

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 MONOGIOS AND CO. and  
5 MONOGIOS INTERNATIONAL COMPANY,  
6 *Petitioners,*

7  
8 vs.

9  
10 CITY OF PENDLETON,  
11 *Respondent.*

12 LUBA No. 2002-032

13  
14  
15 FINAL OPINION  
16 AND ORDER

17  
18 Appeal from City of Pendleton.

19  
20 D. Rahn Hostetter, Enterprise, filed the petition for review and argued on behalf of  
21 petitioners.

22  
23 Peter H. Wells, City Attorney, Pendleton, filed the response brief and argued on  
24 behalf of respondent.

25  
26 BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,  
27 participated in the decision.

28  
29 REMANDED

06/12/2002

30  
31 You are entitled to judicial review of this Order. Judicial review is governed by the  
32 provisions of ORS 197.850.

33

**NATURE OF THE DECISION**

Petitioners challenge a city decision to approve a conditional use permit that allows development within 50 feet of a floodway.

**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 proposed park is bordered by low-density single-family homes on the west. SW Athens Avenue, a partially improved city street, bisects the park property and crosses Tutuilla Creek within the park. SW Athens Avenue then intersects with Tutuilla Road, a north-south road that borders the property to the east. The portion of Tutuilla Road lying north of SW Athens Avenue is a city arterial improved to city standards. The portion of Tutuilla Road south of SW Athens Avenue is a county road improved to county standards.

The property 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.

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

1 development within the floodway.<sup>1</sup> In this case, the planning director determined that the  
2 proposal satisfied three of the six development factors. Therefore, the floodway development  
3 proposal was subject to the city’s conditional use criteria.<sup>2</sup> The planning commission

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<sup>1</sup>PZO Section 113, Development Standards, provides, in relevant part:

- “A. Land uses within the [U-R] Subdistrict shall comply with the provisions of the underlying zone. However, new development within the subdistrict that requires the obtaining of a permit under the provisions of the Uniform Building Code, or that requires excavation or fill within the boundaries of the U-R subdistrict, shall be reviewed by the Planning Director for Referral to the Planning Commission as set forth in B. below.
  
- “B. If, in the opinion of the Director of Planning and Building, the proposed structure or use falls within three or more of the criteria below, it shall require a Conditional Use permit; if less than three, a discretionary approval of the Commission is required:
  - “(1) The construction is valued at \$5,000 or more;
  - “(2) The construction is two hundred fifty (250) square feet in area or over;
  - “(3) The construction exceeds a height of fifteen (15) feet;
  - “(4) The construction has potential visual, audible or odoriferous impacts;
  - “(5) The construction involves excavation, fill, or other alteration of the landscape included within the Umatilla River Subdistrict;
  - “(6) The construction has a potential negative impact on fish or wildlife or an archeological resource.
  
- “C. In evaluating a proposed development within the U-R subdistrict, whether during a public hearing or public meeting, the Commission shall base its decision to approve, conditionally approve, or deny, on all of the following criteria:
  - “(1) Consistency with the policies of the Comprehensive Plan;
  - “(2) Consistency with the purpose statement of [PZO Section 112];
  - “(3) Recommendations received from agencies with expertise in addressing potential impacts;
  - “(4) An evaluation of the economic, social, environmental, and energy consequences of the permit request as defined by OAR 660-016-0000.”

<sup>2</sup>PZO Section 132 provides in relevant part:

“The city Planning Commission may grant a conditional use permit only upon review of ALL of the following criteria:

1 approved the proposed development, with conditions. Petitioners, who own property adjacent  
2 to the proposed park, appealed the planning commission decision to the city council. The city  
3 council affirmed the planning commission’s decision. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners argue that the city erred in considering the proposal to develop within the  
6 floodway, because it was not submitted to the city as part of a formal application. According  
7 to petitioners, the city’s zoning ordinance requires that permit requests be submitted on  
8 specific application forms.<sup>3</sup> Petitioners contend that without an application, the city approved  
9 a request; it did not approve an application. Therefore, petitioners argue, the city’s decision is  
10 invalid and, consequently, it should be reversed.

11 The city’s failure to fill out a conditional use application on a city form is, at best, a  
12 procedural error that may be the basis for reversal or remand only if petitioners establish that  
13 the error prejudiced their substantial rights. *Winner v. Multnomah County*, 30 Or LUBA 420,  
14 424 (1996). Petitioners have failed to establish that the city’s failure to complete a  
15 conditional use application on a particular form prejudiced their substantial rights.

16 The first assignment of error is denied.

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- “A. The proposed use complies with the Comprehensive Plan.
  - “B. The impact of the use is minimized with the provision of landscaped buffers and/or fencing abutting residences, adequate off-street parking plan, and safe public access and vehicular movement.
  - “C. The location for all proposed uses \* \* \* is reasonable compared with other available property identically zoned within the City or within the proximity of the proposed use. \* \* \*
  - “D. The site fronts public rights-of-way, improved to City standards (sidewalk, curbs, gutters, streets) or an irrevocable consent to participate in [a local improvement district (L.I.D.)] for those improvements has been executed.”

<sup>3</sup>PZO Section 157(A) provides, in relevant part:

“\* \* \* All applications provided for in this Ordinance shall be made on forms prescribed by the City. \* \* \*”

1 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

2 According to petitioners, the proposed development is located within a Flood Hazard  
3 Area, and is therefore subject to PZO Section 84.<sup>4</sup> PZO Section 84 sets out approval  
4 standards for development within Flood Hazard Areas and requires, among other things, that  
5 no building or development permit be issued until the proposed construction has been  
6 reviewed by the city public works director and approved by the planning commission. In  
7 their second assignment of error, petitioners contend that the city’s decision fails to address  
8 PZO Section 84, or respond to petitioners’ arguments below that PZO Section 84 is  
9 applicable during conditional use permit review. In addition, petitioners argue that the city’s  
10 decision fails to address the standards required by PZO Section 84.

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<sup>4</sup>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:

“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. \* \* \*

“\* \* \* \* \*

“B. An applicant shall submit with [the] application for a building or development permit sufficient evidence to enable the Public Works Director 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 Planning Commission 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.”

1 In the third assignment of error, petitioners make similar arguments with respect to  
2 the city council’s response to petitioners’ argument that PZO Section 153 applies.<sup>5</sup>

3 The city responds that PZO Sections 84 and 153 are independent of the conditional  
4 use permit process and, therefore, the city council was not obliged to address those standards  
5 during its conditional use decision making. The city concedes that under the city ordinance, it  
6 is possible to combine the conditional use and PZO Sections 84 and 153 permitting  
7 processes, but argues that it is not error to consider separate applications under those  
8 provisions independently. According to the city, during the proceedings below, the planning  
9 director explained to petitioners and the city council that PZO Sections 84 and 153 would be  
10 addressed in later proceedings. The city argues that it is not error for the city’s decision in  
11 this case to fail to address petitioners’ arguments regarding PZO Sections 84 and 153.

12 We have held that when a party raises issues pertaining to an arguably relevant  
13 approval criterion, the local government must address those issues in its decision and explain  
14 why the criterion is not applicable, or why it is met. *Hixson v. Josephine County*, 26 Or  
15 LUBA 159, 162 (1993). Here, the findings do not address the issues petitioners raised  
16 regarding the applicability of PZO Sections 84 and 153 to the subject application. Therefore,  
17 unless we can conclude that PZO Sections 84 and 153 are not applicable criteria during the  
18 conditional use permitting process, the decision must be remanded for findings that address  
19 petitioners’ arguments. At the city council meeting where the issue of compliance with PZO  
20 Sections 84 and 153 was raised, the planning director stated:

21 “[T]raditionally and historically, the City has used the administrative process  
22 for all applications for development permits within a flood hazard zone. \* \* \*  
23 This proposal is within a flood hazard area. There will be no structures  
24 situated within the flood plain. \* \* \* [PZO 84(B)] says an applicant shall

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<sup>5</sup>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.”

1 submit with [the] application for a building or development permit sufficient  
2 evidence to enable the Public Works Director to review [the] construction  
3 methods and materials to determine minimum flood damage will occur in the  
4 event of inundation. [PZO 84(B) goes on to require that the] ‘evidence shall  
5 enable the Planning Commission to determine that...,’ so the sentence  
6 switches from the Public Works Director to the Planning Commission. \* \* \*  
7 [D]ue to this confusion \* \* \* the staff will schedule a meeting at which the  
8 Planning Commission will consider that aspect, but it doesn’t affect Council  
9 granting the Umatilla River subdistrict application. That would be an  
10 independent action. Regarding the issue of a need for a development permit to  
11 be issued, that is also done administratively. \* \* \*” Record 16.

12 We do not believe that the statements made by the planning director are sufficient to  
13 address petitioners’ claims that PZO Sections 84 and 153 are applicable during the  
14 conditional use process. At most, the statements indicate that permits issued under PZO  
15 Sections 84 and 153 are typically issued administratively, and that staff had not considered  
16 the role the planning commission plays in the administration of PZO Section 84(B). *See* n 4.  
17 Because it is not clear from the record what process the city had to follow in order to approve  
18 development under PZO Sections 84 and 153, remand is necessary to allow the city to  
19 address this issue in its decision.

20 The second and third assignments of error are sustained.

21 **FOURTH ASSIGNMENT OF ERROR**

22 Petitioners argue that the city’s findings do not address comprehensive plan policies  
23 that are relevant to the decision and must be satisfied in order to comply with PZO Section  
24 132(A). *See* n 2 (setting out conditional use criteria). Petitioners argue that under PZO  
25 Section 132(A), it is not enough for the city to conclude that the zoning ordinance provisions  
26 implement the comprehensive plan. Petitioners contend that PZO Section 132(A)  
27 independently creates an obligation to address relevant plan policies. Petitioners contend that  
28 the city failed to set out the plan policies it believed were applicable, and the challenged  
29 decision failed to address the Pendleton Comprehensive Plan (PCP) provisions petitioners  
30 identified as being applicable to the conditional use permit application.

1           **A.     PCP Recreation Plan Policy 2**

2           PCP Recreation Plan Policy 2 provides in relevant part:

3           “The park classification system and standards for the City of Pendleton shall  
4           consist of four types, which are:

5           “\* \* \* \* \*

6           “B.    [Neighborhood Parks/Playgrounds.] Neighborhood Parks/Playgrounds  
7           shall be designed and equipped to provide for quiet relaxation as well  
8           as to allow for active play and should include the neighborhood play  
9           lot. They shall be designed to serve the population within a one-half  
10          mile radius whose access shall be minimally obstructed by major  
11          barriers to pedestrian traffic such as arterial streets, railroads and rivers  
12          or topography[.] The equipment and activities provided should include  
13          benches, restrooms, play lot equipment, hard surface sport area[s] \* \*  
14          \* and turf area[s] (softball). Minimum size[:] five acres.

15          “C.   [Community Parks.] Community Parks are to be located and designed  
16          to be separated from any other major organized recreational area and  
17          equipped to provide major facilities and uses such as softball, baseball,  
18          archery, horse shoes, \* \* \* restrooms, etc., for city-wide use within a  
19          maximum distance of one mile walking and/or half-hour riding.  
20          Minimum size: 30 acres.”

21                Petitioners argue that PCP Recreation Plan Policy 2 requires that community parks  
22                include at least 30 acres and that they be located within a maximum distance of “one mile  
23                walking [distance].” Petitioners point out that the proposed Grecian Heights Community  
24                Park includes only 15 acres and is located more than one mile from the city center.  
25                Petitioners argue that the city’s decision fails to explain why the proposed park is a  
26                community park, as that term is described in PCP Recreation Plan Policy 2.

27                Petitioners do not explain why PCP Recreation Plan Policy 2 applies to a conditional  
28                use permit to develop within 50 feet of a floodway. Granted, the proposed improvements are  
29                part of the Grecian Heights Community Park development program, but that in itself does not  
30                convert a floodway development conditional use permit into a conditional use permit to  
31                approve the park itself. PCP Recreation Plan Policy 2 does not apply to the challenged  
32                decision, and the city’s failure to address the policy in its decision was not error.



1           **B.      PCP Recreation Plan Need 5 and Policy 5A.**

2           PCP Recreation Plan Need 5 provides:

3           “There is a need to maximize conservation of waterways, wetlands, animal  
4           habitats and other natural resources; and to carefully review developments  
5           near such resources to ensure impacts are mitigated.”

6           PCP Recreation Plan Policy 5A provides:

7           “The City of Pendleton shall encourage all parties in the conservation of  
8           identified wetlands and waterways (*i.e.*, the Umatilla River and its tributaries),  
9           game and wildlife habitat and similar natural resources, and to permit only  
10          compatible development after careful review (with notification to and in  
11          coordination with the Division of State Lands).”

12          Petitioners argue that the city’s decision fails to explain how the proposed  
13          construction is consistent with Recreation Plan Need 5 and Policy 5A. According to  
14          petitioners, there is no evidence in the record regarding the mitigation of wetland resources  
15          and the city’s decision does not address wetland mitigation. Petitioners also argue that the  
16          city has failed to provide the required notice of the proposal to the Oregon Division of State  
17          Lands (DSL).

18          The city responds that it did address the conservation of wetlands in its decision. The  
19          city also argues that the findings state that all “affected agencies” were notified of the  
20          proposed development. Record 7. The city contends that all “affected agencies” includes the  
21          DSL. According to the city, the record reflects that the notice of the proposed project was  
22          given to DSL.<sup>6</sup>

23          In the city’s decision, the city explains that it believes that the proposed development  
24          responds to the need “to maximize conservation of waterways, wetlands, animal habitats and  
25          other natural resources.” Record 6. In addition, the city’s findings state, in pertinent part:

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<sup>6</sup>The city points to the March 5, 2002 City Council minutes, where the Planning Director testified:

“[DSL], as well as all other affected public agencies, were given notice of the park development proposal when the Parks and Recreation Director sent out \* \* \* notices as [part of a funding request.]” Record 13.

1           “1.    The Umatilla River Subdistrict regulations were adopted in  
2           compliance with [PCP Recreation Plan Policy 5.] The policy states  
3           that the ‘City of Pendleton shall encourage all parties in the  
4           conservation of identified wetlands and waterways (*i.e.*, the Umatilla  
5           River and its tributaries), game and wildlife habitat and similar natural  
6           resources, and to permit only compatible development after careful  
7           review (with notification to and in coordination with [DSL]).’

8           “2.    The purpose of the U-R subdistrict is set forth in [PZO] Section  
9           112 \* \* \*. This proposal, which promotes, stabilizes and enhances the  
10          natural resource development of a tributary of the Umatilla River as a  
11          source for park, recreation and open space development for the  
12          citizens of Pendleton, and includes a design that minimizes impacts on  
13          the riparian vegetation and ecosystem, is in compliance with this  
14          stated purpose.

15          “3.    \* \* \* The area on each side of the creek is in a ‘floodplain’ and is a  
16          ‘wetland.’ No structures will be installed in this area and specific  
17          requirements of the floodplain ordinance will be met, and in most  
18          cases exceeded. The city has notified the [Oregon Department of  
19          Environmental Quality (DEQ), the Oregon Department of Fish and  
20          Wildlife (ODF&W)] and other affected agencies of this proposal and  
21          has received comments in support of the project back from both DEQ  
22          and ODF&W. \* \* \*

23          “\* \* \* \* \*

24          “Environmental Consequences: The City has and/or will secure all the  
25          necessary permits from the affected State and Federal Natural Resource  
26          Agencies. [DEQ and ODF&W] have already provided letters in support [of]  
27          the project. The City will be working with ODF&W on fish habitat concerns.  
28          As indicated above, a unique feature of the project is that Tutuilla Creek runs  
29          through the project and is incorporated in the design for restoration and  
30          enhancement. A major component planned is to restore and stabilize the creek  
31          bed and riparian area through the park [that] is 2000 linear feet through the  
32          project. Substantial improvement for fish and wildlife is expected with the  
33          development. Extensive tree, shrub and grass establishment is planned.  
34          Completion of this project will result in substantial air, water and soil stability  
35          improvements, in addition to fish and wildlife enhancements. \* \* \*” Record 7.

36          Without a more developed argument from petitioners or evidence to show that the  
37          notice to DSL was inadequate to satisfy Policy 5A, or that there is some impact on the  
38          wetlands within the project area that requires more detailed consideration, we believe the  
39          city’s findings and evidence are adequate to demonstrate that the proposed development is

1 compatible with wetlands that may be located on the site, and that DSL was notified of the  
2 proposed development within the meaning of Policy 5A.

3 **C. PCP Pedestrian Plan Policy 1**

4 PCP Pedestrian Plan Policy 1 provides in relevant part:

5 “The City of Pendleton recognizes that citizens walk to meet their various  
6 needs and it is in the public interest to provide for the safety of all pedestrians.  
7 Therefore, it shall be the policy of the City of Pendleton:

8 “A. to require the installation of sidewalks on both sides of all arterial \* \*  
9 \* and minor streets when improved or upgraded except when  
10 topography dictates that the abutting property would not benefit [from  
11 the] installation as approved by the City Council.”

12 According to petitioners, SW Athens Avenue does not have sidewalks. Petitioners  
13 argue that Pedestrian Plan Policy 1 requires the installation of sidewalks on both sides of SW  
14 Athens Avenue and that the city’s decision fails to require the construction of sidewalks as  
15 part of the park development.

16 The city responds that its acquisition of the park property was conditioned on its  
17 agreement to participate in an L.I.D. to help pay for improvements to SW Athens Avenue  
18 when those improvements are scheduled. According to the city, petitioners acknowledged  
19 that obligation during the proceedings below, and merely challenge the fact that the city’s  
20 findings do not reiterate that obligation. Record 15.

21 It is clear that Pedestrian Plan Policy 1 does not require the installation of sidewalks  
22 when development is approved on property abutting arterial or minor streets. Rather,  
23 Pedestrian Plan Policy 1 requires the installation of sidewalks when the streets themselves  
24 are improved. Because Pedestrian Plan Policy 1 does not impose the requirement petitioners  
25 argue it imposes, we agree with the city that this subassignment of error provides no basis for  
26 reversal or remand.

27 The fourth assignment of error is denied.

1 **FIFTH ASSIGNMENT OF ERROR**

2 Petitioners argue that the city’s findings of fact with respect to PZO Section 132(C)  
3 and (D) are inadequate. *See* n 2. With respect to PZO Section 132(C), petitioners contend  
4 that that standard requires the city to (1) identify properties within city limits that are of like  
5 zoning or are in proximity to the subject property; (2) compare those properties to the subject  
6 property; and (3) determine whether the subject property is a reasonable location for the  
7 proposed uses. With respect to PZO Section 132(D), petitioners contend that the city’s  
8 decision must explain why the city is not obligated to either (1) improve SW Athens Avenue  
9 to full city standards or (2) sign an irrevocable consent to participate in an L.I.D.

10 The city’s findings pertaining to PZO Section 132(C) and (D) state:

11 **“C. Location reasonable when compared to other available properties.**  
12 \* \* \* [T]his location of the community park to be developed along the  
13 Tutuilla Creek floodway is reasonable in that it is uniquely suitable as  
14 a preserved area and for a public open space. This location also  
15 provides the opportunity for walking/jogging pathways along the  
16 creekside and direct access to the ball fields and recreation facilities  
17 from the parking areas via footbridges over the creek without  
18 obstruction of the stream or encroachment into the floodway of the  
19 creek. The development along the creekside will involve an extensive  
20 amount of tree planting to enhance the stream channel.

21 **“D. Frontage on improved public right of way.** The property has  
22 frontage on both SW Athens Avenue and Tutuilla Road, and will have  
23 access onto Tutuilla Road, which is a County road improved to County  
24 standards (south portion) and full city arterial street standards for the  
25 portion north of its intersection with SW Athens Avenue. \* \* \*”  
26 Record 6.

27 Reasonably read, the city found that PZO Section 132(C) is met because the proposed  
28 site alone (1) provides support for the adjacent park facilities; (2) provides pedestrian access  
29 without encroachment on a floodway; and (3) will result in improvements to the Tutuilla  
30 Creek stream channel. Those findings are adequate to demonstrate that PZO Section 132(C)  
31 is satisfied.

1           The adequacy of the findings with respect to PZO Section 132(D) presents a closer  
2 question. It is not clear from the decision whether the city interprets PZO Section 132(D) to  
3 require that *all* rights-of-way that front the subject property be improved to city standards, or  
4 whether it is sufficient that *one* of the rights-of-way that fronts the subject property is  
5 improved. If it is the former, it is not clear whether the city is relying on the deed provisions  
6 that require the city to participate in an L.I.D. for the improvement of SW Athens Avenue to  
7 satisfy PZO Section 132(D). We agree with petitioners that the city’s findings are inadequate  
8 to explain why it believes PZO Section 132(D) is satisfied.

9           The fifth assignment of error is sustained in part.

10          The city’s decision is remanded.