

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

3 BOTTTS MARSH, LLC,

4 Petitioner,

5 v.

6 CITY OF WHEELER,

7 Respondent,

8 and

9 OREGON COAST ALLIANCE,

10 Intervenor-Respondent

LUBA No. 2022-002

11 **PETITIONER'S REPLY TO RESPONSE BRIEFS OF**
12 **RESPONDENT CITY OF WHEELER AND INTERVENOR-**
13 **RESPONDENT OREGON COAST ALLIANCE**

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1 ***Reply to City’s Response to Summary of Material Facts.***

2 Respondent City of Wheeler (“Respondent” or “City”) describes the City
3 Council’s November 16, 2021 decision as follows: “After deliberation, the city
4 council made a *tentative* decision to deny the application and asked staff to
5 prepare findings for adoption at a subsequent meeting.” City Resp. 3 (emphasis
6 added). This characterization sets up the City’s argument that Petitioner failed
7 to preserve its challenge to the findings, but the characterization is not accurate.

8 After the vote, Mayor Honeycutt stated: “It is 3 nays; 2 ayes and the
9 motion has been left as the Planning Commission has decided, that this
10 project’s not approved.” Transcript 53. Nothing in the mayor’s statement
11 indicated that the denial was “tentative.”

12 ***Reply to City’s Response to First Assignment of Error.***

13 Preservation. Based on its newly created “fact” that the decision was
14 “tentative,” the City contends Petitioner did not preserve its arguments under
15 the first assignment of error. The City cites *Frewing v. City of Tigard*, 27 Or
16 LUBA 331, 338 (2004). Unlike *Frewing*, however, the City’s decision to
17 consider draft findings from Walt Wendolowski was not new evidence, and
18 nothing in Mayor Honeycutt’s statements indicated that the decision remained
19 open to rebuttal or further discussion.

20 The City itself does not appear to believe the decision remained open.
21 Later in its Response, the City contradicts its preservation argument by
22 asserting that “parties in a quasi-judicial land use proceeding have no right to
23 rebut proposed findings,” and that “Petitioner had no right to participate in the
24 effort to prepare findings.” City Resp. 10, 11. In addition, the City objects to
25 Petitioner’s reference to the December 15, 2021 meeting minutes. *Id.* at 5 n.2.

26

1 But if the City’s final decision was made on December 15, then the City should
2 have included the minutes and audio recording in the record.

3 To be clear, Petitioner does not object to City Council’s direction to
4 Mr. Wendolowski to prepare written findings, but to the City Council’s
5 direction to Mr. Wendolowski to *establish reasons behind the denial*. The
6 transcript of the November 16 hearing makes it clear that the City Council made
7 a final decision to deny and then later, after the decision was final and the
8 record closed, worked with staff to develop an after-the-fact rationale to support
9 denial.

10 Similarly, Petitioner could not have objected to the *ex parte* contacts,
11 because they occurred after adjournment and Petitioner did not know about the
12 contacts until the City provided the audio recording of the November 16, 2021
13 meeting. Respondent’s preservation arguments are without factual or legal
14 basis.

15 Procedural Error. Respondent argues that the City’s *de novo* appeal
16 hearing “had the effect of curing any prejudice” at the Planning Commission
17 meeting. City Resp. 8. The City is incorrect. Absent the procedural flaws at the
18 Planning Commission meeting, Petitioner’s application might well have been
19 approved, and no appeal to the City Council would have been necessary. For
20 example, Commissioner Doni Mitchell, who improperly abstained from the
21 vote, might have broken the tie with an affirmative vote.

22 ***Reply to Oregon Coast Alliance’s Response to Second Assignment of Error.***

23 Petitioner raised several internal inconsistencies in the City’s decision,
24 which both undermine its findings of noncompliance, and also illustrate that the
25 City’s reasons for denial were invented and pretextual. The Response filed by
26 the Oregon Coast Alliance (“OCA”) does not address the inconsistencies. As

1 one example, the decision states that a concrete walkway “connects to both the
2 commercial and industrial portions of the building,” but on the other hands
3 finds that the commercial and industrial portions are *not* connected. (Rec. 10,
4 13, 109.) OCA relies on an argument that the two code provisions, WZO
5 11.050.4.a.(6) and WZO 11.050.4.a.(10), are distinct requirements for design
6 review, OCA Resp. 5, but that is not the point. Rather, the point is that the
7 City’s decision makes two statements about the project that are fundamentally
8 contradictory. Nothing in the decision or the OCA Response explains or
9 reconciles that contradiction, or other contradictions cited in the Petition for
10 Review.

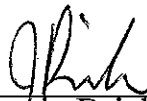
11 OCA additionally notes that “the applicant does not address or allege
12 fault in the finding related to the applicant ‘submitted inconsistent information
13 regarding window trim.’” OCA Resp. 14. That is not true. *See* Petition 31 n.9.
14 ***Reply to City’s Response to Fourth Assignment of Error.***

15 Preservation. The City argues that Petitioner failed to preserve the fourth
16 assignment of error because Petitioner should have anticipated that the City
17 would deny the application for illegitimate reasons. Specifically, the City states:
18 “the evidence suggests that the petitioner perceived this alleged animus well
19 before the record closed but failed to raise its belief that such animus created a
20 de facto moratorium.” City Resp. 13. In support of its statement, the City cites
21 to the November 16, 2021 transcript, in which Petitioner concluded a statement
22 to the Council by saying, “For tonight, I need you to follow the City’s Staff
23 Report and approve my project” That statement reflects Petitioner’s hope-
24 springs-eternal attitude that the City Council would fairly apply review criteria
25 to the application. In order to preserve the moratorium argument, Petitioner was
26

1 not required to anticipate foul play or speculate that the City might deny the
2 application.

3 Illegal Moratorium. Certainly, LUBA considers the merits of each
4 appeal as it comes before the Board. To the extent possible, however, Petitioner
5 encourages the Board to place this appeal in a larger context, because Petitioner
6 has been attempting to develop this property since 2019. The City accuses
7 Petitioner of “conveniently ignor[ing] the City’s decision in 2020”, City Resp.
8 14, but that approval came from a different City Council. On the current
9 Council, three out of five members, as well as the mayor, had gone “on record”
10 in opposition to Petitioner’s initial applications. *This* City Council has placed a
11 *de facto* moratorium on development of Petitioner’s property.

12
13 DATED: March 28, 2022.

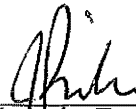
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1 **CERTIFICATE OF COMPLIANCE**

2 I certify that (1) this brief complies with the word-count limitation in
3 OAR 661-010-0039 and (2) the word count of this reply as described in OAR
4 661-010-0039 is 971 words.

5 I certify that the size of the type in this reply is not smaller than 14-point
6 for both the text of the brief and footnotes as required by OAR 661-010-
7 0030(2).

8 DATED: March 28, 2022.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 28, 2022, I filed the original and one copy of Petitioner’s Reply to Response Briefs of Respondent City of Wheeler and Intervenor-Respondent Oregon Coast Alliance with the Land Use Board of Appeals, DSL Building, 775 Summer Street NE Suite 330, Salem, Oregon 97301-1283, by first-class mail.

I further certify that on March 28, 2022, I served a true and correct copy of Petitioner’s Reply to Response Briefs of Respondent City of Wheeler and Intervenor-Respondent Oregon Coast Alliance by first-class mail on the following persons:

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March 28, 2022

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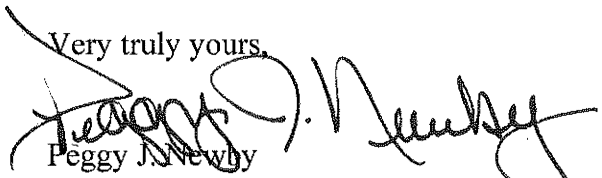
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Re: Botts Marsh, LLC v. City of Wheeler (LUBA 2022-002)

Dear Clerk:

Please find enclosed for filing an original and one copy of Petitioner Botts Marsh, LLC's Reply to Response Briefs of Respondent City of Wheeler and Intervenor-Respondent Oregon Coast Alliance.

Very truly yours,



Peggy J. Newby
Practice Assistant to Sarah Stauffer Curtiss

Enclosures

cc: Service List

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