. A plot plan with a complete landscape design shall indicate all retained mature vegetation, proposed plantings and ground covers, as well as other landscaping materials to be used, the extent and design of paved areas, culverts, and other proposed design features and functions.
4. The following guidelines shall be used by the Planning Commission in the evaluation of proposals:
 - a. Site Design
 - (1) Where existing natural or topographic features are present, they should be used to enhance the development. For example, incorporate small streams in the landscape design rather

than placing them in a culvert and filling.

- (2) Existing trees should be left standing except where necessary for building placement, sun exposure, safety or other valid purpose. Landscaped vegetation buffers shall be provided along major streets or highways, or to separate adjacent uses. The use of native plants is encouraged.
- (3) Graded areas shall be replanted as soon as possible after construction to prevent erosion. In areas where planting will not thrive, other materials such as wood fences, decorative rock, stone walls, and paving of brick or stone shall be used.
- (4) Exterior lighting shall be restrained in design, and shielded so as not to cast glare on adjacent private or public property or the night sky.
- (5) Storage or mechanical equipment shall be screened from view. Trash enclosures and screening shall be carefully located and treated to integrate with the appearance of the site/building design. Screen all outdoor storage. Roof top equipment shall be screened a minimum of 1 foot higher than the highest point on the equipment and shall be setback a minimum of 10 feet from the building edge.
- (6) Primary building entrances shall open directly to the outside and shall have walkways connecting them to the street sidewalk. Create storefronts and entries that are visible and easily accessible from the street. Either orient the primary entrance to the building along a street facing property line or create an ADA accessible courtyard / plaza incorporating pedestrian amenities including street trees, outdoor seating and decorative pavers. Ensure a direct pedestrian connection between the street and buildings on the site, and between buildings and other activities within the site. In addition, provide for connections between adjacent sites, where feasible.
- (7) Community amenities such as patio/seating areas, water features, art work or sculpture, clock towers, pedestrian plazas with park benches or other features located in areas accessible to the public are encouraged and may be calculated as part of the landscaping requirement. Benches in public areas on private property, adjacent to public right of way shall comply with design review standards for architectural style.
- (8) A landscaping plan shall be submitted which shows existing and proposed vegetation, trees, landscaping materials, a timeline for installation and maintenance, and other features in order to permit the Planning Commission to review the plan. Landscaping shall be provided along project site boundaries where it does not interfere with access and clear vision. Landscaping is intended to soften the effects of built and paved areas. It also helps reduce storm water runoff by providing a surface into which storm water can percolate.
- (9) Parking lots shall be divided into groups of no more than 8 spaces with landscaping and

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walkways dividing the groups. A walkway or sidewalk shall be provided to separate the parking from public streets and adjacent property. Parking shall be designed to be as unobtrusive as possible, through site location and landscaping.

- (10) Uses shall provide a hard-surfaced, well-marked and lighted pedestrian access system consistent with the accessibility standards of the Americans with Disabilities Act Accessibility Guidelines.

b. Building Design

- (1) The height and scale of the buildings should be compatible with the site and adjoining buildings. Use of materials should promote harmony with the surrounding structures and site. The materials shall be chosen and constructed to be compatible with the natural elements and applicable city ordinances.
- (2) Architectural style should not be restricted. Evaluation of a project should be based on quality of design and the relationship to its surroundings. However, the use of styles characteristic of Wheeler and the coastal area are preferred. These include the use of natural wood siding such as cedar shingles. The City encourages the use of pitched roofs, large overhangs, wood fences and wood signs. Colors should be earth tones harmonious with the structure, with bright or brilliant colors used only for accent.
- (3) Monotony of design in single or multiple building projects shall be avoided. Variety of detail, form, and site design shall be used to provide visual interest. In a Planned Development, no more than 25% of all buildings in the development shall replicate the same roofline or footprint.
- (4) Restaurants or facilities with late entertainment shall not have an adverse noise impact on adjacent residential uses and shall employ appropriate sound-proofing techniques.
- (5) The impact that structures will have on views from adjacent or other areas will be taken into account.
- (6) The property owner shall establish one street facing entrance or store front with access acceptable to the City.
- (7) The street facing entrance or store front shall provide windows or window displays a minimum of 4 feet in height along the ground floor street-facing frontage for a minimum of 50 percent of the horizontal length of the building. Glass doors may be credited toward the 50 percent requirement. This section shall not apply to multifamily dwellings.
- (8) Architectural features or landscaping shall be provided for at least 30 percent of the wall

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length on each street facing elevation.

- (9) Multi-story commercial, mixed-use or multifamily dwellings shall have ground floors defined and separated from upper stories by architectural features that visually identify the transition from ground floor to upper story.
- (10) Provide recessed shielded lighting on street-facing elevations. Provide articulated facades for every 40 feet of building length. Articulated facades shall contain at least one of the following features: building offsets, projections, changes in elevation or horizontal direction, or a distinct pattern of divisions in surface materials. Large expanses of blank walls shall only be located in areas that are not visible to the public.
- (11) New commercial or mixed-use residential / commercial structures shall be encouraged to provide weather protection for pedestrians along street facing elevations.

5. Performance Bond.

The Planning Commission may require that the property owner furnish to the City a performance bond, cash or surety for the value of the cost of improvements that will be dedicated for public use in order to assure that the improvements are completed within the timeframe specified. These improvements may include open space, and infrastructure such as sidewalks, streets, water, sewer, and stormwater drainage.

6. Compliance with Approved Plans

Compliance with conditions of approval and adherence to the submitted plans, as approved, is required. Any departure from these conditions of approval and approved plans constitutes a violation of this ordinance.

7. Time Limit for Design Review

Approval of an application for design review shall be void after one year or such lesser time as the authorization may specify unless construction has taken place. The Planning Commission may extend authorization for an additional period not to exceed six months provided a written request is submitted to the City Manager at least 10 days prior to the expiration of the permit. The Planning Commission shall review the request at the next available Planning Commission meeting.

8. Limitations on Refiling of Application.

Applications for which a substantially similar application has been denied will be heard by the Planning Commission only after a period of six months has elapsed from date of the earlier decision.

FINAL BYLAWS FOR THE
CITY OF WHEELER
PLANNING COMMISSION

I. Purpose

II. Organization

A. Members of the Wheeler City Planning Commission shall be appointed by the City Council under Ordinance 76-1.

B. Duties of all Commission Members shall be:

- 1) To read and be familiar with the Wheeler City Zoning Ordinance;
- 2) To read and be familiar with the Comprehensive Plan and the Comprehensive Plan Background Report of the City of Wheeler;
- 3) To be present at and participate in all Commission Meetings.
- 4) To attend all Commission workshops if possible.
- 5) To visit all sites relative to applicant requests.
- 6) To attend training workshops for planning commission members.

C. Members terms are set by City Council under Resolution 95-3 (attached).

D. A member may be removed by the City Council, after a hearing of misconduct or non-performance of duty. A member who is absent from two consecutive meetings without an excuse as approved by the Commission and fails to notify the City Recorder during said period, is presumed to be in non-performance of duty and the City Council shall declare the position vacant unless finding otherwise following the hearing.

Members excused from meetings are to review tapes of missed meetings.

III. Officers, Duties, Membership, and Conduct of Members

A. Officers

- 1) Ordinance 76-1 Section 3 defines officers voting privilege, status, and duties (attached) .
- 2) The President shall preside at all meetings and hearings of the Planning Commission, and shall have the duties normally conferred by parliamentary usage on such officers.

B. Membership of Commission

- 1) The Commission membership is defined by Ordinance 76-1, Section 2.

C. Conduct of Members

- 1) Members of the Planning Commission shall direct inquiries about ordinances to City Hall staff.
- 2) Inquiries regarding ordinance interpretations or applicant requests are to be directed to City Hall staff for placement on the Commission Meeting agenda.
- 3) The general interpretation of ordinances and applicant requests are to be made in the normal course of the Commission Meeting with Planning Commission members present for general discussion.

IV. Meetings, Quorums, Notification

Public hearings conducted under this section shall follow the procedures and requirements of these bylaws.

Procedural Rights.

The following procedural entitlements shall be provided at the public hearing:

- A. An impartial review as free from potential conflicts of interest and pre-hearing ex-parte contacts as is reasonably possible:
 1. No member of a hearing body shall participate in a discussion of the proposal or vote on the proposal when any of the following conditions exist:

- a. Any of the following have a direct or substantial financial interest in the proposal: the hearing body member or the member's spouse, brother, sister, child, parent, father-in-law, mother-in-law, any business in which the member is then serving or has served within the previous two years, or any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment.
- b. The member owns property within the area entitled to receive notice of the public hearing.
- c. The member has a direct private interest in the proposal.
- d. For any other valid reason, the member has determined that participation in the hearing and decision cannot be in an impartial manner.

Disqualifications due to a conflict of interest or personal bias may be ordered by a majority of the members present. The person who is the subject of the motion may not vote on the motion.

2. Hearing body members shall reveal any pre-hearing or ex-parte contacts with regard to any matter at the commencement of the first public hearing following the pre-hearing or ex-parte contact where action will be considered or taken on the matter. If such contacts have not impaired the member's impartiality or ability to vote on the matter, the member shall so state and shall participate in the public hearing. If the member determines that such contact has affected his impartiality or ability to vote on the matter, the member shall remove himself from the deliberations.

Disqualifications due to ex-parte contact may be ordered by a majority of the members present. The person who is the subject of the motion may not vote on the motion.

3. A party to a hearing may challenge the qualifications of a member of the hearing body to participate in the hearing and decision regarding the matter. The challenge shall state the facts

relied upon by the challenger relating to a person's bias, prejudice, personal interest, ex-parte contact, or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner. The hearing body shall deliberate and Vote on such a challenge. The person who is the subject of the challenge may not vote on the motion.

4. A party to a hearing may rebut the substance of the communication that formed the basis for an ex parte contact declared by a member of the hearing body.
 5. No officer or employee of the city who has a financial or other private interest in a proposal shall participate in discussion with or give an official opinion to the hearing body on the proposal without first declaring for the record the nature and extent of each interest.
- B. A reasonable opportunity for those persons potentially affected by the proposal to present evidence.
- C. A reasonable opportunity for rebuttal of new material.

Rights of disqualified member of the hearing body.

A disqualified member of the hearing body shall have the following rights:

- A. An abstaining or disqualified member of the hearing body may be counted for purposes of forming a quorum. A member who represents personal interest at a hearing may do so only by abstaining from voting on the proposal, physically joining the audience and vacating the seat on the hearing body, and making full disclosure of his or her status and position at the time of addressing the hearing body.
- B. A member absent during the presentation of evidence in a hearing may not participate in the deliberations or final decision regarding the matter of the hearing unless the member has reviewed the evidence received.

Burden and nature of proof.

Except for a determination of the applicability of bylaw provisions, the burden of proof is upon the proponent. The proposal must be supported by proof that it conforms to the applicable provisions of these bylaws, especially the

specific criteria set forth for the particular type of decision under consideration.

Nature of proceedings.

An order of proceedings for a hearing will depend in part on the nature of the hearing. The following shall be supplemented by administrative procedures as appropriate.

A. Before receiving information on the issue, the following shall be addressed:

1. Any objections on jurisdictional grounds shall be noted in the record and if there is objection, the person presiding has the discretion to proceed or terminate.
2. Any abstentions or disqualifications, based on conflicts of interest, personal bias, or ex-parte contacts, shall be determined.
3. A statement by the person presiding that:
 - a. Describes the applicable substantive criteria against which the application will be reviewed,
 - b. Testimony and evidence must be directed toward the criteria described in paragraph (a) above or other criteria in the comprehensive plan or zoning ordinance which a party believes to apply to the land use action, and
 - c. Failure to raise an issue or address a criterion with sufficient specificity to afford the decision makers and parties to the hearing an opportunity to respond to the issue precludes an appeal based on that issue or criterion,
 - d. Describes the review and appeal process provided for by these bylaws.

B. Presentations and Evidence.

1. The presiding officer shall preserve order at the public hearing and shall decide questions of order subject to a majority vote.
2. The presiding officer may set reasonable time limits for oral presentations. The presiding

officer may determine not to receive cumulative, repetitious, immaterial or derogatory testimony.

3. Evidence shall be received from the staff and from proponents and opponents.
 - a. Evidence shall be admissible if it is of a type commonly relied upon by reasonable and prudent persons in the conduct of serious affairs. Erroneous evidence shall not invalidate or preclude action unless shown to have prejudiced the substantial rights of a party to the hearing.
 - b. Members of the hearing body may take official notice of judicially known facts of a general, technical or scientific nature within their specialized knowledge. Such notice shall be stated and may be rebutted.
 - c. The presiding officer may approve or deny a request from a person attending the hearing to ask a question. Unless the presiding officer specifies otherwise, if the request to ask a question is approved, the presiding officer will direct the question to the person submitting testimony.
4. The hearing body may view the area in dispute with notification to the parties to the hearing, of the time, manner and circumstances of such a visit.
5. The hearing body may recess a hearing in order to obtain additional information or to serve further notice upon other property owners or persons it decides may be interested in the proposal being considered. The time and date when the hearing is to resume shall be announced.
6. When the hearing has been closed, the hearing body shall openly discuss the issue and may further question a person submitting information or the staff, if opportunity for rebuttal is provided. No testimony shall be accepted after the close of the public hearing unless the hearing body provides an opportunity for review and rebuttal of that testimony.
7. At the conclusion of the public hearing, a participant in the public hearing may request that the record remain open for at least seven days for the purpose of submitting additional evidence.

Such a request may only be made at the first de novo hearing held in conjunction with a permit application or zoning ordinance text or map amendment.

Whenever the record is supplemented in this manner any person may raise new issues which relate to the new evidence, testimony or criteria for decision making which apply to the matter at issue. This extension of time shall not be counted as part of the one hundred twenty day limit.

Decision.

Following the procedure described, the hearing body shall approve, approve with conditions or deny the application or if the hearing is in the nature of an appeal, affirm, affirm with modifications or additional conditions, reverse or remand the decision that is on appeal.

- A. The decision of the hearing body shall be by a written order signed by the chair or his or her designee.
- B. The order shall incorporate finding of facts and conclusions that include:
 1. A statement of the applicable criteria and standards against which the proposal was tested;
 2. A statement of the facts which the hearing body relied upon in establishing compliance or noncompliance with each applicable criteria or standards and briefly state how those facts support the decision.
 3. In the case of a denial, it shall be sufficient to address only those criteria upon which the applicant failed to carry the burden of proof or, when appropriate the facts in the record that support denial.
- C. The written order is the final decision on the matter and the date of the order is the date that it is signed. The order becomes effective on the expiration of the appeal period, unless an appeal has been filed.

Record of proceedings.

The secretary to the hearing body shall be present at each hearing and shall cause the proceedings to be recorded stenographically or electronically.

- A. Testimony shall be transcribed if required for judicial review or if ordered by the hearing body.
- B. The hearing body shall, retain as part of the hearing records each item of physical or documentary evidence presented and shall have the items marked to show the identity of the person offering the same and whether presented on behalf of a proponent or opponent.

Exhibits received into evidence shall be retained in the hearing file until after the applicable appeal period has expired, at which time the exhibits may be released to the person identified thereon, or otherwise disposed of.

- C. The findings shall be included in the record.
- D. A person shall have access to the record of proceedings at reasonable times, places and circumstances. A person shall be entitled to make copies of the record at the person's own expense.

Notice of decision.

Notice of a decision by a hearing body shall be provided to all parties to the hearing within five working days of the date that the final order was signed. The notice of the decision shall include:

- A. A brief description of the decision reached.
- B. A statement that the decision may be appealed by filing an appeal within twenty calendar days of the date that the final order was signed.
- C. A description of the requirements for an appeal, including the type of appeal that may be requested.
- D. A statement that an appeal may only be filed concerning criteria that were addressed at the initial public hearing.
- E. A statement that the complete case, including the final order is available for review at the city.

Request for review of a decision.

- A. A decision on the issuance of a permit concerning a land use matter may be appealed to the planning commission by an affected party by filing an appeal with the city recorder within twenty days of the date that written notice of the decision was mailed. The

notice of appeal that is filed with the city shall indicate the nature of the interpretation that is being appealed. The matter at issue will be a determination of the appropriateness of the interpretation of the requirements of these bylaws.

- B. A decision of the planning commission may be appealed to the city council by a party to the hearing by filing an appeal within twenty calendar days of the date the final order is signed. The notice of appeal filed with the city shall contain the information outlined in Section 18.030.

Scope of review.

The reviewing body may determine, as a non-public hearing item, that the scope of review, on appeal, will be one of the following:

- A. Restricted to the record made on the decision being appealed.
- B. Limited to the admission of additional evidence on such issues as the reviewing body determines necessary for a proper resolution of the matter.
- C. Remand the matter to the hearing body for additional consideration.
- D. A de novo hearing on the merits.

Review on the record.

- A. Unless otherwise provided for by the reviewing body, review of the decision on appeal shall be confined to the record of the proceeding as specified in this section. The record shall include the following:
 - 1. A factual report prepared by the City Recorder.
 - 2. All exhibits, materials, pleadings, memoranda, stipulations and motions submitted by any party and received or considered in reaching the decision under review.
 - 3. The final order and findings of fact adopted in support of the decision being appealed.
 - 4. The request for an appeal filed by the appellant.
 - 5. The minutes of the public hearing. The reviewing

body may request that a transcript of the hearing be prepared.

- B. All parties to the initial hearing shall receive a notice of the proposed review of the record. The notice shall indicate the date, time and place of the review and the issue(s) that are the subject of the review.
- C. The reviewing body shall make its decision based upon the record after first granting the right of argument but not the introduction of additional evidence to parties to the hearing.
- D. In considering the appeal, the reviewing body need only consider those matters specifically raised by the appellant. The reviewing body may consider other matters if it so desires.
- E. The appellant shall bear the burden of proof.

Review consisting of additional evidence or de novo review.

- A. The reviewing body may hear the entire matter de novo; or it may admit additional testimony and other evidence without holding a de novo hearing. The reviewing body shall grant a request for a new hearing only where it finds that:
 - 1. The additional testimony or other evidence could not reasonably have been presented at the prior hearing; or
 - 2. A hearing is necessary to fully and properly evaluate a significant issue relevant to the proposed development action; and
 - 3. The request is not necessitated by improper or unreasonable conduct of the requesting party or by a failure to present evidence that was available at the time of the previous review.
- B. Hearings on appeal, either de novo or limited to additional evidence on specific issue(s), shall be conducted in accordance with the requirements of these bylaws.
- C. All testimony, evidence and other material from the record of the previous consideration shall be included in the record of the review.

Review body decision.

- A. Upon review, the Planning Commission or City Council may affirm, reverse, or modify in whole or part, a determination or requirement of the decision that is under review.

When the Planning Commission modifies or renders a decision that reverses a decision of the design review board, the Planning Commission shall set forth its findings and state its reasons for taking the action and shall be in conformance with the requirements applicable ordinances.

When the City Council modifies or renders a decision that reverses a decision of the Planning Commission, the City Council shall set forth its findings and state its reasons for taking the action. When the City Council elects to remand the matter back to the Planning Commission for further consideration as it deems necessary, it shall include a statement explaining the error found to have materially affected the outcome of the original decision and the action necessary to rectify such.

- B. Notice of the City Council decision shall be provided to all parties to the hearing within five working days of the date that the final order was signed. The notice of decision shall include:
1. A brief description of the decision reached;
 2. A statement that the decision may be appealed to the Land Use Board of Appeals by filing a notice of intent to appeal a land use decision within 21 days after the date the decision sought to be reviewed becomes final; and
 3. A statement that the complete case, including the final order is available for review at the city.

Notification of State and Federal agencies.

The City shall forward a copy of the final decision, including the findings and required conditions, within seven working days, to the appropriate state and/or federal agencies where a use or activity involves a state or federal permit which requires a determination of consistency with the local comprehensive plan. The response shall contain a statement of whether or not approval of the permit would be consistent with the comprehensive plan, the reasons the development is or is not so considered, and standards and conditions which should apply if a state or federal permit is granted.

Final action on application for permit or zone change request.

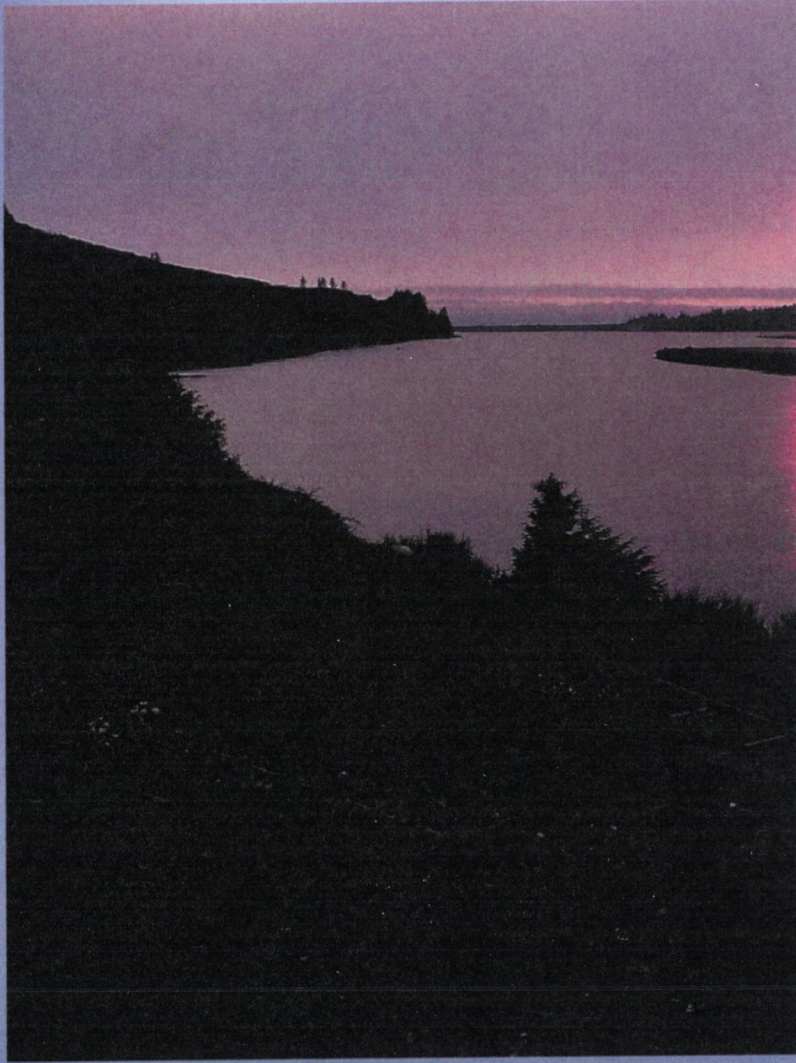
The City shall take final action on an application for a permit or zone change with one hundred twenty days of the receipt of a complete application. The one hundred twenty day period does not apply to an amendment to the comprehensive plan or zoning ordinance, or the adoption of a new land use regulation. At the request of the applicant, the one hundred twenty day period may be extended for a reasonable period of time.

Requirements of a request for appeal of a Planning Commission decision.

An appeal of a Planning Commission decision shall contain the following:

- A. An identification of the decision sought to be reviewed, including the date of the decision.
- B. A statement of the interest of the person seeking review and that he/she was a party to the initial proceedings.
- C. The specific grounds relied upon for review, including a statement that the criteria against which review is being requested were addressed at the planning commission hearing.
- D. If de novo review or review by additional testimony and other evidence is requested, a statement relating the request to the factors listed in these bylaws.

ORS Chapter 227, City Planning and Zoning is the final authority. If any part of these bylaws is in conflict with ORS 227, it shall be superseded by ORS 227.



City of Wheeler Vision

2011

Wheeler Vision 2011

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Wheeler's Priorities and Recommendations for Action

1. Protect the Natural Beauty

Recommendations:

- ◆ Protect existing views for all of the community:
 - Adopt and/or maintain strict height limits on any new developments and structures
 - City Council to maintain, strengthen, and enforce height limits on all new, remodeled, or repurposed structures within the city jurisdiction
 - Work with state and county agencies to support height restrictions within the city
 - City to control brush and trees in city right of way to not impede existing views:
 - Allow citizens to clear and maintain the right of way adjacent to their property lines, as long as:
 - City maintains approval authority for all work in the City right of way
 - City Council adopts policies to require the submission and review of specific plans for any work done to remove vegetation or brush and trees in the City's right of way
 - If a request is approved by City Council, the Right of Way Work application fee will be waived for any work to maintain or remove vegetation in the right of way by property owners
 - Continue to develop city trail system as resources become available.
- ◆ Manage urban growth boundaries through ordinances and policies that reflect preservation and continuation of existing and future natural beauty and habitats in the Wheeler area.
- ◆ City Council needs to support and cooperate with efforts to improve the usability of the bay through dredging by working with other municipalities agencies, the county and state, the Port of Nehalem, and neighboring municipalities and communities to improve access to the Nehalem Bay for both recreation and habitat purposes:
 - Appoint liaison to work with state and federal decision making agencies to improve the marine habitats
 - Do not increase the moorage capacity in Wheeler but support efforts to improve the usability of the existing moorage capacity

PETITIONER'S EXHIBIT C

Unofficial Transcript

UNOFFICIAL TRANSCRIPT

City of Wheeler City Council Hearing November 16, 2021

- Honeycutt: Thank you everyone for attending tonight's meeting, taking time for your evening as we move forward here and let's call this meeting to order at November 16, 2021 at let's go 7:10 p.m. this evening. And at this time we'll start with Councilor Verburg for roll call.
- Verburg: Jay Verburg.
- King: Jim King.
- Grossnickle: Tim Grossnickle.
- Honeycutt: Doug Honeycutt.
- Kemp: Clif Kemp.
- Taylor: Gordon Taylor.
- Glowa: Michael Glowa.
- Honeycutt: Yeah, Mike Glowa, I heard you fine that time Mike and so at this time, we'll go on down and let's work through the consent calendar. Let's...when everyone's had time to review the minutes from our City Council October 6th, October 19th, and October 27th meeting, along with our special meeting on October 27th, and as council has any questions on that or are you ready to approve those minutes? Okay, do we want to vote on that? Make a motion...
- King: [Inaudible] that the minutes from October...September 26th. I'm sorry...
- Honeycutt: October 6.
- King: October 6.
- Honeycutt: October 19. And the executive session a special meeting on October 27th.
- King: October 19 and the special session be approved.
- Honeycutt: We have an approval and also a second on that. Thank you, Jim. At this time, do we have any public comments before we get started on non-agenda items?
- Man 1: Do we need to vote on that?
- Man 2: Yeah, we need to vote on that.
- Honeycutt: I don't know.

Man 3: We have to vote....

Honeycutt: Well, Okay. Go ahead and go ahead, Jay.

Verburg: Jay Verburg, aye.

King: Jim King, aye.

Kemp: Clif Kemp, aye.

Taylor: Gordon Taylor, aye.

Honeycutt: Vote is unanimous except Mike. We're voting on a consent calendar, Mike. Mike can you hear me?

Glowa: I can barely hear you. Can you hear me alright?

Honeycutt: Yeah, yeah. Go ahead Mike. We're taking a vote on the consent calendar and...

Woman: Vote on the consent calendar.

Glowa: Huh?

Woman: A vote on the consent calendar.

Honeycutt: If you can hear me, we need your vote, Mike, to accept the consent calendar.

Glowa: I accept it.

Honeycutt: Okay, and that was for October 6th to 19th and a special meeting in the executive session on the 27th. Thank you. And it's unanimous that it's accepted. At this time, moving on down on public comments on non-agenda items. Is there any public comments at this time? Okay, I have no public comments in person. Anyone on zoom, Mary, that has any comments that's got their hand raised? Okay, so at this time we have no public comments on non-agenda items. And Tim, do you have anything on City Manager Public Works?

Grossnickle: No, I just wanted to thank those during the last storm that walked past Zimmerman Creek and helped a [inaudible] to keep from plugging up because it only takes about an hour for it to plug up once you clear it. Thank you for those that helped us with that.

Verburg: Which creek was that?

Grossnickle: Zimmerman Creek up on Hemlock Street. Anytime you're up there and want to pull out a branch or two, you can.

Honeycutt: Any other...

Grossnickle: I don't have [inaudible]...

Honeycutt: Okay, very good. Thank you, Tim. Moving on at this time, we're going to go on to design review on application PR-070121-1. And that going to be 2021-02-DR, which is design review. And at this time, I'm going to go ahead and read the design review Notice of Public Hearing, Design Review Appeal to City Council. So at this time, the Wheeler City Council, we're being redundant here holding a special meeting. This is not a special meeting. This is our regular council meeting, November 16, 2021, 7:00 p.m. and gives information about how to log into. This meeting will include a public hearing to consider the following appealed application. Appeal of the denied design review application to construct a building that will allow processing and retail sales of fish and shellfish. The applicant is Kenneth Ulbricht and for property owned by Botts Marsh, LLC. Application number is 2021-02-DR. And it's design review application PR-070121-1. It's on the west side of the highway 101 and railroad tracks approximately opposite of Hemlock Street. And the accessors map numbers are 2N-10W-02BB, tax lot 400. And that's about 45/100 of an acre. And the other tax lot is 2N-10W-02BC tax lot 4800. And that's approximately 1.72 acres. And the zoning on tax lot 400, industrial. Tax lot 4800 is water-related commercial. And this application will be evaluated against the design reviews standards, listed in Wheeler zoning ordinance, Section 1.050. And that'll be design review and Section 11.110, Shoreland Development, Article 2 water-related commercial zone, and Article 3 the industrial zone. And before we move forward on this, the last couple of days there's been quite a bit of...I've received several calls, more than several, that from the public, that I don't want any confusion tonight that this is about design review and exactly what I just read. We're not going to be talking about cottages tonight. We're not going to be talking about anything other than what's on the application. And what I just read is what the council is to consider tonight. And that's what they will be voting on. And anything in the future would have to be under a new application put in by the applicant on this property. So that may or may not help anyone's public testimony but we don't have an and-or here for tonight's meeting. So with that said, we're going to go ahead and move forward. And I'm going to ask council at this time for anyone that needs to discuss, to abstain themselves, and objections to jurisdiction, ex-parte contacts, conflict of interest or bias on behalf of any of the council members. And does any councilor have anything they would like to disclose at this time.

Glowa: Yes, Michael Glowa does.

Honeycutt: Yes, go ahead, Mike.

Glowa: Well, I believe I may have had some ex-parte contacts, so I want to reiterate that right now. On October 27th, when I was at the post office before a workshop, ran into Dan Ayres [inaudible] a local resident. And they discussed a little bit about the Planning Commission Meeting. And Dan Ayres asked me if I had been on Zoom for the [inaudible]. I said, "no, I'm going to a workshop now to get all the detail about it" but I said, "it's going to be an appeal to the City Council, so I'm

going to stay distant from that.” So we discussed a couple of other things, like my trip to Arizona, etcetera. So didn’t really discuss the development that much. But on...went to the workshop, after the workshop, I drove home and saw my neighbor, Carl Whiting, in the yard and mentioned to him that there’s a letter that we all received from Ken Ulbricht’s lawyer. And from my knowledge, I brought it up to Walt that it’s probably...I figured it was public information, so I mentioned it to Carl that his name was brought up in there and he might want to find that...put public record request in the city to review that letter. So we talked about a few other things since he’d be watching over the house while I was gone. And also then on November 13th, Saturday, Karen Matthews texted me and wanted to know if there’s a rumor about a letter from...you know, I said “well”...I texted her back and said, “I mentioned it at an open public workshop, so I don’t feel it was confidential. It surely wasn’t in a [inaudible] session. But it’s not a rumor. It was a letter sent and addressed to each of the members of the council concerning the development and some other issues.” And she asked for a copy and I said, “well, you know you could...since it’s a public record, you could go to City Hall and do a records request if you’d like,” but I didn’t supply it so that was the extent of our conversation. Said we’d be looking at facts and judging this based on the facts, and not personal agendas. So those are the encounters I had with the local residents.

Honeycutt: Okay, thank you Mike. Is anyone else, Councilor Glowa...

Glowa: No.

Honeycutt: ...before we move on? Okay, is anyone else, Jay?

Verburg: Yeah, Jay Verburg. I’d like to declare ex-parte contact with citizens as well. I don’t have any specific dates. Small meeting with Carl at his new shop, nothing pertaining to the current application and then Deanne Ragnell and Margaret Taylor, just yesterday; again, nothing pertaining specifically to the application, mostly about land use and things like that. Spent most the time just kind of generalized talking and listening. None of the specific topics of the application were discussed.

Honeycutt: Councilor King.

King: Jim King. I don’t have anything.

Honeycutt: I don’t have a vote this evening. The Mayor here in Wheeler only breaks a tie in the event of a vote but I have talked with both citizens in Wheeler, multiple citizens, I don’t have a list, and I would assume it’s extensive of folks that are both pro and also do not, they are con, on both sides of this issue. I do need to disclose that and also early on, and I have already disclosed this, it’s been several months back, but I have met with Mr. Ulbricht in his office and those are the ex parte contacts that I have to declare at this time. I don’t keep a log when I run across people in town of who and what we discuss, but I have discussed with

many of our citizens here on both sides of this issue. So that's what I have on the ex parte. Councilor Kemp.

Kemp: Clif Kemp, I have nothing to declare.

Honeycutt: Councilor Taylor.

Taylor: I am not sure how far back this stuff is supposed to go because this has been going on for quite a while here. I've talked to John Lawrence a number of times. I spoke to Deanne Ragnell maybe three times in the last couple months, not at length on the matter. Talked to Patrick Rock in the last couple months about it. Nothing in-depth. You know, I'm aware that I need to keep it all brief. I think that sort of covers it but I'm sure I'm missing a couple. There's also the question of the letter that was sent. I know we discussed it at one of the workshops, the letter that was sent by the applicants' attorney, and whether or not that was an attempt to influence. I don't know if we need to deal with that or...

Honeycutt: And that's the letter that we, each councilor and myself received, is that what you're referring to?

Taylor: Yeah.

Honeycutt: And that letter, if we can, I'd like to make that public record.

Taylor: Okay, that seems fair.

Honeycutt: Okay.

Taylor: I guess that's all I've got.

Honeycutt: Okay, very good.

Taylor: I talked to my wife, too, but I get extra credit for that.

Honeycutt: Before we move forward, there's no other, anything to declare at this time. At this time, has Bill got on Zoom with us yet? Okay. I'm going to move forward to Walt on the Staff Report if we can, Walt, and to briefly go over the design review piece of what is to be considered this evening in your opinion on this.

Wendolowski: Yeah, it would certainly helped if I unmute. Okay, thank you, Mayor for the introduction to introduce this application. Again, we're looking at an application for a combination retail and fish processing center. This project is in two distinct parts. The fish processing portion contains about [inaudible] square feet and includes warehousing facility. This will be located entirely on the industrial zone portion of the site. Fish and shellfish will be stored and shipped from the site, along with some limited processing. Attached to the structure and located entirely on the WRC zone portion of the site is a 1,500 square-foot retail market. This part of the structure includes a second floor to be used as an office and for storage.

The industrial side will feature grey vertical metal siding with a metal roof. Two bay doors will be located on the east side of the building facing the parking lot. Retail portion of the site will have the same metal structure as on the first floor with a second floor finished in wood siding. Second floor runs perpendicular to the ground floor with large windows with views of the river. Primary access to this site is off Highway 101 via Hemlock Street. There will be a single driveway accessing both facilities. The driveway provides direct access to the site's parking, a total of 18 spaces were included on the site plan; 6 within the commercial zoned portion of the site; remainder on the industrial portion. Each parking space is located next to a surrounding concrete walkway and the lighting is also provided within the parking area. Landscape improvements are to the southwest and north side of the site. The landscaping will be primarily fescue grasses and additional soil will be brought in as part of the improvements. Irrigation will be installed. Existing natural vegetation will remain. Applicant also intends to all trees greater than 6 inches diameter at 4 ft. in height will be retained. Lighting plan shows exterior lighting to be dominated by gooseneck lamps and shine directly onto the ground. There's one light on the south side that includes a cylinder-type of lamp. Application of this request was sent to the affected agencies, area property owners at the time of the Planning Commission meeting. Three letters of support were submitted. I will note that the Planning Commission did hear this. This is an appeal to the City Council. It was the Commission's decision not to approve the request.

With regard to the process, our development ordinance, zoning ordinance requires all new uses in the commercial and the industrial zone to be reviewed as a design review and also, given their location, they must address matters with regard to the shoreland development requirements. For the record, within the WRC zone, they do list retail sales of fish as a permitted use and also in the industrial zone it does list seafood processing as an outright permitted activity. Again, both of these uses are outright permitted but do require approval of a design review.

For the record, neither zone has any setback requirements. The only issue is so the buildings can be built right up to the property line. The only dimension limitation is the height which is 24 feet. Again, this project is in two distinct zones. Zoning ordinance does not prohibit development in more than one zone. The only applicable requirement is that the use be identified as permitted or conditionally permitted.

So at this juncture, I'd just like to summarize these notes. The proposed seafood processing plant and retail sales outlet are outright permitted uses in their respective zones. As outright permitted uses they are only subject to the design review process. The buildings may be attached, provide the improvements, comply with the building and fire code requirements and nothing in the zoning ordinance prohibits the applicant from developing a single project involving more than one zone. While we are looking at two separate zones here I will note for the record that both of them require the same review process and also the same

review requirements so I will, so my comments really address both parts of the structure.

Now, within the design review which is found under Section 11.050, this is required which is the purpose of the Commission hearing and also the appeal here to the City Council. When a design review is required, the Commission or I should say the decisionmaker needs to review the comprehensive plan policies that would apply to this particular request. I will simply note here that the policies which we determined that could apply are Goal 9, Policy 3 that such developments are subject to a design review by the Planning Commission. Under Goal 16, Policy 2.A the City does have various estuary zones and implemented those through the Estuary Development Management Unit, and also due to the interaction of the Shoreland requirements, the WRC and industrial zones. The objective of the Estuary Development Zone is provide for the expansion, creation of other commercial industrial uses, and I simply note that this is consistent with the Policy 2C(ii)(B) under Goal 16. Goal 16, Policy 4.J.8 notes that industrial uses will be identified as water related industrial uses on a case by case basis. Included with this group is fish or shellfish processing in warehouse or other storage. This policy is implemented through the industrial zone portion of the project which includes a processing plant and warehousing. Consistent with the policy and also allowed within the zone. Commercial uses in Goal 16, Policy 4.J.9 are identified water related commercial again on a case by case basis for implementation. Such uses could include fish or shellfish wholesale outlets, retail establishments, restaurants and so forth. Again, in implementing this policy the City identified retail fish sales as a suitable permitted commercial use in the WRC zone.

Finally, Policy 4.J.11 under Goal 16, multi-purpose and cooperative uses, the parking areas and piers should be provided when practical. Again, we have a shared parking area. Policy under Goal 16, Policy 4.J.12, water related non-dependent non-related uses in the estuaries shall be limited to those do not require fill, do not preclude the provision or maintenance of navigation. This facility will not require the use of fill and certainly does not preclude provisions for maintenance of water and dependent uses. Finally, this application or the process, they need to provide, comply with provisions of the underlying zone and the design review.

Now Section 11.050.3 establishes the application requirements and Staff believes these were met. With regard to the site design, Item 1 where natural or topographic features are present, it should be used to enhance the development. For the record, the site is generally level, currently graded to allow development, and does not appear to have topographic features onsite that weren't retention. The second item is that existing trees should be left standing, except as necessary for building placement, and as previously noted, the applicant intends to maintain trees of a certain diameter on the property. Item 3, graded areas shall be planted as soon as possible to prevent erosion. For the record, based on the size of the site, the National Pollutant Discharge Elimination System, 1200 C permit is

required and I believe the applicant has already obtained that. It was required through Oregon DEQ and this is again, something that needs to be done prior to development.

Item 4, exterior lighting shall be restrained and designed and shielded as not to cast glare. Again, this lighting plan I did review that with regard to the layout. Most of these are, there's one cylindrical type lamp but most of these are gooseneck lamps that shine downward. There's also three parking lot lamps and these are also designed to shine downward. So I don't believe there will be any glare on adjacent properties.

Item 5, storage and mechanical equipment needs to be screened. According to the applicant outdoor services will be screened with a 6-foot cedar fence and all trash areas covered. Also, the submitted site plans do not identify any rooftop equipment. If so installed, these must be screened along with the roof not exceed 24 feet in height. The subsection (6) talks about access to the building. I noted earlier that walkways will connect the parking area to each building entrance and except for a break due to the garage entrances, pedestrian access will connect those parts of the facility. In addition, the entrance to the commercial portion includes a covered courtyard.

Item 7, community amenities such as patio seating, water features, art work or sculptures are certainly encouraged and can be included in the landscaping calculation. I'd like to note this is a mixed commercial industrial development. While designed to attract the public through retail sales this is not designed nor intended to be a public park. However, the site will be landscaped and the cherry trees will be retained. In addition, the entrance to the commercial side of the facility includes a covered courtyard which provides an additional amenity.

Section 8, landscaping plans shall be submitted which shows existing vegetation and also plans for improvements. Note that this site is relatively flat with natural vegetation surrounding a large dirt gravel area. The submitted plan identified existing trees which will be retained. Plans also show a lawn surrounding the facility and that along with any drainage improvements will reduce stormwater runoff. Maintaining this greenspace requires the installation of irrigation facilities.

Item 9, parking lot shall be divided into groups of no more than 8 spaces with landscaping and walkways dividing the groups. A walkway or sidewalk is necessary to connect to building entrances. This parking design contained complies with this requirements. The spaces are placed in groups containing no more than 8 spaces. Walkways do make the connection. We did the calculation for the minimum parking requirement and determined that 17.5 spaces are required. This particular site includes 18 spaces.

Item 10, uses shall provide hard surface well-marked lighted pedestrian access. Again, this was previously noted. The paved parking area will also be lighted to help with the access to the buildings.

Under Section 4(b), the guidelines to review building design are noted in this section and there's a number of items that need to be considered.

Item 1, the height and scale of the building should be compatible with the site and adjoining buildings. Now this permitted site plan indicates building will not exceed 24 feet which complies with the zoning ordinance limitation. The building combines grey metal siding, dark grey roof with trim, including a board and batten exterior on the commercial second floor and white window trim. Must be noted the ordinance does not specify a particular exterior material finish or color requirement nor are there buildings directly adjacent to the proposed facility to create a comparison. Given the type of the building, again for industrial and commercial uses, the size and finish appear reasonable to accommodate the uses without creating an unsightly structure.

Under Item 2, architectural style should not be restricted, however, the use of styles characteristic of Wheeler and the coastal areas are preferred. Again, the industrial portion is finished in earth tone colors, contrasting wood trim, does not include bright or brilliant colors. The commercial portion has a similar color scheme that the second has board and batten wood exterior. This subsection notes that architectural styles should not be restricted. Given the majority of the building area is devoted to industrial activity, it is difficult to match the design expectation of this subsection with an industrial building. On balance, though, the design accommodates the use, does not establish any unusual or unsightly structure and generally keep it with the expectations of this subsection.

Item 3, monotony of design in single or multiple building projects shall be avoided. Overall, this building has a mixture of features which apply a comparative design. There's a break in the roofline, along with different roof elevation levels. Second floor of the commercial portion has a wood exterior finish contrasting with the metal structure. The exterior industrial portion of the building that is facing the parking lot has several windows breaking up the monotony of the blank wall. This also provides an entrance and second floor to the commercial side. Provisions regarding plan developments that are noted in this section do not apply.

Subsection 4, restaurants or facilities with late entertainment need to have reduced noise, adverse impacts. Again, this does not reply to the request.

Item 5, the impact that structures will have on views from the adjacent or other areas must be taken into account. There is no doubt improvements will obviously restrict some views as one entrance in sight. However, it must be noted the building only occupies approximately 11 percent of the entire site and does not

exceed the height limitations of the zone. Again, while not a public park, public views are still available at the covered courtyard and commercial entrance.

Item 6, the property owner will establish one street-facing entrance or storefront. The structure does not face the street in the typical sense. The commercial storefront, however, faces a covered courtyard, is readily visible from the parking lot and is accessible via a concrete walkway. On balance, Staff finds this access acceptable.

Item 7, the street-facing entrance, the storefront shall provide windows or window displays and I would just simply note for the record, these provisions apply to the commercial storefront and based on submitted information, they exceed the 50 percent requirement with this section.

Item 8, architectural features and landscaping shall be provided 30 percent of the wall length of each street-facing elevation. On the street-facing portion the applicant calculated 48 feet of the 112-foot length as landscape primarily in lawn. This amounts to 42 percent of the frontage.

Item 9, multi-story commercial mixed-use or multi-family dwellings shall have ground floors defined and separated by architectural features. In this case, the commercial portion of the structure has a distinct roof separation and exterior finish. Metal ground floor, wood on the second floor make individual separation.

Item 10, provide recessed shield lighting. I will just simply note we reviewed lighting for this project along with the included parking lighting.

Item 11, new commercial or mixed-use residential shall have weather protection for pedestrians on the walkway. This does not, in this case, this does not include a residential component. However, the commercial entrance does include a covered courtyard which does provide protection.

Subsection (5) identifies requirements for performance bonds.

Subsection (6) requires compliance with approved plans and any conditions of approval.

Subsection (7) establishes time limits for the design review.

Subsection (8) in this section establishes limits on re-filing the application.

I will just simply note for the record these particular subsections have to deal with administration of an approved decision and do not include particular design criteria.

Finally, Section 11.110 addresses shoreline and estuarine development standards. They apply to the natural, estuarine natural and development zone along with the industrial and WRC zone. So again, this would apply to this particular project.

Section 11.111 has general standards that apply to all shoreline uses. Item 1 is setbacks, and that includes non-water dependent uses. The shoreline setback for non-water dependent uses shall be 30 feet. For the record, based on submitted information, site plan, buildings will comply with this provision.

Under Item 2, there are requirements that there will be setbacks for repairing vegetation, specifically noting Vosburg Creek. For the record, this site is not located near the creek nor within an identified estuary natural area. Except for the related site grading, there is no indication that any riparian areas will be disturbed.

Item 3, waterfront access, waterfront access for the public such as walkways will be provided whenever possible and are consistent with public safety. Again, this project includes both commercial and industrial activities and is not designed for public recreation. On the industrial side public safety concerns with truck and possibly forklift traffic precludes public access to the waterfront and shore. However, the commercial side has a covered courtyard where customers can view the river and shoreland.

Item 4 is signs. I'd just like to note for the record sign permits are separate from the review process and must comply with the requirements in 11.100.

Lot area, there's no minimum lot area within either zone would apply.

Item 6, utilities. The preferences for all utilities is to be located underground. Applicant did not make a request to install above-ground utilities.

Parking, I previously reviewed parking and note that it complies with the provisions.

Item 8, architectural design, proposal must comply with the provisions in Section 11.050. These were previously reviewed.

Finally, Item 9, nonstructural solutions to erosion will be used where practical, and again, site plan has identified storm drainage improvements and these will all, this development will also require a 1200-C permit from DEQ prior to construction.

Regarding other considerations, the zoning ordinance does not contain specific provisions regarding water, sanitary sewer, and storm sewer. However, these services will be required. Engineering plans must be submitted to ensure compliance with applicable city and agency requirements.

Hemlock Street south of 101 and the railroad right-of-way provides access to the site. Due to the operation generates of vehicle and truck traffic on this portion of Hemlock, it's appropriate to require some level of improved access. This also avoids migrating gravel from adjacent unimproved roads. It is recommended the roadway south of the tracks be paved to the entrance. But the site recommended

paving width as 24 feet and given the lack of pedestrian facilities on 101, Hemlock, and Marine Drive, sidewalks would not be required.

At this point and this was also noted at the Planning Commission level, Staff finds the proposal generally complies with the applicable design review shorelands criteria. The recommendation to the Commission was for approval subject to the following conditions.

The design review:

(a) is limited to the proposed processing plant retail sales. Any change in this plan or modification may require additional land use approvals.

(b) prior to development the applicant will participate in a pre-engineering conference with the facility providers, and also if applicable, apply to ODOT for a permit to work within the railroad right-of-way.

(c) developer shall submit engineering plans to the City addressing water, stormwater stream and similar improvements, sanitary sewer plans will be submitted to the Nehalem Bay Water Agency. These plans will be reviewed and approved by the City prior to construction.

(d) developer shall submit a building permit for construction of the proposed building complying with all code requirements. The submitted plan shall substantially confirm to the approved layout, including landscaping irrigation plans. Building permits may be submitted concurrent with engineering plans; however, building shall not proceed until such time engineering plans, including applicable Nehalem Bay Agency and ODOT permits are approved. Prior to receiving the building permit, it is recommended the developers submit evidence of reciprocal access and parking agreement between the two parcels or as an option, they may combine the property of the two parcels into one property.

(f) prior to occupancy, the developer will extend and install sanitary, sewer, water, storm drainage to serve the development. Improvements shall comply with the plans approved by the City and the Nehalem Bay Agency. All parking improvements, including paving, striping driveways, and other requirements shall be installed with the layout and also the applicant shall improve Hemlock Street south of the Railroad consistent with approved plans.

(g) public facility and street design, construction, maintenance shall be subject to the following: all utility installation shall conform to the City's plans. All improvements shall comply with the standards for the Wheeler Public Works Department. Hemlock Street improvement shall be at least 24 feet unless an alternative width is required prior to final engineering approval by the City. Render approval of the construction drawings must be received from ODOT. All parking driveway and maneuvering areas shall be constructed [inaudible] all concrete and other improved material. An NPDES 1200-C permit will be

completed, and finally, unless impractical or otherwise prohibited, all new utility lines shall be placed underground.

(h) unless otherwise modified by this decision, the improvement shall comply with the development requirements with the Wheeler Zoning Ordinance.

(i) compliance with these conditions, the requirements of the Wheeler Zoning Ordinance and Nehalem Bay Wastewater Agencies, ODOT, and applicable building code provisions shall be the sole responsibility of the developer.

(j) the applicant is herein advised that the use of property involved in this application may require additional permits from the City or other local, state, or federal agencies. City of Wheeler land use and review and approval process does not take the place of or relieve the applicant of responsibility for acquiring such other permits or satisfying any restrictions or their conditions thereof.

With that, that ends the Staff Report. Thank you very much for your patience. It was a rather long one to begin with.

Honeycutt: Thank you, Walt. I'm assuming in the event Council has questions or myself, that you'll be following along here.

Wendolowski: I am sitting right here. Yes, sir.

Honeycutt: Okay, thank you very much again. I appreciate it.

Glowa: I have a question.

Honeycutt: Go ahead, Mike.

Glowa: I have a question of Walt.

Wendolowski: Yes. Yes, sir.

Glowa: I read everything and didn't notice anything about Article 11, geotechnical provisions. Specifically Section 11.020, geological investigations. Item 2 said site specific investigations shall be conducted at the developer's expense. Results of the site inspection shall be made available to the City prior to scheduling of public hearings. Was that done?

Wendolowski: Can you hold for a moment while I grab that section, sir?

Glowa: Pardon me?

Wendolowski: Can you hold for a moment while...

Glowa: Yeah, Section 11.020, geological investigations, Item 2 and 3 under that section specifically states that the site investigation report shall make it possible for engineers, planners, and City officials to calculate and design for geological risk.

Wendolowski: Okay. Let me just get to that.

Glowa: It was on page 56 of the...

Wendolowski: Yes, I've got it right here. Thank you very much. Generally speaking, it says under (i) site specific investigations shall be a pre-requisite for issuance of any building permits where ground disturbing activities are proposed. All proposals for land divisions required by the City for excavation and for construction of roads and streets, these will be done at the developer's expense. Generally, when it comes to this decision, the decision on geologic matters goes with the Building Official and the Building Official, while looking at the site, will determine whether or not additional information is required. That is, that occurs prior to applying for a building permit and receiving a building permit.

Glowa: Yeah, I understand that. Section 11.020, Item 2 said...

Wendolowski: Two, yeah...

Glowa: It said should be prior to scheduling a public hearing. So that wasn't done, or it was?

Wendolowski: Not to my knowledge.

Glowa: Right, well, I didn't see it anywhere. Thank you.

Honeycutt: Mike, we might have some more information from the Chair of our Planning Commission. Go ahead, Mike. Just say your name and we'll...

Anderson: Mike Anderson, Chairman of the Planning Commission. We, there is a letter in the packet that states that the applicant requested that the geologic report from the first project be submitted, be allowed to be used for this project knowing that it would have to be...whatever structure had to be done, would have to be re-engineered, but that the geologic report would be accepted. There was a letter in the packet that the City accepted that. So the Planning Commission used that information as having a geological report in order to have a public hearing.

Honeycutt: And that would satisfy what Councilor Glowa was asking.

Anderson: Yes, it would and it is a letter that is somewhere in the packet. The Planning Commission had the letter, the geotech report has been online for quite some time.

Honeycutt: Okay, thank you. Walt, were you able to hear?

Wendolowski: Yes. Yes, indeed. I want to thank Mike for the follow-up and I apologize to Commissioner Glowa that I did forget that. I knew there was something in the Commission but I could not put my finger on it. So there was information at the Commission level. That packet obviously is going forward to the City Council.

Honeycutt: Okay, thank you. Mike, Councilor Glowa, does that answer all of your question?

Glowa: Sort of, but not right. Let's move on.

Honeycutt: Okay, very good. At this time, we're going to call on the applicant and I don't know if it's going to be Mr. Ulbricht or Ms. Bricker.

Honeycutt: Yeah, go ahead Council Kemp.

Kemp: This is the section that leaves questions for Staff before the applicant [inaudible]?

Honeycutt: That is correct. That is correct. Go ahead.

Kemp: Walt, this is Clif Kemp. On your report on page 4, Goal 16, Policy 4.J.8...

Woman: Speak up.

Kemp: Industrial uses shall be identified as water related industrial uses on a case by case basis.

Woman: I'm not...

Kemp: ...case by case.

Wendolowski: This caused a little confusion on the Planning Commission level in terms of how to look at this. Understanding your comprehensive plan provides guidelines for implementing the plan, and the actual implementation is done through your zoning ordinance. So the comprehensive plan makes suggestions as to what would be appropriate. When the decision was made, or I should say when the zoning ordinance was put together, the decision was made at that time what uses would be appropriate as outright permitted and those that would require conditional use. The same would apply for the commercial zone portion. Again, the comprehensive plan listed ideas that would be appropriate, that they would be reviewed by the City when the code was put together, and what you have now is a zoning ordinance that lists these uses as outright permitted. In effect, your zoning ordinance implements these plan policies.

Kemp: So your interpretation is that an outright permitted use is exempted from a case by case basis?

Wendolowski: Absolutely. Because the plan does not implement...let's see, how do I put this...the plan is not your day-to-day document for administering land use planning. That is your big planning document. Your zoning ordinance implements the comprehensive plan and is the guiding document for day-to-day decisions. Your current zoning ordinance is pretty clear on both Adobe RRC and industrial what uses are permitted outright. Both of these uses comply with that. At some point in the future the Planning Commission may wish to change that

but at this juncture, those plan policies provide guidance for the implementation of the rules which are found in the zoning ordinance.

Kemp: Okay, on page 6 of your report, Item 3, on the NPDES 1200-C permit...

Wendolowski: Yes.

Kemp: You indicated that you understood that the applicant had taken out a permit on it. I realize he doesn't need to have a permit today but do you have any proof that he has a permit?

Wendolowski: That is our understanding. He did mention that at the Planning...

Kemp: Do you have any proof?

Wendolowski: What's that?

Kemp: Not an understanding. Have you seen the permit?

Wendolowski: No, absolutely not. It's something that needs to be done prior to any construction, engineering, etc. Applicant made the statement at the Planning Commission meeting that they do have...

Kemp: You don't need to explain it further. If you haven't see it, that's the question.

Wendolowski: Okay.

Kemp: Okay. Are you taking ownership for this document in that you and the local city staff agreed to the findings on it?

Wendolowski: I'm certainly taking ownership. I did write it for the Planning Commission.

Kemp: On your, on the last item, the Planning Commission Actions, Item 8, #3, deny the application established findings as to why the application fails to comply with certain criteria...this was denied at the Planning Commission. What were the established findings as to why?

Wendolowski: The vote was not to deny but not to approve and no findings were established and that was the end of the hearing.

Kemp: In your experience, is that normal?

Wendolowski: It is a bit unusual. Normally what you do if you deny, you actually vote to deny. You make a decision and if it's to deny you need to establish the findings and basis for that denial. If you approve, then you can simply put the findings that are in this document for approval or modify as you see fit.

Kemp: Okay, thank you.

Wendolowski: Okay.

Kemp: Thank you. Now can I move to some questions for the staff?

Honeycutt: Sure. Any other council have questions? Go ahead, Council Kemp.

Kemp: Tim, my understanding that your consideration on an application is complete when it's ready to submit to the County for a permit, is that correct?

Grossnickle: That would include design approval and the professional reports that the City requires?

Kemp: So this application is not ready to submit to the...

Grossnickle: No. A long ways from it being submitted.

Woman: [Inaudible].

Honeycutt: Let's ask that question again Councilor Kemp.

Kemp: My understanding was that the consideration of an application being complete is when it's ready to submit to the County for a permit.

Grossnickle: We use the term "application complete" as an extended phrase. Application is complete for design review is a different phrase than application is complete for permit processing. We have a number of agencies as he's cited to give us data and approval letters before we give our City approval to the County to process to have a hearing and process their permit application. So, that would be the best use of the term of completeness; that the City has written a letter approving all of the application.

Kemp: Okay, and I think you said we're a long way from that?

Grossnickle: I did say that.

Kemp: Okay. In your opinion, have all the criteria been met now for the design review process?

Grossnickle: I agreed with Walt. We talked back and forth about these requirements and I sent in even a list of requirements that the City, that I drew from the ordinances and we agreed that each of these had been met. Sufficient for design review.

Kemp: Okay. In the site plans and elevation review, [audio problem...feedback happening]. Has the developer submitted plans including the HVAC units in their location?

Grossnickle: No.

Kemp: Has the developer submitted plans for waste water [inaudible], etc., to their locations?

Grossnickle: No, there's no specification for [inaudible].

Kemp: Okay. Has the developer submitted to you his NPDES 1200-C?

Grossnickle: He has not.

Kemp: Okay, thank you.

Grossnickle: None of those are required for design review but they are definitely required for the second state.

Kemp: That's what I was going to ask. So those are not needed to be presented prior to the design review?

Grossnickle: That's correct.

Kemp: Okay.

Honeycutt: Any other Council questions?

Verburg: I guess, Council Verburg here. I would like to know is this package more complete than what was presented to the Planning Commission?

Grossnickle: It only has one addition and that is a, the dimensions of the lot and elevations of the lot were presented.

Verburg: Okay.

Wendolowski: Mayor Honeycutt, could I...

Honeycutt: We'll have public comment shortly here.

Woman: You'll have to speak up. We can't hear.

Honeycutt: Okay. Thank you, [inaudible]. So, just to be redundant, Walt and Tim, my understanding from what I heard for my own...even though I don't have a vote in this tonight...but all criteria that the applicant has put in is met: design review, for the design review standards, and the shoreline standards. Is that what I heard from both of you?

Wendolowski: Yes, from my end, correct.

Honeycutt: Okay, and from the staff side, you're comfortable with answering that yes?

Grossnickle: Yes. I do have some concern about the shoreline standards. Not that he hasn't met them but that we have not yet required the kinds of standards that we should

and I believe that's something we are working diligently with Lisa Phipps and the State to do. We just haven't done it yet. We don't even have a revitalization plan committee established that develops a revitalization plan for shorelines. So, not that I know of anything that would directly affect this application, but the reason for those plans is so that the ground between the building and the river act as a proper filter for anything that's placed into that ground. In this case, in this application, there's no indication so far that there would be anything placed into that ground that's harmful to the river. I haven't seen all the data yet but that's as far as I'll go with that.

Honeycutt: Thank you. Any other comments before we move on from Council or staff or from Walt? Okay. Moving on, Mr. Ulbricht, Ms. Bricker.

Woman: Mr. Chairman, Mr. Chairman?

Honeycutt: Yeah, go ahead.

Woman: I can't hear a thing. Is this the best you can do with the sound system?

Man: I think they need to speak into the mikes, a lot closer to. They're not.

Honeycutt: Okay, we can do that. Is that any better.

Man: That's better.

Honeycutt: Okay, all right. We'll concentrate on talking on that. Who asked the question, can she hear now?

Woman: A little better.

Honeycutt: Okay, we'll, we'll...

Woman: It's still really bad. Is this the best you can do?

Honeycutt: We'll speak up. I can't get much closer here, so I guess to answer your question, that would be yes. Possibly we can turn the volume up but I think we're about the best we can do here with the equipment we have.

Woman: Well, if you could turn the volume up I would think that would help.

Honeycutt: I think we have it as high as we can get it for you. We'll double-check it for you because we definitely want you to be able to hear on Zoom.

Woman: Okay.

Honeycutt: Pardon me, Ms. Bricker, we'll be right there.

Man: That's a little better now, just holding it closer to...

Honeycutt: Okay, we'll focus on mike, talking real close to these mikes.

[People talking in the background]

Honeycutt: Why don't we go ahead and move forward on this while they're looking at the technical side of this, Ms. Bricker.

Bricker: Okay. How's that for volume?

Honeycutt: Mike, can you hear?

Man: It's a little better.

Honeycutt: Okay, all right. We'll speak up as much as we can.

Bricker: Very briefly, two things first. Logistically I submitted our, a letter requesting an appeal on October 11 and I think a couple of people have mentioned that letter if that's the one they're talking about. Just so you know, I submitted that to the City with the assumption that it would become a public document.

In addition, because I thought there would be new people here today who weren't necessarily familiar with the history of this project and the fact that there was a conditional use application before this outright use, permitted use application, I did a two-page summary of the background which I called applicant summary and it's on the back table. If anyone would like a copy, Councilors and Mayor Honeycutt, I also provided copies before the meeting and I think you have it. It's not meant to be an advocacy document. It's just meant to give some background. It is from the applicant.

So very quickly, we agree with the Staff Report. We think that this project does meet the design review criteria. We do not have any problem with the recommended conditions in the Staff Report.

Man: It's worse than it was...working on technical fixes...

Bricker: Okay, and so, as stated in the letter on October 11, we think that the Planning Commission decision which was a denial by virtue of the fact that it was a tie vote, was incorrect. We believe that your role on the City Council, since the recommendation is approval from Staff and I still haven't heard any ways that the application does not meet design review criteria because there weren't any findings in that decision, that tie vote after the Planning Commission meeting. So your role I believe is to approve. I think that you have already reminded us all, Mayor Honeycutt, that this isn't a question of we're not, you're not voting on the use, you're voting on design review. The use is already permitted. I can't stress that enough. These are uses that are allowed in the industrial and water-related commercial zones, they just are. This is a limited land use decision. It is, as Walt has stated I think very clearly, you are looking at the code provisions specifically and that is what implements the comprehensive plan. There is not a role here for

the comprehensive plan, or for that matter, the vision document, to be applied somehow directly to this design review application. That is not permitted in a limited land use decision of this kind. I won't call it ministerial but I'd say it's pretty close. That is all unless you have questions for me.

Honeycutt: Any questions for the applicant?

Kemp: Are you comfortable answering some questions that are general about the project?

Bricker: I think so.

Kemp: Do you or Mr. Ulbricht have a Wheeler business license?

Bricker: Excuse me, a what?

Kemp: Business license to do business in Wheeler.

Bricker: I do not have a business license to do business in Wheeler.

Kemp: Does Mr. Ulbricht?

Ulbricht: Your question again, Clif?

Kemp: I'm asking you if you have a business license in Wheeler?

Ulbricht: No, I don't have...

Kemp: We're looking for revenue here, it's \$50.

Ulbricht: I don't have a business yet. I'd like to have one.

Kemp: Well, [inaudible] sign here in the City so it might not be a bad idea. Do you presently own a seafood processing plant?

Ulbricht: No, I do not.

Kemp: Have you ever owned a seafood processing plant?

Ulbricht: Yes, I have.

Kemp: Have you lived next to a seafood processing plant?

Ulbricht: I'm sorry?

Kemp: Have you lived next to a seafood processing plant?

Ulbricht: No, I have not.

Kemp: So you don't live in close proximity to a seafood processing plant now?

Ulbricht: That's correct.

Kemp: Okay. Thank you. That's all my questions.

Honeycutt: Any other questions of any other Councilor? Thank you Ms. Bricker and Mr. Ulbricht. We're doing the written, open this up to public testimony for those in favor. We do have a list here on the boards that in support. I'm going to go ahead and go down this list in the order it was signed. That doesn't mean that just because you didn't sign this if you do want to speak or give testimony, now is the time. I would like to ask everyone to respect each other's time and that testimony's allowed for five minutes. So at that time, opening public testimony:

Mary Leverette, you were the first one to sign.

Leverette: Mr. Mayor, Councilors, I am Mary Leverette from 375 Du Bois Street. Tonight I have two points that I wish to make. The first point is to urge a vote to approve the design review proposal. The second point is to ask for a kinder more respectful village. On my first point you will have heard many and various points of view this evening. However, the central issue is to review and vote to approve or deny the design review proposal for our waterfront. I urge you to approve this application. My second point, since moving to Wheeler I have been struck by a number of negative comments about any proposed development on the waterfront including negative comments about individuals and this saddens me a great deal. I do not believe that a person, any person who changes his/her mind is a liar. We all change our minds. I do not believe a person, any person who changes his/her plans or designs to consider the interests of others is a liar. Hopefully, we extend this courtesy to others. I would like to believe that after tonight whether the vote is aye or nay, all of us will be more respectful, kind and tolerant of others, especially our neighbors and fellow citizens. Thank you.

Honeycutt: Thanks, Mary. Let's go on. Ms. Simmons.

Simmons: My name is Cynthia Simmons. I live on 4th Street in Wheeler. Some of my testimony was in regards to why we have given out the cottages and are moving forward to something else. I don't know, it mentioned the cottages.

Honeycutt: Get closer to the mike.

Simmons: Oh, sorry. It mentions the cottages so I don't know if it's...

Honeycutt: Yeah, and this evening, just for clarification, as you know, we're, the points that we're discussing is design review only on a processing plant and seafood retail.

Simmons: Okay.

Honeycutt: There's no application at this time for any cottage.

Simmons: Yes, I understand that. I just mentioned the cottages in here so I don't know. I didn't really know what was going on at the beginning until I came to a meeting. I'd like to say that I, with a few other people, went up and spoke to Mr. Ulbricht and heard a completely different story than what I had been hearing in town. I found him to be very gracious and accommodating and frankly disappointed that Wheeler wouldn't work with him. It makes me sad for my town and it made me feel for his property because we all own property in this town and I can't imagine not being able to build a shed on my property or a garage because the whole town came out and said no. I was impressed that he was an ecologist and that his original plan wanted to have walking trails and a park and a community garden and a farmer's market, but all of that was voted down. I also feel the two people that were told that it was probably proper to be recused from the last vote did not recuse themselves even though they had conflicts of interest. I feel as though the review should be approved tonight because they seem to have met all the requirements. The Council is not here to decide whether or not it gets built right now or anything. It's just reviewing the design. If we put ourselves in a place of litigation our town right now is running on a shoestring and a prayer and on bonds and grants to keep our City going. If we had a development on the waterfront there would be tax revenue that could perhaps help with our infrastructure where we really need it and business and commerce in our town. I can't see why we would risk going bankrupt as a town just to say no to development and that vision to me, bankruptcy, is not our best option for a vision for Wheeler. Thank you very much.

Honeycutt: Thank you. Mr. Anderson.

Anderson: Yeah I think I gave a written statement that the Council should have so I'm not going to go through and read it. Basically I believe that the project does meet all the requirements of design review of our Wheeler City ordinances. I believe there was some confusion at the Planning Commission that it was more of a conditional use and it is not. It is an outright permitted use and that is what the Council members need to keep in mind and that what you are looking at is design review. Thank you.

Honeycutt: Thank you. Is there anybody else in support? Go ahead, Joseph, go ahead.

Datillo: Joseph Datillo, 1234 4th Street. I wanted to basically do the same thing that Mike did and say I reviewed everything, was at all the hearings. I am just reiterating what I voted on the Planning Commission. It was my assessment after all that time invested that it met all the criteria of design review and that there was nothing missing at that time. I'm glad that the additional information was provided for the [inaudible] to make it easier to find that, but all the information was available at least for plan review. My assessment is that it is good to go. If you have any further questions from me, you're welcome to but I didn't want to say anything further to [inaudible] things given separate here.

Honeycutt: Thank you.

Datillo: Thank you.

Honeycutt: Go ahead, Jane.

Geason: Jane Geason, 391 Winkler Street, Wheeler. A number of the counselor's questions that came up tonight about the design review sounded to me to more to building permits. And if it's a yes vote and building permits are applied for those issues will be addressed by the county. That's not what we're here to vote on tonight—as far as, I understand. I hate to see those two aspects get confused. Tim, you mentioned something about current law that maybe isn't as it should be when it comes to riparian properties and I agree. But, we have to go with what the law is right now, not what it should be, not what we hope it will be, we have to follow what the state and county and city laws are as they stand at this time. And I agree that there needs to be changes so that in a way, that's neither here nor there for tonight's vote.

Grossnickle: What was the word you used, Janie? I was proselytizing for something in the future. Sorry!

Geason: It's okay. And then the other thing I would say, well two things 1. Look at all the people here, that's great and I hope Wheeler continues to bring people to these meetings so people can see directly what's going on with the city and not fall prey to false rumors, innuendo. I lived here 23 years ago. At the time, my ex-husband worked at the clinic as Executive Director when the North County Health Initiative tried to happen, so you may remember that. He, bless his heart, had the stuffing kicked out of him. I see some of that happening to Ken. I think we're better than that and if we're not, we should be better than that. It's okay to disagree. We can all have different ideas about where this [inaudible] should be. We need to be kinder about it and listen to each other and talk to each other directly. So, thank you.

Honeycutt: Thank you. Barry, do we have anyone on Zoom that wants to testify in support? If they do we'll have more opportunity for them later, too. So, is there anyone else in support?

Bradley: Good evening Mayor and Council members, Michelle Bradley, General Manager at the Port of Tillamook Bay. We have the railroad right-of-way that is impacted by this project. I just wanted to do kind of a clarification of something I heard earlier. It's actually the railroad that gives the authority to work in the right-of-way, it's not ODOT.

Kemp: I was going to ask you that.

Bradley: You must have seen my head kind of whip around there. So, but we've been working with Mr. Ulbricht for years on different phases of the project. He's been beyond gracious of trying to incorporate the Salmonberry Trail and other items into his projects here. He has been a delight to meet onsite with multiple times and is interesting in making sure that that's part of the community. Thank you.

Honeycutt: Thank you. Thank you, Michelle. Anyone else in support? Karen. Karen is in opposition and just for clarification and before you get started Karen, Council always knows that you can ask at this time if there's any questions you want to ask or if you want to testify. Go ahead, Karen.

Matthews: Thank you Mayor and City Council. I'd like to I guess soften your statement that I am only in opposition. I want to see that the law is followed and adhered to. I am not in opposition of building and I think that with meeting each and every criteria, that's really important. I do have a slideshow that Mary's going to be putting up so if you can bear with me for a minute, make the time clock stop for a minute. Thank you.

Man: Mr. Mayor, do we have a timekeeper?

Matthews: Yeah, she's been doing it.

Man: I kind of think this is Item G; I'm not sure.

Matthews: So while she finds those slides, I presented this also to the Planning Commission and there's a couple of references there that will say Planning Commission but you can just enter City Council. You know we all live in this town. It's beautiful. It has a great view. I think it's called the City with a Million Dollar View. All of us have our interests.

Man: Karen, bear with us a second. We'll stop the clock.

Matthews: Yeah, we practiced this this earlier, but...and it worked.

Man: We're not paying for this either.

Matthews: There we go. I guess we'll just continue to see my...Hi, Mike. Okay. So with that...thank you. We all find this to be a very special place and the future is guided by our vision plan. We worked on that many, many years to put that into law through our comp plan and our ordinances. I'm not going to belabor the part about the design review but paragraph 2 does state that no permits will be issued until the site plans have been reviewed and approved under the comp plan and ordinances by the Planning Commission. The zoning ordinance Section 11.111, General Shoreland, the setback shoreland for non-water dependent uses shall be 30 feet. Comp Plan Goal 5, riparian vegetation within identified riparian zones shall be protected and retained at 25 feet riparian zone is established adjacent to Nehalem Bay. Then Comp Plan Rule 17, the Oregon Coastal Shoreland rule states that based upon inventories comprehensive plans for coastal areas adjacent to the ocean, estuaries, or coastal lakes, shall identify the coastal shorelands and those areas are to include at least areas subject to ocean flooding and lands within 100 feet of the ocean shore and within 15 feet of an estuary or coastal lake. That's the one that applies to us. The comp plan...the next slide...I apologize for the quality. It's a snapshot from our City of Wheeler website but it talks about the shorelands and it shows it on a map. The next slide is a compilation of sound

bytes. I know you can't see much there. Don't worry about it Jay, it's alright. This is a compilation of sound bytes and because Lisa Phipps was having a hard time with her audio and video synching up during that meeting, in August the City Council had Lisa Phipps, the Regional Department of Land Conservation and Development, come in and talk about all those things that Tim mentioned that we really have a ball of string that needs to get unraveled and all that. So, what I'm trying to do here is I've taken out, and I've talked to Lisa several times. Because Wheeler's ordinances and Comp Plan are not matching, you have to look at the hierarchy of what the state laws and the governance states. So, with that, we're going to go to the first audio clip and it is introduction of Lisa.

[Audio clip 1: The geography is Lincoln County and five of its seven cities, [inaudible] County and its seven cities, Clatsop County and it's five cities and [inaudible].]

Thank you and the next one is a definition of our current setback areas and why they are important.

[Audio clip 2: So the riparian setback is an area that has been deemed necessary to [inaudible] the riparian [inaudible]. That area between [inaudible] vegetation that has a lot of benefit so whether it's filtering water, planting shade, [inaudible], [most all inaudible], generally those setbacks provide protection. And so when Tillamook County, the City...]

Okay, so she just goes in to talk about City stuff. Audio clip 3 talks about our contracts.

[Audio Clip 3: So there are a couple of issues that [inaudible] is that you have conflicting setbacks identified [inaudible] and so [inaudible] riparian and water setbacks deemed and how they're applied and how this kind of [inaudible] style. So, when I came up, okay, can I disable my camera, maybe that will help a little bit, I'm not sure if that's the case but so, situations where there are]

That's the important part. Situations where there.

[Continuation of Audio Clip 3: differences in [inaudible] comprehensive plan takes precedence.]

Glowa: Mr. Mayor, perhaps we just take a break to get this audio working because I can't hear squat.

Matthews: Mike, it's online. I'll direct you to where it is. The entire meeting audio. Okay, I apologize. This did work better last time. I'm not sure what's going on but Lisa is talking about, let's go to the next slide. She basically has stated that the hierarchy is the Comp Plan is the overarching document that is used. From that you build your zoning ordinances and when you have a conflict you go back to the Comp Plan. So Comp Plan Rule 5 says 25 feet, but that's for an nontidal waterways. We clearly have a tidally influenced waterway and Comp Plan

Rule 17 which is tidally influenced is 50 ft. So, based on that and I will go to the next slide, this is just graphics. If I was doing it myself I would do it as I was speaking, sorry. So basically, you know, you need to interpret that. The shoreland, Rule 17 governs the setbacks for our waterfront and that is 50 feet not the 30 feet. Whether...I'll just leave it at that. I have another document that I was going to read, I'm not going to. So I think we need to talk to Elsie Geeson again. I do have another letter that I submitted. I'm not going to read through it because of the time that I've already taken and I really do appreciate it. There is, however, one thing that I have highlighted there in yellow which I'm hoping that you guys look at. The Plot Plan, there was one on the 23rd of August, there was another one on the 7th...6th, excuse me, and then reviewed on the 7th of October. All of a sudden two more bay doors showed up: one on the north side, one on the west side. The one on west side is *really* problematic. As you might guess, from my comments, I am very, very concerned about the environmental protection of our estuary. It is indeed what's brought people to our town. It's what drew me here and many of the others in this room and it's part of the lifeblood of Wheeler. So please, let's protect the estuary at all costs. Thank you.

Honeycutt: Thank you. If you could, Karen, describe what that problem is with the doors.

Matthews: Take a look in your packet please. Under the drawings that you have, hang on let's see here, and I will show you. There's one that looks like this and it shows grass all around it and then there's another one that I don't have a copy but it's the elevation drawing on the west side and the north side. That shows two large bay doors. There is no pavement. It's got grass all around it. It's not meant to be driven up to. The other concern that I have which is on this other document clearly needs to be reviewed. There's a safety issue with parking. There is parking on the north side but the people that are getting out at the retail, if they come across there they are going to have to cross behind big trucks that are at the bay doors and that's a hazard. Something needs to be fixed about that if we're going to allow this development. Okay, do you see where I'm talking about.

Man: I'm still digging.

Matthews: Yeah, so those were not on the August 20...excuse me, the September 23rd drawings but they showed up on the October 6th drawings. The Planning Commission, anyway...okay. Any other questions?

Honeycutt: Thanks, Karen.

Matthews: Great. Thank you.

[Inaudible question]

Honeycutt: Yeah, it was a discussion on the difference between riparian setbacks and building setbacks. Is that enough clarification? Okay. Let's go ahead and I don't know which order they came in first but you mentioned Mark first, so go ahead Mark. Mark, can you hear me? This is Doug Honeycutt here.

Nelson: Okay, it looks like I'm unmuted.

Honeycutt: Okay, go ahead.

Nelson: Thank you. So I want to point out that I am not against progress but I have to insist that everybody follow the rules as we go through the process which is not unreasonable. I want to point out that grandfathering in the geological hazard report for this project means that it is not open to public discussion. In addition, just like any number of things in life what you are, the appeal that you have before you reflects the decision made by the Planning Commission which did not include the changes indicated to the height of both of the building and the surrounding elevation. Those things need to be stricken from the appeal because they were not included in the original assertion, the original design review. As long as people follow the rules then I am good, but knowing the hassle that I went through with the geological hazard report in particular, just to grandfather it in, rubberstamping what was previously done but not allowing for a public discussion about it is not right. Thanks for your help. I yield my time.

Honeycutt: Thank you, Mark.

Man: Do we still have Walt on the line with us?

Honeycutt: We do have. Walt is still there. Do you have a question for Walt?

Man: Yeah, I guess this is relation to Mark Nelson that as a de novo hearing which is what I was told this was going to be run as, can new pieces of information be included into the packet?

Wendolowski: Yes.

Man: Okay.

Honeycutt: He said yes. The answer from Walt was yes. This is a de novo and new information can be submitted to Council. At this time Ms. Stone is, has the floor. She's still...go ahead Ms. Stone if you can hear me. Let's come back to Ms. Stone and we'll go to Paul. Paul, did you have something to say? Ms. Lazlo?

Lazlo: Hi. My name is Maren Doyle Lazlo. I've been a resident here for about 23 years. My husband and I moved here and created the Old Wheeler Hotel and then subsequently sold it to Katie Brown. We're still here 23, 24 years later because we love...or I love the town. I am actually, I am not against development in town. I know that, you know, Wheeler has been arrested in time for different reasons, you know, over the years political reasons and financially it just has been stopped in time. That works for our benefit these days. We have this beautiful waterfront and of course it will be developed here at some point. I just, for one, I don't want to see a fish processing plant down on my piece of...my view of the waterfront in Wheeler. Like I said, I'm pro-development because it will happen. If it's well,

anyway, I just, you know, there's no way in hell I want a fish processing plant in town. I guess I'll just leave it at that.

Honeycutt: Thank you. Gary Gibson. Say that again. Okay, Ralph, if you're here. You have the floor Mr. Thomas, Margie.

Thomas: Yeah, here I am. Margie Thomas, 195 First Street. We've been in Wheeler for 47 years part-time. I just have a quick question and I don't know if Tim can answer it or not but is there anyway of knowing if anything else is going to be built on this property?

Grossnickle: Is there anyway of knowing if anyone else is going to be...

Thomas: If anything else, if any other buildings are going to be built on this property?

Grossnickle: Not on this particular lot.

Thomas: On this lot. Mr. Ulbricht's development.

Grossnickle: Not that I know of.

Thomas: Okay. That's it.

Honeycutt: Thank you, Margie. There was someone else. Barbara, go ahead. Barbara, you have the floor. How about Ms. Stone. Did she...

Wilson: Okay, can you hear me now?

Honeycutt: Yeah, go ahead, Barb.

Wilson: Okay. I'm Barbara Wilson, 563 Fourth Street in Wheeler. I am a property owner there and my son lives there. I live in east Washington County but I come to Wheeler frequently. It was several years ago, maybe three or four years ago when there was a hearing at City Hall in Wheeler where they discussed this piece of property and it was someone's idea that it would be left as a greenspace, undeveloped, a public park. I came and I testified at that and it appeared that it was approved. I don't remember if it was the City Council or the Planning Commission but I went away thinking that it was a done deal. Then all of a sudden I began to hear about this proposed development for fish processing plant on this same piece of property which I thought was the same piece of property, and if it isn't, please correct me. But I do want to mention to you in east Washington County where I live in Beaverton, we are urbanized and we have traffic and we have high density housing. The Park District put a measure on the ballot a few years ago where they wanted to go by greenspaces and the measure passed. It was a big measure...I think \$100 million something like that and the environmentalists all came out and supported it and the money measure pass and they had all this money. What happened was they went out to buy greenspaces, riparian and natural areas and there were none. There were none. And they did

the best they could with the money that they had but there were no greenspaces available. What I'm telling you is this: Greenspaces and public open space, greenery, riparian and so on are so valuable and so important. I don't know what happened to this proposal and I don't know how this gentleman came into the picture and decided they wanted a fish processing plant. I'm not sure how that happened. But if you approve this you're giving away something very valuable and the future will not be able to speak. So please give it some consideration. I'm of a mind that on this river is overfished and I'm told that the fish would come some place from the ocean. I'm not keen on fish processing plants and I'm not sure it's appropriate for Wheeler. Thank you.

Honeycutt: Thank you, Barbara. Sandy Douma.

Douma: Sandy Douma, 231 Hemlock Street. I guess I'm kind of confused after reading the paper that was put out by Mr. Ulbricht because at the bottom of it talks about three alternatives and then the bottom line says the applicant is still willing to discuss the original proposal but the City must understand time is running out. If the City wants to consider alternatives to the fish processing plant the City will have to take the initiative and act quickly. The applicant cannot tolerate further delay. So I guess one of my questions is what does he want? I don't know. I understand talking about the fish processing plant despite what the flyer that was in our mailbox and despite what was in on social media. That was against fish processing but wanted housing for the area, and then another idea they want to have short-term rentals. So I don't know what, what the real true plan is. But what you...when I look around here at all of us, none of us are going to be here 50 years from now and maybe less than that. You have not made the charters, the ordinances, Comp Plan, or a Vision Plan but it's there to guide you. You have not changed any of these and they were all in effect, and Mr. Ulbricht thought [inaudible]. Nothing changed. That was the rules for you to go by and that's for him too. There is also the geotech report from 2006 when he bought the property. That has not changed. It is still filled to 5-15 feet of organic fill that is highly compressible with hazardous materials that will settle drastically and will liquify when there is an earthquake. When asked at the last Planning Commission meeting what he would do with the dirt that he would have to remove he said "I don't have to answer that." When he was asked what he would do with how he would secure the chemicals that would be in the fish processing plant he stated "I don't have to tell you what goes on inside the building." We all live here and I live pretty darn close to it and it scares me. I think we deserve to know those things. One of the interesting things that changed was the boundaries for the floodplain that has outlined his specific property. It doesn't take much to see that there's no difference in elevation between his property and the rest of the waterfront. How did that happen and why? One of the things that, one of the big things that changed that none of us when the Comp Plan and all that stuff was done, was climate change. It's on our radar now. It will effect our town. We will be putting people in danger. I mean the people that live right on the waterfront, it's got to be scary. We have not heard if the City has enough water to run a fish plant. We haven't heard what's going to happen with the guts, fish

body, shellfish scales and all the other debris and how it's, and the fact that it's going to stink up our entire town, and that's a huge problem when it comes to the Vision Plan. How do we deal with the wastewater that this plant is going to generate? I know that those things went down as a list of contingencies that he must meet but when it affects us personally, it seems like it would be a good thing for him to answer those questions. I have not heard, I do know two people that have wanted to, and I don't know if it's in your packet, the reason why they voted no on this. At that meeting, what I kept hearing them say "These plans are hard to read. I don't understand them. Please submit something that is easy to read, easy to understand, that it meets standards." He was given opportunity to do that and he refused. I can't speak directly for them but that is what I heard. I hope you vote no because a fish...I know you're not supposed to talk about the fish processing plant but I guess you've got to ask him what does he want? He's got three different things here. What is it that he really wants.

Honeycutt: Thank you, Sandy. Anna, go ahead, this is Doug.

St. John: Hi there. Can you hear me?

Honeycutt: Yes, go ahead.

St. John: Hopefully I'm not too loud. This is Anna St. John. I did provide written testimony to everybody earlier today. I believe Mary circulated that. I thought I would take this opportunity to read my testimony to you. I won't read the entire testimony, I'll kind of abbreviate it. Again, my name is Anna St. John. I've owned a home at 529 Second Street since August of 2010. I'm a new member of the Wheeler Planning Commission. I've also been a registered geologist licensed in Oregon since 1996. Over the course of my 30-year career I have prepared and reviewed site plans for public agencies and private companies. I did not approve the above application on October 7, 2021. I would not have on September 23, 2021 if a vote had been taken because of the substandard quality of the exhibits attached to the application to satisfy Article 11, Section 11.05 of the City of Wheeler's Zoning Ordinance. Even Mr. Walt Wendolowski with the Morgan Group, a planner hired by the City to review the application recommended that a full set of plans be prepared to scale for the next step by the Commission. That is a condition of approving the application. With all due respect, a full set of professional plans should have been attached to the original application. The quality of these exhibits will set a precedent regarding the quality of materials that can be approved for design review for future development projects in Wheeler. I offered the following comments for your consideration regarding design review.

Article 3 or Section 3 defines what a site plan should include. In my comment I noted that I explained what they should include, a site plan or plot plan is a type of drawing used by architects, landscape architects, urban planners, engineers which shows existing and proposed conditions for a given area typically a parcel of land which is to be modified. Site plans typically show buildings, roads,

sidewalks, paths, trails, parking, drainage facilities, sanitary shorelines, water lines, lighting, and landscaping garden elements. Site plans include the scale and a north arrow so anyone can calculate the area of features shown on the plan and that orientation of the proposed features. These plans may or may not represent the final plans to be used for permitting and construction but they should accurately present the elements of a proposed project for review and to serve as a historical record of the proposed project.

Multiple hand-drawn exhibits, some with and without measurable scales or north arrows were included to satisfy the site plan requirement for design review. It was very surprising to be presented with such draft work product for design review for a proposed development of this size. Also, as a registered geologist license in Oregon I was concerned about the use of a licensed professional engineer's seal from 2017 or 2018. It wasn't really legible.

On Exhibit 7, a PE stamp plan appeared to have been repurposed for this exhibit. When an official seal is applied to a document that PE is attesting that he or she was in responsible charge over the engineering work, land surveying work or photogrammetric work. I cited to a link on the Oregon State Board of Examiners and for Engineering and Land Surveying. If the PE was not responsible and in charge of the preparation of these modified figures this may constitute a prohibited activity pursuant to ORS 672.045(4), that is to say an attempt to use an expired or revoked certificate or permit. As a registered geologist in Oregon I certainly would not allow the repurposing of plans, figures, bearing my seal without knowledge and direction because I could lose my license. More professional architectural drawings were submitted on October 6 after the original hearing was extended with additional features added to the building doors which led some Planning Commissioners to inquire which plans were to be reviewed and considered as part of this application. I also noted as in my experience, an example of a professional plans that may be found in the April 2021 City of Wheeler Planning Commission packet for the design review application for the North County Food Bank, No. 1-DR-PC-21.

I had a few other comments about the design and I wanted you all to consider how an estimated 10,280 square foot building consisting of grey black metal siding promotes harmony with the surrounding structures on the site and also yeah, that's all. So I just wanted to let you all know where I was coming from with my vote. There were a lot of really great points raised by the community and as a Planning Commissioner, my understanding from Goal 1 of the Comp Plan is that I'm supposed to represent the community and listen to their concerns. I appreciated all that testimony although it may not have been considered relevant for design review. It was important to hear it. It was important to the community to hear it. For this caliber, for this magnitude and size of development I just, I feel like as a city we're setting a precedent if we approve what was initially provided. So, thank you so much for your consideration and your service. I really appreciate it.

Honeycutt: Thank you, Anna. I'm sorry, okay, *6? Okay. Judy, if you can hear me, you need to push *6.

Stone: Yeah, yeah. Are you there? Are you there?

Honeycutt: Go ahead. I can hear you.

Stone: A connection. Thank you so much for allowing public testimony and for your service. I'm writing to tell you why as a City Planner, I voted against the proposal for the waterfront fish plant. Let me begin by saying I am not opposed to development on that property. I want Wheeler to prosper. The development needs to be in alignment with what the people of Wheeler have repeatedly said they want their town to look like and development must satisfy our Comp Plan and ordinances and the visioning statement on which many citizens work so diligently. Mr. Ulbricht's initial plan for the hotel and restaurant along with short-term rental cottages did not. It was denied by the prior Planning Commission and Council. Wheeler's ordinances do not allow short-term rentals. The citizens have reiterated that for decades. After the hotel was turned down, Mr. Ulbricht wrote a very threatening letter to the City saying he was suing the Mayor, the City Manager and the Council and now said he was going to put a fish plant industrial park. He submitted very rudimentary plans that frankly looked like they had been cut and pasted by an amateur. They gave no specifics. Over the next month the Planning Commission saw ever changing plans as the City Manager cajoled Mr. Ulbricht for the necessary information needed. In the meantime, the City Planner was called and threatened as well as the City Manager according to City staff. Finally, when the plan was deemed complete, the Planning Commission set hearings on which we heard from support from four boat owners in Warrenton who all said they had been promised by Mr. Ulbricht that they would be up and going in 2022. They also said they had a financial stake in the process. Mr. Ulbricht was unwilling to discuss exactly what the processing fish was going to mean and declined to answer where the byproducts of processing would be disposed of. This would have been on the design review. There should have been something on there that talked about some kind of storage units.

Additionally, the production of ice could be a huge drain on the water system we share with Manzanita. Chemicals would also be involved. The storage and safety were not addressed anywhere in the design. The geotech report from 2006-7 reported the fill in which these buildings would be based and noted the plan was sinking and would settle and could not support large buildings for a sustained period. Not to mention our rising sea levels, the designation of salmon habitat and production of our estuary. Again, as late as four hours before the public meeting the plans changed again now calling for freight doors on the water side and the north end of the building. Elevations were also not cited. A necessary element of design review.

Finally, by the second half of the public meeting we had heard much detail testimony from citizens who raised various concerns about the design, safety and long-range plans of this development. We didn't yet have a real detailed site plans of this development. But we didn't have yet a real detailed site plan with elevations and other specifics. The City Manager said he had a full set of plans in the office downstairs and went to retrieve them. Some members did not know of these plans. When viewed, these plans were not for this project but for the previous hotel/restaurant. In my and other's opinions, we could not okay plans for which we did not have all the information. The project was denied.

During the public meeting Mr. Ulbricht and his attorney were specifically asked if he would consider a scaled down hotel/restaurant that met our ordinances and he said "Absolutely not." He said his plans were to make an industrial park on the land. This is about something that the former Mayor wrote that talked about affordable housing but I'm not going to talk about that because it's not relevant.

I came onto the Planning Commission with no exposure or opinion about this developer. I have vaguely heard about the development but hadn't really been following it. Over the course of my tenure, I have seen what a detailed development proposal looks like in the new Food Bank plans. It held all the vital information when we needed to make an informed decision. Mr. Ulbricht's plans for the fish plant were incomplete, sloppy and ever-changing which is why I voted no.

If this Council and staff who have been holding meetings with this developer for months pass this project which stands to pollute, mar the view of our waterfront, cause truckload jams and traffic congestion and many other negative effects, those things will be with us for the next 100 years. With all we know about our warming climate, rising waters, pollution and health concerns, it would behoove this Council to be forward-looking rather than trying to make something fit just to have income to grow our local government. This fish plant, according to the developer, will employ just two people. It's a poor choice for the people of Wheeler and I'm asking you to deny it. Thank you very much for listening to me.

Honeycutt: Thank you. Mr. Whiting, did you have public testimony? Okay.

Whiting: Thank you to every volunteer who makes up this Council, for those Planning Commission members who have given so much of their time to this process and who as a group eventually voted this application down. I agree with those in our community both for and against that our kindness and neighborliness toward one another are critical assets to our community and I fully expect these to be honored and maintained for the good of us all. Let's get into it. Walt mentioned that zoning ordinance takes precedence over the Comp Plan on implementation on water-related industrial. But the zoning ordinance says the same thing as the Comp Plan Goal 16, Policy 4.J.8, mentioned by Councilors Kemp and Glowa. The following is from page 9 of the zoning ordinance document. Water Related, a commercial or industry use or activity is water-related *if* uses and activities are

not directly dependent upon access to a water body but provide goods and services that are directly associated with water dependent land or waterway use, *and* not or, *and* if not located adjacent to water would result in a public loss of quality in the goods and services offered. That is the standard that both the zoning ordinance is providing to the Planning Commission and this body to determine on a case-by-case basis whether something or not meets the standard of water-related industrial.

Except as necessary for water dependent or water-related uses or facilities, these things such as restaurants, business, factories, trailer parks, are not generally considered dependent upon or related to water rotation needs (that's from page 10 of the zoning document).

Industrial uses shall be identified was water-related industrial on a case-by-case basis. That's Goal 16, Policy 4.J.8. With consideration given to the public loss of quality and goods and services here we are again. It states: "Water-related industrial uses *could* include fish or shellfish processing plants and warehousing and other storage for marine equipment or water-borne farmers." So, what makes it relevant is not as a warehouse, it's whether it's housing marine equipment. That's where the water-related comes in and that's why there's a litmus test so that you can check against it. Our Planning Commission Chair stated to you in writing that comments that are stating that this is *not* an outright use are based on emotion. I'm reading to you directly from the zoning ordinances and directly from the Comprehensive Plan that we are required by law to follow.

So what makes it water-related industrial is not whether it's titled a warehouse or fish processing. I could have a skateboard shop and call it fish processing but that doesn't mean I can put it down on the water. It's what you do there. So, if the applicant's limited processing where it's minimally described does not appear to meet the standard, it is because it arrives and leaves by truck, frozen. The bay waters never enter into it. So this use is industrial, not water-related industrial. An industrial use in a water-related industrial zone is conditional, not outright. You can say, "No, no, no, it's outright, it's outright. See water-related and it says fish processing. Case closed." On a case-by-case basis. This is the case. This is the basis.

When design review is required no permit will be issued until site plans have been reviewed and approved under Comprehensive Plan policies and ordinance provisions by the Planning Commission. That is not a narrow window of paint colors and numbers of windows and what kind of hinges. It's the Comprehensive Plan policies and ordinance provisions. That's what the community is taking as their invitation to weigh in on these issues. Where else would we weigh in? At the building finished plans, where's the hearing on that? This is our opportunity to just say things like water usage. Applications which...in the case of water usage, we have Exhibit 9. The project will have water storage and treatment processing located next to the building. No specific water treatment equipment has been identified yet. Water collection and storage will vary depending on

season of the year. Water usage is provided on the water meter sizing worksheet. There is absolutely no way to calculate water usage for this project and the potential for costly City infrastructure without clarity on how much water and waste this fish facility will actually entail. The worksheet is for this application I'm sorry to say outlandish and useless.

I will finish up quickly. There is a single urinal listed and no toilet. But more importantly, the critical question is not how many such fixtures but how much water will flow through those fixtures. The last application was remanded by LUBA in part because it did not demonstrate applicant complied with the Vision. Where have the guidelines [inaudible] an ordinance been consulted and adequately met.

At last, I will state that the geologic study that has been stated a number of times as complying in its effect, before hearings take place was from an engineer currently out of business. That was then a new engineer of record signed on and said "Well, we'll take this on." It says in conclusion after reviewing the documents provided to us EEI is willing to take over the geologic engineer and record for this project provided the building owner is willing to accept the greater than normal risks associated with constructing on a highly compressible organic soil. On soils that are both liquifiable and will experience lateral spread during earthquake and within a tsunami inundation zone. I love this community. I believe we all love this community. I believe that people who would like to see this move forward love this community. Love is expressed in different ways. I try to be very respectful to all of the volunteers in this body and all the volunteers on the Planning Commission and I feel that this is, I agree with those members of the Planning Commission; some of them are registered geologists, another an architect with some record, that have said this doesn't feel complete. They have given their indication. The Chair of the Department gave a different indication to you and suggested that testimony such as mine about whether water-related industrial is relevant is just emotion-based chatter. Please read the documents carefully as you think about your decision...I'm sure most of you already have and thank you for carefully examining and looking at this because in a world of rising water and concerns about our salmon and concerns about everything else, we're in a position where this is a critical decision. Thank you.

- Chair: Thank you, Carl. Is there any other testimony to be given?
- Ragnell: Deanne Ragnell. So the plans shows that this application is for a very large building over 10,000 square feet. It is to be used as a seafood processing plant. The location of it is...
- Man: Ma'am, I'm sorry to interrupt, can you speak up. I'm getting comments that people can't hear you.
- Ragnell: Sorry. Okay. So, the application is for a very large building over 10,000 square feet and it is to be used as a seafood processing plant. The location is in the center

or our town on the very waterfront that boasts the million dollar view. It's a big deal. Yet it's really unfortunate that our elected officials on the Planning Commission, City Council, and the citizens of this town can ask absolutely no questions about it unless they are to do with paint colors, plantings, doorways, or the height of the buildings. Some of us have asked ourselves how can this be? How can we not know more about something that's this big? Well the answer seems to center around words. The application was deemed by the applicant and the City staff to fit the category of design review. And design review fast tracks an application out of the important issues that would normally be raised for subject project into just deciding those issues that I mentioned above. So because of proposed use of the building contained the words "seafood processing," Article 3, Section 3.010 lists seafood processing as an acceptable outright use in industrial zone. No questions allowed.

Now the members of the Planning Commission who are tasked with the following City ordinance Section 11.050 states: "When design review is required no permit will be issued until site plans are being reviewed and approved under Comprehensive Plan policies and ordinance provisions." Yet when they attempted to ask questions about the site plan and how it's met these requirements they were prevented. They were told that their questions could only ask does the application meet setback requirements? Does it meet height requirements? Do the paint colors regulations match and the end pieces. No one knows anything about the kind of seafood processing that will take place in the center of this town. Will it involve headings, scaling, [inaudible] freezing, we're not allowed to ask.

When a member of the Planning Commission asked for information Mr. Ulbricht responded "The design and review criteria I have met the fish processing definition." So my question is what definition is that? This whole application hinges on what that means. Do you Councilors know where that definition can be found? Apart from the fact that any processing involving seafood is odorous (meaning odor), fish processing is a water intensive industry. And quoting from the Environmental and Social Guidelines for fish processing, they say "Fish processing is a water-intensive industry. Processed water is used for washing fish, cleaning process areas, cooling, and production purposes. Therefore, processes require high quality water and can represent considerable cost to the facility."

So if this whole creation is happening smack in the middle of our town, shouldn't somebody know something about it in order to make decisions about water, waste water, storm runoff, odor, chemicals? Indeed, water is a major component of seafood processing, why does the application only address the amount of water that's to be used for sinks, tubs, and urinals?

The point I'm trying to make here is that this application was accepted on the strength of the words "seafood processing" without a shred of evidence or proof as to what does fish processing is really going to include. How can anybody make decisions when the pertinent information is secret?

The term water-related, there are more words that seem to have no basis. Attempts by members of the Planning Commission or the public to show that the intended use of appeared to be linked to the use of the waters in Nehalem Bay have been discounted. Again, by inserting the words “water-related” into the application Article 3, Section 3.010 enables it to be fast-forward and to design review category when no discussion is allowed. I won’t bother to quote what’s already been quoted about the industrial uses that Carl quoted. But there’s nothing in this application to show that goods and services involved in this seafood processing plant are water-dependent. All attempts were made by local citizens to know why this important part of City policy was being ignored was shut down. The three fishery companies who have negotiated Mr. Ulbricht, their letters are in the record, will not be impacted by any water-related constraints.

Cliff Lewis who is involved in Alaska Salmon Fisheries states in his letter that he wants a distribution and market center. So clearly his fish will be frozen. Conversations with another fishery owner indicates that his fish would be frozen on the boat and trucked in. All the letters of support seem to purpose on market distribution being the most important thing.

So my question is, is it possible that this building is going to be used as a warehouse for frozen fish and not a fish processing plant? Article 3, Section 3.010 does not provide outright of seafood warehousing.

I don’t know if we’ll have time to discuss the geological issues regarding this...do I have a couple more minutes?

Honeycutt: Yeah, we’ll wrap it up in a few.

Ragnell: Okay, I’ll be very brief. So the applicant has taken the liberty of using the outdated survey submitted for a different building application for geotechnical engineering reports. These were for a building application in 2019 which was again based on the even earlier and completely different building application in 2007. In both cases the licenses of the signature of the geotechnical engineers have expired. The document’s outdated and invalid. Both engineers who took over as engineers of record, their recommendations were based on an entirely different project. Although the signing engineer’s license has expired, it’s doubtful that they know that this has been submitted without their knowledge of changes.

The site is the most problematic piece of ground in the City on which to build but due to technical reports from the risks associated with constructing on highly compressible and liquifiable soils of the site, it requires several feet of material would have to be removed in order to accommodate foundations which would consist of six inches or more of compacted gravel, 2.5 feet of geofabric in order to support the concrete mats. The amount of material that would need to be excavated for just the building sites not including the parking lot can be estimated around 3,000 cubic yards. There are [inaudible] to this amount of material has

not been addressed. In addition, since this entire area is comprised of building sources not organic, the possibility of contaminants to materials so close to Nehalem Bay must be considered an important factor in determining the storage and disposal of this material.

So by slotting this application with a design review is precluded, ignored, and dismissed all the work that previous citizens and Councilors did in attempting to revive the guidelines and laws to keep a livable town and for this reason I request this Council deny the application.

Honeycutt: Thank you, Deanne. We'll take a two-minute break. Mary, you say we've got someone on Zoom. Okay. Very good. Are we ready, Mary? Okay, and there was Cameron, go ahead, the floor is yours.

LaFollette: Okay, here we go. Can you hear me?

Honeycutt: Yes, I can hear you fine.

LaFollette: I'll try to speak up in case that's a...I've heard a lot of comments about video...I mean audio on the hearing tonight.

Kemp: We can hear you well.

LaFollette: Okay, that's good. My name is Cameron LaFollette. I am Executive Director of Oregon Coast Alliance. I would like in this testimony to simply summarize some of the points that are in ORCA's testimony prepared by our attorney, Sean Malone. I will just boil down the more complex details. You could read those details in the testimony. Some of the points I'm going to mention have already been mentioned by others but I want to list them all because together they present a compelling case of why this application must be denied. ORCA disagrees with the Staff assessment that the Ulbricht project has met the requirements of Wheeler Ordinance and Comprehensive Plan policies and the standards and criteria required for approval.

Design review is not a rubber stamp of approval on an outright use. It requires standards and criteria to be met. Design review requires the project site plans as an outright use be consistent with Comprehensive Plan policies. It's in Section 2 of the Design Review Ordinance there for everybody to see; a couple of people have already mentioned this.

The comprehensive plan policies required to be met include the Vision Plan. There has been no attempt whatsoever by the applicant to show compliance with the Vision Plan. Now the Vision Plan contains ranked and ordered priorities such as protecting the natural beauty, preserving a small town atmosphere, and improving the livability of Wheeler. There's no indication that this industrial fish plant would in any way uphold and support the Vision Plan which is a mandatory review criterion under the Comprehensive Plan.

Second, Policy 4.J.8 requires that industrial uses be identified as water-related on a case-by-case basis. It is not the situation that the choice has already been made by the ordinance, there must be a case-by-case determination. This test has not been done for the portion of the property zoned water-related industrial. Fish processing is listed as a potential water-related industrial use but it must undergo this test and satisfy the other required criteria.

Third, Policy 4.J.9 requires a similar case-by-case determination for water-related commercial uses. The applicant has also not demonstrated that this test has been met. To reiterate those two points there's nothing in this application indicating that either the proposed industrial use of fish processing or the commercial use of shellfish sales are marine-oriented and no attempt to meet the test required by the Comprehensive Plan and City ordinance.

Fourth, this site, the Ulbricht property, the Botts Marsh Upland as it's often called was once owned by Wheeler Lumber Company which operated mills and other activities through at least the 1950s. There was a Phase I Environmental Assessment Report done in 2016 on this property because of concerns from contaminated soils, and a Phase II Environmental Assessment done in 2017. The Phase II Assessment strongly suggested that a contaminated media management plan be prepared during the planning for any development work on the property out of concern for contaminated soils. The applicant has not provided any such plan or even mentioned concerns of this kind which are relevant to the Bay, the water in the area, people visiting, people working on the site, and anybody else who's in the vicinity, especially construction workers.

Fifth, the application has no information making it possible for decision-makers to decide on water use, sanitary needs, and stormwater management. There's no information on water treatment for fish processing, nor the chemicals used for such processing. Requiring these items is not a matter for conditions of approval, they must be complied with upfront during the approval process because they affect other approval criteria.

Sixth, the applicant's materials mention a property line adjustment but no such PLA has been applied for or approved under the requirements of Wheeler ordinance.

Next, the Wheeler Ordinance requires a geological report where ground disturbing activities are proposed before the public hearing. The applicant has never submitted a geological report or geotechnical report for this proposal specifically. ORCA disagrees with the Planning Commission Chair that this requirement of Wheeler Ordinance has been met.

As a final point, I would make it clear that our opinion, and you can read the details in the attorney's testimony, this project in fact is a conditional use and should instead of being considered as an outright use, should be required to meet the criteria required of conditional uses under Wheeler ordinances.

For all these reasons ORCA requests that the City Council uphold the Planning Commission's denial of this fish plant application. Thank you.

Honeycutt: Thank you, Cameron. Anyone else on Zoom? Anyone else have public testimony that they want to add? Dan Ayers. Come up, Dan. This is neutral testimony.

Ayers: Dan Ayers, 460 Cedar Street, Wheeler. I just want to reiterate the fact that this is a public hearing and the public hearing is specifically for design review. That's where the Planning Commission design review got off track. There was questions, issues, testimony that was brought up during the Planning Commission design review that some of the Planning Commissioners thought that they didn't have enough information. That information that they didn't have had nothing to do with the criteria set forth to make a decision on the design review whether it was in regards to the site decision or the building design. There was issues about the geotech, the hot topic is the geologic hazard. The Geologic Hazard Report is not for this sitting body or the Planning Commission decision body to review. It's up to the City staff to review that. It's not up to you. City staff gets paid to review it. They review it to make sure that what has been recommended by the engineer that created the Geologic Hazard Report is in compliance with the plans that are going to be presented in its final draft. The site design you can see that it's now 11.050, #3 doesn't say anything about showing infrastructure. It talks about elevations of the building, landscaping, vegetation, covers, and design features of [inaudible]. It doesn't talk about the infrastructure but yet there was questions from the Planning Commissioners about they couldn't see the height, they couldn't determine [inaudible] elevation, they didn't see the infrastructure, they didn't know what was going to happen to the fish guts, and all of these are great questions in good issues to be brought up, but not at a design review. It should be brought up in a platform where there's a regular Planning Commission meeting or a City Council meeting or, to be brought up, set a time, spend a little money and sit down with Staff and bring up these issues. These are all great issues and questions that should be, you know, brought to the public and hashed out. Maybe we need to change our zoning ordinances and maybe we need to readdress our Comprehensive Plan, but this is not the right platform for that. You are to base your decision on the criteria that's set before you in the site design in 11.050.

And just a side note, awhile back a few years ago, one of the largest seafood processing plants on the west coast was located in Oregon. They had a fire and a good portion of it was destroyed. They went ahead and rebuilt WAY bigger than it used to be and during the rebuilding process they continued to work processing fish because it wasn't totally destroyed. While they were rebuilding it the fish processing still continued to go on. They are one of the largest on the west coast. I was an inspector for that project for all the [inaudible] structure, for the piping, the reclamation of water, the tanks, the holding tanks, all the valves, all the underground stuff that when you go to that site today you don't see and I was the inspector for that. All the time that I was there every day you wouldn't have

known that that was a fish processing plant. I didn't smell fish ever every day that I was there. It was all enclosed inside this building and nothing escaped. No water escaped, no air escaped, and it's all reclaimed in such a way that you wouldn't know there was fish processing going on.

Then there's the issue about this buffer zone between the proposed structure and our view from the Nehalem River. I think that between the 1220-C, the Geologic Hazard Report, and the stormwater plan that issue will be addressed. I think there will be a plan so that our river is protected and it will be in those reports. But that's not up for you to decide that or address that or review it. Your responsibility tonight is to address whether the applicant has met the criteria for the site design and for the building design. That's it. Thank you.

Honeycutt: Thank you. Thank you, Dan. Anyone else on Zoom with public testimony before we close it? Anybody else in person that has any testimony? Come on up please.

Simmons: My name is Stuart Simmons, 27 S Pennsylvania Avenue, Wheeler is my address. I'm an architect. I've been practicing architecture since 1972. I sent a letter into Wheeler Planning on the first submission and requested that this be denied. Based on the following concerns I urge you to uphold City Planning denial. This Geotech Report is outdated. It is not current. There is no environmental impact report on the seafood processing's facility. A facility of this size you're having an environmental impact report attached to it so that each one of you can look at this and understand what the implications are of this seafood processing plant for this community for these people who live here who you represent.

There is differing criteria on the riparian zone that needs to be clarified: 25 feet, 50 feet. You know what happens when that river floods. You see what impact it's going to have on a building being in close proximity to that water. There are some things that haven't been mentioned here and one's the impact of COVID. It's brought the population of Portland to the coast. We all know that. We see it. The property values here, what's happened to them? They've gone very high because this is desired property. This is a resource that needs to be protected. It is the city with a million dollar view. Each one of you are obligated to support and defend that view. This seafood processing is certainly not the highest view to the tourists. This community deserves to have a greenspace that would benefit each one of you and your families and each family on Zoom and each of these people who are represented here. So I thank you for what you are doing, for hearing this and taking the time to do this as a part of your obligation to us, but I also say go the extra mile. Think about the heart of this project and what it's impact could be in this community. I urge you to uphold the City Planning's denial. Thank you.

Honeycutt: Thank you. Any other testimony? I'm going to close it here just in a minute but I would like to say I would like to thank everyone on Zoom who testified tonight and in person. It was informative testimony. I know our Council's listening. I'm listening and I appreciate the professionalism on testimony. Thank you very

much. At this time public testimony is closed. Ms. Bricker, you've got the floor for rebuttal if you'd like.

Bricker:

Thank you, Mr. Mayor, City Council members, Jennie Bricker for the applicant and I will make a few comments and then I'm going to turn it over to my client to wrap up. I know you know this, but I will emphasize that you are not here to make a decision based on the support or opposition to this project. That is not relevant. This is not a popularity contest and developing private property is not based on what the public wants you to do with your property. I own property and I think many of you own property and I think you can probably put yourself in the position of having your plans for your property scrutinized at this level, put into a popularity contest, including a high degree of nitpicking, open-ended questions that have no relevance to the review criteria, accusations, misstatements, even at times defamation. It's not fair and the U.S. Constitution and the Oregon Constitution both protect two things: One is fairness and we call that due process. That concept embraces the fact that your decision is based on the law and the law for design review is very discrete. You have a limited number of standards that you can apply. That fairness is essential to your process.

The other thing that those Constitutions both protect is private property. Private property cannot be taken as you know without just compensation. It can't be taken by the government, it can't be taken by any governmental body even to protect public views. You can't create a view easement across property because you don't want to look at a development. That is a taking.

I'll move on from that. A couple of points on some issues that came up. There just simply is no mythical case-by-case evaluation here of water-dependent use. These are uses that are permitted outright and they just are and there really isn't much you can say about that. There is no magical way to convert a permitted use to a conditional use because you think that it needs to be water-dependent. The code, as written, the zoning code, has already made that decision. That just, that conversion process does not exist. Those arguments are not only incorrect, I would even call them frivolous with all due respect to my fellow attorneys.

The 50 foot setback is not a setback. It is a riparian protection zone. It's not a building setback. I'll just simply say that this application does comply with setback requirements. This application complies with this use. With all due respect to Mr. Whiting, I also disagree with his novel code interpretation about the importance of a definition of water-dependent.

I will conclude by saying something that I have said in the past and I'm just going to keep saying it because two people have mentioned the importance of greenspace. I completely agree with Ms. Wilson who talked about Beaverton's situation. The importance of natural areas. I am personally a big proponent. Please do not forget that the Botts Marsh estuary was going to be drained and developed into condominiums and a private marina. Please remind yourselves that in 1987 the Oregon Supreme Court said yes to the Goal exception that would

have let that happen and put that estuary...and here I'm talking about the estuary that's not part of this application but is adjacent to it. Please do not forget that this estuary was in direct danger of development. The reason it wasn't developed and never can be developed because it is protected is because of this gentleman right back here. He bought the whole thing and he sold the property to a Trust that conveyed it to another Trust and that property is not going to be developed. It is permanently protected. That is, I don't know how many acres, 7? I don't know how many acres the Marsh is but that's not going away now. It's not going to be developed. There's one reason for that and that's this person you have before you. When they created the Botts Marsh Management Plan, and my summary document reflects this and summarizes the history of this development and that purchase in 2018, that plan contemplated his original proposal. The cottages which require a zone change, the retail building with the restaurant and the apartments above, and then the boutique hotel. Those, that application is gone. You did not approve that application. The first City Council did and then you reversed that so that's why we're here today with a use that is permitted in this zone. We're here because the first development was not accepted. I feel bad about that because I thought that was the superior development, but you know, my client is a business man and he needs to move forward with this and this is what, he has a very viable project. I think he's excited about it. I think it's a good project and that's the one you have before you. It's not, it's never good to consider things without a context and I think you need to put in context the fact that when he bought the property or at some point at least, you were President of [what is the name of it, Ken?] North Coast Land Conservancy, the original I think person who bought the property and then transferred it to the Lower Nehalem Community Trust.

The ecology of that estuary was important to him. He got it protected and now I'm just, I feel very sad about the way he's been treated in this process and I'm talking about the City Council, I'm talking mainly about the public and I'll just go back to my original point. Opposition to this project is not a review criterion. No matter how vociferous and vicious the opposition may be, no matter how much the citizens despise a development, that is not the basis for your decision. I know you know that but I just want to say it again. I'll turn it over to Ken.

Honeycutt: Thank you.

Ulbricht: I'll be quick. I'd like to start out by the landscape I've been dealing with for the last few years. I did not write a letter to either of you two people saying I was going to sue you and you know that and I was saddened by that. But that's the landscape I've been dealing with for two years on *my* property.

I, what you heard tonight are just attempts to stop me from developing my property. That's all you're hearing tonight. Let's stick to the design review issues. I didn't write your City ordinances; I followed them is what I did. I followed what this City had written. Your Staff and City Planner thinks I followed them. I agreed with the conditions you wrote; I think you did a great

job. But I'll tell you what I did say, and we put it in a letter that I would meet, despite the decisions, I would meet and discuss other options. I did say that. For tonight, I need you to follow the City's Staff Report and approve my project so I can develop it. Thank you.

Honeycutt: Thanks, Ken. I would like to comment on that. I never did say you wrote that letter. Okay, moving on to Staff comments. Any recommendations? Walt, do you have anything?

Wendolowski: No, nothing to add.

Honeycutt: Tim, do you have anything?

Grossnickle: The public does have a good deal of opportunity to watch and participate in the County process and the County hearing that will be reviewing all of the professional letters and input and all the completed design issues. I recommend that those of you who feel unrequited in this hearing which is a very specific hearing, make sure you're present in the County hearing which will cover the full application for a permit. This is not an application for a permit. It's just simply a review of the design of the building, particularly the outside view of the building and the outside function to the building. That's really all I wanted to say.

BEGINNING OF DELIBERATIONS

Honeycutt: Okay, thank you. At this time we're going to go ahead and start deliberations on Council which is going to include myself and Council members. We're going to start deliberations if there are any which I think there will be that will only include Council and myself. At this time...

Verburg: Can I ask a question to Walt real quick?

Honeycutt: Yes, no Staff [inaudible] at anytime during deliberations. Go ahead.

Verburg: Walt, I just have a quick question just to clarify something. In your memorandum regarding the agency requirements, (B) you have listed as geologic and you have it listed as the building official has the authority. Who is the building official?

Wendolowski: The building official has the authority to look at the need for additional geological engineering work and that will be Tillamook County.

Verburg: Thank you. That's what I wanted to know.

Honeycutt: Any other Council...

Man: Tillamook County...

Verburg: ...building officials.

Man: Tillamook County deals with the geological report.

Verburg: They deal with the stability of the building, yes.

Man: Okay.

Wendolowski: That is correct. Tillamook County handles the building permit.

Verburg: So my reason for asking that for the rest of the Council was just to clarify because I, there are so many arguments that are thrown and we, as Council, are put in a position where we are specifically supposed to vote on design-related issues. I hear so many of these issues come up over and over again which are valid, genuine concerns that need to be addressed. They are heard. I want people to understand that these problems are heard and they're understood. We have a sheet in our packet that lists the various agencies that will also have to be involved with this. No matter what happens with this design review tonight, we are not the sole dictators of the permit whether this building will be built. Our job tonight is design review.

We have eight different agencies from stormwater to Tillamook County Building Officials for geological approval, we have wastewater management approval, we have DEQ approval that will determine what's going into the air, what's going into water, we have ODOT which is going to determine streets and pavement and things like that. This, our approval or denial does not rest entirely upon our shoulders to determine that this building will be built. I think that's an important thing to recognize as we move forward. Thank you.

Honeycutt: That's very good. Any other Councilor have any other comments? I guess I'd like to kind of double-down on what Councilor Verburg just said. There have been a lot of hard feelings in our town and Ms. Simmons made a comment about hoping this can heal and we can understand really what the City wants and needs. We are, we have kind of a low bar as far as approval or denial tonight and it's going to go onto the County and things get even tougher there. So please understand however this vote goes we have one duty and that is to this design review and that's all whether we like it or we don't like it. So I thank you, Jay, for...

Verburg: Oh yes, and your voice does not end here.

Honeycutt: That's right.

Verburg: Your voice does not end here tonight. Unfortunately, no matter which way it goes and which side you stand on, there are others out there that you will have to attend and voice your opinion. That's just how it goes. And yeah, you get MVP award tonight for nicest statement made.

Honeycutt: Any other comments.

Glowa: One thing I'm struggling with is the concept of it being an outright use instead of conditional use. Given that from what I see, we're trucking in fish and trucking out fish and the thing could just as well be located in Tigard as right here. I see no reason it's, no compelling reason at all it's water-related. I guess my question is how does that, I guess I'm trying to figure out how to vote here and how that changes the status of the application if...see what I'm getting at here? I don't see this as being water-related.

Honeycutt: I think that Walt spoke to that as far as the zone is concerned. Walt, can you help on that matter?

Glowa: I mean I realize that fish comes from water.

Honeycutt: That's the first step.

Glowa: Yeah, I don't happen to catch them there but...

Honeycutt: Except flying fish.

Wendolowski: There is no definition in our code on seafood processing and so without any specific definition you need to, I guess, use common sense or reasonably accepted interpretation. Seafood processing would obviously include storage and again, I'm just struck with the fact that it's simply listed as-is within a permitted use and that is kind of our starting point. But we have no specific definition. We having nothing...it says it has to be 50 percent processing/50 percent storage or some combination and although this is a water-related zone, it doesn't necessarily say that all uses have to be water-related. In fact there are conditional uses that are listed that are non water-related. So, I guess you take the term seafood processing at face value and I think that was where we saw this.

Glowa: It there's no public loss of the quality in the goods or services that would result in placing it elsewhere. Then isn't it a conditional use? That's my questions. That's what I'm really getting hung up on with here.

Taylor: I have a comment on this.

Honeycutt: Hold up, Mike. Go ahead Gordon. You have the floor.

Taylor: It would seem to me that this concept was logically based on processing seafood that's coming in off of a boat. That's what would make it water-related and we're making a bit of a stretch here by returning it on a truck. This just, it just doesn't make sense and we're...

Kemp: Let me play devil's advocate for a second against your comment just because I'm thinking this through. If somebody wanted, as an example let's say somebody wanted to put in a skateboard shop, would we tell them no because their business doesn't have fish that came from water? You would tell them no.

Man: If they were claiming their skateboard shop was water-related.

[Group laughter]

Man: I'd like to see the skateboard shop.

Honeycutt: Also, I'd like to add that this application has just more than just the processing to be considered also. It's seafood retail so I don't want to lose that in the conversation.

Taylor: I guess the reason I brought that up is the forward-thinking. Forward-thinking...let's envision 10 years down the road, Ulbricht's going to retire. He's going to sell his building. Someone doesn't want to sell fish; they want to have a commercial retail inside. Does that mean they could not buy it and make it that without forcing the City to rezone the property? Is that truly what citizens would want?

Wendolowski: So, what...

Taylor: With a great design plan with something that would benefit the City and possibly the citizens.

Wendolowski: Well, one of the recommended conditions had to do with any change in the use of the building or the plan will likely require additional land use approvals. So, if we accept for the face value that seafood processing however defined is permitted in the zone anything else that would be contrary to that would either be possibly a conditional use or will require a zone change.

Taylor: We're saying that because it's seafood processing, it's permitted outright but something else would require different zoning, right?

Wendolowski: Right, so let's use an example. I'm speaking solely for the industrial portion of this site. Seafood processing is listed as a permitted use. If you want to have say a restaurant on the industrial portion, it would require a zone change because there is no provision in the industrial zone for either a permitted outright or conditional use to allow a restaurant. So, if someone were going in that direction, they would have to get a zone changed to the appropriate zone.

Taylor: So if this application was for a restaurant, for instance, it would just require different zoning and more hoops to be jumping through right now, right?

Wendolowski: Well, that would be correct but let me flip this around too is that one of the options is, let's see let me get to the water commercial part of it, hotels, motels, and restaurants are identified uses but require a conditional use approval. So, there is that. So yes, if you're looking at the industrial zone, you were only limited to those uses either permitted or conditionally permitted in that zone. Otherwise you would have to establish a zone that is consistent with the proposed use. I

know I've heard residential over time but again that would require a zone that would allow residential development.

Man: It seems like what we're dealing with Gordon is perhaps let's see what you think of this but the zone is...we're struck with the zone. It's what it is right now for this application. We've got a really loose definition of what seafood processing means. In fact, they are going to be processing seafood. That's a fact. Whether it can be done someplace else or not is kind of irrelevant. It is water-related because fish live in water. It doesn't say that it has to be related to *that* water. I know that makes it pretty loose but can we interpret it any other way?

Kemp: If I might, I'd like to read the City of Wheeler Oregon Zoning Ordinance 79.02, Article 3. IND (which is Industrial) Zone – Water-Related Industrial, Section 3.010. Intent. The water- related industrial area, designated by the primary symbol IND, is established to encourage development of marine-oriented industrial and commercial uses which are compatible with the community setting and natural values in the Wheeler area.

I am going to submit to you this evening that this building and design are not compatible with the community and natural settings. The building is a thing presented to us to be anywhere, as Gordon points out, there doesn't have to be a river adjacent to it. It probably is designed and looks to be in any industrial park or cold storage park on the west coast. The thought of a two-level building is approximately a football field located down at prime viewing property on the river bay front does not meet the intent of this ordinance, with the Vision and apparently 50 or 60 percent of the people that live in Wheeler. So...

King: Is that a criteria of design review?

Kemp: I'm only reading to you what...

King: No, I understand. I appreciate that. Again, I'm trying to clarify and differentiate between what is the design, what is the zone, what is the geological and what we are here to do tonight to vote on.

Verburg: Usage that Ken's come to us with absolutely is permitted. I don't think there's any question about that, but is that really compatible with the community and what the community wants in the Wheeler waterfront?

King: Well, but that, that's still outside of what our task is tonight, [inaudible].

Man: Our task is to either uphold or deny what the Planning Commission's already ruled.

Man: Design and review, but you just spoke of many other valuable things but that doesn't have...

Man: I understand that.

Man: Okay. What was your point though? I guess I don't understand.

Kemp: The point is I don't think the design is compatible with the community for that location. I think that comes under the heading of design and review, that's my interpretation.

Honeycutt: Councilor Glowa, you had a comment earlier.

Glowa: Yes, well, my impression is that years ago when this zone was created there was a commercial fishery here and there was a lot of activity in the Bay up until early 1950s and I think the water-related zone was created with that verbiage for that reason in a sense that obviously the Bay is no longer being commercially fished for crab or anything else. It's only recreational. In light of the fact that you need a zone change but right now it is definitely, this project is definitely not water-related I think as the architects of this zone designed back in the late 1940s and the 1950s. I think it was water-related. This certainly isn't water-related. It shouldn't be permitted outright, it should be a conditional use. That's my take because it's an outdated zone. In addition to that, with that, the building is, it just doesn't come from that Wheeler character. It's a flat roof. The color is ugly. I think it's very unappealing so that's part of the design review that we brought up. The geological investigation, you can't go by a 2006 investigation. There's going to be some, you're going to disturb the ground in order to building that place. They have to for the roadways and irrigation of storms and everything else. There's too many conditions that will be in place after this if we approve this. Who's going to do the follow-up? We don't have a code enforcement officer. There's a lot of conditions that should be addressed prior to this. That's my take on it.

Honeycutt: Thank you, Mike. Go ahead.

Verburg: I'm sorry but it seems like we're trying to change the definition tonight.

Glowa: Change the definition?

Verburg: We're trying to change the definition of what design review is and I don't think we have the right to do that. I think we have to have a very narrow understanding of what design review means and vote yes or no based on that, based on what it is right now today.

Kemp: I think we all have a pretty good idea. There was a lot of testimony about it.

Verburg: There is, there has been a lot of testimony and there...especially over the months and years here. There's been tons of testimony. Unfortunately, and I, the sad thing is I agree with you. I think the zoning ordinance was written at a time under the idea of what they're currently doing with water-related industrial. That's our issue though; not the client's issue. That is an issue, in fact I don't know what the legal term is, I'll probably get schooled here by Ms. Bricker here after this is

over, but we can't punish the design review based upon our lack of a certain definition is how I feel about that.

Honeycutt: Yes. Any other thoughts or comments? Clif? I guess if we don't have any other deliberations I'm going to ask Council for a motion.

Man: [Inaudible].

Honeycutt: At this time, no, we've already done that, so. I just need a motion from Council.

King: I move that the Wheeler City Council rescind its Planning Commission design review decision on October 7, 2021 for this application: 2021-03-DR-070121-1-DR and approve this application for design review which meets Shoreline Water Development Article 2, Water-Related Commercial, and Article 3, Industrial Zoning requirements.

Verburg: I have a contingency.

King: Is now the time to add that?

Honeycutt: Go ahead.

Verburg: I've seen it stated throughout that Council or Planning Commission may require a surety bond and is something that I would like to be required, a surety bond on the project.

Honeycutt: Okay.

Verburg: So with that, I...

Honeycutt: As amended?

King: As amended.

Verburg: Jay Verburg, aye.

Honeycutt: You have to...

Verburg: Sorry, second it then.

Honeycutt: We have a second on the motion?

Verburg: I will second it.

Honeycutt: Okay, is there any more discussion before we vote?

Glowa: Can you speak a little clearer in the mike?

Honeycutt: Did you, you did hear Mike, the motion and the second?

Glowa: No.

Honeycutt: We'll repeat it if you did not.

Glowa: Can you repeat it?

Honeycutt: Okay. I apologize, Jim. Could you repeat that please.

King: Mike, can you hear me now?

Glowa: Yeah.

King: Okay. I move that the Wheeler City Council rescind its Planning Commission design review decision of October 7, 2021 for this application: 2021-03-DR-070121-1-DR and approve this application for design review which meets Shoreland Water Development Article 2, Water-Related Commercial and Article 3, Industrial Zoning requirements.

Verburg: With the contingency of a surety bond.

Honeycutt: That's correct and that motion has been made and seconded and I'm asking for anymore discussion before we vote.

Man: Let's clarify here to be sure that an aye vote is for rescinding?

Honeycutt: For rescinding and approving.

Man: A nay vote is to [inaudible].

Honeycutt: That is correct.

Man: Hold on. Let's make sure we know what we're talking about. I'm not sure what you were saying.

Man: Your proposal is to rescind the Planning Commission's decision.

Man: Yes. An aye vote.

Man: An aye vote would be affirmative of rescinding.

Man: Rescinding, correct.

Man: Okay.

Honeycutt: Mike, Councilor Glowa did you understand?

Glowa: Yeah, the motion was to rescind it, right?

Honeycutt: That is correct.

Man: An aye vote approves it?

Honeycutt: An aye vote rescinds the Planning Commission's decision and approves the application for design review.

Man: All right.

Honeycutt: So at this time if there's no more discussions, is Council ready to vote on this? Go ahead, Councilor Verburg.

Verburg: Aye.

King: Aye.

Kemp: Nay.

Taylor: Nay.

Glowa: Nay.

Honeycutt: That is, I'm going to ask you to repeat that so I can hear it Mike please.

Glowa: Nay, no.

Honeycutt: Okay, I've got nay. It is 3 nays; 2 ayes and the motion has been left as the Planning Commission has decided, that this project's not approved. At this time I want to thank everybody for showing up tonight.

Wendolowski: Excuse me for a moment. Hate to interrupt Mayor but you've effectively denied a decision and this, if appealed, there needs to be findings for the basis for the denial. I'm not trying to create any problems here but just from a legal standpoint, you need to establish reasons behind the denial. I could create, I'm suggesting the following: Provide reasons for the denial allow me to create an order of decision for the Council.

Man: Walt, what is the timeframe we have on that to get back with the applicant?

Wendolowski: We are only 81 days into our 120-day time period. So, if need be, the Council can return to vote on a specific denial based on findings created. I've been taking notes here and I could also listen or review the minutes and return with an order for the Council's consideration at their next meeting. That might be a little cleaner otherwise we are here tonight going through all the findings to establish the basis for denial.

Glowa: That sounds good to me, Walt.

Honeycutt: Yeah, we're going to authorize you to do that, Walt and I'd like to have more discussions tomorrow with Staff and yourself.

Wendolowski: Yes. That would be great. That will be great. I think I have enough here to work with but I'd feel a lot more comfortable with the Council reviewing the material instead of me just writing it solo.

Glowa: Walt, I want to thank you for writing such a great appeal hearing procedures, two-page deal, plus the criteria for design review. That was very helpful.

Wendolowski: Thank you. Thank you.

Honeycutt: Walt, we'll set up a time sometime tomorrow at your earliest convenience when myself and Staff can talk with you and then we'll present it to Council.

Wendolowski: Okay. That sounds good.

Honeycutt: Okay, thank you.

Wendolowski: Thank you.

Honeycutt: We'll call at 10:30 and we'll adjourn the meeting. Thanks you guys.

Whiting: The dialogue that the people from [inaudible] Planning Commission should be incorporated in there, because Walt didn't ask for the reasons for their denial.

Honeycutt: Right. We'll have to get that in there. Thank you, Councilor Glowa.

Glowa: You're welcome.

Whiting: [inaudible].


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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in OAR 661-010-0030(2) and (2) the word count of this brief as described in OAR 661-010-0030(2) is 10,251 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by OAR 661-010-0030(2).

DATED: February 28, 2022.



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 28, 2022, I filed an original and one copy of Petitioner Botts Marsh, LLC’s Petition for Review with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, Oregon 97301-1283, by first-class U.S. mail.

I further certify that on February 28, 2022, I served a true and correct copy of the foregoing Petitioner Botts Marsh, LLC’s Petition for Review by first-class U.S. mail on the following persons at the addresses listed below:

Doug Honeycutt, Mayor Tim Grossnickle, City Manager City of Wheeler P.O. Box 177 Wheeler, OR 97147 <i>Respondent</i>	Carrie Richter Bill Kabeiseman Bateman Seidel 1000 SW Broadway, Suite 1910 Portland, OR 97205 <i>Counsel for Respondent</i>
Doug Honeycutt, Mayor Tim Grossnickle, City Manager City of Wheeler 775 Nehalem Blvd. Wheeler, OR 97147 <i>Respondent</i>	Sean Malone Attorney at Law 259 E. 5 th Avenue, Suite 200-C Eugene, OR 97401 <i>Counsel for Intervenor</i>

DATED: February 28, 2022.



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