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

RESPONDENT CITY OF WHEELER'S ANSWERING BRIEF

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TABLE OF CONTENTS

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APPENDIX

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TABLE OF AUTHORITIES

Cases

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Statutes

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Other Authorities

Rules

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I. STANDING

The Respondent City of Wheeler ("Respondent" or "City") accepts the facts establishing the standing of Petitioner Botts Marsh, LLC ("Petitioner").

II. STATEMENT OF THE CASE

A. Nature of the Land Use Decision and Relief Sought.

The City generally accepts Petitioner's statement of the Nature of the Land Use Decision, but the City denies that it declared a moratorium subject to ORS 197.540, that any due process or takings clause violations have occurred, or that the petitioner is entitled to any relief. LUBA should affirm the City's decision.

The City has coordinated with the Intervenor-Respondent Oregon Coast Alliance ("Intervenor" or "OCA") regarding the response briefing. This City Response Brief addresses Petitioner's First, Fourth and Fifth Assignments of Error. The Intervenor's Response Brief addresses Petitioner's Second and Third Assignments of Error.

B. Summary of Arguments.

Petitioner's procedural objections fail because the challenged decision is the city council's decision, rather that the planning commission decision. *De novo* review of the matter before the city council cured any procedural alleged defects occurring before the planning commission. Any challenges to the council proceedings were not preserved and the drafting and adoption of the Order of Denial decision complied with all state and local requirements.

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1 The City properly construed its land use regulations in requiring
2 compliance with the applicable design review criteria and did not impose a
3 moratorium as that term is used in Oregon land use law.
4 The City's decision comported with all due process and takings clause
5 guarantees imposed under state and federal constitutional law.
6 **C. Summary of Material Facts.**
7 A majority of the facts set forth the Petition for Review are irrelevant to
8 resolution of petitioner's procedural objections and for this reason, a more
9 concise summary is adequate for LUBA's resolution of these matters.
10 In April 2020, the City approved two conditional use applications to
11 develop the petitioner's property with a mixed use building and a hotel. These
12 approvals were appealed to LUBA and remanded for additional findings.
13 *Oregon Coast Alliance v. City of Wheeler* ___ Or LUBA ___ (LUBA Nos
14 2020-064/065, March 9, 2021)(*OCA*). On remand, the City voted to deny these
15 applications and in reviewing that decision, LUBA found procedural violations
16 requiring remand. *Botts Marsh LLC v. City of Wheeler,* ___ Or LUBA ___
17 (LUBA Nos 2021-072/073, March 17, 2022) (*Botts-Marsh I*).
18 In July 2021, petitioner submitted an application for a different type of
19 development on the same Nehalem Bay-adjacent property. Under this proposal,
20 petitioner sought design review approval for a new building that would
21 accommodate a processing, storage and retail sales of fish and shellfish use.
22 Rec 1. On September 23, 2021, the Planning Commission held a public hearing

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where it received written and oral testimony from all parties, including the petitioner. Thereafter, all parties were then given 7 days to submit additional written testimony and the petitioner was given an additional 7 days to respond.

At the continued meeting on October 7, 2021, the planning commission allowed all parties to present additional oral testimony and according to the petitioner, the "public testimony focused on the same issues brought up at the September 23, 2021, hearing." Pet 8. With one commissioner abstaining, the planning commission decision resulted in a tie vote, and the application was denied.

On October 11, 2021, petitioner appealed the denial to the city council. Rec 337-343. The city council held a *de novo* hearing on November 16, 2021, where all parties were given the opportunity to submit testimony orally or in writing. Rec 126-304. After taking testimony from anyone who wished to testify, Petitioner was given a final opportunity to provide rebuttal. Pet Ex C p 43-45.[1] After deliberation, the city council made a tentative decision to deny the application and asked staff to prepare findings for adoption at a subsequent meeting. Pet Ex C p 53. On December 15, 2021, the city council adopted the Final Order of Denial including written findings as they had been prepared by City staff. Rec 1. This appeal followed.

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[1] The Petition for Review includes an unofficial transcript of the November 16, 2021, hearing before the city council. Rather than refer LUBA to certain events based on the video presentation, the City refers to events as they are set forth in petitioner's transcript as appropriate.

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D. JURISDICTION

ORS 197.825(1) grants LUBA "exclusive jurisdiction to review any land use decision or limited land use decision of a local government." In this case, the City is a local government and its decision denying petitioner's proposed development was a limited land use decision as that term is defined at ORS 197.015(12). Accordingly, LUBA has jurisdiction over this appeal.

III. RESPONSES TO ASSIGNMENTS OF ERROR

A. RESPONSE TO FIRST ASSIGNMENT OF ERROR – The City's Final Decision was Not Procedurally Deficient.

1. Preservation of Error.

Petitioner's challenges to the planning commission procedures were preserved. However, petitioner does not identify where it raised any objection to the drafting or adoption of the final findings before the city council. Petitioner was required to promptly note any alleged right of rebuttal or challenge to the findings, either with respect to their content or the terms of their creation before the closure of the City's proceedings so the council could consider the request. *Frewing v City of Tigard,* 47 Or LUBA 331, 338 (2004) (the right to rebut new evidence requires a contemporaneous assertion of objection when the new evidence is submitted, so that the local government can rule on the merits of the request and allow rebuttal where warranted.) There is no evidence that petitioner made any effort either orally or in writing to raise

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any challenge to the findings below[2] and as a result, creates a new issue that was not raised. ORS 197.835(3) provides that LUBA review is limited to issues "raised by any participant before the local hearings body." Petitioner failed to identify where its objections relating to the proceedings before city council were raised. Any concerns over *ex parte* contacts occurring after the November 16 hearing or the drafting of findings could certainly have been raised on or before the hearing on December 15, 2021, and thus, these challenges have been waived.

2. Standard of Review.

Petitioner correctly identified the controlling standard of review.

3. Argument.

Petitioner's First Assignment of Error is premised on a belief that the procedures used, which petitioner views as prejudiced against it, failed to be appropriately "iterative and collaborative." No legal authority exists for this position. While the petitioner may prefer an iterative process and some local government regulations may provide for such a process, that is not the case in the City of Wheeler. In the *M&T Partners Inc v. City of Salem* case, the only

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[2] At footnote 3 of the Petition for Review, petitioner provides a link to the minutes of the December 15, 2021, city council hearing without providing any motion or other explanation for how LUBA can consider these extra-record materials. LUBA's scope of review is limited to items contained in the record. ORS 197.835(2)(a). Petitioner cannot use the December 15, 2021, meeting minutes or video to substantiate any facts, particularly whether any effort was made to object to previous proceedings or the findings.

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citation offered by petitioner in support of its point, LUBA explains that as a limited land use decision, design review focuses on the physical characteristics of a use rather than whether the use is allowed outright. ____Or LUBA ___ (LUBA No. 2018-143, Aug. 14, 2019). Nothing in the *M&T Partners* case or city regulation suggests that the decision-making procedures employed for limited land use decisions or design review requires that the City "make suggestions and express preferences," – essentially designing a compliant project - for acceptance by an applicant.[3] Pet 17.

Unless the code specifies otherwise,[4] the general rule is that an applicant has the burden of proof throughout a quasi-judicial process to demonstrate that

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[3] In their concurring opinion in *Botts-Marsh I*, Board Chair Zamudio explained that proper findings for denial include an explanation for how an applicable standard might be satisfied. *Citing Bridge Street Partners v City of Lafayette,* 56 Or LUBA 387, 394 (2008). Whether or not petitioner's desire for an iterative approach should have been accomplished, at least in part, through findings at the level of detail Board Chair Zamudio identified, this is not the argument that petitioner makes here. Further, as explained elsewhere, this discussion is essentially irrelevant to the procedural objections that are the focus of Petitioner's First Assignment of Error.

[4] As explained in greater detail in the substance below, the document entitled "Final Bylaws for the City of Wheeler Planning Commission" (Bylaws) was repealed by the adoption of Ordinance 2019-01. However, if not repealed, these Bylaws reinforce that an applicant bears the burden of proof throughout the review process:

> "Burden and nature of proof.
>
> "Except for a determination of the applicability of bylaws provisions, the burden of proof is upon the proponent. The

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all applicable approval criteria have been satisfied. *Columbia Riverkeeper v. Columbia County*, ___ Or LUBA ___ (LUBA No 2018-020, Dec 27, 2018); *Friends of Yamhill County v. Yamhill County,* 44 Or LUBA 777, 780 (2003); *Rochlin v. Multnomah County*, 35 Or LUBA 333, 348 (1998), aff'd 159 Or App 681, 981 P2d 399 (1999); *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973).

Petitioner's argument that the permissive nature of the design review criteria suggests an iterative process is similarly misplaced. Whether certain standards are permissive or mandatory relates to the heaviness of the burden and not the placement of the burden itself. In other words, a permissive criterion might allow a decision maker greater flexibility when evaluating an evidentiary showing but it does not suggest any intent to relieve an applicant of the burden to produce evidence in the first instance.[5]

> 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." Pet Ex B(2), p 4-5.

5 For example, with respect to a criterion requiring that the "height and scale of the buildings should be compatible with the surrounding structures," Wheeler Zoning Ordinance (WZO) 11.050.3(4)(b), the City's finding explains:

> "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

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1 Moreover, petitioner's desire for an iterative conversation about design
2 bears no relationship to the specific procedural objections set forth in the
3 remainder of its assignment of error. Therefore, in addition to lacking any legal
4 requirement, petitioner's post-proceeding effort to secure greater assistance
5 from the decision-maker is irrelevant.

6 Turning to the City's procedures, petitioner asserts that its application
7 was denied for "illegitimate reasons," the majority of these objections are
8 directed at activities occurring before the planning commission. Pet 19. The
9 overall shortcoming with petitioner's allegation is that the challenged decision
10 is not the planning commission decision. Rather, the city council conducted a
11 *de novo* public hearing on petitioner's appeal of the planning commission
12 decision. Proceeding with a subsequent *de novo* review on appeal to the city
13 council had the effect of curing any prejudice to petitioner's substantial rights
14 that might have occurred during the planning commission proceedings. *Buel-*
15 *McIntire v. City of Yachats,* ___ Or LUBA ___ (LUBA No. 2011-012, July 1,
16 2011.) For example, petitioner objects to not being given the opportunity to
17 respond to oral interjections offered by the public during the planning
18 commission's deliberation. However, the petitioner was given an unfettered

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20 materials proposed will promote harmony with the structures and site." Rec 13.

21 The City was under no obligation to redesign the building when the
22 application did not identify the surrounding buildings or explain how the proposed design would be compatible.

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full and fair opportunity to participate both in writing and orally, including final rebuttal, as part of city council review. (Pet Br Ex C, p 43.) As a result, petitioner's challenges to the procedures before the planning commission all fail.

In addition, the "Final Bylaws for the City of Wheeler Planning Commission" adopted in 1995 have no regulatory effect and therefore, do not require a "'procedural entitlement' to an impartial review," and although such an obligation may otherwise exist in state law, petitioner fails to identify any. Pet 18. The petition for review not only lacks any motion or other explanation authorizing LUBA's consideration of the Bylaws, in 2019, the City repealed all previously adopted hearing procedures including the Bylaws through its adoption of Ordinance 2019-01.[6] App. A. Because the Bylaws did not control the City's review, they did not provide petitioner any of the procedural protections it seeks.[7]

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[6] Under ORS 40.090(7), LUBA may take official notice of an "ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom." LUBA routinely takes official notice of local ordinances. *McNamara v. Union County*, 28 Or LUBA 722, 723 (1994) (*citing Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695, 698, *aff'd,* 101 Or App 458, rev den, 310 Or 243 (1990); *Murray v. City of Beaverton*, 17 Or LUBA 723, 742 n 18 (1989)).

[7] The City understands that in *Botts Marsh, LLC I,* LUBA assumed that the Bylaws imposed procedural obligations upon the City, but those Bylaws alone did not serve as the basis for LUBA's finding errors in the City's review. For this reason, assuming the inapplicability of the Bylaws appears to be of little consequence in *Botts Marsh, LLC I.*

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1 Further, in order to suffer some prejudice, the testimony complained of
2 must have been new and/or had some legal relevance to the decision-maker.
3 *Woodstock Neighborhood Association v. City of Portland*, 28 Or LUBA 146,
4 153 (1994) (Restatements of testimony already presented does not qualify as
5 new evidence triggering a right to respond.) In describing the events of the
6 October 7, 2021, hearing, petitioner concedes: "[D]uring the meeting, public
7 testimony focused on the same issues brought up at the September 23, 2021,
8 hearing." Pet 8. Assuming that this is true, petitioner suffered no prejudice as a
9 result of opponents getting extra time or interjecting during the proceeding
10 when those statements were the same as those previously presented.
11 The only challenge directed to the decision that the city made - the city
12 council decision - is that the petitioner did not have the opportunity to respond
13 to the final, adopted writing findings. First, there is well-established precedent
14 for a prevailing party in a quasi-judicial land use proceeding to prepare draft
15 findings that a local government then considers for adoption. *Sunnyside*
16 *Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21, 569 P2d 1063 (1977).
17 Further, parties in a quasi-judicial land use proceeding have no right to rebut
18 proposed findings absent local provisions to the contrary. *Arlington Heights*
19 *Homeowners v. City of Portland*, 41 Or LUBA 185, 199 (2001). In *Rawson v.*
20 *City of Hood River*, petitioner sought to depose certain city officials to reveal
21 alleged *ex parte* contacts occurring during the finding drafting process. 77 Or
22 LUBA 571(2018) LUBA explained:

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> "[O]ur cases have made it quite clear that non-prevailing parties have no right to comment on or rebut the proposed final decision or its supporting findings before the decision maker adopts the proposed final decision and its supporting findings. *Loprinzi's Gym v. City of Portland*, 56 Or LUBA 358, 369 (2008); *Sorte v. City of Newport*, 26 Or LUBA at 244-45; *Adler v. City of Portland*, 24 Or LUBA at 12. Just as petitioner has no right to object to or rebut a proposed written final decision and supporting findings that are prepared by the prevailing party in a quasi-judicial land use proceeding, petitioner has no right to participate in that process and no right to notice that the prevailing party is working with planning staff to prepare a proposed final decision and supporting findings." *Id* at 574-575.

Petitioner had no right to participate in the effort to prepare findings.[8] Further, there is no requirement that the findings match or otherwise reflect the decision-maker deliberation. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588, 591 (1991). The city council reviewed the proposed findings at its meeting on December 15, 2021. To the extent that these findings did not

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8 The petition for review includes an undeveloped argument that *ex parte* contacts between project opponent Carl Whiting and certain councilors occurred after adjournment of the meeting on November 16. What LUBA's order in *Rawson* also establishes is that speculation about *ex parte* contacts relating to post-hearing finding drafting is insufficient. *Id* at 575 *citing Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743, 746 (1999) ("A petitioner moving to present evidence of *ex parte* contacts or bias must offer some substantial reason to believe that evidence of such *ex parte* contacts or bias can be established and that such *ex parte* contacts or bias would lead to reversal or remand," *citing Pfahl v. City of Depoe Bay*, 16 Or LUBA 1073, 1074-75 (1988) and *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 608, 609-10 (1987). As cited, the video shows Mr. Carl Whiting urging the mayor and a city councilor to adopt written findings but there is no allegation, nor basis for finding that a discussion of this nature alone provides any basis for reversal or remand, in addition to being waived.

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accurately reflect the council's position, amendments could have been made. The reviewable land use decision in an appeal before LUBA is the final written decision, not what individual parties, staff or members of the decision-making body may have stated from time to time during the course of local government proceedings.

Since the petitioner has not identified any procedural defect that would require reversal or remand, this assignment of error must be denied.

B. RESPONSE TO FOURTH ASSIGNMENT OF ERROR – The City Properly Construed its Land Use Regulations in Requiring Compliance with the Applicable Design Review Criteria and Did Not Impose a Moratorium as that term is used in Oregon Land Use Law.

1. Preservation of Error.

Petitioner denies any obligation to raise its de facto moratorium concerns because "Petitioner did not anticipate that the City would deny the design review application." Pet 36. This assertion is difficult to reconcile with petitioner's claims elsewhere that the City's denial based on the design review criteria was entirely pretextual, preventing petitioner from developing its land. In its notice of appeal from the planning commission to the city council, petitioner argued that the planning commission denied its application because of "bias against the development, the applicant or both." Rec 340. Said another way, and as stated in the Petition for Review, "the City's intent is not to ensure compliance with applicable land use standards but rather to prevent

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development altogether." Pet 37. Yet, petitioner never argued below that denying the design review out of perceived animus toward the petitioner would result in a moratorium in violation of ORS 197.524, as would be necessary to put the City on notice of this issue. Rather, the evidence suggests that the petitioner perceived this alleged animus well before the record closed but failed to raise its belief that such animus created a de facto moratorium. Pet Ex C, 44. As such, this argument has been waived and should not be considered.

2. Standard of Review.

The appropriate standard of review presented in this assignment is whether the City "improperly construed the applicable law." ORS 197.835(9)(a)(D) such that reversal or remand is required. Further, ORS 197.540(2) authorizes LUBA to invalidate any moratorium that it finds was adopted in violation of ORS 197.505 to 197.540.

3. Argument.

ORS 197.524 provides:

> "(1) When a local government engages in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for the subdivision or partitioning of, or construction on, any land, including delaying or stopping issuance based on a shortage of public facilities, the local government shall:
>
> "(a) Adopt a public facilities strategy under ORS 197.768; or
>
> "(b) Adopt a moratorium on construction or land development under ORS 197.505 to 197.540.

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> "(2) The provisions of subsection (1) of this section do not apply to the delay or stopping of the issuance of permits, authorizations or approvals because they are inconsistent with the local government's comprehensive plan or land use regulations."

Petitioner argues that denial of the two conditional use permits in 2021, along with the proposed design review application, indicates that the City imposed a de facto moratorium contrary to the requirements of ORS 197.505 to 197.540. Petitioner conveniently ignores the City's decision in 2020 approving the two conditional applications for development on this site. Although those decisions were ultimately remanded by LUBA, it simply is not true that the City's intent is to "prohibit all development of the Property." *OCA, supra.*

In any event, the City agrees with petitioner that the City did not follow the statutory process set out in ORS 197.505 *et seq* for the declaration of a moratorium. The reason the City did not follow the statutory process for declaring a moratorium is because the City did not impose a moratorium on the development of this property. As discussed above, the City's decision did nothing other than deny petitioner a development permit for failure to comply with its land use regulations. To the extent LUBA agrees with the City on this point, i.e., that the City did not declare a moratorium, it need go no further and may simply deny this assignment of error.

As LUBA has previously held, the denial of an application is not a "moratorium" and is allowed under ORS 197.524(2), where the city concluded the application was not consistent with the applicable code provisions. *Najimi v.*

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City of Cannon Beach, ____ Or LUBA ____ (LUBA No. 2020-118, June 21, 2021); *GPA 1, LLC v. City of Corvallis*, 73 Or LUBA 339, 349 (2016); *Pelz v. Clackamas County,* 59 Or LUBA 219 (2009); *Vista Construction, LLC v. City of Grants Pass*, 55 Or LUBA 590, 594-95 (2008). The same is true here; all the City has done is deny the permit because it was not consistent with the provisions of the city code. This assignment of error should be denied.

C. RESPONSE TO FIFTH ASSIGNMENT OF ERROR – The City's Decision Provided Due Process and Did not Run Afoul of the Takings Clause Protections Provided by the United States and Oregon Constitutions.

1. Preservation of Error.

The City agrees that these constitutional challenges were raised in oral testimony by petitioner's counsel below.

2. Standard of Review.

Petitioner correctly notes that LUBA must reverse a land use decision that it deems unconstitutional under OAR 661.010-0071(1)(b).

3. Argument.

Petitioner first argues that the procedural violations identified in its First Assignment of Error effectively deprived it of the rights guaranteed by the Oregon Supreme Court in *Fasano v. Washington County,* 264 Or 574, 507 P2nd 23 (1973), resulting in a due process violation under the Fourteenth Amendment of the US Constitution.

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1 The problem with this argument is that the basis for the procedural
2 guarantees identified in *Fasano,* such as the right to present and rebut evidence
3 and to a decision free of bias, comes from comprehensive land use planning
4 statutes rather than any constitution-based due process clause. *1000 Friends of*
5 *Oregon v. Wasco Co. Court*, 304 Or 76, 80-81, 742 P2d 39 (1987). Without
6 any legal argument, explanation or identification of the nature of the alleged
7 due process violation based on constitutional guarantees, LUBA cannot
8 conclude that any due process violation occurred.

9 With respect to petitioner's argument that certain *Fasano*-related
10 procedural protections were compromised, as explained above, petitioner had a
11 full and fair opportunity to present evidence and provided rebuttal, both orally
12 and in writing, before the city council on appeal. Petitioner's claims of
13 decisionmaker bias are limited to certain planning commission relation actions
14 that, even if sufficient, were eliminated by city council review where no
15 allegation of bias was presented. The City's decision – the one that was
16 considered and adopted by the city council – complied with all *Fasano*
17 procedural guarantees and therefore must be affirmed.

18 Petitioner's second constitutional-related objection is that the City's
19 decision effectively takes property without just compensation in violation of the
20 Takings Clause of the Fifth Amendment of the US Constitution as well as
21 Article I, Section 18 of the Oregon Constitution. Doubling down on the
22 moratorium idea pushed in its Fourth Assignment, petitioner argues the design

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review denial, when coupled with the previous conditional use denials, establishes a "pattern and practice of blocking all development of the Property." Pet 39. Petitioner goes on to allege that the "Petitioner has been prevented from making any economically feasible private development or use of the Property." *Id.*

There are multiple shortcomings with this argument. First, the argument is undeveloped. Short of the statement set forth above coupled with the citation to *Lucas v. S. C. Coastal Council,* 505 US 1003, 1019, 112 S Ct 2886, 120 L ED 2d 798 (1992), petitioner fails to provide the explanation necessary for LUBA to offer any relief. *Doman v. City of Woodburn,* 45 Or LUBA 158, 160 (2002) (It is petitioner's responsibility to allege the facts necessary to support their claim and to adequately develop their legal argument. LUBA does not supply or develop a party's argument for them." Citing *Deschutes Development v. Deschutes County,* 5 Or LUBA 218, 220 (1982).)

It does not take a very close examination of the Supreme Court's holding *Lucas* case to distinguish it from the facts presented here. The offending ordinance adopted and giving rise to the *Lucas* case barred petitioner from erecting any permanent habitable structures on his two parcels, with no exceptions. Such a legislative enactment expressly prohibiting development is clearly distinguishable from a singular quasi-judicial review of a specific development application which was denied based on the adopted design review criteria at issue here.

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Petitioner's suggestion that this denial decision, when coupled with the denial of the conditional use permits in the *Botts Marsh LLC I* appeal would "block all development" is little more than hyperbole. The findings identify and explain which design review criteria the City concluded were not satisfied indicating that this was a failure of a specific application and not the petitioner itself. Presumably if the petitioner returned filing an application including the requisite pedestrian and building connections, a building design that addressed compatibility with respect to height, scale, materials and overall building style, contained appropriate design diversity, and a design that responded to surrounding views, the application would be approved. In fact, as noted above, the City has already demonstrated its willingness to approve two conditional use applications in 2020, even though they were ultimately overturned by LUBA.

Further, the City's decision in *Botts Marsh LLC I* considered an entirely different use subject to a completely different regulatory scheme. The conditional use denials are discrete and distinguishable from the design review at issue here. As such, they do not create a "pattern and practice" of anything. Whether considered independently as a singular discrete decision or considered along with the denials for a conditional use review for an entirely different proposal, petitioner has not shown that the City deprived it of all economically viable use of this site. A whole world of development possibilities remain.

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1 Petitioner is not entitled to a reversal based on a deprivation of all reasonable
2 economic use.

3 Petitioner's next argument that the City's denial is based, in part, on the
4 failure to consider how the development would impact views from adjacent
5 areas as required by WZO 11.050.4.B(5), which serves as an unconstitutional
6 exaction is similarly misplaced. It is true that the City is prohibited, under
7 *Dolan v. City of Tigard,* 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994)
8 and *Koontz v. St. Johns River Water Mgmt Dist.,* 570 US 595, 606, 133 S Ct
9 2586, 2595 (2013), from denying an application based on an applicant's refusal
10 to accept a condition imposing an exaction that is not roughly proportional to
11 the impact from the proposed development. That said, there is no evidence that
12 the City was demanding anything in exchange for an approval necessary to give
13 rise to an unconstitutional condition analysis.

14 In *Koontz,* the district denial was premised on the petitioner's
15 unwillingness to grant a conservation easement or make off-site improvements
16 to mitigate for wetland impacts. In *Tonquin Holdings v. Clackamas County,* 64
17 Or LUBA 68, 87 (2011), the county required the dedication of a conservation
18 easement to protect certain wetlands as part of an aggregate related mining
19 permit. In both cases, the decision-maker was demanding some property right
20 in exchange for an approval or as a condition-based denial. The City's denial
21 did not demand or even suggest that a private view easement in favor of a
22

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neighbor was required, or even necessary to secure approval. Without such a demand, there is no exaction triggering constitutional analysis.

As discussed in the OCA Response, WZO 11.050.4.B(5) requires that a building is designed to "take into account" the "impact that structures will have on views from adjacent or other areas." Petitioner responded to this requirement by pointing out that the proposed building will be at the maximum height that is allowed in the zone. Whether or not the design meets the required building height limitation is not responsive to the criterion that requires some acknowledgment of the visual impact a maximum-height building might have on surrounding properties. The City's finding that petitioner failed to respond to this obligation does not suggest that a different design approach, such as sculpting, otherwise changing the roofline or reducing the building height to some degree would not be approved so as to effect a conditional-denial recognized taking.[9]

Although petitioner makes no claim for a regulatory taking, in *Penn Central Transportation Company v. New York City*, 438 US 104, 98 S Ct 2646, 57 L Ed 2d 631(1978), the Court held that a decision that disallowed use of the air rights above an existing landmarked historic building did not affect a taking because the existing structure still had viable economic use. Here, the

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9 Petitioner's suggestion that the development of an underground bunker as the only possible option given the City's decision is not only a new fact not in the record that LUBA may not consider, it is again hyperbole that overstates the effect of the City's much more limited determination.

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1 petitioner has not established that it would be impossible to accommodate the
2 proposed use (or any permitted use) in a shorter or reconfigured building design
3 that would have a reduced impact on views. Just as *Penn Central Trans Co* did
4 not have a right to use the maximum zoned capacity for economic return,
5 petitioner is similarly constrained.

6 In conclusion, petitioner fails to cite to anything to suggest that the City's
7 denial generally or with respect to the view-related impacts criterion, are
8 prohibited by the United States or Oregon Constitutions. No citation suggests
9 that LUBA must find a constitutional right to a permitted use designed to the
10 maximum authorized development standards or that to deny an application that
11 fails to respond to the various design-related review criteria is a taking.
12 Petitioner has a right to develop permitted uses consistent with the design
13 review standards set forth in WZO Section 11.050.4. Petitioner failed to show
14 that these standards are satisfied given the design particulars that it proposed.
15 The City's refusal to approve a particular non-compliant design does not give
16 rise to a taking. This assignment of error should be denied.
17 ////
18 ////
19 ////
20 ////
21 ////
22 ////

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III. CONCLUSION

For these reasons, as well as those set forth in the ORCA Response Brief, the City's decision should be affirmed.

DATED March 21, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word count limitation in OAR 661-010-0030(2)(b) and contains 6,442 words; and it is proportionately typed, not smaller than 14-point font, for the body and footnotes.

DATED March 21, 2021.

BATEMAN SEIDEL MINER BLOMGREN
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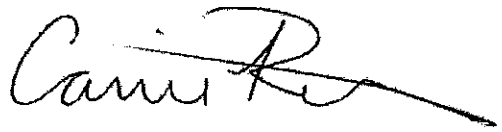

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 21, 2021, I caused to be delivered by first class mail an original and one copy of the enclosed **RESPONDENT CITY OF WHEELER'S ANSWERING BRIEF** with the:

Land Use Board of Appeals
775 Summer Street, Suite 330
Salem, OR 97301-1283

and, on the same date, I caused to be delivered by first class U.S. mail, a true and correct copy of the foregoing document on

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ORDINANCE 2019-01

AN ORDINANCE ESTABLISHING A PLANNING COMMISSION FOR THE CITY OF WHEELER, ESTABLISHING RULES, AND REPEALING ALL PREVIOUS PLANNING COMMISSION ORDINANCES & HEARING PROCEDURES.

THE CITY OF WHEELER ORDAINS AS FOLLOWS:

Section1. Repeal.
City of Wheeler Ordinance #76-01 and Ordinance 97-05 shall each be repealed in their entirety. Further, all prior Ordinances and Resolutions, including Resolution 95-03, pertaining to the Planning Commission, which are in conflict with the provisions herein, are repealed in their entirety.

Section 2. Policy.
The City intends this Ordinance to establish and set duties of a Planning Commission to assist the Council in planning for the orderly growth and development of the City and to further legislative policies of the State as shown in ORS Chapter 227.

Section 3. Membership.
The Planning Commission shall consist of not less than five (5) or more than nine (9) members, excluding the non-voting members. Membership shall be limited to residents of the City, residents of the Urban Growth Area, and non-residents who own property or a business that operates within the City or its Urban Growth Area. No more than two (2) members of the Planning Commission may reside outside the City limits of Wheeler. No more than two (2) members of the Planning Commission may be City officers, who shall serve as ex-officio nonvoting members. No more than two (2) voting members may engage principally in the buying, selling, or developing of real estate for profit as individuals or be members or officers of any business entity that engages principally in the buying, selling or developing of real estate or profit. No more than two (2) members shall be engaged in the same kind of occupation, business, trade or profession. A majority of members of the Commission, including the Chair, constitutes a quorum. The Commission may make and alter rules and regulations for its government and procedures consistent with laws of the State of Oregon and with the City Charter and Ordinances.

Section 4. Term.
The term length of each Planning Commission position shall be four years. The Planning Commission Chair shall appropriately stagger the term ending dates of the current Planning Commissioners, and a Commissioner whose term has expired may apply for the same position on the Commission.

Section 5. Officers.
The Planning Commission shall elect officers at its first meeting held in each calendar year. There shall be a Chair, a Vice-Chair and a Secretary. Each shall hold office for one year or until a successor is elected. Officer terms can have an extension beyond four years, with the approval of the City Council. The Planning Commission is encouraged to ensure that each member can perform the position of Chair and Vice-Chair and to rotate these leadership positions every four years.

Section 6. Vacancies.
The office of a member of the City Planning Commission becomes vacant immediately, upon any of the following events occurring: death, adjudicated incompetence, and recall from office or written resignation.

Upon a majority vote of the City Planning Commission, a vacancy may be declared in the following cases: Absence of a member for two consecutive meetings without the consent of the members of the Planning Commission, or ceasing to meet the Planning Commission membership requirements in section 3 above, or ceasing to be a qualified elector under State law.

Any person wishing to be a member of the Planning Commission shall complete an application that will be reviewed by the City Council which will confirm or deny that application. The newly appointed member's term begins immediately upon the appointment and continues until the expiration of the term of the position being filled.

Section 7. Meetings.
The Planning Commission will normally meet once per month for the purpose of responding to a land use application or to undertake Section 9, Powers and Duties, outlined in this Ordinance. A proposed schedule of meetings will generally be approved by the Planning Commission at its first meeting held in each calendar year. Meeting dates are subject to change or cancellation consistent with public meeting laws. The City Council may request that the Planning Commission provide a report or recommendation about a specific topic or may request that the Planning Commission to table any topic, except for land use applications. To facilitate citizen involvement, a citizen can submit a topic in writing or in person for discussion that is consistent with the Section 9, Powers and Duties, in this Ordinance, provided however, that the Commission shall make a determination as to whether or not they will address that topic.

Section 8. Report to the Council
To facilitate an ongoing communication between the Planning Commission and City Council, the Planning Commission shall provide the agenda and minutes of each Planning Commission meeting to the City Council. The Planning Commission shall be responsible for keeping the City

Council advised of pending public hearings or other matters which will require decisions of the City Council.

Section 9. Powers and Duties. The powers and duties of the Planning Commission shall be as follows:

A. Recommend and make suggestions to the Council concerning the laying out, widening, extending, and locating of public thoroughfares, parking of vehicles, relief of traffic congestion, betterment of housing and sanitation conditions and establishment of districts for limiting the use, height, area, bulk and other characteristics of buildings and structures relating to land development.

B. Recommend plans for regulating future growth, development and beautification of the City in respect to its public and private buildings and works, streets, parks, grounds and vacant lots, and plans consistent with future growth and development of the City in order to secure to the City and its inhabitants sanitation, proper service of public utilities, including appropriate public incentives for overall energy conservation.

C. Do and perform all other acts and things necessary or proper to carry out provisions of ORS Chapter 227 and the requests of the City Council as they relate to the Planning and Zoning within the City jurisdiction.

D. Conduct public hearings and make quasi-judicial land use decisions as may be properly before it.

E. Study and propose such measures as are advisable for the promotion of the public interest, health, morals, safety, comfort, convenience and welfare of the City and in the City's Urban Growth Boundary, and to this end work with and participate in discussions with the City Council, the State, regulatory agencies, with the City Councils and Planning Commissions and Councils of neighboring Cities and Counties.

Section 10. Review.
All subdivisions, partitions, street vacations and street improvement requests and all plans or plats for vacating or laying out, widening, extending or locating streets shall be submitted to the Planning Commission prior to submission to the City Council. The Planning Commission shall consider all proposals within timelines required by law. The Planning Commission shall submit to the City Council a recommendation for approval or denial supported by findings of fact that address the applicable criteria and any other recommendations deemed appropriate by the Planning Commission.

Section 11. Preparation of Ordinances or Amendments.

The Planning Commission may prepare, on its own motion or at the request of the City Council, such Ordinances or amendments to as may be considered necessary to promote the orderly growth and development of the City. All such Ordinances or amendments shall be considered by the Planning Commission at a public hearing before submission of such Ordinance for City Council consideration for approval.

Section 12. Budget and Expenditures.
A budget necessary to support the activities of the Planning Commission shall be provided by the City Council. The City Manager shall manage the contract with the City Planner and will determine the appropriateness of suggested expenditures.

Section 13. Oregon Statewide Planning Goal One: Citizen Involvement.
The City Council may schedule an annual meeting with the Planning Commission for the purpose to review the consistency of Planning Commission performance with Oregon Statewide Planning Goal One Citizen Involvement and the Wheeler Comprehensive Plan.

PASSED and ADOPTED by the City Council this 19 day of February, 2019 and APPROVED by the Mayor this 19 day of February 2019.

CITY COUNCIL WHEELER, OREGON	**Aye**	**Nay**	**Absent/Abstain**
Heidi Stacks, President	✓		/
Dave Bell, Councilor	✓		/
Jim King, Councilor	✓		/
Dawn Sea Kahrs, Councilor	✓		/
Jay Verburg, Councilor	✓		/

Stevie S. Burden
ATTEST: Stevie S. Burden, Mayor

2-19-19
DATE:

Juliet Hyams
Juliet Hyams, City Manager