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CASE FILE: LUBA No. 2022-002 Remand

DATE APPLICANT REQUESTED REMAND BE ADDRESSED: September 20, 2023

DATE CITY MET WITH APPLICANT'S STAFF: November 1, 2023

120-DAY COMPLETION DATE: January 18, 2024

CITY COUNCIL HEARING DATE: December 6, 2023

STAFF REPORT

LUBA No. 2022-002 Remand

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

A. REPORT OF FACTS

1. Property 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.
2. Applicant's Request: 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.
3. Background: LUBA remanded the City's decision denying an application for Design Review of a fish processing plant by Kenneth Ulbricht. LUBA found that the City's decision did not adequately explain its decision in the findings. This staff report identifies the six issues that were remanded from LUBA and, in each instance, provides the text of the code provision, the City's previous finding, and the discussion of that finding from LUBA's opinion.
4. Zoning: Tax Lot 400: Industrial (IND); Tax Lot 4800: Water Related Commercial (WRC).
5. Surrounding 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.

B. HISTORY OF APPLICATIONS

1. In 2021, the applicant submitted an application for design review to allow the construction of a building that will allow processing and retail sales of fish and shellfish. The project would consist of two distinct parts: (1) an 8,780 square foot fish processing and warehousing facility located entirely on the Industrially zoned portion of the site, and (2) attached to this structure, and located entirely within the WRC zoned portion of the site, would 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 application was first heard by the Planning Commission on October 7, 2021. The Commission denied the application and provided notice of its decision on October 8, 2021.

3. The applicant appealed the decision to the City Council and the Council reviewed the appeals at their November 16, 2021, Council meeting and upheld the Commission's denial of the design review application. Final Orders were signed on December 15, 2021, and that decision was appealed to LUBA.
4. In a decision dated May 11, 2022, LUBA sustained the appellants' argument that the City's decision was inadequate. In particular, LUBA concluded: "The City's decision is remanded for the reasons explained in our resolution of the second assignment of error. We emphasize that our remand is narrow. The city must adopt findings on remand that are sufficient to inform petitioner of the nature and types of changes in the proposal that will be necessary to obtain approval, that is, sufficient to avoid petitioner 'having [its] success or failure determined by guessing under which shell lies the pea.' Commonwealth Properties, 35 Or App at 399."
5. On August 4, 2022, the applicant provided a supplemental application narrative and site plans to address the deficiencies the City identified in its December 15, 2021 final decision.
6. In August of 2023 the City entered mediation with the applicant. On September 20, 2023, the applicant's attorney requested that the City address the remand from LUBA on the fish processing plant application.
7. On November 1, 2023, City Staff met with the applicant's attorney and provided design criteria addressing the issues remanded by LUBA. At the time this staff report was written, no additional application materials had been received from the applicant.
8. Public Testimony Received: As of the time this staff report was written the City had received written testimony from Mark Nelson.

C. STAFF ANALYSIS

The City can only impose conditions of approval that are necessary to ensure that the applicable approval criteria are satisfied. The City is constrained to considering only those limited criteria identified in LUBA's remand.

1. **WZO 11.050(4)(a)(6): Provision of a Courtyard / Plaza.**
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.

Original City Findings:

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.

LUBA Decision:

The primary entrance is not oriented along a street facing property line, and therefore the design must " * * * create an ADA accessible courtyard/plaza incorporating pedestrian amenities including street trees, outdoor seating and decorative pavers" Petitioner [Botts Marsh LLC] argues that the findings fail to explain why the paved and covered area at the primary entrance fails to qualify as the "courtyard/plaza" that is required if the primary entrance is not oriented to the street. According to petitioner, the interpretation of "courtyard" in the city's decision does not comply with WZO 11.050(4)(a)(6) because nothing in the text of the provision suggests an enclosed area. Petitioner argues that the provision itself is concerned with visibility and easy accessibility to the primary entrance, and having a completely or mostly enclosed area would frustrate the goal of easy and visible access. Moreover, petitioner argues, the findings do not address the word "plaza" at all or explain why the paved and covered area at the entrance fails to qualify as a plaza.

We agree with petitioner that the city's findings are inadequate to explain why the covered area at the primary entrance to the building fails to qualify as the "courtyard/plaza" that is a required substitute for a street facing entrance. First, the findings do not identify, and we cannot tell, the source of the city's definition of "courtyard." Webster's Third New Int'l Dictionary 523 (unabridged ed 2002) defines "courtyard" as "[A] court or enclosure adjacent to or attached to a house, castle, palace, or other building." Nothing in the common definition of "courtyard" requires it to be "unroofed" or "completely or mostly enclosed," as the city found was required.

Second, the city's findings do not explain the meaning of "plaza" or explain why the covered, open primary entrance to the building fails to qualify as a "plaza" as that word is used in WZO 11.050(4)(a)(6). "Plaza" is defined as "[A] public square in a city or town : an open square." *Websters Third New Int'l Dictionary* 1738 (unabridged ed 2002). *See McNulty v. Lake Oswego*, 15 Or LUBA 16, 24-25 (1986) (a design-review decision must explain why the design review criterion is or is not met by defining the pertinent terms and explaining how a term is applied in context of the design on review).

Applicant Supplemental Narrative 8-4-22:

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).

STAFF ANALYSIS: *This provision has been addressed. The Supplemental Narrative 8-4-22 indicates a courtyard/plaza on the site plans with decorative pavers, benches, and trees near the primary commercial building entrance. Some of this area is covered by the overhang of the second story, and some remains open to the sky. Council will need to determine if this constitutes a sufficient courtyard/plaza.*

2. WZO 11.050(4)(a)(6): Direct Pedestrian Connection.

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.

Original City 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.

LUBA Findings:

Petitioner [Botts Marsh LLC] argues that the city's findings do not explain why the city reached the conclusion it did, given the site plan and other materials submitted by petitioner that show sidewalks encircling the parking lot that connect the building's primary entrance, and that the findings do not explain how the location of the loading area means there is not a direct pedestrian connection between the building and "other activities on the site." WZO 11.050(4)(a)(6). Petitioner argues that the site plan and other submitted materials show that the primary entrance to the building is accessible from the sidewalk and the parking area. In addition, petitioner argues that avoidance of "safety problems" is not a relevant consideration for the criterion and that any safety problems created by the design are speculative at best.

Intervenor-Respondent (intervenor) responds that the site plan shows that the loading area blocks the parking spaces north of the loading area from directly connecting to the primary building entrance, and there is therefore no direct connection from one half of the parking lot to the primary entrance. Intervenor also responds that * * * safety * * * appear[s] to be the reason for the 'direct pedestrian connection' requirement."

WZO 11.050(4)(a)(6) provides "Ensure a direct pedestrian connection between the street and buildings on the site, and between buildings and other activities within the site." We agree with intervenor that the sidewalks do not, as petitioner asserts, encircle the parking lot, but are instead interrupted by the driveway and the bay doors. We agree, however, with petitioner that the city's

findings are inadequate. They do not explain why the sidewalks provided are insufficient to provide a direct pedestrian connection to the building. The design criterion simply does not state that all connections must be to the primary building entrance, or that a direct connection must be provided to all activities on the site. While intervenor may be correct that safety is an important reason behind the requirement for a direct pedestrian connection, the city's findings do not include that explanation. Absent any interpretation of the relevant terms of the provision, petitioner is left to guess as to what modifications to the design could satisfy the requirement.

Applicant Supplemental Narrative 8-4-22:

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 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.

STAFF ANALYSIS: *This provision has not been fully addressed. The Supplemental Narrative 8-4-22 does show "pavement markings" on a walkway that connects the sidewalk on the north side of the parking lot to the sidewalk on the south side of the parking lot. While this does make a pedestrian connection between the two sidewalks and the two parking areas, the connection would still cross the path of any trucks coming and going from the loading bay which could create a safety hazard for pedestrians.*

3. WZO 11.050(4)(b)(1): Compatibility with Site and Adjoining Buildings.

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.

Original City 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.

LUBA Findings:

We agree with petitioner that the city's findings are inadequate to explain why the evidence in the record that identifies the materials to be used in construction is not evidence that demonstrates that the last sentence of WZO 11.050(4)(b)(l) is met. *Rudell [v. City of Bandon, 62 Or LUBA 279, 293 (2010)]*. In addition, the phrase "materials" is ambiguous, and the phrase "natural elements" is similarly ambiguous. Absent any explanation in the findings as to what the natural elements are and why the materials chosen are not compatible with those elements, the city's findings leave petitioner "largely in the dark" about how to satisfy that criterion. *J. Conser and Sons, LLC [v. City of Millersburg, 73 Or LUBA 57, 68 (2016)]*.

Moreover, while we tend to agree with petitioner that WZO 1.0701 means that the first two sentences of the provision are non-mandatory provisions, on remand the city should adopt reviewable interpretations of WZO 1.070 and WZO 11.050(4)(b)(l) in the first instance. If it determines that the first two sentences of WZO 11.050(4)(b)(l) are mandatory criteria, the city should resolve any conflict between that provision and WZO 1.070. *See Champion v. City of Portland, 28 Or LUBA 618, 628 (1995)* (design review guidelines expressed in non-mandatory terms are properly interpreted by the city council as non-mandatory, and that interpretation is entitled to deference under ORS 197.829(1)).

Applicant Supplemental Narrative 8-4-22: 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:

[Image of the Site Plan from the Supplemental Narrative 8-4-22]

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:

[Images of the Dart Property from the Supplemental Narrative 8-4-22]

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:

[Image of the Rail Riders Shed and Shipping Container from the Supplemental Narrative 8-4-22]

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.

[Image of the Rail Riders Shipping Container from the Supplemental Narrative 8-4-22]

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:

[Image of Handy Creek Bakery from the Supplemental Narrative 8-4-22]

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 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.

STAFF ANALYSIS: *This provision has been met. The Supplemental Narrative 8-4-22 shows how the height and scale of the proposed buildings will be compatible with nearby buildings in the area (and includes photos of those buildings for reference). It identifies the natural elements of the site as water, vegetation, sky, and dirt. It also indicates that the dark gray and black of the roofing material, light gray metal and natural wood color of the siding, wood siding framing the entrances, green canopies, and black trim harmonize with water and sky. The metal finishes “echo the texture of water” and the brown board-and-batten wood siding is compatible with the dirt and woody vegetation of the existing natural landscape.*

4. WZO 11.050(4)(b)(2): Architectural Style of Development.

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.

Original City 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 [sic] 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 "[these 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.

LUBA Findings:

As with WZO 1 1.050(4)(b)(1), we tend to agree with petitioner that, given the permissive language in WZO 11.050(4)(b)(2) and the clarification in WZO 1.070, WZO 11.050(4)(b)(2) is non-mandatory, and therefore may not be relied on as a basis to deny an application. However, because we are remanding the decision for other reasons, on remand the city can adopt reviewable interpretations of WZO 1.070 and WZO 1 1.050(4)(b)(2) in the first instance and, if it determines that WZO 11.050(4)(b)(2) is a mandatory criterion, resolve any conflict between that provision and WZO 1.070.

Applicant Supplemental Narrative 8-4-22: The building design was influenced by the following historical photographs:

[Historic Image of Wheeler Lumber from the Supplemental Narrative 8-4-22]

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.

[Historic Image of Wheeler Main Street from the Supplemental Narrative 8-4-22]

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.

[Image of Old Wheeler Hotel from the Supplemental Narrative 8-4-22]

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 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.

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.

STAFF ANALYSIS: *This provision has been met. The Supplemental Narrative 8-4-22 shows pictures of other commercial buildings in Wheeler, some historic and some current. These building have similar bay doors, windows, and canopies supported by steel struts as the applicant's proposed building.*

5. **WZO 11.050(4)(b)(3): Avoiding Monotony of Design.**

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.

Original City Findings:

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.

LUBA Findings:

The city council does not explain the source of its definition of "monotony," but Webster's defines it as "sameness that produces boredom" and "sameness or uniformity of tone or sound * * *." *Webster's Third New Int'l Dictionary* 1464 (unabridged ed 2002). The city council found specifically that "[t]he 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." Record 15. We find the adequacy of this finding to be the closest call. Although petitioner argues that there is a canopy over the entrance on the north side, the canopy detail shown on the elevation appears minimal and the roofline variations are less varied on the north and west sides of the building. Record 99. We agree, however, with petitioner that the city's findings are inadequate to explain why the detail, form and site design proposed by petitioner are inadequate to demonstrate that the proposed design satisfies this criterion. The criterion is focused on avoidance of monotony of design in a building project," and the findings do not explain whether the criterion requires evaluation of monotony on an elevation by elevation basis, as opposed to the building as a whole. The criterion includes

no measuring points, no description of what is necessary to demonstrate a "variety" of detail, form, and site design, and no description of what is meant by "visual interest." If the city desires to have a certain amount of wood versus metal, or a certain number of colors used, or other features that, in the city's view, "avoid monotony," the city is obligated to inform petitioner, in the words of *Commonwealth [Properties v. Washington County]*, 35 Or App 387, 400, 582 P2d 1384 (1978)] specifically how those policies will be applicable to the project in question." We also agree with petitioner that the city's findings regarding this criterion are inconsistent with other findings that point out that the retail sales portion of the building has "distinct roof separation and exterior finish" and that "improvements on the industrial portion of the site effectively break up the monotony of a blank wall." Record 16-17. On remand, the city must specify what is lacking in petitioner's proposal to meet the required "variety of detail, form and site design," and what is meant by "visual interest."

Applicant Supplemental Narrative 8-4-22:

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.

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.

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.

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.

STAFF ANALYSIS: *The Supplemental Narrative 8-4-22 shows revised site plans that include the addition of a primary building entrance on the north elevation with forest green canopies over the windows and additional wood trim around the entrances. On the west elevation the applicant has added additional wood trim and a matching canopy over the secondary entrance. Council will need to decide if these additions provide enough additional detail to satisfy the issue of monotony on these elevations.*

6. WZO 11.050(4)(b)(5): Impact on Views.

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

Original City 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 [is] 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 minimum 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." Record 15-16

LUBA Decision:

In the second assignment of error, petitioner argues that the city council's findings fail to address the evidence in the record that the building does not exceed the maximum allowed height for the zone, and that 90% of the site is preserved as open space. Relatedly, in a portion of the fifth assignment of error, petitioner also argues that the city council's findings and its implied interpretation of WZO 11.050(4)(b)(5) to prohibit any impact to the views of the bay from other properties creates a view easement that burdens petitioner's property in favor of other properties, and amounts to a taking or exaction of petitioner's property without just compensation under the Fifth Amendment to the United States Constitution. Petitioner argues that as the city has interpreted the criterion, any structure on the now vacant property will impact views of the bay. Petitioner also argues that in zoning the property I and WRC, zones that allow buildings up to 24 feet in height, the city has determined that buildings up to 24 feet in height on the property satisfy applicable design review provisions.

The city responds that the city council's findings do not amount to an exaction of petitioner's property without compensation because a different design approach, such as reducing building height or hanging the roof line, could be approved. Respondent's Brief 20. The problem with the city's response is that the findings do not reflect it. Rather, the findings reflect the city council's position that a building that otherwise conforms to the standards in the zoning ordinance would impact views of the bay for the structure at 175 Nehalem Boulevard, and that therefore the city may deny the proposal. That rationale comes exceedingly close to constituting an unconstitutional exaction of a view easement in favor of other property owners without just compensation to petitioner. However, because we are remanding the decision on other bases, petitioner has not yet established that the city has exacted a view easement over petitioner's property without just compensation.

It is axiomatic that any development on the now vacant property will "impact" the existing views of the bay from other areas, because there is nothing obstructing that view presently. We agree with petitioner that given that any development of the vacant property will impact the views from other areas, the city's justification for why this criterion is not met does not satisfy the applicable provisions of the WZO. ORS 197.828(2)(b). On remand, the city must evaluate compliance WZO 11.050(4)(b)(5) with the understanding that petitioner's use is permitted outright on the property, and that the city cannot, consistent with the United States Constitution, interpret the provision in a manner that results in a de facto view easement over petitioner's property.

Applicant Supplemental Narrative 8-4-22:

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.

STAFF ANALYSIS: *This provision has been met. The development will obviously restrict some views as one enters the site. However, the building only occupies approximately 11% of the site and does not exceed the height limitations of the respective zones. Although not a public park, public views are still available at the covered courtyard to the commercial entrance.*

D. CONCLUSIONS

STAFF RECOMMENDATION: *Staff recommends that Council have the applicant address the following issues before approving this application:*

- a. Pedestrian safety should be further addressed, as the indicated “pavement markings” on a walkway that connects the sidewalk on the north side of the parking lot to the sidewalk on the south side of the parking lot still crosses the path of any trucks coming and going from the loading bay resulting in a potential safety issue.
- b. Council will need to determine if the courtyard/plaza indicated on the site plans with benches, trees, and decorative pavers is sufficient to satisfy the requirement of WZO 11.050(4)(a)(6), otherwise they may require additional pedestrian amenities or architectural details be included.
- c. Council will need to determine if the additional architectural details that have been provided are sufficient to break up the monotony of the north and west elevations, otherwise they may require additional architectural features be included in the plans.

Staff also recommends the following conditions of approval:

- a. Development shall be in accordance with the proposed plan.
- b. Any future alterations will require evaluation of the City requirements by the Planning Commission.

Submitted by,

Pax Broder

City Manager

Enclosures:

Original Fish Processing Design Review Application

LUBA No. 2022-002 Remand
December 6, 2023 City Council Hearing

Applicant's Supplemental Statement & Appendices 8-4-22