

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

ROY COMRIE,
Petitioner,

vs.

CITY OF PENDLETON,
Respondent,

and

OREGON DEPARTMENT
OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2004-019

FINAL OPINION
AND ORDER

Appeal from City of Pendleton.

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

No appearance by City of Pendleton.

Bonnie E. Heitsch, Assistant Attorney General, and Kathryn A. Lincoln, Assistant Attorney General, Salem, filed the response brief. With them on the brief was Hardy Myers, Attorney General. Bonnie E. Heitsch argued on behalf of intervenor-respondent.

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

AFFIRMED

05/19/2004

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

NATURE OF THE DECISION

Petitioner appeals the city’s approval of a conditional use permit to construct a bridge over the Umatilla River and a railroad overpass.

MOTION TO INTERVENE

The Oregon Department of Transportation (ODOT), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The project area includes the Ball Park Bridge, part of US 30, that crosses the Umatilla River and connects downtown Pendleton to Highway 37 and the city airport. US 30 is under the jurisdiction and control of intervenor ODOT. Parallel to and south of US 30 and the Ball Park Bridge is a Union Pacific Railroad (UPRR) track and bridge. The city’s transportation system plan (TSP), adopted in 1997, contemplates future upgrades to Ball Park Bridge, widening US 30 to five lanes, and extension of a downtown street, SW 20th Street, via a grade-separated crossing of the UPRR track to connect with US 30 east of the Ball Park Bridge.

A portion of the project area is within the Umatilla River (U-R) subdistrict, which requires a conditional use permit for new development. A majority of the area within the U-R subdistrict affected by the project is zoned either Central Commercial (C-1) or Central Commercial, Limited Use Development (C-1/L-U). A small portion is zoned Light Industrial (M-1). Highway transit uses are permitted outright in the C-1, C-1/L-U and M-1 zones. An area north of the Umatilla River adjacent to the Ball Park bridge and the existing alignment of US 30 is zoned High Density Residential (R-3) and developed with a ball park. Highway transit uses are not permitted either outright or conditionally in the R-3 zone.

Following adoption of the TSP in 1997, the city discovered that the Ball Park bridge is structurally deficient and also that it is eligible for the National Register of Historic Places. These considerations led the city and ODOT to seek alternatives to upgrading the Ball Park Bridge, as

1 contemplated in the 1997 TSP. After lengthy study, the city and ODOT arrived at a preferred
2 alternative. The preferred alternative involves retaining Ball Park Bridge as a pedestrian bridge, and
3 constructing a new bridge between Ball Park Bridge and the UPRR bridge. The new bridge
4 location requires realignment of a portion of US 30 to the south of its current position. ODOT
5 concluded that the new alignment rendered infeasible the extension of SW 20th street via a grade
6 separated crossing of the UPRR track that is contemplated in the 1997 TSP. In place of the SW
7 20th street extension, ODOT proposed extending a nearby east-west arterial, SW Court Place, in a
8 wide curve north, crossing the UPRR track via an overpass, and connecting to the realigned US 30
9 just east of the new bridge.

10 On July 20, 2001, the city council amended the description of the SW 20th street extension
11 in the TSP to add terms intended to allow for ODOT's proposed extension of SW Court Place to
12 US 30.¹ In January 2003, ODOT applied to the city for a conditional use permit to construct the
13 portions of the preferred alternative within the U-R subdistrict. The city planning commission held a
14 hearing on the application February 20, 2003, and voted to approve the permit on February 21,
15 2003. Petitioner appeared at that hearing in opposition to the proposal, but the city did not provide
16 petitioner with notice of the planning commission decision, and the city rejected petitioner's belated
17 attempt to file a local appeal of the planning commission approval to the city council.² On
18 December 5, 2003, LUBA remanded the city decision rejecting petitioner's local appeal, requiring
19 that the city hear petitioner's local appeal of the planning commission decision. *Comrie v. City of*
20 *Pendleton*, ___ Or LUBA ___ (LUBA No. 2003-096, December 5, 2003).

¹ As amended by the July 20, 2001 decision, the TSP states, in relevant part:

“SW 20th Street *or vicinity* should be extended as a ~~5-lane~~ *multi-lane* arterial street from its current terminus to [US 30]. * * * This extension requires an additional crossing of the Union Pacific; to limit the delay experienced by motorists, emergency vehicles, bicyclists and pedestrians in the downtown, a grade separated crossing should be constructed.” Record Vol I, 32 (Italics represent added language; strike-through represents deleted language).

² Petitioner apparently owns property that may be condemned under the proposed project.

1 On remand, the city council conducted a hearing and on January 20, 2004, voted to reject
2 petitioner’s appeal, affirming the planning commission decision. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner contends that the city erred in approving any portion of the project in the R-3
5 zone, where highway transit uses are not permitted outright or conditionally. In addition, petitioner
6 argues that the proposed construction is inconsistent with limitations on the height of fences and
7 walls in the R-3 and C-1 zones and the maximum lot coverage standards in the C-1 zone.

8 According to petitioner, the uses permitted or conditionally allowed in the R-3 zone do not
9 include highway transit uses, such as the proposed project. In addition, petitioner argues that the
10 elevated portions of the proposed US 30 improvements will exceed the six-foot maximum height of
11 “fences or walls” allowed in the R-3 zone, pursuant to Pendleton Zoning Ordinance (PZO) 25(K).³
12 Therefore, petitioner argues, the city erred in approving any highway transit improvements in the R-
13 3 zone.

14 With respect to the C-1 zone, petitioner argues that PZO 45 requires that construction of
15 any “commercial building” over 25,000 square feet in size requires approval as a conditional use,
16 even if the use is permitted outright.⁴ In addition, petitioner argues that the elevated portions of the
17 US 30 improvements will exceed the eight-foot height of fences allowed in the C-1 zone.

18 ODOT responds that no argument was raised below that the proposed project is not
19 permitted in the R-3 zone, or that it is inconsistent with R-3 and C-1 requirements, and therefore

³ PZO 25(K) is part of the city’s regulations governing residential zones, and provides, in relevant part:

“In any residential zone, a sight-obscuring fence or wall, not exceeding six (6) feet in height, may be located or maintained within the required interior yards, except where the requirements of vision clearance apply. * * *”

⁴ PZO 45 governs commercial zones, and provides:

“There shall be no maximum lot coverage regulations for commercial zones; however, the construction of any commercial building over 25,000 square feet shall require authorization by the Planning Commission under the conditional use provisions of Sections 131-137 of this Ordinance, even if the use is permitted outright.”

1 those arguments are waived. ORS 197.763(1).⁵ On the merits, ODOT argues that notwithstanding
2 statements in the city council decision that portions of the project adjoin or are within the R-3 zone,
3 in fact the only R-3 zoned land within the project area is the ball park north of the existing US 30
4 alignment. According to ODOT, no part of the proposed bridge, overpass or realignment of US 30
5 to the south of its existing alignment is within R-3 zoned land. With respect to the R-3 and C-1
6 fence or wall height limits, ODOT argues that the cited regulations govern sight-obscuring, self-
7 standing fences or walls, not retaining walls such as that proposed for the US 30 realignment.
8 Further, ODOT argues that the lot coverage standards in the C-1 zone govern only “commercial
9 buildings,” not other types of uses allowed in the C-1 zone, such as the disputed highway
10 improvements.

11 **A. Waiver**

12 At oral argument, petitioner cited to testimony at Record Vol I, 202 that petitioner
13 contends raises the issue of whether the proposed highway transit uses are allowed in the R-3
14 zone.⁶ Petitioner also cites to testimony at Record Vol I, 524 that allegedly raises the issue of

⁵ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

⁶ The testimony at R Vol I, 202 states, in relevant part:

“Under *Relevant Criteria*, the criteria appear in conflict with themselves. Criteri[on] No. 1 identifies the Umatilla River Subdistrict (U-R), which includes land use zones [C-1, C-1(L-U), M-1 and R-3]. No map or other indication is provided to clarify the convergence.

“Criteri[on] No. 2 simply identifies the majority of the land as being zoned C-1 and C-1/L-U while the minority is zoned R3 and M-1. Then in criteri[on] No. 3, [Pendleton Zoning Ordinance or PZO] 158 (C) is used to conclude, ‘the site shall be considered to be zoned’ C-1 and C-1/L-U.

“This line of logic seems sound where those sites that contain multiple land use zones area to be covered by one set of zoning codes, but the confusion enters from the next set of Relevant Criteria. In criteri[on] No. 4, a portion of the project is within 75 feet of the Umatilla River and,

1 consistency with R-3 and C-1 wall height restrictions. However, we do not see that the cited
2 testimony raises either issue. The testimony at Record Vol I, 202 critiques the draft findings
3 prepared by the city, quoted at n 7 below, and expresses puzzlement that the city does not actually
4 apply any C-1 or C-1/L-U standards in its decision. However, nowhere does that testimony
5 suggest that the proposed project is not permitted in the R-3 zone.⁷ Because that issue was not
6 raised below, it is waived.

7 The cited testimony at Record Vol I, 524 does not mention walls or C-1 or C-1/L-U height
8 or lot coverage restrictions at all. Because nothing in the record cited to us adequately raises issues
9 regarding consistency with the fence/wall height or lot coverage requirements of the R-3, C-1 or C-
10 1/L-U zones, those issues are also waived.

11 **B. PZO 158(C)**

12 Finally, petitioner also argues under this assignment of error that the findings quoted at n 7
13 misconstrue PZO 158(C). According to petitioner, PZO 158(C) concerns circumstances where a
14 single lot is in multiple zones, not where multiple lots are within different zones, as here. Petitioner
15 may be correct on that point, but the only significance petitioner attaches to the city's alleged

thereafter, the remaining Relevant Criteria only deal with the U-R Subdistrict. I'm unclear as to why criteria No. 1, No. 2, and No. 3 were included in the discussion since I was unable to find specific application of C-1, or C-1/L-U zoning restrictions." Record Vol 1, 202.

⁷ Under the heading "Relevant Criteria," the city's decision states, in relevant part:

- "1. The area is zoned [C-1, C-1/L-U, M-1 and R-3], specifically as it applies to the portion of the project within the U-R Subdistrict.
- "2. The majority of the area is zoned [C-1 and C-1/LU]. A minority of the property is zoned [R-3 and M-1].
- "3. [PZO] 158(C) sets forth that 'If a zone boundary as shown on the [official zoning] map divides a lot between zones, the entire lot shall be deemed to be in the zone in which the greater area of the lot is.' Thus, the site shall be considered to be zoned [C-1 and C-1/L-U].
- "4. A portion of the proposed project (railroad overpass, bridge, new intersection and cul-de-sac of the existing US 30 Westgate alignment) is within 75 feet of the floodway of the Umatilla River and is thus contained with the Umatilla River (U-R) Subdistrict." Record Vol I, 5.

1 misinterpretation of PZO 158(C) relates to the issues of whether the proposed project is permitted
2 within the R-3 zone or consistent with R-3 and C-1 zone requirements, issues we have just
3 concluded were not raised below. Contrary to petitioner’s suggestion, it does not appear that the
4 findings quoted at n 7 were drafted to respond to issues raised regarding compliance with the R-3
5 and C-1 zone requirements. The findings quoted at n 7 were part of the February 20, 2003
6 planning commission decision, and continued forward unchanged in the city council’s January 20,
7 2004 decision. Cf. Record Vol II, 10, and Record Vol I, 5. Whatever the intended purpose of
8 those findings, the city’s conclusion that the “site” shall be considered to be zoned C-1 and C-1/L-
9 U pursuant to PZO 158(C) appears to have no bearing on the issues petitioner raises in the first
10 assignment of error regarding compliance with the R-3 and C-1 zone requirements. Accordingly,
11 the city’s error if any in construing and applying PZO 158(C) would appear to be harmless error.
12 Because petitioner does not attach any significance to the city’s alleged misconstruction of
13 PZO 158(C) other than issues we have found to be waived, petitioner’s arguments with respect to
14 PZO 158(C) do not provide a basis for reversal or remand.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 PZO 113(C) and PZO 132(A) require in relevant part that a proposed conditional use must
18 be shown to be consistent with the Comprehensive Plan. Petitioner contends that the city failed to
19 adequately demonstrate that the proposed use is consistent with comprehensive plan policies
20 governing (1) wetlands and natural resources, and (2) transportation.

21 **A. Wetlands and Natural Resources**

22 Opponents below argued that the proposed use is not consistent with comprehensive plan
23 policies requiring that the city

24 “encourage all parties in the conservation of identified wetlands and waterways (*i.e.*
25 the Umatilla River and its tributaries), game and wildlife habitat and similar natural
26 resources, and to permit only compatible development after careful review * * *.”
27 Pendleton Comprehensive Plan (PCP) 26.

1 The city adopted findings to address the PCP policies cited by the opponents, concluding that the
2 design of the project as approved and regulated by various state and federal agencies sufficed to
3 protect wetlands and natural resources.⁸ Petitioner challenges the adequacy of those findings,

⁸ The city's findings state, in relevant part:

“[Opponents] also assert that the proposed project is in conflict with several comprehensive plan provisions. As the project is expressly provided for in the Transportation System Plan [TSP], it is considered consistent with comprehensive plan provisions. But, in the interest of assuring that we have thoroughly considered all issues we will address each citizen concern individually.

“[Opponents] correctly assert that the project area contains water areas. The replacement bridge crossing spans the Umatilla River. A bridge replacement by its very nature will span the water body and will require some alteration of the adjacent riverbank and river. We find that ODOT has coordinated with appropriate state and federal regulatory agencies and have received permits to construct the replacement bridge. These permits have been conditioned with numerous limitations regarding the timing of in-water work, construction techniques and impose mitigation with subsequent monitoring to restore any removal of vegetation on the river banks. The restrictions ensure that water quality is not degraded and wildlife is protected during the construction process. In addition, the bridge structure was designed in a way to reduce scour potential and to minimize the disturbance to wildlife and water quality. ODOT has applied for and received a floodway permit from the City of Pendleton. The review of this request for a conditional use permit within the [U-R] Subdistrict is another opportunity to review the proposal and to ensure that the potentially conflicting use is consistent with the intent and spirit of the [PCP]. We find that the proposed project is properly designed and will be constructed in a way to avoid adverse consequences to the Umatilla River. We find that the policies protecting water resources in the [PCP] have been met.

“[Opponents] correctly assert that there are wetlands in the project area. Approximately 0.2 acres of wetland were delineated in the project area. These wetlands are located exclusively along both banks of the river from the water's edge to the break in slope. Conservation and mitigation measures have been taken including restoration of the disturbed areas and enhancement of 0.3 acres of riparian vegetation. We find that the proposed project, with the mitigation and conservation measures will have no permanent impacts to wetlands, and poses no conflicts with the objectives of the [PCP] policies.

“* * * * *

“[Opponents] correctly assert that the project area contains wildlife and fish. The [PCP] identifies that urban development such as streets and bridges could dramatically degrade the existing surface water and riparian vegetation. ([PCP] 29). The [PCP] requires that such a conflict with wildlife and water quality can only be determined with a review of a specific proposal. [*Id.*].

“We have reviewed this specific proposal which includes a replacement bridge over the Umatilla River and we find that ODOT has taken reasonable and appropriate design measures to reduce any potential adverse impacts to fish and wildlife in the Umatilla River. The bridge was designed in a way to minimize impacts to the main river channel and reduce potential scour by aligning new bents with the existing bents of the existing Ball Park Bridge. In

1 arguing that (1) the approval of regulatory agencies does nothing to establish consistency with the
2 language at PCP 26; (2) the findings fail to explain how the design will “minimize the disturbance to
3 wildlife and water quality” compared to other designs that do not involve a replacement bridge or
4 the overpass; and (3) the findings erroneously rely on language at PCP 29 to conclude that the
5 design is consistent with preservation of wildlife habitat in the Umatilla River, when in fact the cited
6 language identifies urban development such as bridges to be “conflicting uses” with wildlife habitat
7 that must be addressed through a permit process. Finally, petitioner argues that the city erred in
8 finding that the design promotes open space and recreational use by facilitating future expansion of
9 an existing pedestrian walkway. According to petitioner, any expansion of the existing walkway is
10 entirely speculative.

11 ODOT responds, and we agree, that the city’s findings adequately explain why the
12 proposed use is consistent with PCP policies requiring protection of wetlands, natural resources,
13 open spaces and recreation. The city relied in part on the approval of and conditions imposed by
14 state and federal agencies, but did not substitute those approvals for findings explaining why the
15 project is consistent with PCP policies, as petitioner suggests. Petitioner does not explain why the
16 city was required to compare designs and choose the design that causes the least disturbance to
17 wildlife and water quality. Nor does Petitioner explain why the conditional use permit process
18 required by the U-R subdistrict is insufficient to ensure adequate preservation of wildlife habitat in
19 the Umatilla River, for purposes of the policies at PCP 29. Finally, we agree with ODOT that the
20 proposed expansion of the pedestrian walkway facilitated by conversion of the Ball Park Bridge to
21 a pedestrian bridge is more than speculative, and the city’s findings sufficiently explain why the
22 project promotes open space and recreational use.

addition, ODOT has extensively analyzed the impacts to wildlife and performed a biological assessment of the area. It has agreed to pages of restrictions and management techniques that will reduce the impacts of construction on the water quality of the river and minimize disturbance to wildlife. With these mitigation strategies, we believe that no conflicts exists and the policies of the [PCP] have been met.” Record Vol I, 10-11.

1 **B. Transportation**

2 Petitioner argues that the 1990 PCP describes the SW 20th Street extension project as an
3 *underpass* of the UPRR, and that the city’s approval of an *overpass* of the UPRR via an extension
4 of SW Court Place is inconsistent with the 1990 PCP.⁹ According to petitioner, the TSP language
5 quoted at n 1 does not authorize either (1) an overpass of the UPRR or (2) an extension of SW
6 Court Place to US 30 rather than SW 20th Street. To the extent it purports to authorize either or
7 both, petitioner contends that the TSP is not part of the city’s comprehensive plan, and thus the
8 1990 PCP trumps any contrary language in the TSP.

9 The city’s decision finds that the TSP is part of the city’s comprehensive plan and,
10 moreover, that it serves as the transportation element of the PCP. Record Vol I, 9.¹⁰ The city

⁹ The 1990 PCP states in relevant part:

“S.W. 20th Street Extension: Extend S.W. 20th Street from its northerly dead end to [US 30], providing an underpass at the UPRR main line. * * *” PCP Appendix B-1.

¹⁰ The city’s decision states, in relevant part:

“This City Council finds that this project to extend SW Court Place to [US 30] with the RR overpass is consistent with the acknowledged TSP. SW Court Place is within the vicinity of SW 20th Street. The project will extend SW Court Place with two travel lanes to [US 30]. The project includes a grade-separated crossing with the UPRR in the form of an overpass.

“* * * [A] concern was raised by a citizen that the TSP has no relevance as the TSP is not the same thing as the Comprehensive Plan. We agree that the TSP is not the same thing as the Comprehensive Plan but disagree that it has no relevance. The TSP is part of the Comprehensive Plan fulfilling the statutory and regulatory obligations of Goal 12. In other words the TSP serves as the transportation chapter of the Comprehensive Plan. * * *.”

“* * * The TSP addressed extension of SW 20th Street from Court Place to [US 30] and the widening of [US 30] and replacement of the existing bridge at the Umatilla River in its alternatives analysis, (page 6-10) and upon further analysis, incorporated revised projects in the TSP (page 9-12 and 9-18). The projects identified in the TSP replace those projects identified in earlier adopted Comprehensive Plan. While some of the transportation projects identified in the earlier Comprehensive Plan were readopted in the TSP such as the [US 30] widening and Umatilla River Bridge replacement, other projects, through the extensive alternatives analysis were modified and readopted in the modified form such as the SW 20th street or vicinity extension and grade separated crossing of the UPRR, and others were dropped entirely. We find that both the bridge replacement and the SW Court Place extension are consistent with the TSP. As the TSP is the adopted transportation element of the comprehensive plan it is consistent with the Comprehensive Plan.” Record Vol I, 9.

1 found that the projects described in the TSP replace the projects described in the PCP. *Id.*
2 Because the TSP contemplates a grade-separated crossing of the UPRR that is not limited to an
3 underpass, and because the TSP contemplates extension of a street in the vicinity of SW 20th Street
4 to US 30, the city concluded that extension of SW Court Place to US 30 via an overpass is
5 consistent with the TSP, and therefore consistent with the PCP.

6 Petitioner does not address these findings or the interpretations they include. We agree with
7 ODOT that the city’s key interpretations (*i.e.*, that the TSP is the transportation element of the
8 PCP, that the TSP projects replace projects described in the PCP, and that the extension of SW
9 Court Place via an overpass of the UPRR is consistent with the TSP as amended in 2001) are not
10 reversible under the discretionary standard of review we must apply to a governing body’s
11 interpretations of its comprehensive plan, pursuant to ORS 197.829(1) and *Church v. Grant*
12 *County*, 187 Or App 518, 69 P3d 759 (2003). While adding the terms “or vicinity” to the SW
13 20th Street description in the TSP is admittedly a brief and awkward way of allowing the extension
14 of a street other than SW 20th Street, petitioner does not dispute that the intent of the 2001 TSP
15 amendment was precisely that. *See, e.g.*, Record Vol 1, page 146 (Minutes of July 20, 2001 City
16 Council hearing, describing purpose of the 2001 TSP amendments).

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 PZO 132(C), one of the applicable conditional use criteria, requires a finding that “[t]he
20 location for all proposed uses, except residential uses, is reasonable compared with other available
21 property identically zoned within the City or within the proximity of the proposed use.” Petitioner
22 argues that the city’s findings of compliance with PZO 132(C) fail to compare the proposed site and
23 location with “other property identically zoned” or “within the proximity of the proposed use.” In
24 particular, petitioner faults the city for failing to consider the extension of SW 20th Street to US 30,
25 as contemplated by the 1997 TSP.

1 The city’s findings addressing PZO 132(C) do not expressly consider extending SW 20th
2 Street to US 30, as an alternative to extending SW Court Place.¹¹ However, elsewhere in the
3 decision the city describes the 12 alternative designs the city and ODOT considered, and the city’s
4 conclusion that the extension of SW 20th Street to US 30 was infeasible “due to excessive
5 geometric and/or environmental constraints.” Record Vol I, 7 (quoting ODOT’s environmental
6 assessment). Petitioner does not seriously suggest that there is any reasonable alternative location
7 or design for the project, with the exception of the SW 20th Street extension. However, petitioner
8 does not explain why the city erred in concluding that that extension was infeasible. Given the
9 limited range of alternative locations for the proposed project that are feasible and consistent with
10 the TSP, the city’s findings addressing PZO 132(C) are adequate and supported by substantial
11 evidence.

12 The third assignment of error is denied.

13 The city’s decision is affirmed.

¹¹ The city’s decision states, in relevant part:

“The location and nature of the project is identified in the [PCP] and TSP as an improvement project that is needed to improve traffic safety and circulation. The bridge replacement location is limited to sites on either side of the existing bridge. Either site would be within the U-R Subdistrict. The development of the grade separated rail crossing was determined by the City TSP and by the location of the railroad. The TSP identifies a project to extend SW 20th Street or vicinity as a multi-lane arterial street to [US 30] in order to provide for more efficient and safe travel between south and southwest Pendleton and northwest sectors of the City. Accordingly, the location of the grade separated crossing was sited in this location. Development and consolidation of the two project objectives with the engineering constraints limited the alignment to the proposed project site. We find that the location of this project is reasonable and appropriate.” Record Vol I, 17.