

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
13 LUBA Nos. 2003-180 and 2003-181

14
15 FINAL OPINION
16 AND ORDER

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18 Appeal from City of Pendleton.

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

22
23 Joan M. Chambers, Lincoln City, filed the response brief and argued on behalf of
24 respondent. With her on the brief was Peter H. Wells, City Attorney, Pendleton, and Kulla,
25 Ronnau, Schaub and Chambers, PC.

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

29
30 AFFIRMED

02/02/2004

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

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NATURE OF THE DECISION

Petitioners appeal two city decisions that approve development of park facilities within the Tutuilla Creek floodway.

FACTS

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

“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. * * *

“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. The planning commission approved the proposed development, with conditions. Petitioners, who own property adjacent to the proposed park, appealed the planning commission decision to the city council. The city council affirmed the planning commission’s decision * * *” 42 Or LUBA at 292-294 (footnotes omitted).

In *Monogios I*, we sustained two of petitioners’ five assignments of error. We agreed with petitioners’ argument that the city failed to address certain flood hazard provisions. We denied

1 petitioners' claim that the city had failed to adequately address a comprehensive plan policy
2 pertaining to the city's park classification system (Community Park policy).¹

3 Petitioners appealed our decision to the Court of Appeals. *Monogios v. City of*
4 *Pendleton*, 184 Or App 571, 56 P3d 960 (2002) (*Monogios II*). The Court concluded that the
5 city erred by failing to explain whether the Community Park policy is a substantive criterion that
6 controls approval of park facilities, or whether the policy is merely descriptive of a particular variety
7 of park.

8 On remand, the city adopted the decision that became the subject of petitioners' second
9 appeal to us. *Monogios v. City of Pendleton*, 44 Or LUBA 576 (2003) (*Monogios III*). That
10 appeal included three assignments of error. We sustained petitioners' first assignment of error,
11 agreeing with petitioners that the city's findings regarding the Community Park policy were
12 inadequate. Specifically, we found that the city failed to articulate whether the maximum riding
13 distance and minimum acreage requirements within the Community Park policy are mandatory
14 approval criteria or merely aspirational or descriptive terms. We also sustained petitioners' second
15 and third assignments of error regarding the applicability of certain flood hazard permit provisions.
16 We remanded the city's decision. On October 7, 2003, the city adopted the decisions challenged in
17 these consolidated appeals.

¹ "The park classification systems and standards for the City of Pendleton shall consist of four types, which are:

"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." Pendleton Comprehensive Plan (PCP) 21-22.

1 **FIRST ASSIGNMENT OF ERROR**

2 PZO Section 132 establishes conditional use approval criteria and the first of those criteria
3 requires that “the proposed use compl[y] with the Comprehensive Plan.” PZO 132(A). The
4 Community Park policy is part of the PCP. As we explained in our statement of facts, in *Monogios*
5 *II*, the Court of Appeals considered the city’s decision approving the conditional use permit to the
6 city, and held that the city needed to explain whether the park policies set out in the PCP are
7 “substantive [criteria] that will control approval of some park facilities.” 184 Or App at 576. If the
8 city intended the requirements to be approval criteria, the Court required that the city explain how
9 they were satisfied. Alternatively, the Court directed the city to explain why the requirements are not
10 applicable to applications for conditional use approval, *i.e.*, why the requirements should not be
11 considered “approval criteria.”

12 In the conditional use permit decision challenged in these appeals, the city adopted the
13 following findings:

14 *“[The Community Park policy] is [part of] a park classification system. It*
15 *does not provide mandatory park development criteria. [PCP Park Policy 2]*
16 *sets forth four classifications for parks within the park system, (A) Play parks and*
17 *play lots, (B) Neighborhood parks/playgrounds, (C) Community parks, and (D)*
18 *Special recreation areas.*

19 “[PCP Park] Policy 3 designated the various City parks with one of the
20 classification designations, regardless of whether the individual park contains all of
21 the aspirational features listed in the four categories of park facilities. The City of
22 Pendleton has never interpreted the Comprehensive Plan park policies to be
23 approval criteria for the development of individual parks. Pursuant to the provisions
24 of the R-1 zone, a ‘city park’ is a use permitted outright in the R-1 Low Density
25 Residential zone. ‘City park’ is defined as ‘[a] recreation area dedicated and
26 preserved [for] public usage.’

27 “The City of Pendleton established the Grecian Heights Park when it acquired the
28 property. The City could have chosen to use the park simply as open space, which
29 would have been consistent with the definition of ‘city park’ * * *. If the City had
30 chosen not to add park improvements to the park, no development permits of any
31 kind would have been needed. The City chose to add certain amenities to the park,
32 which triggered Conditional Use review under the provisions of the Umatilla River
33 Subdistrict for that portion of the site within the UR subdistrict. * * *

1 “* * * The City of Pendleton, like many other communities, is faced with hard
2 economic choices. The City has determined that it would be better to have a 15-
3 acre park than no park at all. Because a 15-acre park would more likely include
4 more of the descriptive amenities listed in the Comprehensive Plan Park Policy for
5 community parks, it is classified as a community park even if it does not meet the
6 aspirational goal for park size.

7 “It is the finding of the City Council that neither the reference to a ‘minimum’ 30
8 acre park size nor the reference to a ‘maximum’ distance of one mile walking
9 distance and/or half hour riding standards are mandatory approval criteria. * * *
10 [Neither] of these [standards] are included in the implementing ordinances as criteria
11 for new park developments. It is further the finding of the Council that this reference
12 to maximum distance is simply a description of the anticipated distance from which
13 the primary users of the park will be coming to use the park.

14 “It is the interpretation of the City Council that the [Community Park policy]
15 concerning both the maximum distance and the minimum acreage standards are
16 simply descriptive of a particular variety of park, and are the idealized aspirational
17 goals for such parks. These descriptions are not intended to be a substantive
18 criterion that will control the approval of a park facility. Such a determination would
19 be contrary to the basic goals of the Comprehensive Plan Park policies, which are
20 to encourage the development of additional parks of various sizes and amenities.
21 The City of Pendleton has historically and traditionally interpreted and applied these
22 provisions in the Comprehensive Plan Policy listed as a guide and not as an absolute
23 standard. * * *

24 “* * * * *

25 “The City Council of the City of Pendleton finds that for the foregoing stated
26 reasons, * * * [The Community Park policy does not include] approval criteria.
27 Accordingly, this application meets all of the criteria of [PZO 132.]” Record 9-11
28 (emphasis added).

29 Petitioners claim that city has misconstrued the applicable law in concluding that the policy
30 requirements are aspirational goals and are not approval criteria. According to petitioners, the city’s
31 alleged financial inability to construct a community park in compliance with either the minimum size
32 or maximum riding distance requirements is irrelevant to whether the PCP park policies are
33 “approval criteria.” In addition, petitioners note that the application of the park policies in this case
34 arise because the city had to apply PZO 132(A), which requires that conditional uses comply with
35 the comprehensive plan. Petitioners argue that it is not clear whether any other city parks were

1 approved as conditional uses and, therefore, the fact that other parks may have been approved
2 without the city having considered the PCP park policies is simply irrelevant to the question of
3 whether the PCP park policies apply in *this* case.

4 The findings explain that the PCP park policies are merely descriptions of types of parks,
5 and do not operate as approval criteria that must be met in order to approve the development of
6 park facilities within the Tutuilla Creek floodway. The findings also explain that whether a particular
7 park falls within a particular park category listed in the PCP depends on the amenities that the
8 particular park offers, on the population that will likely use the park, and on size. The findings
9 emphasize that the park policies set out in the PCP do not require that parks include all of the
10 characteristics described in one category in order to be developed within city limits. We believe that
11 those findings adequately set out what the city believes those PCP park policies to mean.²

12 Petitioners have not established that the city’s interpretation of the Community Park policy is
13 inconsistent with other PCP park policies, or is inconsistent with the text and context of the
14 remainder of the PCP or the PZO. ORS 197.829(1).³

15 The first assignment of error is denied.

² While we agree with petitioners that the city’s failure to apply the park policies as approval criteria in prior cases where development of city parks were at issue does not mean that the city was necessarily correct in failing to apply them during conditional use review pursuant to PZO 132(A), we believe the findings adequately explain why the city believes that the same reason that the city did not consider the park policies in prior circumstances—that the park policies merely establish different categories of parks, and do not impose approval criteria that must be met before a park is developed within the R-1 zone—is an adequate explanation for the city’s decision not to apply the PCP park policies as approval criteria in this case.

³ ORS 197.829(1) provides, in relevant part:

“The Land Use Board of Appeals 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:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioners argue that the city’s conditional use permit decision does not address the issues
3 that remained to be addressed after our decision in *Monogios III*. According to petitioners, the
4 city’s October 7, 2003 decision merely adopts the minutes of the January 21, 2003 city council
5 meeting where the city council adopted the decision that was challenged in *Monogios III*, and does
6 not address LUBA’s decision in *Monogios III* at all.

7 The city explains that the October 7, 2003 conditional use approval incorporates by
8 reference the minutes of the city council’s January 21, 2003 meeting, which in turn incorporate
9 findings that were attached to those minutes. The city argues that it is clear from the decision that, by
10 referring to the January 21, 2003 minutes, the city was intending to ratify the rationale and the
11 findings that were included in those minutes, *in addition* to adopting additional findings that address
12 LUBA’s *Monogios III* remand.

13 We agree with the city. The October 7, 2003 conditional use permit decision is found at
14 Record 6-17. That decision includes findings that address our decision in *Monogios III*. The city’s
15 October 7, 2003 conditional use approval decision also states that

16 “[t]he City’s January 21, 2003 decision in the matter of CUP02-03 is attached
17 hereto as Exhibit ‘1.’ Except as modified herein, that decision is incorporated by
18 this reference herein.” Record 8.

19 A copy of the January 21, 2003 minutes is found at Record 18-22. A copy of the findings
20 of fact attached to the January 21, 2003 minutes is found at Record 23-26. It is abundantly clear
21 from the October 7, 2003 decision that the city adopted findings that address our decision in
22 *Monogios III* in addition to incorporating prior findings that support the October 7, 2003 decision.

23 The second assignment of error is denied.

24 **THIRD ASSIGNMENT OF ERROR**

25 Petitioners argue that the city erred in concluding that the proposed parking areas are not
26 located within a “Flood Hazard Area,” as that term is defined in PZO 78(A). From that mistake,
27 petitioners argue that the city erred in concluding that a Flood Hazard Permit is not required to

1 construct the parking lots.⁴ Petitioners argue that the proposed parking areas are located within 75
2 feet of the floodway of the Umatilla River.⁵ Petitioners also cite to evidence that the area on each
3 side of Tutuilla Creek is within the floodplain. Petitioners argue that there is no evidence to show
4 why the city believed that the parking areas, which are located within 50 feet of the creek, are not
5 partially or completely within the Flood Hazard Zone.

6 The city's flood hazard permit decision identifies only those portions of the park that are
7 located within the 100-year floodplain as the areas that are subject to the flood hazard permit
8 provisions. *See* Record 81 and maps at Record 303 and 304.⁶ The only improvements that will be
9 located within the 100-year floodplain are two footbridges and approximately 488 feet of paved
10 footpaths. Petitioners do not explain why the evidence that the parking lots will be located within 75
11 feet of the floodway of the *Umatilla River*, a fact that the city vehemently disputes, or will be
12 located within 50 feet of the east bank of Tutuilla Creek, means that the parking areas will be

⁴ PZO 78(A) provides:

“The boundaries of areas delineated as Flood Hazard Areas in the City of Pendleton shall be the boundaries of those areas within the City limits designated on the Flood Insurance Rate Maps adopted by the Department of Housing and Urban Development Flood Insurance Administration effective February 19, 1987, and revised on July 15, 1988. The boundaries of areas shall also include any future additions to the City to which official Flood Insurance Rate modifications are made thereto * * *.”

⁵ PZO 113 requires that development within 75 feet of the Umatilla River or within 50 feet of tributaries of the Umatilla River be subject to review by the planning commission. We believe it is undisputed that the proposed parking areas are within 50 feet of a *tributary* of the Umatilla River, *i.e.*, Tutuilla Creek, which is why the city subjected its proposal to develop park facilities within the Umatilla River Subdistrict to the planning commission for review and approval. However, whether the parking lot is located within 50 feet of Tutuilla Creek, or within 75 feet of the Umatilla River does not affect our disposition of this assignment of error.

⁶ The county's findings at Record 81, state in relevant part:

“Survey information submitted by the City of Pendleton indicates that the parking lot improvements located on the east side of the Tutuilla Creek are outside of the Flood Hazard Subdistrict and [are] not subject to approval herein. The only proposed park improvements subject to Flood Hazard Subdistrict permit approval are the 488 feet of walkways to be located within the Flood Hazard Subdistrict and the replacement of the wooden portion of the previously existing footbridges, which replacement repair work will occur on existing abutments.”

1 located within a Flood Hazard Zone, as that area is described in PZO 78. Accordingly, petitioners'
2 assignment of error provides no basis for reversal or remand.

3 The third assignment of error is denied.

4 The city's decision is affirmed.