BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MONOGIOS AND CO., and
MONOGIOS INTERNATIONAL COMPANY,
Petitioners,

vs.

CITY OF PENDLETON,
Respondent.

LUBA No. 2003-023

FINAL OPINION
AND ORDER

Appeal from City of Pendleton.

D. Rahn Hostetter, Enterprise, filed the petition for review and argued on behalf of petitioners.

Peter H. Wells, City Attorney, Pendleton, filed the response brief and argued on behalf of respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 05/21/2003

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a January 21, 2003 decision approving a conditional use permit for development of park facilities within the Tutuilla Creek floodway.

FACTS

This is matter is before us for the second time. In *Monogios and Co. v. City of Pendleton*, 42 Or LUBA 291 (2002) (*Monogios I*), we set out the following facts:

> "The City of Pendleton is in the process of developing a 15-acre parcel into the Grecian Heights Community Park. The park is located on both sides of a 2,000-foot segment of Tutuilla Creek. [The parcel is zoned Low Density Residential (R-1).] * * *
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> "The [area] that is the subject of this appeal is the portion of the proposed park that is located within 50 feet of the Tutuilla Creek floodway. Within that area, the city proposes to reestablish native vegetation along the creek banks, plant approximately 100 large-canopied trees to shade the water in order to increase fish populations, and construct a footbridge across the creek for access from a parking lot to the ball fields. A portion of the parking lot is also to be located within the floodway.
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> "Tutuilla Creek is a tributary of the Umatilla River. Under the city's zoning ordinance, land within 50 feet of the floodway of Umatilla River tributaries is designated Umatilla River (U-R) subdistrict. Pursuant to Pendleton Zoning Ordinance (PZO) Section 113, development within the U-R subdistrict is subject to review and approval by the planning commission. However, if three or more of six factors are implicated by the proposed development, the development must satisfy conditional use requirements as well as general standards for development within the floodway. In this case, the planning director determined that the proposal satisfied three of the six development factors. Therefore, the floodway development proposal was subject to the city's conditional use criteria. * * *" 42 Or LUBA at 292-294 (footnotes omitted).

In *Monogios I*, we sustained two of petitioners' assignments of error because the city failed to address arguments that petitioners raised pertaining to the applicability of certain flood hazard provisions. We sustained another assignment of error in part because we agreed with petitioners that the city's findings inadequately addressed a conditional use criterion pertaining to frontage improvements on public rights-of-way. We denied petitioners'

remaining assignments of error, including one that included an argument that the city failed to address a comprehensive plan policy pertaining to the city's park classification system (Community Park policy).

Petitioners appealed our decision to the Court of Appeals. The court affirmed our decision for the most part. However, the court concluded that the city also erred by failing to address the Community Park policy. *Monogios and Co. v. City of Pendleton*, 184 Or App 571, 576, 56 P3d 960 (2002) (*Monogios II*). The court then remanded the decision to us, and we in turn remanded the decision to the city to address the matters identified in our decision and the Court of Appeals' decision. *Monogios and Co. v. City of Pendleton*, __ Or LUBA __ (LUBA No. 2002-032, December 18, 2002). On remand, the city adopted the decision challenged in this appeal.

REPLY BRIEF

Petitioners move to file a two-page reply brief. The city objects to the reply brief, arguing that the reply brief is not confined to new matters that were raised in the respondent's brief. *See* OAR 661-010-0039 ("[a] reply brief shall be confined solely to new matters raised in the respondent's brief"). According to the city, the reply brief sets out a new assignment of error.

The challenged decision relies on an earlier April 4, 2002 planning commission decision to demonstrate that the proposed park complies with the flood hazard provisions that were identified in our remand in *Monogios I*. Petitioners' second and third assignments of error challenge that reliance, arguing that the April 4, 2002 decision authorized repair of a wash-out and did not apply the flood hazard provisions to approve the disputed park. In their reply brief, petitioners attempt to expand those assignments of error, and allege that the April 4, 2002 decision cannot be relied on because it is void. In support of that new allegation, petitioners argue in the reply brief that the city provided an inadequate opportunity for local appeal of the April 4, 2002 decision.

Because petitioners reply brief asserts a new argument that as far as we can tell could have been included in the petition for review, and the reply brief is not limited to responding to new issues in the city's response brief, petitioners' motion to allow a reply brief is denied.

FIRST ASSIGNMENT OF ERROR

PZO Section 132 establishes conditional use approval criteria and the first of those criteria requires that "[t]he proposed use compl[y] with the Comprehensive Plan." The Community Park policy is part of the Pendleton Comprehensive Plan (PCP), and provides, in relevant part:

> "The park classification systems and standards for the City of Pendleton shall consist of four types, which are:
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> "* * * * *
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> "C. [Community Parks.] Community Parks are to be located and designed to be separated from any other major organized recreational area and [are] equipped to provide major facilities and uses such as softball, baseball, archery, horse shoes, golf driving, tennis, handball, indoor passive facilities, restrooms, etc., for city-wide use within a maximum distance of one mile walking and/or half-hour riding. Minimum size: 30 acres." PCP 21-22.

In its initial decision, the city did not consider the applicability of this plan policy. In *Monogios II*, the Court of Appeals held, in relevant part that:

> "[t]he city's findings offer nothing to answer the question of whether, when and/or how city comprehensive plan policies regarding parks might apply to the proposed * * * [p]ark. We note * * * that the city's conditional use requirements call for compliance with the comprehensive plan and that the city believes that at least some plan policies are relevant to this conditional use approval because it addressed them in its findings. With respect to the 'Community Park' policy cited by petitioners, there is nothing in the city's findings explaining whether the policy is simply descriptive of a particular variety of park, or whether it is intended to be a substantive criterion that will control approval of some park facilities. * * *
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> "We must conclude that LUBA erred in not requiring the city to address either why the 'community park' policy was satisfied or why that policy is not applicable. LUBA's remand to the city should direct the city to address the plan policy and its applicability to the proposed development. If the policy applies at some other point in the approval process, that fact should be explained. * * *" *Monogios II*, 184 Or App at 576.

On remand, the city adopted the following findings addressing the Community Park policy:

> "The [Community Park policy] states that Community Parks [are to] be [located] '…within a maximum distance of one mile walking and/or one-half hour riding. Minimum size: 30 acres.' This reference means that the park will primarily serve persons within one mile of walking distances **and/or** one-half hour of driving distance.
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> "Because all points within the City of Pendleton are within one-half hour driving distance of each other, from the extreme north to south and east to west, a community park will serve the entire city. The proposed park, together with Pendleton's other Community Park, McKay Community Park, will serve the entire city.
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> "The provision for a 30-acre park minimum does not articulate whether the minimum is aspirational or mandatory. From the context of the provision, the City Council finds that the provision is aspirational only. This is based on the text of other portions of the Comprehensive Plan which use the word 'shall' where mandatory provisions are intended and the fact that the contemporaneously adopted implementing ordinances do not set forth minimum sizes for community parks." Record 23 (bolding in original).

Petitioners argue that the city's findings are inadequate to explain whether the city believes that the Community Park policy provides applicable approval standards or whether the policy is merely aspirational. According to petitioners, the city's findings are internally inconsistent in that the findings appear to interpret the maximum one-half hour riding standard as a mandatory approval criterion, and the 30-acre minimum size standard as aspirational.

With respect to the one-half hour riding provision, petitioners argue that if it does impose a mandatory approval standard, the city's decision improperly equates "riding" with "driving." According to petitioners "riding" is not synonymous with "driving," and the word "riding" connotes transport by bicycle or horse rather than a motorized vehicle. If the city interprets "riding" to include "driving," petitioners argue that interpretation makes no sense in Pendleton, where any point within the city can be reached by automobile in less than one-half hour.

Citing the fact that the city applied other comprehensive plan policies as relevant approval standards in reaching its initial decision, the Court of Appeals in *Monogios II* determined that the city must explain whether the Community Park policy is "simply descriptive of a variety of park," in which case it would not be a mandatory consideration in approving the disputed park, or whether the Community Park policy is a "substantive criterion," which applies to its decision concerning the disputed park. 184 Or App at 586. If the city concludes that the Community Park policy is a substantive criterion, the city must then explain how the Community Park policy applies to the disputed park and whether the proposed park complies with any substantive requirements the city interprets that policy to impose.[1]

The city has failed to answer the threshold inquiry. The city's findings, quoted above, appear to apply the Community Park policy's walking and riding "maximum" distances as substantive mandatory requirements, which require that (1) the maximum walking distance, (2) the maximum riding distance or (3) both the maximum walking and riding distances be satisfied. The challenged decision appears to find that the maximum riding distance is met. The city's findings then apply the "minimum" 30-acre size requirement and dismiss that minimum size requirement as "aspirational."

The city's treatment of the Community Park policy maximum and minimum requirements is, on its face, inconsistent. The words "maximum" and "minimum" are antonyms, but there is simply nothing in the language of the Community Park policy that would allow reading a "maximum" distance requirement in one sentence to impose a mandatory substantive criterion and at the same time read a "minimum" size requirement in the next sentence of the Community Park policy to be an aspirational provision that can be

[1] If the Community Park policy applies as a substantive criterion, it is difficult to see how the disputed park could be approved as presently proposed, because it is undisputed that the proposed park does not include 30 acres.

ignored. There is no explanation in the city's decision for the different legal status it assigns to the maximum and minimum requirements, and we do not see any textual support in the Community Park policy for such an explanation. The cited fact that the contemporaneously adopted implementing ordinances do not set forth minimum sizes for community parks" might lend support to the city's conclusion that the Community Parks policy is "simply descriptive of a particular variety of park," but it does not explain why the city applied the maximum distance provision in the policy as a mandatory requirement since there appears to be no implementing ordinances that impose those distance requirements.

Because it may be that the city did not mean to apply the walking and riding maximum as a mandatory standard, and simply meant to find that riding maximum was met without regard to whether it is an applicable substantive criterion, we remand so that the county can answer the threshold question.[2] Again that threshold question is whether the Community Park policy applies as a substantive criterion to the challenged decision or is merely "descriptive of a variety of park."

The first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

In *Monogios I*, petitioners argued that the city failed to address issues petitioners raised during the local proceedings regarding the applicability of PZO Sections 84 and 153.[3]

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[2] Although we cannot be sure, the city's brief can be read to suggest that the city does not view the Community Park policy as a substantive criterion in this case. If so, that interpretation needs to be reflected in the city's decision. The challenged decision does not express that interpretation.

[3] PZO Section 84 provides, in relevant part:

> "In a Flood Hazard Area, a lot may be used and a structure or part of a structure constructed, reconstructed, altered, occupied or used only after the following requirements have been met:
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> "A. An applicant shall submit with his application for a building or development permit sufficient evidence to indicate that the proposed development will result in a finished floor elevation and access to the property that is at least 1.00 foot higher than the elevation of an Intermediate Regional Flood. * * *

We agreed with petitioners, concluding that it was not clear from the record or the city's decision what process the city had to follow in order to approve development under those provisions. On remand, the city adopted findings that refer to an April 4, 2002 decision by the city planning commission that approved a development permit to "allow for placement of native and rip-rap fill material within the Tutuilla Creek to provide for bank stabilization at the new Grecian Heights Community Park * * *." Record 31. The findings appear to take the position that the April 4, 2002 decision constituted the final appealable decision that applied Sections 84 and 153 to the proposed park improvements, and that petitioners cannot, in the course of this appeal, collaterally attack that decision.[4]

"* * * * *

"B. An applicant shall submit with [the] application for a building or development permit sufficient evidence to enable the City Manager, or his designee, to review [the] construction methods and materials to determine that the minimum flood damage will occur in the event of inundation. The evidence shall enable the City Manager or his designee to determine that:

"(1) Proposed repairs and renovations will use materials and equipment that are resistant to flood damage, and construction methods and practices that will minimize flood damage;

"(2) New construction * * * will be protected against flood damage, will be designed * * * and anchored to prevent flotation, collapse or lateral movement of the structure, will use materials and equipment that are resistant to flood damage, and will use construction methods and practices that will minimize flood damage.

"C. All applications shall be reviewed to determine that all necessary permits have been obtained from those federal, state or local governmental agencies from which prior approval is required."

PZO Section 153 provides, in relevant part:

"* * * In all identified flood hazard subdistricts * * * a development permit shall be required for all structures and land use including, but not limited to, * * * development such as mining, dredging, filling, grading, excavation or drilling."

[4] The findings state, in relevant part:

"Applicability of the Flood Hazard Subdistrict (F-H), [PZO] Section 84 * * * and [PZO] Section 153 * * *

Petitioners argue that the findings are not responsive to our remand, in that they do not explain what process is used or was used to demonstrate that the proposed park improvements comply with PZO Sections 84 and 153. Petitioners also argue that to the extent the city relies on the April 4, 2002 decision to demonstrate that the proposed park improvements comply with PZO Sections 84 and 153, the findings included in that decision are inadequate, because they do not (1) set out what standards of those sections apply to the challenged application; (2) identify the relevant facts; or (3) explain how the facts lead to the conclusion that the standards are satisfied. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1073 (1977). Finally, petitioners also argue that the city's finding that the April 4, 2002 decision approved all of the development proposed within the floodway is not supported by substantial evidence. According to petitioners, the April 4, 2002 decision merely approved the placement of approximately 275 cubic yards of rip-rap in an existing washout within the creek, and does not approve the proposed foot bridges, parking lots and foot paths.

The April 4, 2002 decision approved the placement of 275 cubic yards of rip-rap within a 50 foot segment of Tutuilla Creek within the proposed park. Record 37, 40. It does not discuss the installation of footbridges, walking paths and other amenities along the 2000-

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> "1. At the Planning Commission meeting of April 4, 2002 (minutes of that meeting attached hereto and made a part hereof), by a unanimous vote, the Commission adopted the attached Findings and Decision (Revised April 4, 2002), and granted the request of the City of Pendleton for a Flood Hazard Zone Development permit to allow for placement of native and rip-rap fill material within the Tutuilla Creek to provide for bank stabilization at the proposed Grecian Heights Community Park pursuant to the provisions of * * * [PZO] Section 84 * * *.
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> "2. Pursuant to [PZO] Section 153 * * * on April 8, 2002, notice of the Flood Hazard Development Permit issuance to allow placement of fill within Tutuilla Creek was sent to the Applicant * * * as well as to the public meeting participant and that affected property owners [including petitioners]. This notice advised that this decision of the Planning Commission concerning the Flood Hazard Zone Development Permit approval may be appealed to the City Council within seven (7) days from the date of this mailed notice by a party to the proceedings. * * * **No appeals were filed within this time period**." Record 25-26 (bolding in original).

foot segment of the creek that was the focus of the conditional use application that led to these appeals. Because the city's April 4, 2002 decision does not purport to approve the proposed foot bridges, walking paths or other amenities, the city's remand decision erroneously relied on that decision to demonstrate that the proposed park amenities that will be located within the floodway comply with Sections 84 and 153.

The second and third assignments of error are sustained.

The city's decision is remanded.