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

BOTTS MARSH LLC,
Petitioner,

vs.

CITY OF WHEELER,
Respondent.

LUBA No. 2022-079

FINAL OPINION
AND ORDER

Appeal from City of Wheeler.

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

Carrie A. Richter filed the response brief and argued on behalf of respondent.

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

RUDD, Board Member, concurring.

REMANDED 01/04/2022

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

Petitioner appeals a city council limited land use decision denying, for the second time, a design review application for a building on property zoned Industrial and Water Related Commercial.

FACTS

This is the second time a city council decision denying petitioner's application for design review has been appealed to us. As we explain in more detail below, we remanded the city council's decision denying the application in *Botts Marsh, LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA No 2022-002, May 11, 2022) (*Botts Marsh I*).[1] We describe in detail petitioner's property and the application, the city's proceedings leading to the first city council decision denying the application, our decision in *Botts Marsh I*, and the city's proceedings and decision on remand.

A. The Application

Petitioners' property is located west of Highway 101 and east of the Nehalem River. Botts Marsh, an intertidal wetland adjacent to Nehalem Bay, is located to the north.[2] To the south is vacant land, and to the north is property

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[1] The record in this appeal includes the record from *Botts Marsh I*. We refer to pages from that record in this opinion as "*Botts Marsh I* Record XXX."

[2] The Botts Marsh intertidal wetland is owned and managed by the Lower Nehalem Community Trust for permanent conservation. *Botts Marsh I* Record 337-38.

located outside of the city limits. The property is comprised of two parcels, with a .45-acre parcel zoned Industrial (I), and a 1.72-acre parcel zoned Water Related Commercial (WRC). Wheeler Zoning Ordinance (WZO) 2.020(7) provides that "retail/wholesale fish and shellfish sales" is a permitted use in the WRC zone, and WZO 3.020(7) provides that "seafood processing" is a permitted use in the I zone. However, WZO 11.050(1) provides that "all commercial and industrial development in any zone * * * is subject to design review by the [p]lanning [c]ommission."

In July 2021, petitioner submitted a design review application for a building for the processing, storage, and retail sales of fish and shellfish. The city's decision that was appealed in *Botts Marsh I* explains:

> "The project is in two distinct parts. An 8,780 square foot fish processing and warehousing facility will be located entirely on [the] 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 1,500 square foot retail market. This part of the structure includes a second floor to be used as an office and for storage.
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> "The Industrial side will feature a gray, vertical metal building along with a metal roof. Two bay doors will be located on the east side of the building (facing the parking lot) to receive/ship the product. The retail portion of the site will feature the same metal structure on the first floor, with a second floor finished in wood siding. This second floor runs perpendicular to the ground floor and includes large windows with views of the Nehalem River. The roof on the commercial side matches the industrial roof." *Botts Marsh I* Record 5 (internal numbering omitted).

B. The City's Initial Proceedings on the Application

On August 27, 2021, the city's planner deemed the application complete. The city manager and city planner prepared a staff report that evaluated the building's compliance with the design review criteria in WZO 11.050, and recommended approval of the application. *Botts Marsh I* Record 101-117.

On September 23, 2021, the planning commission held a hearing on the application, and at the conclusion, continued the hearing to October 7, 2021, and kept the record open for new evidence and rebuttal. Prior to the October 7, 2021 hearing, petitioner submitted additional materials to address comments from the public at the first planning commission hearing. *Botts Marsh I* Record 352-54. At the conclusion of the continued hearing on October 7, 2021, the planning commission voted three in favor and three opposed, with one planning commissioner abstaining after declaring that they had a conflict of interest. The parties agree that a tie vote is the equivalent of denial by the planning commission. The record does not include any planning commission findings in support of its decision. *Botts Marsh I*, ___ Or LUBA at ___ (slip op at 4 n 1).

Petitioner appealed the planning commission's decision to the city council, which held a *de novo* hearing on the application on November 16, 2021. The city planner provided a staff report that recommended approval of the application. Some members of the public testified that they believed the uses proposed for the building should not be allowed because they are not "water-related." WRC 1.070(80); WRC 2.010; *see also Botts Marsh I* Record 156, 161-162. Two

members of the planning commission testified in opposition to the application. One member of the public testified that the design of the parking lot created a safety hazard. During deliberations on the application, two city council members also expressed concern that the proposed use of the building was not "water-related." Video Recording, Wheeler City Council, Nov 16, 2021, at 3:07:23 (comments of City Councilor Glowa); Video Recording, Wheeler City Council Nov 16, 2021, at 3:16:53 (comments of City Councilor Kemp).

At the conclusion of the hearing, the city council voted three to two to deny the application. After the vote, the city's planner advised the city council that the city was required to supply reasons for its denial, and recommended that the city planner draft proposed findings in support of the decision to deny the application based on their review of the meeting recording, for the city council to review at its next meeting.

At its December 15, 2021 meeting, the city council adopted a written decision, including findings that the city planner prepared after the November 16, 2021 hearing. The decision concluded that petitioner's application failed to satisfy five of the design review criteria, at WZO 11.050(4)(a)(6), 11.050(4)(b)(1), (2), (3) and (5).

C. *Botts Marsh I*

Petitioner appealed that decision to LUBA. In *Botts Marsh I*, we first explained that the challenged decision is a "limited land use decision," which ORS 197.015(12)(a)(B) defines in relevant part to mean

> "a final decision or determination made by a local government pertaining to a site within an urban growth boundary that concerns:
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> "* * * * *
>
> "(B) The approval or denial of an application based on discretionary standards designed to regulate the physical characteristics *of a use permitted outright*, including but not limited to site review and design review." (Emphasis added); *see Botts Marsh I*, ___ Or LUBA at ___ (slip op at 11).

In *Botts Marsh I*, we explained that the principles articulated by the court in *Commonwealth Properties v. Washington County*, 35 Or App 387, 400, 582 P2d 1384 (1978) – that findings must be sufficient to inform the applicant either what steps are necessary to obtain approval or that approval is unlikely – apply to limited land use decisions under ORS 197.195(4). *Botts Marsh I*, ___ Or LUBA at ___ (slip op at 11-12) (citing *Montgomery v. City of Dunes City*, 60 Or LUBA 274, 282-83, *rev'd and rem'd on other grounds*, 236 Or App 194, 236 P3d 750 (2010))). We discuss *Commonwealth Properties* and other relevant case law in detail in our discussion of the second assignment of error.

Petitioner's assignments of error in *Botts Marsh I* argued that the city council's decision included erroneous or missing interpretations of the applicable design review criteria, and that the city council's findings were inadequate. We agreed with petitioner and sustained petitioner's assignments of error, and remanded the decision to the city. We instructed the city to adopt findings "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." *Botts Marsh I*, ___ Or LUBA at ___ (slip op at 39). We also noted that "[w]e also assume, as the court assumed in *Commonwealth*, that 'in many instances planning authorities will communicate, at least preliminarily, much of this information to [applicants] on an informal basis *prior to the hearing*[.]' 35 Or App at 400." *Botts Marsh I*, ___ Or LUBA at ___ n 8 (emphasis added) (slip op at 30 n 8). We recognize, now, that our assumption was faulty.[3]

D. The City's Proceedings on Remand

In May 2022, petitioner requested that the city initiate proceedings on remand. At that time, petitioner also requested "a meeting with the City Planner and/or other City personnel for a detailed discussion about how the applicant can expect to meet the design review criteria in Wheeler Zoning Ordinance Section 11.050." Record 91. The city did not respond to that request.

In a special meeting on June 28, 2022, the city council discussed the option of reopening the record to allow petitioner to submit a revised application that better addressed the applicable provisions. Video Recording, Wheeler City

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[3] We recognize that the final decision maker was the city council, and that, as a public body, the city council will not provide an applicant with informal comments outside of the public process. However, we had assumed that the city council, planning staff, and petitioner would work together to clarify the city council's concerns in a manner enabling petitioner to address those concerns during the remand proceeding.

Council, June 28, 2022, at 30:00 (comments of the city's counsel and city councilors); Record 88. The city council voted at that meeting not to reopen the record to allow submittal of new evidence potentially making the application compliant.

In early July, petitioner again requested a meeting with the city. The city's attorney responded to petitioner that the city council did not intend to reopen the record. In a meeting on July 19, 2022, the city council reviewed and discussed draft findings in support of a decision to deny the application for a second time. On August 4, 2022, petitioner attempted to submit supplemental application materials, and asked the city to reopen the record and consider the materials. Record 56; Video Recording, Wheeler City Council, Aug 16, 2022, at 29:00 (comments by the city's counsel); *see also* Petition for Review 3. At its meeting on August 16, 2022, the city council voted to adopt written findings denying the application for a second time. This appeal followed.

SECOND ASSIGNMENT OF ERROR

In the second assignment of error, petitioner alleges several errors.

A. Constitutional Vagueness

Petitioner argues that the city's decision violates the Fourteenth Amendment to the United States Constitution and Article I, section 20 of the Oregon Constitution, which, generally summarized, prohibit the city from depriving petitioner of property without due process of law. According to petitioner, the WZO standards that the city applied to deny the application are

"unconstitutionally vague standards that facilitate *ad hoc* decision making and [the city] has reserved for itself unfettered discretion to apply those vague standards." Petition for Review 16; ORS 197.828(2)(c)(B) (LUBA will reverse a local government limited land use decision if "[t]he decision is * * * [u]nconstitutional.").

The city responds, initially, that petitioner is precluded from raising the issue under the law of the case doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (a party at LUBA fails to preserve an issue for review if, in a prior stage of a single proceeding, that issue is decided adversely to the party or that issue could have been raised and was not raised). The city argues that petitioner could have but failed to raise the issue during the proceedings that led to our decision in *Botts Marsh I*.

We agree. The WZO standards that the city applied to deny the application in *Botts Marsh I* are the same standards the city applied to deny the application on remand. If the standards are unconstitutionally vague, they were so at the beginning of petitioner's dealings with the city. Petitioner did not challenge the standards for unconstitutional vagueness during the proceedings that led to our decision in *Botts Marsh I*, and may not do so for the first time now.

B. Failure to Allow Petitioner to Attempt to Meet the Newly Developed Standards

As noted, on remand, the city council rejected petitioner's two requests to consult with and apprise petitioner on how it could satisfy the WZO standards

that the city council's first decision concluded petitioner's design had not satisfied. Record 56, 91. Petitioner also maintains, and the city does not dispute, that the city also rejected petitioner's attempt to submit revised materials into the record. After rejecting petitioner's requests for consultation and guidance, the city council adopted a decision that includes interpretations made for the first time of the five WZO provisions that the city determined in its first decision that petitioner's design failed to meet.

Also in the second assignment of error, we understand petitioner to allege that the city committed a procedural error that prejudiced petitioner's substantial right to a full and fair hearing when the city refused to accept any supplemental materials from petitioner that could demonstrate compliance with the applicable criteria. Petition for Review 15 (citing ORS 197.835(9)(a)(B)); Petition for Review 16 (citing *Commonwealth Properties*, 35 Or App at 397, and alleging the city's actions have "made compliance [with the WZO standards] impossible.").[4] Relatedly, petitioner cites *Commonwealth Properties* and argues that the city's findings continue to fail to satisfy the requirements articulated by the court in

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[4] LUBA will reverse or remand a limited land use decision if "[t]he local government committed a procedural error which prejudiced the substantial rights of the petitioner." ORS 197.828(2)(d). The substantial rights referred to in ORS 197.828(2)(d) are the same as those referred to in ORS 197.835(9)(a)(B). *Warren v. City of Aurora*, 25 Or LUBA 11, 16 (1993). Those rights are the right to an adequate opportunity to prepare and submit one's case and to a full and fair hearing. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988).

Commonwealth Properties and in ORS 197.195(4). For the reasons we explain below, we agree with petitioner that the city has failed to satisfy *Commonwealth Properties* in failing to provide petitioner with the opportunity to address and satisfy the standards before the final decision, and in so doing, the city committed a procedural error that prejudiced petitioner's substantial right to a full and fair hearing.

We discussed *Commonwealth Properties* in detail in *Botts Marsh I* and we expand on that discussion here. In *Commonwealth Properties*, the Court of Appeals reviewed a county board of commissioners' decision that denied an application for a tentative subdivision plat. The county's decision was based in part on a conclusion that the proposed subdivision design did not comply with broadly worded, subjective comprehensive plan policies that, in part, required "the distinctive natural features (of a site) will be retained and incorporated into all developments." *Commonwealth Properties*, 35 Or App at 397-98 (quoting policy statement No. 30 of the Washington County Comprehensive Framework Plan). The applicant challenged the county's decision, arguing that the decision did not satisfy the requirement for findings under *former* ORS 215.416(6) (1987), *renumbered as* ORS 215.416(9) (1991).

The court agreed with the applicant that the county's decision did not adequately explain why the applicant failed to meet relevant approval criteria, because the county did not indicate why it chose the measurements for achieving

compliance with the subjective approval criteria that it chose, or what figures would be acceptable to the county. The court explained:

> "The two-step procedure required for final approval of proposed subdivision plats provides a mechanism for the application of these principles [articulated by the courts in *Sun Ray Dairy v. OLCC*, 16 Or App 63, 71, 517 P2d 289 (1973), *McCann v. OLCC*, 27 Or App 487, 493-94, 556 P2d 973 (1976), and *Marbet v. Portland Gen. Elect.*, 277 Or 447, 460, 561 P2d 154 (1977)]. Because the considerations involved in the approval of a proposed subdivision plat are complex and are inextricably intertwined with the broadly worded policies enunciated in the county comprehensive plan, *it is necessary for the county, at some time*, to announce to a subdivider both which plan policies will govern the granting of such approval *and specifically how those policies will be applicable to the project in question. We assume that in many instances planning authorities will communicate, at least preliminarily, much of this information to subdividers on an informal basis prior to the hearing on tentative approval. In any event, such information must be provided to a subdivider at the time at which the county acts on the request for tentative approval of the proposed plat.* The grounds for the decision at that time will serve as the standards by which the planning authority later acts to grant or to deny final approval of a proposed subdivision. In the case of a denial of tentative [subdivision] approval, [the] grounds [for denial] must be articulated in a manner sufficiently detailed to give a subdivider reasonably definite guides as to what it must do to obtain final plat approval, or inform the subdivider that it is unlikely that a subdivision will be approved." *Commonwealth Properties*, 35 Or App at 400 (emphases added).

The court explained, "[a]n applicant, be he seeking a liquor license or a subdivision, should not be put in a position of having his success or failure determined by guessing under which shell lies the pea."[5] *Id.* at 399.

Citing and relying on the Supreme Court's decision in *Marbet v. Portland Gen. Elect.*, 277 Or 447, 561 P2d 154 (1977), the court also explained that "it is not necessary that every standard used by an agency [be] specifically articulated prior to the initiation of an administrative proceeding '* * * as long as it is in fact adopted as a standard * * * *sufficiently in advance of the final decision so that the applicant * * * can address the import of the standard for a particular project* * * *.'" *Id.* at 400 (quoting *Marbet*, 277 Or at 463). *Sun Ray Dairy v. OLCC*, 16 Or App 63, 71, 517 P2d 289 (1973) and *McCann v. OLCC*, 27 Or App 487, 493-94, 556 P2d 973 (1976), to which the court also referred, stand for the proposition that, in the context of an application for a liquor license, "[a]n applicant * * * should be able to know the standards by which his application will be judged before going to the expense in time, investment and legal fees necessary to make application * * *." *Commonwealth Properties*, 35 Or App at 399 (quoting *Sun Ray Dairy*, 16 Or App at 71).

In *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), the court rejected an argument from the petitioners that the county erred in failing to reopen

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[5] To the court's list of applications that should not be subjected to a shell game, we add design review for a permitted use.

the record on remand to allow them to present alternative interpretations of applicable comprehensive plan provisions. In rejecting the argument, the court emphasized that its decision was not establishing an "across the board test of the kind developed by LUBA in *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993)." 155 Or App at 374 n 2. However, the court acknowledged, in dicta, that

> "in certain limited situations, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. *See Martini v. OLCC*, 110 Or App 508, 823 P2d 1015 (1992)." *Gutoski*, 155 Or App at 373.[6]

In *Dobaj v. Beaverton*, 1 Or LUBA 237, 244 (1980), we sustained the petitioner's challenge to the city council's denial of its application for a comprehensive plan map amendment based on the lack of "buffers" of medium or high-density residential developments between the petitioner's property and the surrounding property, where a requirement for buffers was not evident from the text of the comprehensive plan:

> "We agree with petitioner that one should not have to go on a fishing

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[6] *Martini v. OLCC* holds that under O.R.S. ch 183, when a state agency changes an established interpretation of an administrative rule to a significant degree during the course of a contested case proceeding, the parties must be given an opportunity to present evidence (and argument) responsive to the new standard. *Id.* at 514.

expedition through the plan map to discern policies not expressed or implied in the plan text itself.

> "In order for the city to have properly relied upon a requirement that there be buffering of multi-family residential between commercial and single family residential areas, *at a minimum it had to announce its intent to rely upon such a requirement sufficiently in advance of its final decision so as to grant the applicant a meaningful opportunity to address the standard. See Marbet[] v. Portland Gen[.] Elect[.]*, 277 Or 447, 463, 561 P2d 154, (1977), *Commonwealth Properties, Inc. v. Washington County*, 35 Or App 387, 382 P2d 387 (1978). In the present case it appears the applicant first became aware that the city would require a buffer of multi-family housing when he read the city's draft findings prepared after the close of the public hearing before the city council. However, no opportunity appears to have been afforded petitioner to address the buffering requirement between the time the city council first considered the draft findings on December 3, 1979, and the time of their adoption on December 10, 1979. At the December 10, 1979 meeting, petitioner did submit a request for reconsideration based in part upon the city's error in relying upon the previously unannounced buffer standard. In our view, however, a motion for reconsideration does not give an applicant sufficient opportunity to address the question of whether it can or whether it should even have to meet a standard not known or reasonably susceptible of being known to the applicant at the time of the public hearing. Under the circumstances presented here, the city erred in basing its denial in part upon its finding that a requirement that multi-family housing separate the applicant's property from adjacent single family residential areas had not been met." (Emphasis added.)

In *Dobaj*, we remanded the decision to the city "for further proceedings consistent with" our opinion. 1 Or LUBA at 245.

Taken together, *Commonwealth Properties*, *Marbet*, *Gutoski* and *Dobaj* stand for the proposition that (1) the city may articulate during a quasi-judicial proceeding on an application for design review specifically *how* vague and/or

subjective standards will apply to a design review application, and (2) the city is required to do so "sufficiently in advance of its final decision so as to grant the applicant a meaningful opportunity to address the standard." *Dobaj*, 1 Or LUBA at 244. Here, the city failed to specifically articulate how its vague and subjective design review standards would apply to petitioner's development sufficiently in advance of its final decision, but instead articulated the "how" in the final decision itself, and accordingly failed to grant petitioner a meaningful opportunity to address the standards before the final decision. That was error.

The second assignment of error is sustained, in part.

C. Conclusion

Our resolution of the second assignment of error requires remand to the city to provide petitioner with an opportunity to satisfy the applicable standards by providing new evidence to demonstrate satisfaction of those standards and to provide the public with the opportunity to comment on the new submissions. Because it will assist the parties on remand and bring closure to the matter, we also resolve petitioner's challenges to the city's interpretations of the applicable WZO standards set out in the first assignment of error, as well as the remaining assignments of error.

FIRST ASSIGNMENT OF ERROR

In the challenged decision, the city council adopted, for the first time, interpretations of the five WZO design review criteria that it previously found were not met in the decision challenged in *Botts Marsh I*. In the first assignment

of error, petitioner alleges that the city council's interpretations of the WZO provisions improperly construe those provisions, which we understand to mean that the limited land use decision does not comply with applicable provisions of the land use regulations. ORS 197.828(2)(b) (LUBA shall reverse or remand a limited land use decision if it "does not comply with applicable provisions of the land use regulations"). We set out each of those criteria, the city's interpretations of them, and petitioner's challenges to them.

LUBA must affirm a governing body's interpretation of its own land use regulation if the interpretation is not inconsistent with the regulation's express language, purpose, or policy. ORS 197.829(1).[7] The test under ORS 197.829(1) is not whether the interpretation is correct, or the best or superior interpretation,

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[7] ORS 197.829(1) provides:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
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> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

but whether the governing body's interpretation is "plausible," given its text and context. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).

A. WZO 11.050(4)(a)(6)

WZO 11.050(4)(a)(6) is a "site design" standard and requires:

> "Primary building entrances shall open directly to the outside and shall have walkways connecting them to the street sidewalk. Create storefronts and entries that are visible and easily accessible from the street. Either orient the primary entrance to the building along a street facing property line or create an ADA accessible courtyard/plaza incorporating pedestrian amenities including street trees, outdoor seating and decorative pavers. Ensure a direct pedestrian connection between the street and buildings on the site, and between buildings and other activities within the site. In addition, provide for connections between adjacent sites, where feasible."

1. Primary Entrance

The property is not located adjacent to a public street. The site plan and other materials submitted by petitioner show what petitioner identifies as the primary entrance to the building facing south, with a covered area that has open sides. *Botts Marsh I* Record 94, 97. The application identifies that area as a "courtyard/plaza." *Botts Marsh I* Record 68. Because the primary entrance is not oriented along a street facing property line, the design must "create an ADA accessible courtyard/plaza incorporating pedestrian amenities including street trees, outdoor seating and decorative pavers." WZO 11.050(4)(a)(6). We refer to this as the Primary Entrance Standard.

In its initial decision, the city found that the application failed to "create an ADA accessible courtyard/plaza incorporating pedestrian amenities including street trees, outdoor seating and decorative pavers." *Id.*; Record 2. In *Botts Marsh I*, we agreed with petitioner that the city's findings were 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. ___ Or LUBA at ___ (slip op at 18-19).

In its decision on remand, the city adopted interpretations of WZO 11.050(4)(a)(6). Record 3-4. To summarize, the city council concluded that the Primary Entrance Standard serves a "wayfinding purpose" and requires that a courtyard must be "visible from the street;" the pedestrian amenities are required features that are "visual cues denoting the existence of a plaza or courtyard;" and the courtyard "must include some open area to allow for tree growth." Record 4.

Petitioner first argues that the city council's interpretation of the primary entrance section of WZO 11.050(4)(a)(6) to include a requirement that a courtyard/plaza be "visible from the street;" include the listed pedestrian amenities; and "include some open area to allow for tree growth" converts the provision into a mandatory approval criterion. We reject that argument. Although WZO 11.050(4) refers to the provisions that follow it as "guidelines," WZO 11.050(4)(a)(6) includes mandatory language that makes it clear that it is a standard that must be met in order to gain approval of the application.

We also understand petitioner to argue that the city council's interpretation is inconsistent with the express language of the standard. The city responds, and we agree, with one exception, that the city council's interpretation of WZO 11.050(4)(a)(6) to require the courtyard/plaza to be visible from the street and to require the listed amenities is not inconsistent with the express language of the provision. The city points out that the standard itself references locating "entries that are visible * * * from the street." WZO 11.050(4)(a)(6). The city also points to the express language of the standard as mandating "street trees, outdoor seating and decorative pavers." *Id.* The exception is that we agree with petitioner that the standard does not require "some open area to allow for tree growth." Record 4. The city's interpretation of the standard to include such a requirement is inconsistent with and not supported by anything in the express language of the standard.

The city's interpretation of the Primary Entrance Standard is consistent with the express language of the standard, except that it is inconsistent with the express language of the standard where it requires open area for tree growth, for which there is no support in the express language of the standard.

2. Direct Pedestrian Connection

We quote the pertinent language from WZO 11.050(4)(a)(6) again:

> "Ensure a direct pedestrian connection between the street and buildings on the site, and between buildings and other activities within the site."

We refer to the standard as the Direct Pedestrian Connection Standard. The site plans showed a parking lot on the east side of the building and a loading dock in approximately the middle of the east side of the building. Sidewalks are shown along portions of the north and east and along the south perimeters of the subject property, with breaks where the driveway entrance from Marine Drive is located. *Botts Marsh I* Record 85, 87, 94.

In the decision challenged in *Botts Marsh I*, the city found that the site's design failed to "[e]nsure a direct pedestrian connection between the street and buildings on the site, and between buildings and other activities within the site." WZO 11.050(4)(a)(6). We agreed with petitioner that the city's findings were inadequate because they did not explain why the sidewalks provided were insufficient to provide a direct pedestrian connection to the building. We explained that:

> "[t]he 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." *Botts Marsh I*, ___ Or LUBA at ___ (slip op at 21).

We remanded the decision to the city to adopt more adequate findings and any necessary interpretations of WZO 11.050(4)(a)(6).

On remand, the city interpreted the requirement to "ensure a direct connection * * * between buildings and other activities within the site" to require a direct connection to parking spaces used by retail customers that is not "intercepted by other activities, particularly those that might compromise safe pedestrian access." Record 6-7.

Petitioner's challenges to the city council's interpretation of the Direct Pedestrian Connection Standard are not well developed. We understand petitioner to argue that the city council's interpretation speculates about the use, which is permitted outright in the zone. However, absent any developed challenge to the interpretation, we agree with the city that the interpretation is not inconsistent with the express language of the WZO, and it is affirmed.

The city council's interpretation of the Direct Pedestrian Connection Standard is not inconsistent with the express language of the standard.

B. WZO 11.050(4)(b)(1) and (2)

WZO 11.050(4)(b)(1) and (2) provide:

> "(1) 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."

> "(2) 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."

The city's initial decision concluded that the application failed to satisfy WZO 11.050(4)(b)(1) and (2) because petitioner did not submit sufficient evidence and argument to demonstrate that they were satisfied.[8] In *Botts Marsh I*, petitioner cited WZO 1.070(1), which provides that "[t]he word shall is mandatory and the words should or may are permissive," and argued that the provisions are not mandatory approval criteria that can be a basis to deny the application.

We explained that while we tended to agree with petitioner that WZO 1.070(1) means that the provisions are non-mandatory provisions, the city on remand could adopt reviewable interpretations of WZO 1.070(1) and WZO 11.050(4)(b)(1) and (2) in the first instance. We cautioned that if the city determines that WZO 11.050(4)(b)(1) and (2) are mandatory criteria, the city should resolve any conflict between those provisions and WZO 1.070(1). *Botts Marsh I*, ___ Or LUBA at ___ (slip op at 24).

On remand, the city relied on the introductory provision to the more specific standards found in WZO 11.050(4), which provides that "[t]he following guidelines *shall be used* by the Planning Commission in the evaluation of proposals[,]" to interpret WZO 11.050(4)(b)(1) and (2) as mandatory

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[8] In particular, regarding WZO 11.050(4)(b)(2), the city noted that there were not historical pictures submitted into the record. *Botts Marsh I* Record 10-11.

requirements that an applicant must show, or, in the city council's words, that "they cannot simply be ignored." Record 8-9 (emphasis added). Stated differently, while the city council acknowledged that WZO 1.070(1) supports an interpretation that the obligations in the two standards are "permissive," nevertheless the city council concluded that an applicant is required to design a building that is compatible with the site and surrounding structures, and to use materials that are "compatible with the natural elements." WZO 11.050(4)(b)(1).

Petitioner argues that the city's interpretation of WZO 11.050(4)(b)(1) and (2) as imposing mandatory requirements that petitioner must satisfy in order to gain approval is inconsistent with the express language of the provisions and with WZO 1.070(1). Petitioner argues that the use of the word "shall" in the introductory provision of WZO 11.050(4) cannot convert permissive language into mandatory language.

We largely agree with petitioner, with one exception that we discuss below. First, the city has adopted a specific provision in WZO 1.070(1) that defines the word "should" as "permissive." "Permissive" means "allowing discretion: OPTIONAL[.]" *Webster's Third Int'l Dictionary* 1683 (unabridged ed 2002). As a general rule of construction, a more specific provision controls over a more general provision. ORS 174.020(2). The more specific provisions in WZO 11.050(4)(b)(1) and (2) use the word "should" and, except as we discuss below, are otherwise phrased in non-mandatory language, while the more general provision in the introductory paragraph in WZO 11.050(4) uses the word "shall."

In that circumstance, we conclude that the city council's interpretation of WZO 11.050(4)(b)(1) and (2), which use the permissive "should" and other non-mandatory language, is inconsistent with the express language of the provisions and that WZO 11.050(4)'s use of the word "shall" does not support the city council's interpretation of those provisions as mandatory.

The exception is in the last sentence of WZO 11.050(4)(b)(1), which provides that "[t]he materials *shall* be chosen and constructed to be compatible with the natural elements and applicable city ordinances." (Emphasis added.) That sentence is mandatory and requires petitioner to demonstrate on remand by submission of additional or new evidence, that the materials are compatible with the natural elements that the city has identified in the challenged decision.[9]

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[9] Those are described as follows:

> "With respect to the term 'natural elements,' the Council finds that compatibility obligation extends to considering those elements that exist in their natural and unaltered state that are visible in and around the site. The site photo in the LUBA No. 2022-002 Rec at p 96 suggests that the site is largely rural, pastoral, and undeveloped; it does not depict anything that is black, dark gray or made of metal.
>
> "Rather, the most striking natural elements appear to be the Nehalem River, a wide expanse of untouched grassy marsh area, as well as the tree-covered hills to the east. Because this area is generally pristine in its natural condition, the Council finds that a greater attention to and degree of material compatibility is required than would be required, for example, in the downtown area. For example, the east elevation – the primary elevation visible from S. Marine Drive and Highway 101, clad primarily in black or dark gray

The city may not apply the permissive elements of WZO 11.050(4)(b)(1) or (2) to deny petitioner's application. On remand the city may, pursuant to the last sentence in WZO 11.050(4)(b)(1), require petitioner to demonstrate that the

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> metal wall siding and roof panels at this scale will be highly visible when surrounded by nothing but a vast expanse of blue river, wetlands and green marsh scrub. Similarly, the west elevation, viewable from the bay itself and across the bay, would be highly visible against the marshland and green forested hills. Given the Council's finding of largely undeveloped natural surroundings, a wood sided structure may be more appropriate, or that colors more complementary of the natural setting would also be appropriate. Further, calling for the use 'dark gray metal' walls alone does not provide adequate evidence of finish to determine compatibility. For example, a smooth, flat finished metal can sometime read like wood but, depending on the color and finish, can also be highly reflective. Material samples would be helpful in addressing this concern.
>
> "Presenting 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 will be viewed within its surrounding context. Once this information is available, the Council can decide the degree to which nearby buildings or natural resources might dictate the use of different materials, 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, which is critical to determining whether existing landscaping will provide any visual screening, whether highly reflective surfaces like water bodies might dictate the use of different materials, finishes or colors. The Council finds that, given the evidence in the record, the applicant has not demonstrated that WZO 11.050(4)(b)(l) is satisfied." Record 9-10.

materials are compatible with the natural elements that the city has identified in the challenged decision. *See* n 9.

C. WZO 11.050(4)(b)(3)

WZO 11.050(4)(b)(3) provides:

> "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." (Emphasis added.)

We refer to this standard as the Avoid Monotony Standard.

The evidence submitted by petitioner showed three contrasting roof lines, a second-floor overhang for the south primary entrance, a canopy over the entrance on the north side of the building, black windows, contrasting exterior finishes on the first and second floors, contrasting wood finish around the loading doors, the building's irregular shape, and a footprint that follows the contours of the water. The city council concluded that the design failed to satisfy WZO 11.050(4)(b)(3). In *Botts Marsh I*, we agreed with petitioner that the city's findings were inadequate:

> "We agree * * * 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*, 'specifically how those policies will be applicable to the project in question.' 35 Or App at 400. *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.' [Botts Marsh I] 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.'"* *Botts Marsh I*, ___ Or LUBA at ___ (slip op at 29-30) (emphasis added, internal footnote omitted).

We emphasized that we assumed that the city's planning staff would communicate this information to petitioner on an informal basis prior to the hearing. *Id.* As explained in detail above in our resolution of the second assignment of error, petitioner's multiple attempts at communication with the city regarding how to satisfy the standards prior to the hearing on remand were rejected.

On remand, the city interpreted the Avoid Monotony Standard to require petitioner to demonstrate the avoidance of monotony on each elevation because "there is no elevation that will be shielded from public view." Record 13. Petitioner does not challenge that interpretation.

The city council found

> "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 relies on a 25% replication reference and concludes that a change in roof line, wall recess, materials, window size and placement for every quarter of linear length of an elevation *could* satisfy WZO 11.050(4)(b)(3)." Record 13-14 (emphasis added).

Petitioner argues that the city council's interpretation of the standard to require a change in roof line, wall recess, materials and window size, and placement for every quarter of linear length is not supported by anything in the express language of the standard, and inserts words into the standard that are missing, in contravention of ORS 174.010.[10] Petitioner argues that the city council's interpretation is inconsistent with the express language of the standard, which applies the 25% requirement only to (1) entire buildings (2) in a planned development. WZO 11.050(4)(b)(3).

Although the response brief does not address it, in a footnote, the city council acknowledged that the 25% requirement is not "directly required" by the provision, and that other alternative approaches could satisfy the criterion. Record 14 n 3. We understand that finding to recognize that the city's extension of the 25% requirement that applies by its express terms only to buildings in a

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[10] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

planned development to apply to elevations for a single building is not supported by anything in the express language of the standard. Given that, we agree with petitioner that the city's interpretation of the standard to require "a change in roof line, wall recess, materials, window size and placement for every quarter of linear length of an elevation" is inconsistent with the express language of the standard, which expressly applies only to entire buildings in a planned unit development. Record 13-14.

As we noted in *Botts Marsh I*, the Avoid Monotony Standard 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." ___ Or LUBA at ___ (slip op at 29-30). We also noted that the city's first decision adopted findings that concluded 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.'" *Id.* at ___ (slip op at 30) (citing *Botts Marsh I* Record 16-17). Those findings appeared to support a conclusion that the Avoid Monotony Standard was met as to the south and east elevations, and the city's first decision did not explain why it was not met.[11] In the challenged decision, the city addressed the south

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[11] The city's findings at *Botts Marsh I* Record 15 found that "the north and west elevations are particularly monotonous and lack detail." However, the findings concluded that WZO 11.050(4)(b)(10) was met. WZO 11.050(4)(b)(10) provides:

elevation and concluded that the south elevation satisfies the Avoid Monotony Standard. Record 13.

In the absence of any clear direction in the language of the exceedingly vague Avoid Monotony Standard, the city's discretion to require changes to petitioner's design on remand is extremely narrow. On remand, for the east, north, and west elevations, the city may require petitioner to submit a revised design that includes similar features that the city has already concluded would satisfy the Avoid Monotony Standard on the south elevation.

> "Provide recessed shielded lighting on street-facing elevations. Provide articulated facades for every 40 feet of building length. Articulated facades shall contain at least one of the following features: building offsets, projections, changes in elevation or horizontal direction, or a distinct pattern of divisions in surface materials. Large expanses of blank walls shall only be located in areas that are not visible to the public."

In its first decision, the city found that standard was met:

> "The north and west sides of the structure contain blank walls but are not visible from the street. The east of the structure shows two separate roof elevations, with a mix of windows and vehicle entrance doors. While these facade improvements are likely intended for commercial uses, the improvements on the industrial portion of the site effectively break up the monotony of a blank wall." *Botts Marsh I* Record 17.

D. WZO 11.050(4)(b)(5)

WZO 11.050(4)(b)(5) provides that "[t]he impact that structures will have on views from adjacent or other areas will be taken into account." We refer to this provision as the View Impact Standard.

In its first decision, the city concluded that the criterion was not met:

> "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 [H]ighway 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 maximum 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.

In *Botts Marsh I*, we agreed with petitioner that the city's findings were inadequate to address the evidence in the record that the building satisfies the maximum allowed height for the zone, and that 90% of the site is preserved as open space. We also explained:

> "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 [of] 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." *Botts Marsh I*, ___ Or LUBA at ___ (slip op at 32).

On remand, the city adopted the following findings:

"Designing a building that is responsive to WZO 11.050(4)(b)(5) requires some analysis of the degree to which the proposal affects views and whether there are any 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 [foot] tall building. If so, it may be that the building['s] 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. The applications included no drawings or renderings that would allow the Council to consider the impacts of this development on the views from any location. However, the Council notes that the subject property is located at the north end of the City limits and along the river and that development here ha[s] the potential to block the views from the town up the river. [*Botts Marsh I*] Rec p 96. In addition, the property is located at the north end of town and is placed in such a way that it would be the primary 'gateway' to the City and has the potential to entirely prevent views to the bay and marshlands that are the predominant feature in this area of town. Finally, from the bay, the proposed development is isolated from the rest of the urban downtown area and, therefore, will be more apparent than if it were in a different location.

> "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. Moreover, the appropriate consideration of the compatibility in WZO 11.050(4)(b)(l) and architectural style in WZO 11.050(4)(b)(2) may well address most of the concerns regarding views. But again, without any renderings showing how this building will look in context from town, Highway 101, the bay, or anywhere else, and without some analysis of the identified issues, it is not possible 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 Council cannot conduct the necessary review. For this reason, the Council finds that the applicant has not demonstrated that WZO 11.050(4)(b)(5) is satisfied." Record 16-17.

In sum, it appears that the city continues to want a lower building height, although it is unclear how much lower, and to perhaps want a building with a different roof.

Petitioner argues that the city council's interpretation of the standard to require petitioner to supply an analysis of "whether any design changes * * * could provide greater view protections," which the city suggests could include reducing the building's height or "greater sculpting in the roof form," is not supported by anything in the express language of the standard. Record 16. Relatedly, petitioner argues that WZO 2.040(1) and WZO 3.040(1) establish a maximum building height of 24 feet in the relevant zones, and the city's interpretation of WZO 11.050(4)(b)(5) impermissibly imposes a need-based requirement for developing a building that is allowed under those provisions.

Petitioner argues that interpretation is inconsistent with the express language of WZO 11.050(4)(b)(5), WZO 2.040(1), and WZO 3.040(1).

First, we agree with petitioner that the city's interpretation of WZO 11.050(4)(b)(5) impermissibly imposes a need-based requirement for developing a building that is allowed under WZO 2.040(1) and 3.040(1), and is inconsistent with the express language of WZO 2.040(1) and 3.040(1) and WZO 11.050(4)(b)(5). Second, the city's findings do not give petitioner *assurance* regarding what would be required to satisfy the View Impact Standard, except to suggest that "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." Record 16-17 (emphasis added).

The city's findings also continue to complain that petitioner did not supply enough evidence to satisfy the standard, while having rejected petitioner's attempts to submit additional evidence during the proceedings on remand. Finally, in spite of our direction to the city in *Botts Marsh I*, the city has not addressed the evidence in the record that 90 percent of the subject property will remain as open space. Accordingly, we agree with petitioner that the findings continue to be inadequate to inform petitioner how to satisfy the View Impact Standard.

The extent of discretion the city has to require changes to the design is a matter of first impression, and we are aware of no LUBA or Court of Appeals cases addressing the issue. However, we addressed an analogous issue in *GPA 1,*

LLC v. City of Corvallis, 73 Or LUBA 339 (2016) (*First Decision*) and *GPA 1, LLC v. City of Corvallis*, 74 Or LUBA 527 (2016) (*Second Decision*), and those cases provide important guidance for our decision in this appeal.

In *First Decision*, the city council denied an application for detailed development plan approval to construct a road through the petitioner's property that was included and shown on the city's transportation system plan (TSP) as an arterial road. The city council denied the application because it concluded that developing the road in the location generally shown in the city's TSP and specifically shown in a previously approved conceptual development plan, in the location of a previously dedicated right of way, would encroach too much into protected natural features. We remanded the decision because we concluded that the city's findings were inadequate to inform petitioner what was required to obtain approval of the road that was already included in the city's TSP and that the city had previously approved in a conceptual development plan. *First Decision*, 73 Or LUBA at 353-54. Essentially, we concluded that the road was a permitted use and that the city had to inform the petitioner what steps were needed to gain approval.

In *Second Decision*, on remand, without reopening the record, the city again denied the petitioner's application. The city, in *Second Decision*, required the petitioner to submit additional natural features assessments and submit a preliminary design showing how a future subdivision on its property might be developed. Unsurprisingly, the petitioner appealed that decision to us.

We concluded that the city's findings were again insufficient to inform the petitioner how to gain approval. *Second Decision*, 74 Or LUBA at 536. However, rather than reverse under ORS 197.835(10)(a)(A) as the petitioner requested, we remanded the city's decision again because we recognized that "the city retain[ed] an interest in deciding which of the natural features on the property should be impacted and the extent of those impacts, in approving the exact location and construction details of the road. That interest is heightened by the fact that the city will eventually own, operate and maintain the road."[12] *Second Decision*, 74 Or LUBA at 538. We explained, however, that the city's discretion on remand was "very narrow" because the proposed road was already authorized by the city's TSP and several prior land use decisions, and that the proceedings on remand must allow the petitioner to participate. *Id.* We concluded:

> "To reiterate, the limited discretion that the city has on remand is to determine which of the six alternatives is the city's preferred location of the road that the city will eventually own and operate, consistent with the [previous decisions approving the location of the road]. Alternatively, if the city now believes none of those six alternatives is approvable, it must give the applicant very clear and

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[12] ORS 197.835(10)(a)(A) requires LUBA to reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

> "Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

> precise direction on what changes need to be made to one or more of those alternatives to make it approvable. *Sending petitioner on another unguided or poorly guided errand to make yet another proposal or to collect additional information is not an option at this point in the process.*" *Id.* at 539. (emphasis added).

Similarly, here, because petitioner's proposal is for a use permitted outright on the property, the city has very limited discretion on remand to require changes to the design to comply with the View Impact Standard. That limited discretion does not allow the city to require petitioner to lower the height of the building that is otherwise allowed under WZO 2.040(1) and WZO 3.040(1). Moreover, as we cautioned in *Botts Marsh I*, the city may not interpret or apply the View Impact Standard in a manner that results in a *de facto* view easement on petitioner's property.

E. Conclusion

The city council's interpretation of the Primary Entrance Standard in WZO 11.050(4)(a)(6) is plausible, except that the city may not require an open area for tree growth. The city council's interpretation of the Direct Pedestrian Connection Standard in WZO 11.050(4)(a)(6) is plausible. The city council has limited discretion on remand to require changes to achieve compliance with the Primary Entrance Standard and the Direct Pedestrian Connection standard.

The city council may not apply the permissive standards in WZO 11.050(4)(b)(1) and (2) to the application, except that the city council has limited discretion on remand to require changes to the application that use materials that

are compatible with the natural elements that the city has identified in the challenged decision.

The city council's interpretation of the Avoid Monotony Standard in WZO 11.050(4)(b)(3) is inconsistent with the express language of the provision, and the city council may not require petitioner to demonstrate 25 percent replication for all elevations of the building. The city may require petitioner to submit a revised application for the east, north and west elevations that includes similar features as the south elevation.

The city council has limited discretion on remand to require changes to comply with the View Impact Standard in WZO 11.050(4)(b)(5), and may not require design changes that reduce the building's height below 24 feet or that result in a *de facto* view easement over petitioner's property.

Finally, the proceedings on remand must allow petitioner to participate.

The first assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioner argues that the city committed two procedural errors that violated its rights. First, petitioner argues that the city violated ORS 227.178(3), commonly referred to as the goal post rule, which requires the city to decide on petitioner's application based on the standards and criteria that applied on the date the application was deemed complete – August 27, 2021. Petitioner argues that the city's interpretations of the criteria in WZO 11.050 have changed the applicable standards and criteria to include new

additional standards and criteria that did not apply on August 27, 2021. Accordingly, petitioner argues, the city's decision violates ORS 227.178(3).[13] Second, petitioner also argues that the city's evolving interpretations have "effectively rezoned" the property without compliance with the requirements in ORS 227.186, commonly known as Ballot Measure 56. Petition for Review 19-20.

The city responds, initially, that petitioner is precluded from raising the issues raised in this assignment of error under the law of the case doctrine articulated in *Beck*. 313 Or 148. We disagree with the city on that point. The city adopted the interpretations included in the decision for the first time in the challenged decision. Although its arguments are barely developed, we understand petitioner to argue that the city's interpretations of the applicable standards and criteria in its second decision have changed so significantly that the city has violated the goal post rule.

ORS 227.178(3)(a) provides that for an application for a limited land use decision:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the

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[13] WZO 18.045 is the city's codification of the goal post rule.

application was first submitted."

The goal post statute "provides, in essence, that the rules in existence when an application is complete are the rules that govern the approval or rejection of the application—government, in other words, cannot 'move the goal-posts' after the applicant has (to complete the sports metaphor) kicked the ball[.]" *Setniker v. Polk County*, 244 Or App 618, 624, 260 P3d 800, *rev den*, 351 Or 216, 262 P3d 402 (2011). The goal post statute "assure[s] both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings." *Davenport v. City of Tigard*, 121 Or App 135, 141, 854 P2d 483 (1993).

We reject petitioner's largely undeveloped argument. In *Waveseer of Oregon, LLC v. Deschutes County*, 308 Or App 494, 502, 482 P3d 212 (2021), the Court of Appeals explained that

> "it may often be a close call whether a local government has, in effect, promulgated new approval standards and criteria through the process of adjudication, and not merely refined by interpretation existing codified standards and criteria. Detecting the precise point at which an act of interpretation becomes an act of legislation can hardly be said to be a science."

As we explain above in our resolution of the first and second assignments of error, when evaluating a design review application for a permitted use under standards that are extremely vague and subjective, a city often engages in a significant amount of interpretation of those subjective standards. Nothing that

petitioner has cited prohibits that interpretational exercise, as long as that exercise occurs in conjunction with a dialogue with design review applicants prior to the final decision, as described in our resolution of the second assignment of error.[14]

We also reject petitioner's undeveloped argument that the city's interpretational exercise resulted in a rezoning of its property without compliance with the notice and procedural requirements in ORS 227.186. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) ("It is not our function to supply petitioner with legal theories or to make petitioner's case for petitioner.").

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

ORS 197.524 provides:

> "(1) When a local government engages in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for the subdivision or partitioning of, or construction on, any land, including delaying or stopping issuance based on a shortage of public facilities, the local government shall:

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[14] In *Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873, *rev den*, 319 Or 150, 877 P2d 87 (1994), an argument was presented to the Court of Appeals that "inconsistent interpretations by a local decision maker might, under some circumstances, be a basis for a reversal of the local decisions." Those circumstances may include a "design to act arbitrarily or inconsistently from case to case." *Id.* The court did not resolve that question because there was no factual basis for concluding that the local government there had engaged in arbitrary decision making. *Id.*

"(a) Adopt a public facilities strategy under ORS 197.768; or

"(b) Adopt a moratorium on construction or land development under ORS 197.505 to 197.540.

"(2) The provisions of subsection (1) of this section do not apply to the delay or stopping of the issuance of permits, authorizations or approvals because they are inconsistent with the local government's comprehensive plan or land use regulations."

In the fourth assignment of error, petitioner argues that the city has adopted a "de facto" moratorium on construction and land development without complying with the procedures in ORS 197.505 through 197.540. Petitioner argues that the city has engaged in a pattern and practice of denying multiple applications by petitioner to develop the property with both conditional uses and permitted uses, with the goal of preventing development on petitioner's property.[15]

The city responds that the city's previous denials of applications to develop conditional uses on petitioner's property are not pattern or practice of denials where the denials were the result of the city's conclusion that the applications

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[15] Petitioner argues that the city's decision denying the application for the first time, *Botts Marsh I*, and the second time, this appeal, together with two prior city decisions denying different applications for conditional uses on the same property, amount to a "pattern or practice" of stopping the issuance of authorizations for construction on its property. ORS 197.524(1). Those two city decisions denying different applications for conditional uses were appealed to LUBA in *Botts Marsh, LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA Nos 2021-072/073, Mar 17, 2022), and *Botts Marsh, LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA Nos 2022-063/064, Nov 9, 2022).

failed to meet applicable standards. We agree with the city that the city's previous denials of petitioner's applications for a conditional use on the property and of petitioner's pending application for design review for a permitted use do not amount to a pattern and practice of stopping development approvals.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In the fifth assignment of error, petitioner argues that the city's decision violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, section 20 of the Oregon Constitution because the city has applied WZO 11.050 differently, or not at all, to other applicants. In support of the assignment of error, petitioner moves for LUBA to take evidence not in the record regarding other design review approvals that occurred in 2018 and in April 2021, prior to petitioner's filing its application in August 2021.

Petitioner argues that petitioner preserved the issues by raising "the basic issue of fairness and the uniform application of design review criteria" during the hearings before the city council that led to the city's first denial decision. Petition for Review 22. Petitioner also argues that it learned of the decisions when the city responded on October 10, 2022 to a public records request from petitioner. *Id.*

Our review of a decision is confined to those "[i]ssues * * * raised by any participant before the local hearings body as provided by ORS * * *197.797[.]" ORS 197.835(3). ORS 197.797(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be

> raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body * * * and the parties an adequate opportunity to respond to each issue."

When attempting to differentiate between "issues" and "arguments," there is no "easy or universally applicable formula." *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001). While a petitioner is not required to establish that a precise argument made on appeal was made below, that does not mean that "*any* argument can be advanced at LUBA so long as it has some bearing on an applicable approval criterion and general references to compliance with the criterion itself were made below." *Id.* (emphasis in original). A particular issue must be identified in a manner detailed enough to give the decision-maker and the parties fair notice and an adequate opportunity to respond. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991); *see also Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d 712 (2008) ("[I]ssues [must] be preserved at the local government level for board review * * * in sufficient detail to allow a thorough examination by the decision-maker, so as to obviate the need for further review or at least to make that review more efficient and timely.").

The city responds that petitioner is precluded from raising the issue raised in the fifth assignment of error because petitioner failed to raise the issue with specificity during the proceedings before the city, as required by ORS 197.797(1). We agree with the city that petitioner failed to raise the issue raised

in the fifth assignment of error with the specificity that is required by ORS 197.797(1). *Craven v. Jackson County*, 29 Or LUBA 125, *aff'd*, 135 Or App 250, 898 P2d 809, *rev den*, 321 Or 512, 900 P2d 509(1995) (petitioner was precluded from raising an issue regarding a violation of the Equal Protection Clause where the issue was not raised below with sufficient specificity to afford the decision maker an opportunity to respond to it). Further, we agree with the city that petitioner has not established that issue could not have been raised during the proceedings on the application, where the other decisions were made four months and three years before petitioner filed its application. Petitioner may not raise it for the first time in this appeal. Our resolution of this assignment of error requires that we deny petitioner's accompanying motion to take evidence.

The motion to take evidence is denied.

The fifth assignment of error is denied.

DISPOSITION

The city's decision is remanded for further proceedings consistent with this opinion.

Rudd, Board Member, concurring.

I agree with the majority's disposition of the appeal. I write to clarify my conclusions concerning the city council's interpretation of its view standard.

The majority explains that "we agree with petitioner that the city's interpretation of WZO 11.050(4)(b)(5) impermissibly imposes a need-based requirement for developing a building at the maximum height allowed under

WZO 2.040(1) and 3.040(1), and is inconsistent with the express language of WZO 2.040(1) and 3.040(1) and WZO 11.050(4)(b)(5)." ___ Or LUBA at ___ (slip op at 35). WZO 2.040(1) provides that "the maximum height shall be 24 feet" in the WRC zone. WZO 3.040(1) provides that the maximum height shall be 24 feet in the Industrial Water Related zone. WZO 11.050(4)(b)(5) provides "[t]he impact that structures will have on views from adjacent or other areas will be taken into account." I agree with the majority that the city council's interpretation of WZO 11.050(4)(b)(5) impermissibly imposes a need-based standard absent from WZO 2.040(1), 3.040(1) and 11.050(4)(b)(5).

The majority ultimately concludes that

> "because petitioner's proposal is for a use permitted outright on the property, the city has very limited discretion on remand to require changes to the design to comply with the View Impact Standard. That limited discretion does not allow the city to require petitioner to lower the height of the building that is otherwise allowed under WZO 2.040(1) and WZO 3.040(1)." ___ Or LUBA at ___ (slip op at 38).

WZO 11.050(4)(b)(5) provides that the impact on views *will* be taken into account. As explained in the majority's opinion, the city's proceedings on remand must allow petitioner to participate. I believe that the city council could require a minimal adjustment in height when taking views into account because a "maximum" height in a code does not necessarily establish a "minimum" height. The lack of clarity in the standard, however, limits the city council's flexibility.