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Via Email:

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City of Wheeler Planning Commission  
755 Nehalem Blvd  
PO Box 177  
Wheeler OR 97147

Re: ORCA Testimony for Planning File #0701-21-1 DR.

Dear Commissioners,

On behalf of Oregon Coast Alliance (ORCA), please accept this testimony for Planning File #0701-21-1 DR, a request for approval of a Design Review application to construct a building that includes the processing, storage and retail sales of fish and shellfish.

The applicant proposes an 8,780 square foot fish processing and warehousing facility located on the Industrial zoned portion of the site, and a 1,500 square foot retail market, including a second floor for office and storage.

Notably absent from the application's narrative, as well as the Staff Report is any demonstrated compliance with the Vision Plan, which was central to a recent decision from the Land use Board of Appeals. *See Oregon Coast Alliance v. City of Wheeler*, \_\_ Or LUBA \_\_ (LUBA Nos. 202-064/065, March 9, 2021) The Vision Plan was adopted by the city in 2012 as a background report to the Wheeler Comprehensive Plan. The Vision Plan includes a section entitled "Wheeler's Priorities and Recommendation for Action," which includes a list of six "ranked ordered" priorities that include the following:

1. Protect the Natural Beauty
2. Preserve Small Town Atmosphere
3. Keep Town Safe and Functional
4. Improve Livability of Wheeler

5. Support a Vital Economy
6. Enhance Citizen Enjoyment

The City must apply the Vision Plan to the proposed application because Section 11.050(2)<sup>1</sup> requires approval “under Comprehensive Plan Policies and Ordinance Provisions by the Planning Commission” and Ordinance No. 2012-06 requires a finding of consistency with the Vision Plan where compliance with the Comprehensive Plan is required: “All applications that require a finding of consistency with the Wheeler Comprehensive Plan shall include a finding of consistency with the section of the City of Wheeler, Oregon Vision Plan 2011 entitled ‘Wheeler Priorities and Recommendations for Action.’” Ordinance No. 2012-06, Section 2.

The subject property is zoned “water-related industrial” in part. Seafood processing is listed as an outright use in Section 3.020 (7). However, Wheeler Comprehensive Plan Goal 15, Policy 4.J.8 states, ““Industrial uses shall be identified as water-related on a case-by-case basis, with consideration given to the public loss of quality in goods or services which would result if the use were not offered adjacent to water.” The Water-related industrial uses are defined in Wheeler ordinance incorporating this standard, *see* Section 1.070 (80). Nothing in the application indicates that the proposed fish plant will use the waters of Nehalem Bay or is in any way dependent on Nehalem Bay. Therefore, though “fish or shellfish processing plants” are a listed example – the Comprehensive Plan states, “Water-related industrial uses could include (a) fish or shellfish processing plants” – the provision indicates the determination is individual. In this instance, as nothing in the application specifies use of, or need for, Nehalem Bay water, there is no public loss of quality in goods or services that would result from placing the project elsewhere or changing it. In either event, as this provision is not met, it raises the question of whether the application proposes an outright use or a conditional use. It appears that it creates a conditional use application instead of an outright use.

The Comprehensive Plan has a restriction for “water-related commercial” zone projects, in Policy 4.J.9, containing precisely the same wording as that for industrial projects. As this application describes a portion of the building that will contain “retail/wholesale fish and shellfish sales,” this policy in the Wheeler Comprehensive Plan is applicable to this part of the proposal. The project must be identified as water-related on a case-by-case basis, and if it has no relationship to Nehalem Bay (as in fact it does not), then the WRC-zoned portion of the

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<sup>1</sup> Section 11.050.2 states that “[w]hen design review is required, no permit will be issued until site plans have been reviewed and approved under *Comprehensive Plan Policies* and Ordinance Provisions by the Planning commission.” (emphasis added). While the staff report alleges compliance with some policies, the staff report fails to demonstrate compliance with the Vision Plan.

application is also most likely a conditional use rather than an outright one as the applicant claims.

Section 11.020 requires a geologic investigation, as ground-disturbing activities are being proposed. The applicant has submitted a letter stating that he will use “the existing geotechnical report...which he has previously submitted.” This would presumably include the 2006 CGI Report, supplemented by a January 29, 2020 letter from Earth Engineers, Inc. taking over as Geotechnical Engineer of Record, which was submitted as part of the previous Ulbricht application for this property. However, the current application is again different, both from 2006 and from the 2019 application, the project assumed by EEI.

Oregon Structural Specialty Code (OSSC) standards may be different now as a result of Oregon’s full adoption of the code in January 2020. The fact that there are new OSSC provisions, and a new design for an industrial building, make it imperative that the applicant submit a new geologic report. As the 2020 EEI letter states, the use of “lightweight geofoam” is “an acceptable approach to reduce (but not eliminate) the risk of excessive building foundation settlement.” (p. 4, EEI letter, January 29, 2020). But that was for a different project under different structural standards. For the prior project, EEI states, “Over the life of the building, it is anticipated to experience excessive settlement (i.e., greater than 1 inch) and may require future maintenance or repairs...” (Letter, p. 4). Given that this project is adjacent to Nehalem Bay, and within the floodplain (despite not being shown as such on Wheeler maps), and that EEI in 2020 noted that the applicant must be “willing to accept the greater than normal risks associated with constructing on highly compressible organic soils, on soils that are both liquefiable and will experience lateral spread during an earthquake, and within a tsunami inundation zone...” (Letter, p. 4), a new geotechnical report is essential to comply with Wheeler ordinances as required by 11.050 (2).

Furthermore, the applicant’s geological submissions, incomplete as they are, indicate clearly, as quoted above, that geofoam is an acceptable approach to “*reduce (but not eliminate) excessive building foundation settlement.*” (Letter, p. 4, emphasis added). However, Wheeler ordinance 11.020(4)(a) states that “The proposed use will be permitted only if: (a) A feasible engineering solution to each potential building hazard is proposed which *could eliminate the hazard to the proposed structure* or surrounding properties.” (emphasis added). Thus, even according to the applicant’s own incomplete geological submission, this project violates Wheeler ordinances on geologic investigation, and thus the application may not move forward.

Most development requires some degree of fill. The applicant has not demonstrated that Goal 16, Policy 4.J.12 is satisfied because the applicant has not demonstrated that the proposal does not require any fill. The notion that largescale construction and parking lots would not require *any* fill appears far-fetched on its face. Notably, the applicant has not presented expert

testimony to demonstrate that fill is not needed. Until then, the application is premature and must be rejected.

The staff report does not demonstrate that the applicant has satisfied subsection 4.a.(2) The applicant has not demonstrated that the trees left standing are “necessary for building placement, sun exposure, safety or other valid purpose.”

The staff report’s proposed findings for subsection 4.a.(3) are irrelevant. A condition of approval, at the very least, is necessary to satisfy this criterion. Beyond that, to satisfy the applicant’s burden of proof, some expert testimony is necessary to demonstrate that erosion can be prevented.

The staff report proposes a “reciprocating access and parking easement between the two parcels.” The Court of Appeals, however, has determined that a reciprocal easement is not available between two properties that are contiguous and in the same ownership. *See Partney v. Russell*, 286 Or App 679 (2020).

Under subsection 4.b(1), the staff report fails to identify how the proposal will be “compatible with the natural elements and applicable city ordinances.” Instead, the staff report makes findings about irrelevant considerations, including that “[g]iven the type of building, the size and finish appear reasonable to accommodate the uses without creating an unsightly structure.” That is simply not the standard. This same mistake was made by the County in *Oregon Coast Alliance v. City of Wheeler*, \_\_ Or LUBA \_\_ (LUBA Nos. 202-064/065, March 9, 2021), when attempting to find compliance with WZO 15.090(5), where the City made findings that were not pertinent to the standard at issue.

Subsection 4.b(4) is not satisfied. That provision requires that “[r]estaurants or facilities with late entertainment shall not have an adverse impact on adjacent residential uses and shall employ appropriate sound-proofing techniques.” While the proposal is for “fish or shellfish wholesale outlets” that includes a “retail market,” the applicant has not demonstrated whether people will be able to eat at the “retail market.” Until the applicant has demonstrated that food will not be eaten on the site, the applicant must demonstrate compliance with subsection 4.b(4) because there are adjacent houses across highway 101. The word “adjacent” is not limited to those residential uses that are immediately contiguous with the subject property.

Subsection 4.b(5) is also not satisfied. That provision requires that “[t]he impact that structures will have on views from adjacent or other areas will be taken into account.” The staff report alleges that the building will only occupy 11% of the site and does not exceed the height limitations. The applicant cannot simply satisfy subsection 4.b(5) by complying with other provisions. The applicant must determine what views are adversely affected, including those residences across highway 101. The applicant has not taken this provision seriously and further finding are necessary to demonstrate compliance. This includes the relevant provisions of the Vision Plan.

Subsection 4.b(6) plainly requires that “[t]he property owner shall establish one street facing entrance or store front with access acceptable to the City.” The applicant concedes that the structure does not “face” a street, and, therefore, clearly, subsection 4.b(6) has not been satisfied.

Section 11.111(3) has not been satisfied. Section 11.111(3) requires that “[w]aterfront access for the public such as walkways, trails, and landscaped areas will be provided, whenever possible and where consistent with public safety.” The staff report alleges that the request is “not designed for public recreation.” That is irrelevant to the criterion. The staff report alleges public safety issues with truck traffic, which precludes access to the waterfront. The applicant has not demonstrated that truck traffic, which is experienced in any area where there are roads or commercial/industrial uses. In fact, from the site plan, it does not appear that any truck traffic will occur on the river-side of the proposal.

The application is grossly incomplete in several other essential aspects, which cumulatively prevent the City of Wheeler from making a decision to approve or deny in good faith:

1. The application contains no substantive information on water use, nor does it indicate whether Wheeler (a very small town) has adequate water capacity to meet the demand.
2. The application provides no information, other than a single, vague, conclusory statement on “treatment processing,” and nothing at all on the use of chemicals necessary for processing fish. These can range from ammonia to Freon, as well as cleaning fluids of several kinds. Where will these chemicals be stored? Where will wastewater containing such chemicals be dumped? What pollution control measures will be used to protect Nehalem Bay in the event of an accident? The application contains no mention of, nor adherence to, Department of Environmental Quality standards for such a facility adjacent to waters of the state.
3. There is no communication to the Nehalem Bay Wastewater Agency (NBWA) explaining in necessary detail the wastewater output and the method of disposal. Nor is there any communication from NBWA on any of these matters, indicating whether the applicant has provided or must yet provide detailed plans and figures for wastewater.

The Staff Report merely places such critical issues in the Conditions of Approval section, requiring plans be submitted to NBWA for sanitary sewer, and to the City of Wheeler for water, stormwater and other facility improvements, and requiring them to conform to the City’s facility plans (*See Staff Report*, p. 15, Conditions C and G). These are far too important matters to be left to mere conditions of approval, which are next to impossible to enforce.

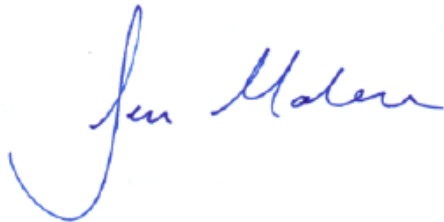
The application, in Exhibit IX, makes vague, totally unsupported statements that place the city in a position of being entirely unable to decide whether the proposal meets the City's infrastructure, water availability, facilities plans, or any other standards, such as pollution control or hazards management. The application in Exhibit IX says, for example, "Water collection and storage will vary depending on the season of the year," and "The project will have water storage and treatment processing located next to the building." There is no application narrative concerning the treatment processing and water storage facility: will it be another building, or underground? How will it provide treatment processing? What provisions will be made for pollution control and hazard abatement if the treatment requires chemicals such as ammonia, Freon or other hazardous substances?

Exhibit IX also states, "Water usage is provided on the 'Water Meter Sizing Worksheet.'" This worksheet provides only a number of fixtures and their unit value, plus a standardized table of load values, and another for estimated demand. The application contains no estimates as to actual water supply likely to be used, seasonal fluctuations, compliance with City of Wheeler Facilities Plans, or impact on Wheeler water delivery infrastructure.

For all these reasons, the Planning Commission may not approve the Ulbricht application. It does not comply with multiple Comprehensive Plan provisions and ordinance provisions.

Finally, ORCA also requests that the record remain open for an additional seven days in order to submit new evidence and argument concerning the application.

Sincerely,



Sean T. Malone  
Attorney for Oregon Coast Alliance

Cc:  
Client