

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 on remand from the Court of Appeals.

Jennie Bricker and Sarah Stauffer Curtiss represented petitioner.

Carrie A. Richter represented respondent.

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

REMANDED 08/31/2023

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.

BACKGROUND

This matter is on remand from the Court of Appeals. In *Botts Marsh, LLC v. City of Wheeler*, ___ Or LUBA ___ (LUBA No 2022-079, Jan 4, 2023) (*Botts Marsh I*), we remanded the decision. We sustained several assignments of error, including, as relevant here, a portion of petitioner’s first assignment of error that argued that the city’s interpretation of Wheeler Zoning Ordinance (WZO) 11.050(4)(a)(6) is inconsistent with the express language of the standard where the interpretation required an open area for tree growth, for which we concluded that there was no support in the express language of the standard.

The city petitioned for judicial review of our decision. In *Botts Marsh, LLC v. City of Wheeler*, 326 Or App 215, 532 P3d 544 (2023) (*Botts Marsh II*), the Court of Appeals reversed that aspect of our decision, holding:

“We agree with the city that it is plausible to interpret that standard to require at least some space for the trees to grow. We therefore reverse LUBA’s order on that point.

“At the same time, we note that, to comply with *Commonwealth [Properties, Inc. v. Washington County*, 35 Or App 387, 582 P2d 1384 (1978)] the city must communicate to applicant how many trees are required and how that determination is supported by the text, context, and purpose of the standard; the minimum amount of

1 'open space' required for each tree and how that determination is
2 supported by the text, context, and purpose of the standard; and how
3 the space will be measured. *Cf. Commonwealth*, 35 Or App at 398-
4 99, 582 P2d 1384." 326 Or App at 230.

5 The court denied the city's other challenges to our decision.

6 Accordingly, consistent with the court's decision in *Botts Marsh II*, the
7 portion of petitioner's first assignment of error that challenges the city's
8 interpretation of WZO 11.050(4)(a)(6) to require petitioner to demonstrate that
9 the site plan includes an open area for tree growth is denied.

10 **DISPOSITION**

11 For the reasons explained in *Botts Marsh I* and *Botts Marsh II*, the city's
12 decision is remanded.