LUBA
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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

BOTTS MARSH, LLC,
Petitioner,

vs.

CITY OF WHEELER,
Respondent.

LUBA Nos. 2022-063/064

FINAL OPINION
AND ORDER

Appeal from City of Wheeler.

Jennie Bricker filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Sarah Stauffer Curtiss.

Carrie Richter filed the response brief and argued on behalf of respondent. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, PC.

RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

RUDD, Board Member, did not participate in the decision.

AFFIRMED 11/09/2022

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

In LUBA No. 2022-063, petitioner appeals a decision by the city council denying its application for a conditional use permit for a 28-room hotel. In LUBA No. 2022-064, petitioner appeals a city council decision denying its application for a conditional use permit for a commercial building to include seafood retail, wholesale, and storage; a restaurant on the first floor; and four apartments on the second floor.

FACTS

Petitioner owns vacant land adjacent to Nehalem Bay that is zoned Water-Related Commercial (WRC). The parcel is accessed from Hemlock Street, which intersects with Highway 101 approximately 30 feet to the east at a controlled intersection with eastbound and westbound stop signage (101/Hemlock intersection). The parcel is also accessed from its intersection with Marine Drive on its southern boundary. Marine Drive runs south from the property, where it intersects with Rector Street, which then intersects with Highway 101 (101/Rector intersection). *Botts Marsh I* Record 148.

In 2019, petitioner submitted applications for two conditional use permits to construct and operate (1) a 28-room hotel and (2) a commercial building with wholesale and retail seafood sales, a restaurant on the ground floor, and four

apartments on the second floor.[1] This is the third time the city's decisions regarding petitioner's conditional use applications have been appealed to LUBA. In the decisions challenged in *Oregon Coast Alliance v. City of Wheeler*, ___ Or LUBA ___ (LUBA Nos 2020-064/065, Mar 9, 2021) (*OCA*), the city council approved the applications. We sustained petitioners' assignment of error that argued that the city's conclusion that Wheeler Zoning Ordinance (WZO) 15.090(5), which requires an applicant for a conditional use to demonstrate that "[t]he use will not create traffic congestion on nearby streets" was met was not supported by substantial evidence in the record. *See OCA*, ___ Or LUBA at ___ (slip op at 17-19). We also sustained the assignment of error that argued that the city's findings were inadequate to explain why the city council concluded that the applications met the applicable provisions of the 2011 Wheeler Vision Plan (Vision Plan). *Id.* at ___ (slip op at 3-6). We remanded the decisions to the city.

On remand, the city council denied the applications, and petitioner appealed the decisions to LUBA. We remanded the city council's decisions for the city council to consider the applications and make a decision without the participation of two city councilors who were not impartial decision makers.

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[1] "Retail/wholesale fish and shellfish sales" facilities are permitted outright in the WRC zone, while restaurant, hotel, and above-street-level residential uses are conditionally allowed in the zone. Wheeler Zoning Ordinance (WZO) 2.020-2.030.

Botts Marsh, LLC v. City of Wheeler, ___ Or LUBA ___ (LUBA Nos. 2021-072/073, Mar 17, 2022) (*Botts Marsh I*).

The city council then conducted proceedings on remand that complied with our decision in *Botts Marsh I* and, at the conclusion, voted to deny the applications and adopted written findings and conclusions. These appeals followed.

SECOND ASSIGNMENT OF ERROR

As explained above, WZO 15.090(5) requires the applicant to demonstrate that "[t]he use will not create traffic congestion on nearby streets." In 2019, petitioner submitted with its initial application materials a traffic study that was initially completed in 2007 and updated in 2020 (2020 Updated Study). A memorandum from the Oregon Department of Transportation (ODOT Memo) stated that the study satisfied ODOT's methodology, its conclusions were reasonable, and that no further analysis was required. *Botts Marsh I* Record 138.

The 2020 Updated Study concluded that the proposed development of a 30 room hotel and 28 cottages would generate 13 morning peak hour and 21 evening peak hour trips turning left from Highway 101 onto Hemlock Street westbound, and that left-turn lane warrants for the northbound approach to the 101/Hemlock intersection would be met in 2023.[2] *Botts Marsh I* Record 372, 376. However,

[2] The 2020 Updated Study evaluated a different proposal that included both a hotel and cottages. *See Botts Marsh I* Record 142. The application in the current appeal sought only approval of the hotel.

the study did not recommend the installation of a dedicated left-turn lane from Highway 101 into the property. The study reached that conclusion based on (1) the fact that no crashes had been reported at the 101/Hemlock intersection, (2) the 25-miles-per-hour speed limit on northbound Highway 101 at the Hemlock intersection, (3) the low number of trips projected to turn left from Highway 101 onto Hemlock Street during the morning and evening peak hours, and (4) the fact that no other left-turn lanes are installed on Highway 101 in the city. *Botts Marsh I* Record 382-85.

As noted, in 2020 the city council approved petitioner's applications, and concluded that WZO 15.090(5) was satisfied. Those decisions were appealed in *OCA*. In *OCA*, we explained the petitioners' assignment of error:

> "According to petitioners, the 2020 Updated Study may demonstrate that a left-turn lane is not warranted because the intersection will operate relatively safely, but the study is not evidence that the proposed development will not create 'traffic congestion' at the intersection of Highway 101 and Hemlock Street within the meaning of WZO 15.090(5). Rather, petitioners argue, the 2020 Updated Study is evidence that the use will in fact create traffic congestion at that intersection. In addition, petitioners argue, absent a definition of the term 'congestion' or a city interpretation of that term, the city council's findings are inadequate." *OCA*, ___ Or LUBA at ___ (slip op at 18-19).

We held:

> "We agree with petitioners in part. While we disagree with petitioners that the 2020 Updated Study conclusively demonstrates that the use will create traffic congestion on nearby streets, the 2020 Updated Study demonstrates at best that a dedicated left-turn lane is not necessary to ensure that the intersection operates safely. It does

> not demonstrate that the use will not create traffic congestion at the intersection of Highway 101 and Hemlock Street within the meaning of WZO 15.090(5). WZO 15.090(5) requires the city to find that the proposed development will not 'create traffic congestion' at the intersection. The city council's decision does not address that issue." *Id.* at ___ (slip op at 19).

Accordingly, we agreed with the petitioners that the absence of a recommendation for a dedicated left turn lane at the 101/Hemlock intersection was not evidence a reasonable person would rely on to conclude that the proposed use would not create traffic congestion on nearby streets. Our final opinion in *OCA* was not appealed. Thus, our decision, that the 2020 Updated Study does not demonstrate that the proposed uses will not create traffic congestion at the 101/Hemlock intersection, is the law of the case, was not subject to dispute on remand, and is not subject to dispute in this subsequent appeal. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).[3]

The city council held a *de novo* hearing on remand from *Botts Marsh I*. On remand before the city council, petitioner again bore the burden of proving that the approval criteria were met. Petitioner did not submit additional evidence regarding traffic congestion on nearby streets. The city council found that petitioner had not demonstrated that WZO 15.090(5) was met because, as

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[3] On remand, the city readopted the findings from the decision at issue in *Botts Marsh I* regarding the WZO 15.090(5) not being met with respect to traffic congestion at Marine Drive and adopted the dictionary definition of congestion. Record 7, 14-15. Despite quoting the Board's *Botts Marsh I* decision in reference to the 101/Hemlock intersection, the city did not address congestion at that intersection. *Id.*

relevant here, the city council concluded that the 2020 Updated Study did not demonstrate that the proposed conditional uses would not create traffic congestion on nearby Marine Drive.[4] The city council found:

> "First, the City Council notes that 'congestion' is an undefined term. The City Council finds that the plain meaning of the term is the condition of overcrowding or overburdening or an excessive accumulation. Therefore, all conditional use applicants must demonstrate the proposed use will not cause an excessive accumulation of traffic on nearby streets or overburden those streets with traffic. The term 'nearby streets' is also not defined. The City Council interprets it to mean, at a minimum, those streets that would provide access to or from the proposed use.
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> "In a study dated March 4, 2020, the applicant's traffic consultant identified three nearby streets that could provide access to and from the project: US 101, Hemlock Street and Marine Drive. The consultant said that access from Marine Drive would be minimal and that 'nominal' volumes of trips would use Marine Drive access. However, on page 10 of the study the consultant proceeded to 'assume[] that all site trips would generally utilize the Hemlock Street at US 101 intersection to access the site' and proceeded to estimate volumes of traffic solely at the Hemlock and US 101 intersection.
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> "Because Marine Drive was identified as a point of access, the

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[4] The city council's findings also identify additional bases for why the city council concluded that WZO 15.090(5) was not met, including that there was no evidence in the record regarding weekend traffic generation and that the 2020 Updated Study evaluated traffic from a larger development than the applications proposed. *Botts Marsh I* Record 17-18. While we tend to agree with petitioner that those additional bases are not supported by substantial evidence in the whole record, we need not address those challenges because we sustain below one of the city's bases for denying the applications.

> Council finds that it is a 'nearby street' for the purposes of WZO 15.090(5). Because the 2020 study says some traffic will use Marine Drive to access the site, but does not explain why volumes were not estimated for access via Marine Drive, the Council finds that the applicant has not shown that the proposed conditional use will not create traffic congestion on Marine Drive." *Botts Marsh I* Record 17 (emphasis omitted).[5]

Thus, the city council found that Marine Drive is a qualifying "nearby street" that must be evaluated, that the 2020 Updated Study did not study projected traffic impacts on Marine Drive, and accordingly that petitioner had not demonstrated that WZO 15.090(5) was met. Stated differently, the city council concluded that petitioner failed to carry its burden of proof regarding traffic congestion on Marine Drive.

Petitioner's second assignment of error is that the city council's decision that WZO 15.090(5) is not met is not supported by substantial evidence in the record. In order to reverse a denial of an application on evidentiary grounds, we must conclude that "the proponent of change sustained his burden of proof as a matter of law." *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979); *see also Garre v. Clackamas County*, 18 Or LUBA 877, 881, *aff'd*, 102 Or App 123, 792 P2d 117 (1990). "It is not enough for the proponent to introduce evidence supporting affirmative findings of fact and conclusions on all applicable legal criteria. The evidence must be such that a reasonable trier of fact

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[5] In the challenged decisions, the city council incorporated its findings adopted in the decisions challenged in *Botts Marsh I* and also adopted additional findings. Record 7, 14-15.

could only say the [proponent's] evidence should be believed." *Weyerhaeuser v. Lane County*, 7 Or LUBA 42, 46 (1982). In other words, in order for LUBA to sustain petitioner's second assignment of error, petitioner must establish that the evidence in the record demonstrates compliance with WZO 15.090(5) as a matter of law.

Petitioner argues that the 2020 Updated Study together with the ODOT Memo conclusively demonstrate that the proposed uses will not create traffic congestion on Marine Drive. With respect to Marine Drive, the 2020 Updated Study recognized that "[a]lternative access is available at the intersection of Rector Street at US-101 by way of Marine Drive; however minimal usage of this alternative access is expected to occur." *Botts Marsh I* Record 143. The study explained that it assumed "nominal volumes" of traffic would access the uses from Marine Drive because it would provide a slower route of travel and a less direct point of access to the development than 101/Hemlock, and would not be intuitive to non-local traffic compared to the 101/Hemlock intersection. *Botts Marsh I* Record 148. In addition, the 2020 Updated Study concluded that the traffic at the 101/Hemlock intersection is below the city's level of service (LOS) threshold and below the state's volume-to-capacity (v/c) thresholds.[6] *Botts Marsh*

[6] The 2020 Updated Study concluded that before and after the development, the Highway 101/Hemlock Street intersection would function at a level of service B and would have a v/c ratio of .07 and .08, well below the ODOT threshold for Highway 101 intersections of 0.95. *Botts Marsh I* Record 154.

I Record 154. The ODOT Memo confirmed the study's methodology and conclusions. Petitioner argues that, accordingly, the only inference that can be drawn regarding traffic on Marine Drive is that the use will not create congestion on that nearby street since the study's assumption that "nominal" traffic would access the site via Marine Drive from the 101/Rector intersection was reasonable. Petitioner also argues that the ODOT Memo provides additional support for a conclusion that WZO 15.090(5) is met with respect to Marine Drive and the city's findings do not mention it. Finally, petitioner argues that the city council "is not a traffic expert" and there is no additional traffic analysis in the record, thus, we understand petitioner to argue, the city was required to defer to petitioner's expert evidence. Petition for Review 27.

The city responds that the 2020 Updated Study does not include any quantification or estimate of the projected traffic that would use Marine Drive via the 101/Rector intersection, but only describes that traffic as "nominal." *Botts Marsh I* Record 148. The city additionally responds that the city council was not obligated to make any inferences from the study, let alone the inference that petitioner now alleges is the *only* inference that can be drawn from the 2020 Updated Study, at least in the absence of any quantification of projected traffic on nearby Marine Drive. Thus, the city responds, the 2020 Updated Study did not establish that the use would not cause congestion on nearby Marine Drive.

With respect to the 101/Hemlock intersection, the city also responds that merely establishing a LOS that is below the city's LOS standards and below the state's v/c capacity does not automatically establish that congestion will not occur on nearby Marine Drive under the city's interpretation of the term "congestion," quoted above. In addition, as the city explains it, there is no evidence in the record to support petitioner's claim that there will be no increase in LOS or v/c on Marine Drive, because the 2020 Updated Study did not study it.

We conclude that petitioner has not established that no reasonable person would reach the conclusion that the city council reached, where it is undisputed that the 2020 Updated Study did not study Marine Drive or the 101/Rector intersection. Here, the only evidence in the record regarding potential traffic on Marine Drive was based on the traffic expert's assumptions derived from traffic projections for the 101/Hemlock intersection. The city council is not required to draw inferences from the study as establishing alleged facts that are not presented in the record. *See River City Disposal v. City of Portland*, 35 Or LUBA 360, 369 (1998) (the hearings officer was not required to defer to an unopposed affidavit as establishing the alleged facts and adequately explained why they did not find the affidavit persuasive); *Oregon Pipeline Company v. Clatsop County*, 71 Or LUBA 246, 263 (2015) (rejecting the petitioner's challenge to a decision denying a permit where the evidence was somewhat equivocal about whether some uses would be limited and did not address whether other uses would be limited).

The second assignment of error is denied.

FIRST ASSIGNMENTS OF ERROR

The other basis for the city council's denial of the applications was its conclusion that the applications failed to satisfy the Vision Plan.[7] In several subassignments of error, petitioner argues that the city council's interpretation of the Vision Plan improperly construes the Vision Plan; constitutes a zone change and a moratorium under ORS 197.505 to 197.540; that the Vision Plan is "void for vagueness"; and that the findings fail to adequately inform petitioner of what steps are needed to gain approval or that approval is unlikely, under the holding in *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978).

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[7] As we explained in *OCA*:

> "The Vision Plan was adopted by the city in 2012 as a background report to the Wheeler Comprehensive Plan (WCP). The Vision Plan includes a section entitled 'Wheeler's Priorities and Recommendations for Action,' which includes a list of six 'rank ordered' priorities. Those are:
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> "1. Protect the Natural Beauty;
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> "2. Preserve Small Town Atmosphere;
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> "3. Keep Town Safe and Functional;
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> "4. Improve Livability of Wheeler;
>
> "5. Support a Vital Economy; and
>
> "6. Enhance Citizen Enjoyment." *OCA*, ___ Or LUBA at ___ (slip op at 3-4).

The city responds, initially, that petitioner failed to raise the issues that the city's interpretation constitutes a zone change and a moratorium or that the Vision Plan violates the Fourteenth Amendment to the United States Constitution and Article I, Section 20, of the Oregon Constitution because it is "too vague to be understood." Petition for Review 7; *see* Response Brief 7. Accordingly, the city argues, petitioner may not raise those issues for the first time on appeal to LUBA. ORS 197.797(1); ORS 197.835(3). In the reply brief, to demonstrate that the issues raised in the first assignment of error were raised below, petitioner cites statements in the record from petitioner's counsel that the Vision Plan is "very general" and that the city could only apply the Vision Plan as review criteria if it could make its standards more specific. Reply Brief 1.

Where a local government denies a land use application on multiple grounds, LUBA will affirm the decision on appeal if at least one basis for denial survives all challenges. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd*, 195 Or App 762, 100 P3d 218 (2004), *rev den*, 338 Or 17, 100 P3d 218 (2005). In that circumstance, LUBA typically does not address challenges directed at other, alternate bases for denial. Addressing alternate bases for denial once LUBA has affirmed at least one valid basis for denial would result in LUBA rendering what are essentially advisory opinions, which is not consistent with the statutory mandate that LUBA's review be conducted pursuant to sound principles of judicial review. ORS 197.805.

Accordingly, we do not address the first assignment of error.

THIRD ASSIGNMENT OF ERROR

In its third assignment of error, petitioner argues that the city's decision is a taking of its property without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, Section 18, of the Oregon Constitution. Petitioner also repeats its challenges included in the first assignment of error regarding the Vision Plan, challenges that we do not reach there or here.

In this assignment of error, petitioner argues that the city's decision to deny its applications, when considered together with a different city decision to deny a different proposal for the development of a permitted, rather than conditional, use on the property, are evidence of a pattern of decision making that are an unconstitutional taking that leaves petitioner without any economically viable use of its property.[8] Although the argument is not well developed, we understand petitioner to assert that the city's decision amounts to an unconstitutional regulatory taking of its property.

The city responds that petitioner's constitutional challenges to the city's decision denying a conditional use permit are not ripe. The city also responds that petitioner's federal constitutional challenges are meritless because there is no

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[8] We remanded that city council decision to deny petitioner's design review application for a use that is permitted on the property in *Botts Marsh LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA No 2022-002, May 11, 2022). The city's decision to, again, deny petitioner's design review application on remand has been appealed to us in LUBA No. 2022-079, and our review is currently pending.

federally protected property interest in a conditional use permit. *See Oregon Entertainment Corp. v. City of Beaverton*, 233 Fed. Appx. 618 (9th Cir 2007) (the statutes and regulations at issue did not create a federally protected property interest in a conditional use permit because the code provisions stating that conditional uses "may be permitted" provided guidelines and left the ultimate disposition to the discretion of the decisionmaker, and "require[d] the exercise of substantial discretion"). Third, the city responds that the delay associated with regulatory review does not by itself amount to a taking of property.

Here, the city council initially approved petitioner's conditional use applications, and we remanded the city's decision in *OCA* because we agreed with challenges to the evidence that the city relied on to conclude that WZO 15.090(5) was met. By the time the hearing on remand was held, the membership of the city council had changed, and the newly composed city council voted to deny the applications. Petitioner appealed the denial, and we remanded that city council decision in *Botts Marsh I* so that petitioner could receive a decision from an impartial decision maker. We did not reach the merits of any of the bases for the city's decision to deny the applications.

The city council then provided petitioner with a *de novo* evidentiary hearing before an impartial decision maker. Petitioner did not present additional evidence regarding traffic congestion. The city denied the applications based on its conclusion that petitioner had not carried its burden of proof to demonstrate that the proposed uses would not create traffic congestion on nearby streets.

We reject petitioner's takings challenge, where it is based on the single instance of the city's denial, on an evidentiary basis, of petitioner's applications for conditional uses on the property and where there is no evidence in the record to support petitioner's allegation that the city's decision to deny its conditional use applications deprives petitioner of all economically viable use of its property. In *Reeves v. City of Tualatin*, we explained that:

> "[I]n 'regulatory takings' cases, a single denial at the local level cannot determine whether all economically viable use of the property has been 'taken,' because other options could be available which would provide economically viable uses of the property. Until the other options are explored by an applicant, a review would be premature." 31 Or LUBA 11, 16 (1996).

We cited and relied on *Nelson v. City of Lake Oswego*, in which the Court of Appeals explained:

> "The tests for regulatory takings under the state and federal constitutions are whether the owner is deprived of *all* substantial beneficial or economically viable use of property. *See Lardy v. Washington County*, 122 Or App 361, 363, 857 P2d 885, *rev den* 318 Or 246 (1993). The reason why the exhaustion/ripeness analysis makes sense in that context is that, with rare exceptions, no *particular* denial of an application for a use can demonstrate the loss of *all* economic use. That is so for two reasons. First, the fact that one use is impermissible under the regulations does not necessarily mean that other economically productive uses are also precluded; and second, until alternative uses are applied for or alternative means of obtaining permission for the first use are attempted, there can be no conclusive authoritative determination of what is legally permitted by the regulations. Therefore, the courts cannot perform their adjudicative function on a claim predicated on a single denial, because something more must be decided by the local or other regulatory authority before there can be a demonstrable loss of all

use and, therefore, a taking. *See Suess Builders v. City of Beaverton*, 294 Or [254], 261-62, [656 P2d 306 (1982)]." 126 Or App 416, 422, 869 P2d 350 (1994) (emphases in original).

See also Joyce v. Multnomah County, 114 Or App 244, 247, 835 P2d 127 (1992) (holding that federal constitutional takings claims are not ripe where the petitioner "ha[d] pursued no alternative approaches to achieve permission for that or any other use"); *Dority v. Clackamas County*, 115 Or App 449, 452, 838 P2d 1103 (1992), *rev den*, 315 Or 311, 846 P2d 1160 (1993) (holding that state constitutional claims were not ripe where a comprehensive plan amendment and zone change were not pursued).

Finally, petitioner also argues that the city's interpretation of the Vision Plan imposes a view easement on its property without just compensation and the city's decision denying its applications is an unconstitutional temporary taking, rather than a permissible administrative delay. Petitioner's arguments are not developed and they are rejected. *Joyce v. Multnomah County*, 23 Or LUBA 116, 118, *aff'd*, 114 Or App 244, 835 P2d 127 (1992).

The third assignment of error is denied.

The city's decision is affirmed.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2022-063/064 on November 9, 2022, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 9th day of November, 2022.

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