

## APPLICANT'S SUPPLEMENTAL APPLICATION NARRATIVE

DATE: August 4, 2022

APPLICATION: City Casefile #0701-21-1 DR

APPLICANT: Ken and Lynn Ulbricht  
Botts Marsh, LLC  
P.O. Box 1161  
Seaside, OR 97138

COUNSEL: Jennie Bricker  
Land Shore Water Legal Services, LLC  
818 SW Third Avenue, PMB 1517  
Portland, OR 97204

SITE LOCATION: Tax Lots 400, 4600, 4700, 4800, Map 2N10W2BC

ZONING: Water-Related Commercial, Water-Related Industrial

PROPOSAL: Design Review to construct a building that includes processing, storage, and retail sales of fish and shellfish.

### BACKGROUND

Site: The property is currently vacant. It is adjacent to Nehalem Bay and is within the Wheeler city limits. North of the site is a wetlands complex, Botts Marsh, that is now permanently protected from development. The parcel to the south, also zoned WRC, is vacant. Nehalem River borders the site to the west. At the site's eastern border are a railroad right-of-way and a leasehold with separate commercial development. Highway 101 lies east of the railroad and leased parcel.

Land Use History: Before it burned down in the 1960s, a shake and shingle mill operated on the property and extended out into Nehalem Bay on pilings. In the 1970s, the property was enlarged and elevated through deposition of dredge spoils. The previous owners held title to the Botts Marsh wetland area as well as the current property that is the subject of this application. They proposed a development that would have included 200 condominiums (later reduced to 95) and commercial uses on the upland parcel; they proposed to drain the Botts Marsh wetlands to construct a private marina. The previous owners pursued their development of the Botts Marsh wetlands under a Goal 16 (Estuarine Resources) exception in the Tillamook County comprehensive plan. The Oregon Supreme Court upheld the exception in 1987.

The applicant purchased the wetlands together with the project site. Ken Ulbricht was formerly president of the North Coast Land Conservancy. He acquired the property with

the goal of permanently protecting the wetlands from development. He conveyed title to the wetlands to the Conservancy on March 12, 2019; NCLC in turn transferred title to the Lower Nehalem Community Trust, which “will maintain the property for the benefit of the ecological values of the estuarine marsh under a conservation easement held by the Oregon Watershed Enhancement Board” (see Botts Marsh Management Plan (2019) at 3). In planning to develop the upland area south of the wetlands, the applicant anticipates continued cooperation with LNCT to ensure that development will not threaten the ecology of the wetlands (see Botts Marsh Management Plan).

Procedural Background: The applicant first submitted conditional use applications in August 2019 to construct a commercial building and a boutique, 28-room hotel. Following appeals from the Planning Commission, the Wheeler City Council conducted *de novo* review of the applications on April 21, 2020, and voted to approve. The Oregon Coast Alliance and three individual project opponents, including current City Council member Michael Glowa, appealed the decisions to the Oregon Land Use Board of Appeals. LUBA remanded the decisions for more detailed findings. On remand, the City Council, which included three new council members and a new mayor, voted to deny. The City issued final decisions on July 6, 2021. The applicant appealed the decisions to LUBA. LUBA remanded the decisions because of procedural errors. On May 24, 2022, the City Council again voted to deny the conditional use applications.

After the first conditional use denial, the applicant changed the development to include uses permitted outright in the WRC and IND Zones, submitting a design review application for approval of a commercial building for fish and shellfish sales on the WRC parcel, and a connected fish processing plant on the IND parcel. The DR application was deemed complete on August 27, 2021. The City's Staff Report recommended approval; however, the Planning Commission denied the application after a tie vote with one abstention. The applicant appealed to City Council, which conducted a *de novo* hearing on November 16, 2021, and voted to deny. The Council issued its final decision on December 15, 2021; the applicant again appealed to LUBA; and LUBA again remanded the decision, instructing the City to “adopt findings on remand that are sufficient to inform [the applicant] of the nature and types of changes in the proposal that will be necessary to obtain approval.” *Botts Marsh, LLC v. City of Wheeler*, LUBA No. 2022-002 (May 11, 2022).

## **APPROVAL CRITERIA**

In order to be approved, the design review application must satisfy the standards listed in Section 11.050 (Design Review) of the Wheeler Zoning Ordinance, as well as Section 11.111 (Shoreland Development), Article 2 (WRC Zone), and Article 3 (IND Zone).

The sections that follow address the deficiencies the City identified in its December 15, 2021 final decision.

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WZO Section 11.050.2 requires consistency with Comprehensive Plan policies and ordinance provisions.

The City's Decision found the application sufficient under this section. Specifically, the Decision found the application consistent with Goal 9, Policy 3; and Goal 16, policies 2.A, 2.C.2.b, 4.J.8, 4.J.9, 4.J.11, and 4.J.12.

WZO Section 11.050.3 establishes application requirements.

The City's Decision found the application sufficient under this section.

WZO Section 11.050.4.a establishes guidelines for site design.

Subsection (1) addresses natural and topographic features.

The City's Decision found that the application met this guideline.

Subsection (2) addresses trees and vegetation.

The City's Decision found that the application met this guideline.

Subsection (3) addresses landscaping and replanting.

The City's Decision found that the application met this guideline and added that an NPDES 1200-C permit would be required from the Oregon Department of Environmental Quality.

Supplemental Response: A copy of the applicant's NPDES 1200-C permit from DEQ is attached as Appendix 1.

Subsection (4) addresses exterior lighting.

The City's Decision found that the application met this guideline and also satisfied lighting requirements in Section 2.040.3 and Section 3.040.3.

Subsection (5) addresses screening and enclosures.

The City's Decision found that the application met this guideline and also satisfied screening requirements in Section 2.040.2 and Section 3.040.2.

Subsection (6) provides as follows: "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.”

The City's Decision found that the application did not meet this guideline. The reasons for noncompliance are listed below, together with the applicant's responses, application revisions, and supplemental application narrative.

- The two sides of the parking lot lack a “direct pedestrian connection” because the loading area divides the parking spaces and could create safety problems for pedestrians.

Supplemental Response: The applicant has revised the site plans to provide a protected pedestrian walkway connecting the two sides of the parking lot. The revised plans are attached as Appendix 2.

- The entry ways on the west and north sides of the building do not have access via sidewalks.

Supplemental Response: The applicant has revised the site plans to provide sidewalks connecting the parking area to all primary and secondary entrances to the building. The revised plans are attached as Appendix 2.

- The Decision stated that a courtyard is needed where a building's primary entrance does not face the street. Although the applicant identified a “courtyard” in the application narrative, it was not identified on the site plans.

Supplemental Response: The applicant has revised the site plans to identify the “courtyard/plaza” at the primary commercial entrance. In addition, the revised plans identify “pedestrian amenities” in the courtyard/plaza area, including benches, trees, and decorative pavers. The revised plans are attached as Appendix 2.

The property does not abut a street and does not have a “street-facing property line.” The west side of the property is bounded by the Nehalem River. Between the east property boundary and Highway 101 lies a railroad right-of-way in separate ownership, which includes two separate, intervening business operations (discussed below).

Subsection (7) addresses “community amenities.”

The City's Decision found that the application met this guideline.

Subsection (8) addresses landscaping requirements.

The City's Decision found that the application met this guideline, and that WZO Section 3.040.4, a buffering requirement in the IND Zone, was not applicable.

Subsection (9) addresses parking.

The City's Decision found that the application met this guideline and also satisfied parking requirements in WZO Section 11.090.

Subsection (10) requires an ADA accessible "pedestrian access system."

The City's Decision found that the application met this guideline.

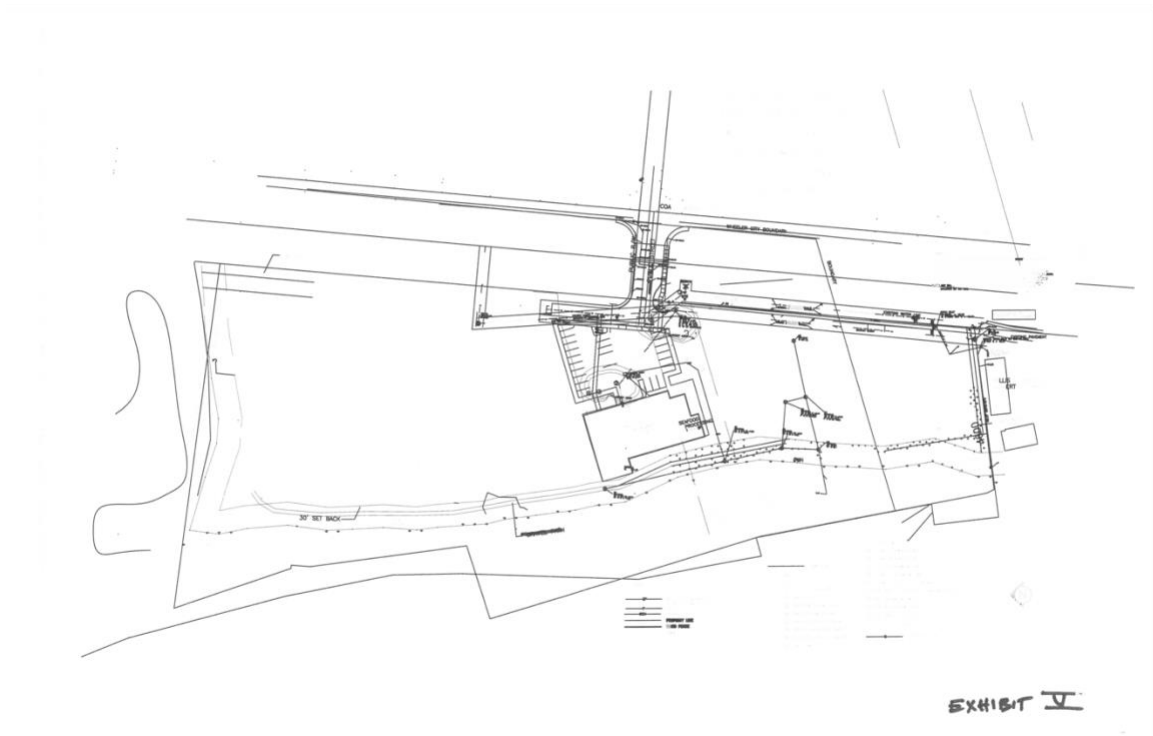
WZO Section 11.050.4.b establishes guidelines for building design.

Subsection (1) provides as follows: "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."

The City's Decision found that the application did not meet this guideline. The reasons for noncompliance are listed below, together with the applicant's responses, application revisions, and supplemental application narrative.

- The application did not demonstrate "how the height and scale of the proposed buildings will be compatible with the site or adjoining buildings."

Supplemental Response: The project design is compatible with the site's layout and topography. As shown in the site plans, the footprint of the building and landscaping follow the curved Marine Drive alignment to the east and the sinuosities of the Nehalem Bay shoreline to the west. The project design is compatible with the site in terms of height and scale. The building will not exceed the Zones' height limitation of 24 feet, and the building consolidates a commercial and an industrial use, thereby reducing the structure's footprint and impact on the natural shoreline. As shown on the site plans submitted with the original application, reproduced below, the building occupies only a small portion of the site's total acreage:



To the north and south of the building and parking area (north is toward the left of the above image), the site remains open space. North of the property boundary lies the Botts Marsh protected wetlands. The parcel south of the site is undeveloped but owned by the applicant. Further south, beyond the boundary of the undeveloped parcel, is a half-acre parcel that, to the best of our knowledge, is owned by Rick Dart. The Dart parcel is developed with a residence, a storage building, and two large commercial buildings:





The two photographs above show the large commercial buildings on the Dart property. They are similar to, and compatible with, the project design. The Dart buildings and the project design share similar features, such as board-and-batten wood siding, pitched roofs, large bay doors, smaller “man doors,” and upper story windows. The building pictured above also has metal siding, like the proposed project, which is visible in red at the left side of the building. A residence on the Dart property, which is partially visible at the far left of the photograph above, has metal roofing, like the proposed project. The commercial buildings are at least as tall as the proposed project.

The subject property is bounded to the west by the Nehalem River. The Tillamook County railroad property lies between the property's east boundary and Highway 101. Two businesses are located on the railroad property, both of them renting “rail riders,” or lightweight, pedal-powered rail bikes for use on the rail line:





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The rail riders business pictured above is located in a blue wooden structure with a barn-style, shingled roof. Across the railroad track is a metal container used for storage. The subject property is located beyond the left edge of the photograph. To the best of our knowledge, this business is not currently operating.



The second rail riders business, Tillamook Rail Riders, operates out of the metal container pictured above. Like the blue barn structure, this business is located between the subject property and Highway 101. The subject property boundary lies at the gravel road and extends past the right edge of the photograph.

Another commercial structure, the Handy Creek Bakery, is located across Nehalem Boulevard from the subject property:





The Handy Creek Bakery features a pitched roof, porch overhang, and painted wood siding. Thus both its materials and overall design are compatible with the design of the proposed project.

In the applicant's view the bright blue barn structure pictured above must be treated as an outlier in terms of design. However, both rail riders businesses utilize square metal containers, so the use of metal siding and roofing in the proposed design is compatible with these structures. The rail riders structures are all smaller than the proposed building, but that scale is consistent with the use, just as the size of the proposed fish processing and fish/shellfish sales building is consistent with that use. Similarly, the smaller scale of the bakery building is consistent with its commercial use, compared to the proposed project. The commercial buildings on the Dart property are similar in height and scale to the proposed project.

Although the structures pictured and discussed above are in the vicinity, there are no "adjoining buildings" on the subject property.

- The application did not demonstrate "how the materials proposed will promote harmony with the structures and site" or "how the materials are compatible with the natural elements." The application did not identify the "natural elements."

Supplemental Response: The site's "natural elements" include water, vegetation, sky, and dirt. The proposed building materials are compatible in color and texture with the natural elements. The roofing materials are dark gray and black, while the siding is lighter gray metal combined with natural wood, board-and-batten style siding. As shown on the revised site plans, building entrances are framed with wood siding and protected by canopies in forest green. The window and door trim is black. Those colors harmonize with the water and (in most seasons) sky, while the metal finishes echo the texture of water. The brown board-and-batten wood siding is compatible with the dirt and woody vegetation of the existing natural landscape. Although there are no adjoining structures on the subject property, we note that the buildings on the Dart parcel and the structures used to house the rail riders businesses are finished with the same materials: metal siding, metal roofing, and board and batten siding. These nearby structures are discussed in more detail above.

Subsection (2) provides as follows: "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."

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The City's Decision found that the application did not meet this guideline. The reasons for noncompliance are listed below, together with the applicant's responses, application revisions, and supplemental application narrative.

- The application did not sufficiently explain how the building design "incorporates the styles characteristic of Wheeler and the coastal area." Although the applicant stated that project design was influenced by historical photographs of previous buildings in Wheeler, the application did not include the photographs.

Supplemental Response: The building design was influenced by the following historical photographs:



The photograph above shows the former development of the subject property, Wheeler Lumber. The basic layout of the proposed building is reminiscent of the building to the right, while the bay doors and windows of the other buildings in the photograph are replicated in the proposed design.

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The photograph above shows the buildings along Wheeler's Main Street (Nehalem Boulevard). The building in the right foreground, as well as the building in the center of the photograph, feature canopies supported by steel struts.



This more recent photograph of the Old Wheeler Hotel also shows canopies supported by struts. This design element has been replicated in the proposed building design, as shown in the site plans in [Appendix 2](#).

- The building design does not use the “identified design elements.”

Supplemental Response: The building design uses “natural wood siding.” Although the siding is board and batten rather than cedar shingles, the language in subsection (2) uses the words “*such as* cedar shingles,” which indicates that cedar shingles are only one example of natural wood siding. In addition, as shown on the revised site plans, the applicant has augmented several building entrances with wood siding, to match the bay doors on the east elevation. The building design also employs pitched roofs, large overhangs (south elevation), cedar fencing to screen outdoor storage, and a color palette of earth tones.

- The application did not provide sufficient information about the “surrounding structures and sites.” The application did not explain how the building design connects to the surrounding area.

Supplemental Response: Detailed information about surrounding structures and sites is provided above in the discussion of WZO Section 11.050.4.b, subsection (1). That discussion is incorporated by reference here.

The building design connects to the surrounding area by preserving its natural shoreline appearance to the maximum extent possible while accommodating development of the use. For example, the building’s finishes are earth tones, chiefly gray and brown to match the natural features on the site (water, sky, dirt). The building consolidates a commercial and an industrial use, reducing the structure’s footprint and impact on the natural shoreline. As shown in the site plans submitted in the original application (reproduced above), most of the site’s total acreage remains open space.

Subsection (3) provides as follows: “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. ...”

The City’s Decision found that the application did not meet this guideline. The reasons for noncompliance are listed below, together with the applicant’s responses, application revisions, and supplemental application narrative.

- Only a “relatively small amount of the structure [is] devoted to natural wood.”

Supplemental Response: As shown on the revised site plans, the applicant has redesigned the west and north elevations to use natural wood siding to surround the building’s primary and secondary industrial entrances.

- The use of two materials for siding (metal and wood) lacks variety and fails to provide visual interest.

Supplemental Response: As shown on the revised site plans, the applicant has redesigned the building to add canopies, in forest green, over the primary and secondary entrances on the west and north elevations. The canopies have been designed to add visual interest, as well as to replicate an element found in historical Wheeler architecture (see photographs and discussion above). The canopy above the loading entrance will be redesigned to match, and will also be forest green. The landscaping around the building, including the addition of "pedestrian amenities" on the south and west sides of the building, also provides visual interest.

- The building's north and west elevations are "particularly monotonous and lack detail" because they have similar patterns of "windows amidst gray/black metal siding and a single door."

Supplemental Response: As shown on the revised site plans, the applicant has added a primary building entrance, additional wood siding, and architecturally interesting, forest green canopies over entrances on the north elevation. On the west elevation (which is not visible from Highway 101), the applicant has added additional wood siding and a matching canopy over the secondary entrance. Proposed landscaping, "pedestrian amenities," and revegetation of the riparian area will add detail and visual interest to the west elevation.

- The applicant submitted inconsistent information about the color of window trim.

Supplemental Response: As shown on the updated site plans submitted in the original application, and as shown again in the revised site plans attached as Appendix 2, the window trim is black.

Subsection (4) addresses noise impacts from facilities with late entertainment.

The City's Decision found that this guideline was not applicable.

Subsection (5) provides as follows: "The impact that structures will have on views from adjacent or other areas will be taken into account."

The City's Decision found that the application did not meet this guideline. The reasons for noncompliance are listed below, together with the applicant's responses, application revisions, and supplemental application narrative.

- The proposed development will "block views" from adjacent structures or structures in other areas, including the residence at 175 Nehalem Boulevard. Compliance with the Zones' maximum height restriction is not sufficient to comply with this requirement.

Supplemental Response: Because the property is currently vacant, *any* development will have an effect on views. While such effect must be “taken into account,” this provision may not be used to prevent all development. *See Botts Marsh v. City of Wheeler*, LUBA No. 2022-002 (May 11, 2022) at 32.

The building and site design mitigate the impact on views to the maximum extent possible while accommodating development of the use. For example, the building's finishes are earth tones, chiefly gray and brown to match the natural features on the site. The building consolidates a commercial and an industrial use, reducing the structure's footprint and impact on the natural shoreline. As shown in the original site plans, reproduced above, most of the site's total acreage remains open space.

Subsection (6) addresses store front requirements.

The City's Decision found that the application met this guideline.

Subsection (7) addresses minimum window requirements.

The City's Decision found that the application met this guideline.

Subsection (8) addresses minimum landscaping requirements.

The City's Decision found that the application met this guideline.

Subsection (9) addresses architectural features to separate ground floors from upper stories.

The City's Decision found that the application met this guideline.

Subsection (10) addresses lighting and “articulated facades” requirements.

The City's Decision found that the application met this guideline.

Subsection (11) addresses pedestrian weather protection.

The City's Decision found that the application met this guideline.

WZO Section 11.111 establishes standards for shoreland development.

Section 11.111.1 establishes setback requirements.

The City's Decision found that the application met this requirement.



Section 11.111.2 establishes setbacks for riparian vegetation protection.

The City's Decision found that the application met this requirement, to the extent the requirement is applicable.

Section 11.111.3 establishes waterfront access requirements.

The City's Decision found that the application met this requirement.

Section 11.111.4 establishes signage requirements.

The City's Decision found that the application will meet this requirement through a separate sign permit.

Section 11.111.5 establishes lot size requirements.

The City's Decision found that this requirement was not applicable.

Section 11.111.6 establishes requirements for the installation of utilities.

The City's Decision found that the application met this requirement.

Section 11.111.7 establishes parking restrictions.

The City's Decision found that the application complied with these restrictions.

Section 11.111.8 requires design review under WZO Section 11.050.

The City's Decision applied design review standards.

Section 11.111.9 addresses erosion control and flood control.

The City's Decision found that the application satisfied this provision and added that an NPDES 1200-C permit from DEQ is required before construction.

Supplemental Response: A copy of the applicant's NPDES 1200-C permit is attached as Appendix 1.