

TO: Wheeler City Council
FROM: Bill Kabeiseman, City Attorney
SUBJECT: Planning File #2021-02-DR/0701-21-DR
DATE: July 15, 2022

I. SUMMARY

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. The Council indicated that it did not want to reopen the hearing in the matter but, instead, evaluate the remanded findings and make a new determination based on the guidance from LUBA. 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. The Council should review the information in the staff report and provide direction to city staff to prepare a new decision on remand in this application.

I. BACKGROUND

- A. **APPLICANT:** Kenneth Ulbricht (for property owned by Bott's Marsh, LLC).
- B. **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.
- C. **PARCEL SIZE:** Tax Lot 400 - 0.45 acres; and Tax Lot 4800 - 1.72 acres.
- D. **EXISTING DEVELOPMENT:** The vacant lot fronts a public street. Services can be extended to the site.
- E. **ZONING:** Lot 400: Industrial (IND); Tax Lot 4800: Water Related Commercial (WRC).
- F. **ADJACENT ZONING AND LAND USE:** Highway 101 and the railroad right-of way border the property on the east and the Nehalem River to the west. Property to the north is located outside City limits while WRC zoned land to the south is vacant.
- G. **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.

- H. DECISION CRITERIA: This application will be evaluated against the design review standards listed in the Wheeler Zoning Ordinance, Section 11.50 (Design Review); Section 11.110 (Shoreland Development); Article 2 (WRC Zone); and Article 3 (Industrial Zone).

II. HISTORY OF APPLICATIONS

- A. 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.
- B. 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.
- C. 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. A Final Orders were signed on December 15, 2021, and that decision was appealed to LUBA.
- D. 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.”
- E. On May 16, 2022 the applicant requested that the City begin proceedings to review the decision on remand.
- F. On June 28, 2022, the Council met and decided to not reopen the public hearing but to reconsider its decision based on the guidance from LUBA. The remainder of this staff report is in six parts, one part for each of the remanded issues. Each part consists of the following:
- a. Statement of the code provision at issue

- b. The finding adopted by the City in its earlier decision
- c. The portion of LUBA's decision discussing that finding, and
- d. Further explanation from staff regarding options available to the Council.

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 Finding:

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 1 L050(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).

Discussion:

There is no dispute that the primary entrance does not face the street, therefore, this code section requires the application to "create an ADA accessible courtyard / plaza incorporating pedestrian amenities including street trees, outdoor seating and decorative pavers."

The application acknowledges as much, and states that the primary entrance will be accessible through an ADA-compliant courtyard, although it does not specifically identify that courtyard. Roughly measured from the elevation drawings, the application appears to be referring to the 10' x 30' recessed space beneath the second story on the south elevation. Rec 98 and 100. The Council must determine whether this recessed area qualifies as a "courtyard / plaza" as necessary to satisfy WZO 11.050(4)(a)(6).



Rather than rely on the dictionary to define terms such as "courtyard" or "plaza," the Council might find relevant the context of that provision, that is, the language of the provision itself. First, the purpose of the provision appears to be to allow the public to easily identify the primary entrance and encourage ease of access. This identification and ease might be realized by orienting the front door to the street or by attracting visitors to a dedicated gathering area where, once there, a visitor may find the primary entrance. As such a qualifying courtyard cannot be entirely enclosed by a building

but must be visible from the street in order to attract visitors. The visual cues of the existence of a plaza or courtyard include pedestrian amenities such as "street trees, outdoor seating and decorative pavers."

The recessed area depicted in the site plan and elevations does not appear to include any pedestrian amenities such as "trees, outdoor seating or decorative pavers" and it is difficult to see how trees could survive or grow to any significant height under this overhang. It is the existence of the street

tree requirement for courtyards and plazas that would support a finding these areas are most often open to the sky, as the Council previously held. Similarly, these amenities suggest that a “plaza” is more than just an open space, as LUBA opined, it is an area that includes amenities serving visitors and employees with a place of rest.

Therefore, the Council could find that a “courtyard / plaza” is an open space sufficiently sized and designed to include “street trees, outdoor seating and decorative pavers” for use by visitors and employees. Although it may be partially covered, it must include some area to accommodate trees. Further, it must be visible from the public street and also distinct from the remainder of the building providing the necessary cues for locating the primary entrance. Without the provision of such a pedestrian-focused gathering space near the primary entrance, the Council may find that WZO 11.050(4)(a)(6) is not satisfied.

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:

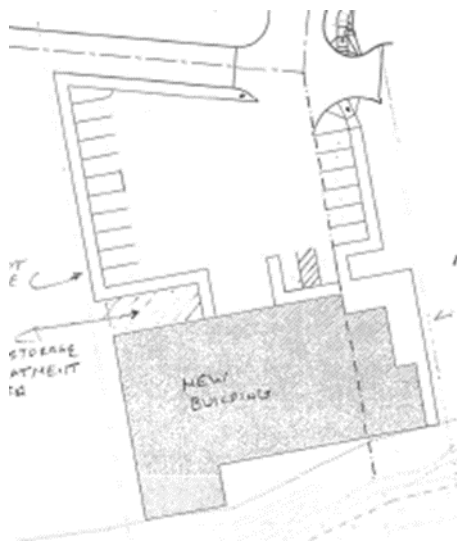
Petitioner [Botts Marsh LLC] argues that the city's findings do not explain why the city reached the conclusion it did, given the site plan and other materials submitted by petitioner that show sidewalks encircling the parking lot that connect the building's primary entrance, and that the findings do 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.

Discussion:

On this issue, LUBA agreed with the City that the site plan did not include sidewalks encircling the site. However, LUBA indicated that the findings were inadequate to adequately explain the extent of this requirement and how it might be satisfied. This City's option here would be to explain with greater detail how the building orientation and parking violates the pedestrian circulation obligations or otherwise find that what is proposed satisfies the standard.



To provide further elaboration on the existing findings, the Council might emphasize that the need for pedestrian connectivity extends beyond just the street but includes off-street parking area, as an activity occurring on the site that must maintain a direct connection with the parking serves. The connection between off-street parking and the building entrances for that use must be "direct" and cannot be intercepted by other activities. A "direct pedestrian connection" is one that allows pedestrians safe access to buildings and to other activities. As proposed, the loading docks accommodating maneuvering trucks and forklift traffic will leave patrons and employees with no safe, direct, connection to the building. Further, of the 9.5 spaces required to serve the retail space, at least 2 of them will be located on the north side of the lot and require crossing the truck loading area. Rec 12 and 67. Asking retail customers, who may well be tourists new to the area, to traverse an active industrial loading area on foot only exacerbates the safety concerns.

A design that satisfies this requirement would relocate the truck loading area so that it does not block direct pedestrian access from the customer / employee parking area into the primary retail and industrial pedestrian access points. To do this, the truck loading and maneuvering area must be relocated outside of the center of the parking lot serving visitors and employees, perhaps on the north side of the site. This change would allow for direct pedestrian access along protected sidewalks into the retail and industrial building entrances located further to the south. Without providing the requisite direct pedestrian connection, the Council could find that WZO 11.050(4)(a)(6) is not satisfied.

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.

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)(1) 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

¹WZO 1.070 is the section of the Zoning Ordinance that contains definitions and includes the following statement:

“The word shall is mandatory and the words should or may are permissive.”

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)).

Discussion:

The task here is to determine the degree to which an applicant must address design compatibility with respect to height, scale and materials. Any interpretation must pay close attention to the descriptive terms “should” or “shall” within this provision as defined by WZO 1.070. The applicant responded to this obligation by providing a list of materials along with a color and location. These include black or dark grey metal roof, walls of dark grey metal or brown wood, and white vinyl windows.² Rec 70. The record does not include any photographs or other renderings from which to determine how the building will appear within the context of the existing built or natural environment. If the Council determines that this information remains insufficient, it must explain what additional information must be provided.

Although permissive with respect to the relationship between what is proposed and adjacent structures, WZO 11.050(4)(b)(1) is prescriptive in requiring an attention to compatibility more generally. Providing some description about how the height and massing responds to the site is critical to making a finding of compatibility, even though the obligation itself is permissive.

Further, moving beyond height and scale, LUBA agreed that material compatibility when it comes to connecting with nature, is not permissive at all. More specifically, “the materials **shall** be chosen...to be compatible with natural elements.” As such, the Council might also consider the degree to which this area, which is largely rural, pastoral, and undeveloped, might require a greater degree of compatibility with respect to natural elements than a more urbanized environment where there might be greater flexibility with respect to compatibility with respect to height and scale. For example, the Council might consider how the east elevation – the primary elevation visible from S. Marine Drive and Highway 101, clad primarily in black or dark grey metal wall siding and roof panels at this scale will appear when surrounded by nothing but a vast expanse of blue wetlands and green marsh scrub. It may be that, when considered in the natural surroundings, a wood sided structure may be more appropriate, or that colors that complement that setting would also be appropriate. The Council should also decide the degree to which metal is or can be a compatible material and in what finish. For example, a smooth finished metal can sometime read like wood but ,depending on the color and finish, can be highly reflective. Material samples would be helpful in this regard.

Presenting evidence sufficient to show that the proposed design is compatible requires the submittal of site photographs, street-view renderings or topographic maps providing evidence indicating how this building will be viewed within its surrounding context. Once this information is available, the Council can decide the degree to which nearby buildings might dictate the use of different materials,

² Although the narrative says that the windows will have white trim, all of the elevation drawings and material studies show windows with black trim. Rec 70, 98, 99, 100.

given the overall height and scale. Asking the decision-maker to visit the site is insufficient (in addition to improperly shifting the burden onto the City to produce evidence showing that a criterion is satisfied) because such a visit will not show the building within the site, to determine whether existing landscaping will provide any screening, whether highly reflective surfaces like water bodies might dictate the use of different materials, finishes or colors. The Council could determine that, until this additional evidence is provided, WZO 11.050(4)(b)(1) is not satisfied.

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.

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.

Discussion:

Of the criteria identified in the LUBA remand, this one is the one that likely lacks the necessary language to impose a mandatory obligation and as such, cannot be a basis for denial. That said, it might be acceptable to opine that, similar to obligations with respect to compatibility under WZO 11.050(4)(b)(1), this provision requires some indication of deliberation with respect to architectural design to show that architectural compatibility was considered. Without such explanation, there is no indication that quality materials and overall style was taken into account. The applicant's only statement in response in the record was: "Project design was influenced from historical pictures of previous buildings in Wheeler." Rec 70. This is conclusory without any description of what stylistic elements were taken from these previous buildings. Examples of buildings with comparable roof pitch, the use of primarily metal vertical siding or clarifying whether the proposed wood siding will be cedar or a composite would all be helpful in finding that, although permissive, style and design quality and overall compatibility with the surroundings was considered.

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.

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:

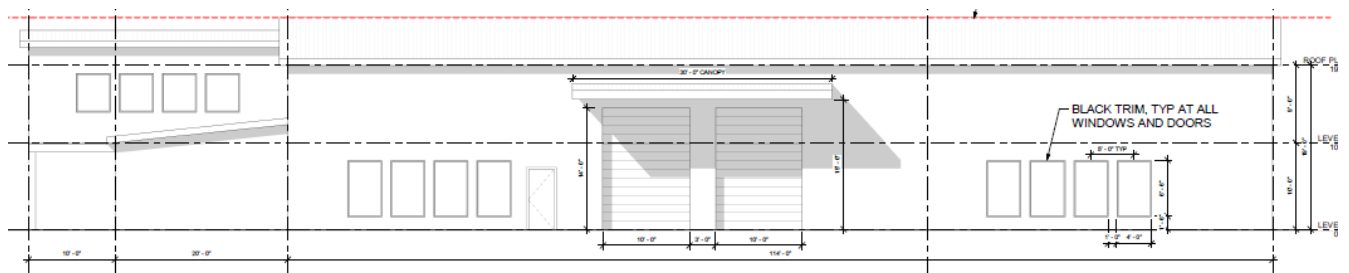
The city council does not explain the source of its definition of "monotony," but Webster's defines it as "sameness that produces boredom" and "sameness or uniformity of tone or sound * * *." *Webster's Third New Int'l Dictionary* 1464 (unabridged ed 2002). The city council found specifically that "[t]he 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."

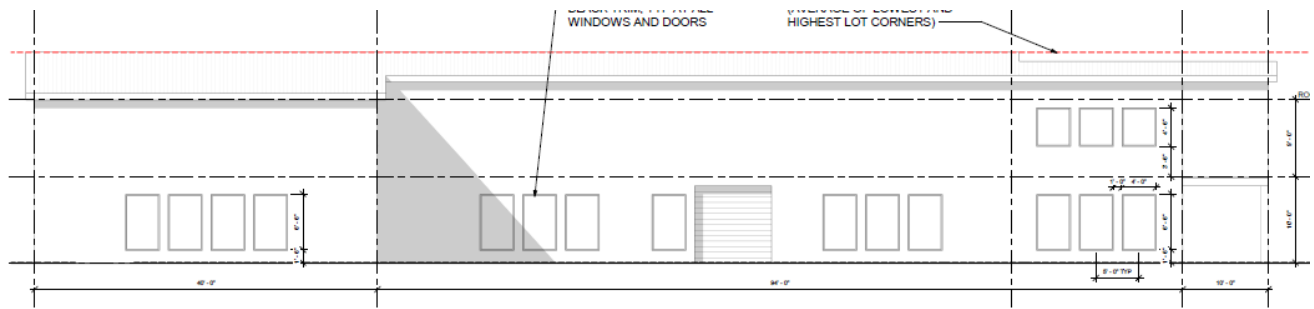
Discussion:

In order to find that WZO 11.050(4)(b)(3) is not satisfied, the City must explain the degree to which monotony in design must be avoided. As the previous findings explain, and LUBA agreed, "monotony of design" is that which is "sameness that produces boredom" and "sameness of uniformity of tone or sound." *Webster's Third New Int'l Dictionary* 1464 (unabridged ed 2002). Avoiding this uniformity is accomplished by changes in detail, form and site design in order to provide "visual interest." Providing "visual interest" requires evaluating monotony on an elevation-by-elevation basis because the whole building cannot be seen all at once. Therefore, although the same materials may be used throughout, each elevation must be evaluated to determine if there is sufficient variety to maintain visual interest as it may be seen. Here, the south and east elevations are those that will be seen from Marine Drive and Highway 101. That said, the north and west elevations are visible from the water. As a standalone building, there is no elevation that will be shielded from public view.

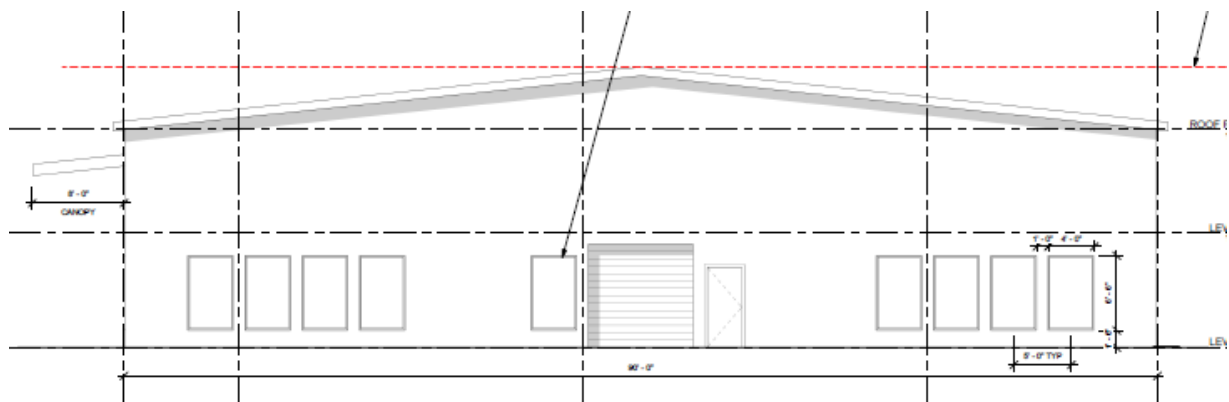
Taking an elevation-by-elevation approach, the findings discussing WZO 11.050(4)(b)(10) did conclude that the inclusion of windows on the industrial side of the building were sufficient to "break up the monotony of a blank wall" but the Council may find that WZO 11.050(4)(b)(3) requires a greater degree of design variety than simply breaking up a blank wall. Rather, the requisite "variety" will include changes in detail, form and site design such as recessed building facades, changes in roof line, variety in window sizes or materials. The Council might agree that the south elevation, with the overhanging roof, shed roof covered first-story bump out, different windows and use of wood siding is sufficient to avoid monotony. If that is the case and taking the 25% replication reference as a guide, the Council might find that a change in roof line, wall recess, materials, window size and placement for every quarter of linear length of an elevation.



As depicted in this drawing, the left side of the west elevation provides a building recess, change in roof line, window size and location at approximately 30' of the total 144' building length. Although the location of the canopy and wood cladding surrounding the loading bays within the remaining linear frontage is not known but at 30' wide, this leaves a remaining 84' without any change. In order to satisfy a rough 25% change rule, there would need to be another change of roof line, recess, window size or location or order to break up the monotony on this elevation.



The west elevations suffers from the same shortcoming in that there is a lack of variety for the center portion of the building or for 94' linear feet. This area would need to be broken up with an additional recess, change in roof line, materials, window size or placement to provide the necessary variety.



Of the four elevations, the north elevation lacks any variety and would need to be substantially revised. It is important to point out that using this 25% of an elevation frontage to trigger a change in detail, form and site design is general and if mechanically applied, could similarly create a monotonous design. This standard should be not viewed as one that is necessary clear and objective. Rather, overall architectural style, use, and surrounding context might dictate changes in details that deviate from this approach. That said, unchanged details for expanses of 84' feet on the east elevation, 90' on the west elevation and the full 90' on the north elevation results in a lack of design variety sufficient to satisfy WZO 11.050(4)(b)(3).

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.

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.

Discussion:

Designing a building that is responsive to WZO 11.050(4)(b)(5) requires some analysis of the degree to which the proposal effects views and whether there are any other design changes that could provide greater view protections while not compromising the applicant's desired use. For example, it may be that a functioning fish processing facility requires machinery or systems that require a 24' tall building. If so, it may be that the building roof cannot be reduced. It may also be that greater sculpting in the roof form could be employed that could offset the impact.

The primary difficulty in addressing this issue is that the applicant failed to provide sufficient information to actually address the loss of views. There is no analysis of the impact of the development on the rest of the town whatsoever, making it difficult to provide much in the way of guidance. However, the City notes that the subject property is located at the north end of the City limits and along the river and that development here have the potential to block the views from the town up the river.

The design of the building does not acknowledge its location adjacent to the bay or factor in the views from downtown Wheeler. It is simply a full block at the maximum permitted height. A design that stepped back, sloped up to the east, or otherwise acknowledged and addressed view concerns would be more likely to satisfy this criterion. But again, without any renderings showing how this building will look in context from town or from Highway 101, it is impossible to determine the degree to which the view will be impacted and without some explanation for the need for a building at maximum height for its full length, the City cannot conduct the necessary review. For this reason, the City cannot find that WZO 11.050(4)(b)(5) is satisfied.