

BEFORE THE WHEELER CITY COUNCIL

In the Matter of the)
)
Application of) LUBA Remand No.
) 2022-002
Kenneth Ulbricht)

ORDER OF APPROVAL

I. NATURE OF THE APPLICATION

This matter comes before the Wheeler City Council on a remand from the Land Use Board of Appeals (LUBA) after a City Council decision not to approve a Design Review application by Kenneth Ulbricht to construct a building that includes the processing, storage and retail sales of fish and shellfish on property located within the Industrial and Water Related Commercial zones.

II. GENERAL INFORMATION

A. 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.

B. Existing Development and Zoning

The vacant lot fronts a public street. Services can be extended to the site. Tax Lot 400 contains 0.45 acres and is zoned Water Related Commercial and Tax Lot 4800 contains 1.72 acres and is zoned Industrial. The site contains a total 2.17 acres.

C. 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.

D. Background Information

During the fall and winter of 2021, the City reviewed and ultimately denied a design review application for a building for the processing, storage, and retail sales of fish and shellfish. This denial was appealed to LUBA and in spring of 2022, this decision was remanded by LUBA for additional findings. *Botts Marsh, LLC v. City of Wheeler* ___ Or LUBA ___ (LUBA No 2022-02, May 11, 2022). In the summer of 2022, the City reviewed the matter on the record and made a decision, again denying the application with additional findings. In January 2023, LUBA remanded the City's decision finding that the City had to reopen the record to allow the applicant an opportunity to demonstrate that that standards are satisfied. *Botts Marsh, LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA No 2022-079). On appeal, this decision was modified by the Oregon Court of Appeals but the obligation to re-open the record on remand remained unchanged. 326 Or.App. 215 (2023),

On September 20, 2023, the applicant provided a formal written request that the City complete review of the Design Review application to construct a building that includes the processing, storage and retail sales of fish and shellfish on remand.

III. PUBLIC HEARINGS

On November 1, 2023, City Staff met with the applicant's attorney and provided notice of the standards that would apply to the application on remand. On December 1, 2023, the applicant submitted modifications to its proposal in response to the limited issues on remand.

The City Council then held a *de novo* public hearing on December 6, 2023 to review the updated application. Notice of the hearing was provided per requirements of the Wheeler Zoning Ordinance. Council members listed *ex parte* contacts, otherwise, no objection was raised as to jurisdiction, conflicts of interest, bias, notice, evidence or testimony presented at the hearing. After hearing testimony from all interested parties, the Council voted to continue the public hearing to date certain December 19, 2023.

On December 13, the applicant submitted revised application materials responding to issues raised by the City Council. At the continuation of the public hearing on December 19, 2023, the City Council conditionally approved the Design Review application and instructed staff to prepare findings consistent with its decision.

IV. FINDINGS OF FACT-GENERAL

After careful consideration of the testimony and evidence in the record, the City Council adopts in support of its decision the findings set forth in the September 16, 2021 Staff Report recommending approval of the subject application, except as specifically modified with the findings that follow:

The Wheeler City Council, after careful consideration of the testimony and evidence in the record, adopts the following Findings of Fact:

- A. The applicant is Kenneth Ulbricht (for property owned by Bott's Marsh, LLC).
- B. 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. Tax Lot 400 contains 0.45 acres; and Tax Lot 4800 contains 1.72 acres for a total of 2.17 acres.
- D. The vacant lot fronts a public street. Services can be extended to the site.
- E. ZONING: Tax Lot 400: Industrial (IND); Tax Lot 4800: Water Related Commercial (WRC).
- F. 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. 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. This application has been evaluated against the applicable approval criteria considered by LUBA and the Oregon Court of Appeals and subject to the limitations imposed through those judicial decisions.

V. APPLICATION SUMMARY

- A. The applicant wishes to construct a building that will allow processing and retail sales of fish and shellfish. The project will feature the following:
 - 1. The project is in two distinct parts. A fish processing and warehousing facility will be located entirely on Industrial zoned portion of the site. Fish and shellfish will be cold-stored and shipped from this site along with some limited processing. Attached to this structure, and located entirely within the WRC zoned portion of the site, will be a retail market. This part of the structure includes a second floor to be used as an office and for storage.

2. The Industrial side of the building has been redesigned to feature natural wood shake siding on the first floor and batten-board siding on the second floor along with a metal roof. Two bay doors will be located on the north side of the building to receive/ship the product. The retail portion of the site will feature the same wood shake siding on the first floor, with a second floor finished in batten-board siding. The roof on the commercial side matches the industrial roof. Several building entrances will be covered by canopies in forest green. Because the building entrance do not face the street, a courtyard area is provided outside of the retail area on the south elevation of the building which has been expanded to include an enhanced paver area with benches and landscaping.
3. Primary access to the site is off Highway 101 via Hemlock Street. A driveway serving both facilities will extend off of Hemlock Street/Marine Drive to access the project.
4. The driveway has been redesigned to provide direct access to the site's customer parking and a second driveway provides access for industrial deliveries and to the employee parking. A total of 16 spaces were included on the site plan in the customer parking lot with an additional 16 spaces located in the employee parking lot. The customer parking spaces are located next to concrete walkways which lead directly to the retail entrance.
5. Landscaping improvements are located on the south and west and sides of the building. The landscaping will include short shrubs and trees.
6. The original lighting plan shows the exterior lighting to be dominated by gooseneck lamps which shine directly onto the ground. One light on the south side of the processing building is a cylinder-type lamp which shines both downward and skyward.

VI. CRITERIA AND FINDINGS –LUBA 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.

Findings: Rather than rely solely on the dictionary to define terms such as “courtyard” or “plaza” in the abstract, the Council relies on the terms of the standard itself. First, the Council interprets the requirement for a “courtyard/plaza” to provide a wayfinding purpose - allowing the public to easily identify the primary entrance and encourage ease of access when the primary entrance does not face the street. 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 denoting the existence of a plaza or courtyard, as identified in WZO 11.050(4)(a)(6) include pedestrian amenities such as “street trees, outdoor seating and decorative pavers.” The list of pedestrian amenities uses the conjunctive ‘and’, which signifies that each of the elements must be included and the Council so interprets the phrase. It is difficult to see how trees could survive or grow to any significant height under this single-story overhang. It is the existence of the street tree requirement for courtyards and plazas that supports the Council’s previous finding that these areas are most often open to the sky. Similarly, these required amenities indicate that a “courtyard/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.

The applicant has identified a courtyard/plaza on the site plans at the south side of the building. As part of its December 13 submittal, the area occupied with decorative pavers has been expanded to cover a larger area per the Council’s request making it large enough to be visually direct customers to visually finding the primary retail entrance. The applicant has added a short shrub border on the south and west sides to give the courtyard an enclosed feel and appearance. There are also benches in the area and trees that are not to exceed 24’ in total height. The City Council concludes that with these revisions, this criterion is now met.

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.

Findings: The Council interprets off-street parking to qualify as “an other activit[y],” and the connection required by WZO 11.050(4)(a)(6) must be “direct” and cannot be intercepted by other activities, particularly those that might compromise safe pedestrian access. The Council finds that the shared access drive coupled with a two-bay loading dock accommodating maneuvering refrigerated delivery trucks and forklift traffic in the middle of the parking area will

leave patrons and employees with no safe, direct, connection to the building entrances from the parking area. As part of the revised design, the applicant has relocated commercial vehicle and truck traffic to the north side of the building so these vehicles no longer cross the customer parking lot or walkways. Sidewalks now connect both sides of the customer parking lot to the courtyard at the primary entrance without interruption, and sidewalks connect to the secondary entrance on the west elevation as well. As such, this criterion is satisfied.

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.

Findings: Although LUBA found that the permissive elements relating to height and scale of the building may not be considered, evidence sufficient to show that the proposed design is compatible requires the submittal of site photographs, street-view renderings or topographic maps providing some pictorial or narrative evidence indicating how this building materials will be viewed within its surrounding context of WZO 11.050(4)(b)(1) is required. The applicant's Supplemental Narrative explains 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 the river, grassy marsh areas, and tree-covered hills. It also indicates that the slate gray and black of the roofing material, natural wood color of the shake and board-and-batten siding, black trim on windows and doors, and green canopies are more compatible with the texture and color of those natural elements. The City Council finds that this criterion is satisfied.

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.

Findings: LUBA concluded that the permissive language in WZO 11.050(4)(b)(2) and the clarification in WZO 1.070 suggests that WZO 11.050(4)(b)(2) is non-

mandatory, and therefore may not be relied on as a basis to deny an application. That said, the applicant's Supplemental Narrative includes historic and recent pictures of other buildings in Wheeler. The building design for the fish processing plant now includes natural wood siding, pitched roofs, large overhangs, cedar fencing for outdoor screening, and a color palette of earth tones with forest green canopies. As such, the City Council concludes that this criterion is met.

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.

Findings: The Council finds that "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 as way 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 likely to be highly 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 requisite level of "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 finds 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. Using these changes as a general guide, the Council finds that the applicant's revised application including two distinct forms of wood siding with a large green canopy over the entrance. The rollup doors on this side have windows. There is also a break in the roofline on this elevation. The west elevation has two distinct forms of wood siding, a canopy over the entrance, a bench, trees, and a variation in roof line at the northwest corner. The east elevation has been redesigned to mirror the style of architecture on the south elevation, which the Council had previously determined satisfied the standard. With these changes, the City Council finds that this criterion has been met.

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

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

Findings: LUBA's decision concluded that this criterion does not allow the city to require the applicant to lower the height of the building that is otherwise allowed under WZO 2.-040(1) and WZO 3.040(1) so as to create a de facto view easement. That said, the Council notes that the applicant has created variations in the roof line in order to make the view more aesthetically appealing. The building's finishes are earth tones to match the natural features on the site. The building also consolidates a commercial and an industrial use, reducing the structures footprint and impact on the natural shoreline. As such, the City Council finds that this criterion is met.

VI. CONCLUSION AND DECISION

Based on the above findings, the City Council of Wheeler concludes the application complies with all the relevant decision criteria. The application is therefore APPROVED with the following conditions:

- A. The Design Review shall be limited to the proposed fish processing/retail sales complex as submitted and approved by the City Council. The applicant is advised that any change in use, modification or other departure from the approval may require additional land use applications and approvals.
- B. Prior to development, the applicant shall:
 - 1. Participate in a pre-engineering conference with the applicable public and private facility providers to coordinate facility improvements. This conference shall occur prior to submitting engineering plans.
 - 2. If applicable, apply to the Oregon Department of Transportation for a permit to work within the railroad right-of-way.
- C. The developer shall submit engineering plans to the City of Wheeler addressing water, storm water, street, and similar facility improvements. Sanitary sewer plans shall also be submitted to the Nehalem Bay Wastewater Agency (NBWA). These plans shall be reviewed and approved by the City and NBWA prior to construction. Plans shall conform to provisions in Condition of Approval "G."
- D. The developer shall submit a building permit for construction of the proposed building, conforming to the applicable building code requirements. The submitted site plan shall substantially conform to the approved layout and include landscaping irrigation plans. Building permits may be submitted concurrent with engineering plans; however,

building shall not proceed until such time engineering plans, including applicable Nehalem Bay Wastewater Agency and Oregon Department of Transportation permits, are approved.

- E. Prior to receiving a building permit, the developer shall submit evidence of a reciprocal access and parking agreement between Tax Lot 4800 and Tax Lot 400. The agreement shall be on a form acceptable to the City and recorded against the deed record of each property.
- F. Prior to occupancy, the developer shall complete the following:
 - 1. The applicant shall extend or install sanitary sewer, water, and storm drainage facilities to serve the development. The improvements shall comply with the plans approved by the City of Wheeler and Nehalem Bay Wastewater Agency.
 - 2. All parking improvements, including paving, striping, driveways and other requirements, shall be installed in compliance with the parking layout on the approved building and engineering plans.
 - 3. Improve Hemlock Street south of the railroad, consistent with an approved Oregon Department of Transportation permit and City of Wheeler engineering plans.
- G. Public facility and street design, constructions and maintenance shall be subject to the following:
 - 1. All public utility installations shall conform to the City's facilities plans. The applicant shall pay plan review, inspection, and permit fees as determined by the Public Works Director.
 - 2. All improvements shall comply with the standards and requirements of the Wheeler Public Works Department. Adequate bonding, or other financial instrument acceptable to the City, shall be obtained to complete any street and facility improvements. The applicant shall be responsible for all costs associated with public facility improvements, including applicable system development charges.
 - 3. The Hemlock Street paved improvement width shall be 24-feet, unless the City or the Oregon Department of Transportation deem an alternate width is required.
 - 4. Prior to final engineering plan approval by the City, written approval of construction drawings must be received from ODOT for any work within the railroad right-of-way.
 - 5. All parking, driveway and maneuvering areas shall be constructed of asphalt, concrete, or other approved material. The applicant shall stripe the proposed

parking spaces per State of Oregon (ORS 447.233) and the Americans with Disabilities Act.

6. An NDEPS 1200c permit shall be completed for the project site and approved by the Oregon Department of Environmental Quality prior to development at the site.

7. Unless impractical or otherwise prohibited, all new utility lines for development shall be placed underground.

H. Unless otherwise modified by this decision, the improvements shall comply with the development requirements of the Wheeler Zoning Ordinance.

I. Compliance with these conditions, the requirements of the Wheeler Zoning Ordinance, Nehalem Bay Wastewater Agency, Oregon Department of Transportation, and applicable building code provisions shall be the sole responsibility of the developer.

J. The Applicant is herein advised that the use of the property involved in this application may require additional permits from the City or other local, State or Federal agencies. The City of Wheeler land use and review and approval process does not take the place of, or relieve the Applicant of responsibility for acquiring such other permits, or satisfy any restrictions or conditions thereon.

PASSED BY THE CITY COUNCIL this 16th day of January, 2024.

AYES: _____ NAYS: _____

APPROVED BY THE MAYOR:

Mayor Clif Kemp

Date

FILED IN THE OFFICE OF THE CITY RECORDER:

ATTEST:

Pax Broder, City Manager

Date