

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

3  
4                   MICHAEL KRETZER,  
5                   *Petitioner,*

6  
7                   vs.

8  
9                   CITY OF SHADY COVE,  
10                  *Respondent.*

11  
12                  LUBA No. 2022-005

13  
14                  FINAL OPINION  
15                  AND ORDER

16  
17                  Appeal from City of Shady Cove.

18  
19                  Andree N. Phelps filed the petition for review and argued on behalf of  
20                  petitioner.

21  
22                  No appearance by City of Shady Cove.

23  
24                  RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board  
25                  Member, participated in the decision.

26  
27                  AFFIRMED

06/06/2022

28  
29                  You are entitled to judicial review of this Order. Judicial review is  
30                  governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner appeals the city council’s denial of their applications for (1) a Floodplain Development Permit and a Riparian Permit for a pedestrian footbridge (the bridge) and related vegetation removal, (2) a Riparian Permit for ongoing vegetation removal.

**MOTION TO TAKE EVIDENCE**

OAR 661-010-0045(1) provides, in part:

“The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178 or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision.”

Petitioner moves that we take as evidence not in the record Appendix C to their petition for review, which is a copy of a sheriff’s report stating that a city staffer called the sheriff and communicated a “fourth hand” report of unpermitted vegetation removal on petitioner’s property.<sup>1</sup> Petition for Review App C. Petitioner asks that we accept Appendix C as evidence of city councilor bias, as set forth in petitioner’s first assignment of error, and/or as substantial evidence

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<sup>1</sup> Petitioner speculates that the phone call to the sheriff was made by a planning technician at the city. Petition for Review 4 n 3.

1 of the nature of petitioner's vegetation removal discussed in petitioner's third  
2 assignment of error.

3 First, petitioner argues that Appendix C provides additional, corroborating  
4 evidence supporting the allegation of bias in their first assignment of error.  
5 Petitioner explains that a city councilor disclosed that they called the city  
6 manager, stated that they were observing the removal of vegetation from the  
7 subject property, and asked how to report the removal. Petitioner argues that it is  
8 natural to conclude that the city councilor's call to the city manager ended in the  
9 city staffer's call to the sheriff reflected in Appendix C. Having initiated the  
10 vegetation removal complaint process, petitioner maintains that the city councilor  
11 was biased and should have recused themselves from voting on petitioner's  
12 applications.<sup>2</sup>

13 Petitioner also argues that Appendix C is relevant to the issue of the nature  
14 of the removal of vegetation from the riparian corridor discussed in their third  
15 assignment of error. The report includes the following statement: "There is no  
16 root structure removal and [petitioner] advises he makes sure no debris enters  
17 [the] river." Petition for Review App C, at 2.

18 OAR 661-010-0045(1) authorizes us to accept evidence concerning  
19 disputed factual allegations in the parties' briefs. The city did not submit a

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<sup>2</sup> Petitioner also argues that the sheriff's report verifies that petitioner felt "targeted" by the city, but petitioner does not explain the relevance of petitioner's feelings to an issue on appeal.

1 response to the motion to take evidence or to the petition for review. There are  
2 therefore no disputed factual allegations in the parties' briefs.

3 The motion to take evidence is denied.

#### 4 **BACKGROUND**

5 Shady Cove Code (SCC) chapter 151 is titled "Flood Damage Prevention."

6 The stated purpose of SCC chapter 151 is

7 "to promote the public health, safety and general welfare, and to  
8 minimize public and private losses due to flood conditions in  
9 specific areas by provisions designed to:

10 "(A) Protect human life, health and property;

11 "(B) Minimize damage to public facilities and utilities such as  
12 water purification and sewage treatment plants, water and gas  
13 mains, electric, telephone and sewer lines, streets and bridges  
14 located in flood plains;

15 "(C) Help maintain a stable tax base by providing for the sound use  
16 and development of flood prone areas;

17 "(D) Minimize expenditure of public money for costly flood  
18 control projects;

19 "(E) Minimize the need for rescue, emergency services, and relief  
20 associated with flooding and generally undertaken at the  
21 expense of the general public;

22 "(F) Minimize prolonged business interruptions, unnecessary  
23 disruption of commerce, access and public service during  
24 times of flood;

25 "(G) Ensure that potential buyers are notified that property is in an  
26 area of special flood hazard;

1           “(H) Ensure that those who occupy the areas of special flood  
2           hazard assume responsibility for their actions; and

3           “(I) Manage the alteration of areas of special flood hazard, stream  
4           channels and shorelines to minimize the impact of  
5           development on the natural and beneficial functions.” SCC  
6           151.003.

7           SCC chapter 151 accomplishes its purpose by establishing methods and practices  
8           designed to:

9           “(A) Require development that is vulnerable to floods, including  
10           structures and facilities necessary for the general health,  
11           safety and welfare of citizens, to be protected against flood  
12           damage at the time of initial construction;

13           “(B) Restrict or prohibit uses which are dangerous to health, safety  
14           and property due to water or erosion hazards, or which  
15           increase flood heights, velocities, or erosion;

16           “(C) Control filling, grading, dredging and other development  
17           which may increase flood damage or erosion;

18           “(D) Prevent or regulate the construction of flood barriers that will  
19           unnaturally divert flood waters or that may increase flood  
20           hazards to other lands;

21           “(E) Preserve and restore natural floodplains, stream channels, and  
22           natural protective barriers which carry and store flood waters;  
23           and

24           “(F) Coordinate with and supplement provisions of State of  
25           Oregon Specialty Codes enforced by the State of Oregon  
26           Building Codes Division.” SCC 151.004.

27           City of Shady Cove Ordinance 279 amended the Natural Resources,  
28           Natural Disasters and Hazards section of the Shady Cove Comprehensive Plan to

1 include additional information about riparian corridor protection.<sup>3</sup> Ordinance 279  
2 Ex A. Ordinance 279 also adopted riparian protection regulations. Ordinance 279  
3 Ex B. Those regulations are known collectively as the “Riparian Ordinance.” The  
4 stated purpose of the Riparian Ordinance is:

5 “1) To implement the goals and policies of the Natural Resources  
6 Element of the Comprehensive Plan.

7 “2) To protect and restore the City of Shady Cove water bodies  
8 and associated riparian areas.

9 “3) To protect and restore the water quality through control of  
10 erosion and sedimentation, through flood management and  
11 thermal regulation (shading).

12 “4) To protect and restore the natural aesthetic qualities of the  
13 resource recognizing these areas as community assets.

14 “5) To protect and restore fish and wildlife habitat in and around  
15 the waterways and water bodies of the City.

16 “6) To meet State requirements for Safe Harbor [OAR 660-023-  
17 0090] in lieu of the standard inventory ESEE process [OAR  
18 660-023-0040 & 0050]

19 “7) *To comply with the requirements of the Endangered Species*  
20 *Act, the Clean Water Act, the Federal Emergency*  
21 *Management Agency’s National Flood Insurance Program,*  
22 *Oregon Statewide Planning Goals 5, 6 and 7, and to comply*

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<sup>3</sup> Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) is “[t]o protect natural resources and conserve scenic and historic areas and open spaces.” The Shady Cove Comprehensive Plan’s Natural Resources, Natural Disasters and Hazards section implements Goal 5. Shady Cove Comprehensive Plan D-1.

1 with the Rogue Basin Total Maximum Daily Load (TMDL)  
2 implementation for Shady Cove.

3 “8) *To work in conjunction with the Flood Damage Prevention*  
4 *Ordinance; where the Riparian Ordinance and the Flood*  
5 *Damage Prevention Ordinance conflict, the most restrictive*  
6 *shall prevail.” Riparian Ordinance Section I(A) (brackets in*  
7 *original; emphases added).*

8 The Riparian Ordinance applies “to all areas within the city of Shady Cove  
9 located along the Rogue River and its tributaries, including Red Lick and India  
10 Creeks.” Riparian Ordinance Section I(B).

11 The subject property is 1.55 acres in size, zoned Low Density Residential  
12 20,000 square feet lots (R-1-20), and improved with a single-family residence. A  
13 branch of the Rogue River crosses the subject property, leaving a third of  
14 petitioner’s property on an island that is inaccessible by foot.<sup>4</sup> On March 30,  
15 2021, the city sent petitioner a letter advising that the city had received a  
16 complaint that a bridge had been constructed on their property within the city’s  
17 Riparian Protection Corridor and the Federally Identified Floodway, without a  
18 required permit, and directing petitioner to submit an after-the-fact application  
19 for city approval of the bridge.

20 On April 20, 2021, petitioner submitted a Floodplain Development Permit  
21 (FDP) application. Record 12-25. The application responded to both the Flood

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<sup>4</sup> Other property owners are similarly situated, with portions of their property located on opposite sides of the branch of the river. The larger, isolated land area is owned by a total of three other private parties and the state of Oregon.

1 Damage Prevention regulations set out in SCC chapter 151 and the Riparian  
2 Ordinance. Record 24-25. On May 11, 2021, petitioner received a letter from a  
3 city planner stating that “no construction may be permitted in the identified  
4 Floodway unless a registered engineer provides a ‘No Rise’ analysis, (Section  
5 151.048 of the [SCC]). I will not be able to approve the application without a  
6 registered engineers report indicating that the bridge will not result in any  
7 increase in flood levels during the occurrence of the base flood discharge.”  
8 Record 45.

9 While the FDP application was pending, on August 5, 2021, petitioner  
10 hired a crew to conduct pruning on the island portion of the property. Shortly  
11 thereafter, the sheriff arrived to investigate a complaint of unpermitted vegetation  
12 removal within the riparian corridor and advised petitioner to go to city hall to  
13 resolve the permit issue. City staff advised petitioner to apply for a Riparian  
14 Permit (RP) to authorize the vegetation removal on the island. Record 47. On  
15 August 17, 2021, the city advised petitioner to file an RP application by August  
16 24, 2021, or face fines. Record 52. On August 24, 2021, petitioner submitted the  
17 RP application. Record 61-63.

18 On October 7, 2021, the city council held a public hearing on both the FDP  
19 and RP applications. Prior to the hearing, city staff issued a two-page staff report  
20 (the initial staff report), explaining that the city council could “choose to deny the  
21 application as it does not contain sufficient evidence to determine that the criteria  
22 of Chapter 151 or Ordinance 279 are met” but suggesting that “a more



1 appropriate choice for the City Council would be to continue the hearing to a  
2 specific data and time to allow [petitioner] time to prepare a complete application  
3 incorporating all requirements of Section 151.027, 151.046, 151.047, 151.048,  
4 and Section IV (A-C) Of Ordinance 279.”<sup>5</sup> Record 11.

5 Shortly before the beginning of the October 7, 2021 public hearing, city  
6 staff issued a second staff report. The second staff report provided the following  
7 update:

8 “On September 29th [petitioner’s] Engineer provided staff with  
9 additional information to include: a riparian site plan, a No Rise  
10 Certification and Report, and an additional submittal narrative.  
11 Based on the additional information Staff considers this application  
12 to be complete on September 29th, 2021. In accordance with ORS  
13 227.181 the City shall renders final decision on the request by  
14 January 27, 2022.

15 “The additional material submitted by [petitioner] satisfies the  
16 submittal criteria in Section 151.027, 151.046, 151.047, 151.048,  
17 and Section IV (A-C) of Ordinance 279.” Record 143.

18 The second staff report also differed from the initial staff report in that it set out  
19 findings and recommendations addressing the identified approval criteria. These

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<sup>5</sup> The initial staff report included the following background information:

“In accordance with Section 151.009 development within a Special Flood Hazard Area requires a permit prior to construction and any development requiring an engineering analysis shall be heard through a quasi-judicial land use hearing. Due to the length of time already spent handling this unpermitted development the City has elevated the review to the City Council for determination.” Record 10.

1 included the statements that “no description of any engineered anchoring of the  
2 structure has been provided. The City Council should decide if the new site  
3 improvement has been constructed in a manner to meet reasonable flood damage  
4 prevention.” Record 144. They also stated that the landscape plan petitioner  
5 submitted did not meet applicable criteria for the RP and suggesting a condition  
6 of approval for the FDP. Record 150-51.

7       After the close of the October 7, 2021 public hearing, the city council voted  
8 to deny the applications. On October 13, 2021, petitioner’s counsel filed a written  
9 objection stating that the city council had erred in refusing petitioner’s request to  
10 leave the record open and accept additional evidence and argument. Record 123-  
11 27. Petitioner’s counsel requested that the city council reopen the record to allow  
12 petitioner to address additional information received at the October 7, 2021  
13 hearing. *Id.* The city approved the request to reopen the record and petitioner  
14 submitted additional material, including a letter from petitioner’s counsel dated  
15 November 24, 2021. Record 192-210.

16       On December 2, 2021, the city council held a public hearing to consider  
17 the additional material, closed the hearing, and continued deliberations to  
18 December 16, 2021. On December 16, 2021, the city council voted to deny the  
19 applications. On December 23, 2021, the final order was signed by the mayor and  
20 city administrator. This appeal followed.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 Petitioner’s first and second assignments of error are procedural. In the  
3 first assignment of error, petitioner argues that the city council erred because a  
4 biased city councilor participated in the decision. In the second assignment of  
5 error, petitioner argues that the city committed procedural error by conflating the  
6 two applications in the notice, hearing, deliberations, and decision, prejudicing  
7 petitioner’s ability to respond. We address the procedural assignments of error  
8 below.

9 **A. Standard of Review**

10 We will reverse or remand a local government land use decision if we find  
11 that the local government “[f]ailed to follow the procedures applicable to the  
12 matter before it in a manner that prejudiced the substantial rights of the  
13 petitioner.” ORS 197.835(9)(a)(B); *see also* OAR 661-010-0073(2)(c).

14 **B. Bias**

15 Petitioner’s first assignment of error is that they were denied a fair hearing  
16 due to bias. Substantial rights include the right to a full and fair hearing. *Muller*  
17 *v. Polk County*, 16 Or LUBA 771, 775 (1988). We have explained that a  
18 petitioner need not “demonstrate that a majority of the decision makers were  
19 influenced by the bias of one of the decision makers, or were themselves biased,  
20 before a reversal or remand is warranted under ORS 197.835(9)(a)(B).”  
21 *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 711 (2001).

1           At the beginning of the October 7, 2021 public hearing, Councilor Nuckles  
2 disclosed that they yelled out to a crew which they observed removing vegetation  
3 from petitioner’s property. Petition for Review App D, at 1. Upon questioning by  
4 petitioner’s counsel, Councilor Nuckles made further disclosures, explaining that  
5 they live across the river from petitioner’s property, that they can see petitioner’s  
6 property from their property, that they called the city manager to ask how to  
7 report the observed removal of vegetation, that their spouse submitted letters in  
8 opposition to petitioner’s proposal, and that they had a conversation with a  
9 neighbor in which the neighbor stated that the crew was using gas equipment to  
10 remove vegetation. Petition for Review App D, at 2.

11           The standard for determining bias is whether the decision-maker has so  
12 prejudged the particular matter before them as to be incapable of determining its  
13 merits on the basis of the evidence and arguments presented. *Columbia*  
14 *Riverkeeper v. Clatsop County*, 267 Or App 578, 602, 341 P3d 790 (2014). In  
15 *Halvorson*, we explained, “Actual bias sufficiently strong to disqualify a decision  
16 maker must be demonstrated in a clear and unmistakable manner. Petitioner has  
17 the burden of showing that a decision maker was incapable of making a decision  
18 based on the evidence and argument before him.” 39 Or LUBA 702, 710 (2001).  
19 We concluded that a city councilor was biased where the evidence of bias was  
20 (1) a letter from the city councilor to the mayor and the other city councilors  
21 analyzing the application in light of the code and concluding that the code was  
22 not met and (2) a memo from the same city councilor to the mayor asking the

1 mayor to recuse themselves based on statements they had made during city  
2 hearings that they wished the residents could resolve the matter without city  
3 involvement and claiming that the mayor wanted to deny the benefits of zoning  
4 code enforcement and undermine the zoning code by private agreement. *Id.* at  
5 706-11.

6 Petitioner has not established bias on the part of Councilor Nuckles, that  
7 is, petitioner has not established that Councilor Nuckles was incapable of making  
8 a decision based on the evidence and argument before them. Prior to voting at the  
9 December 16 meeting, Councilor Nuckles expressed that the hearing had been  
10 extremely taxing, somewhat personal at times, and exhausting. Audio Recording,  
11 Shady Cove City Council, Dec 16, 2021, at 37:58. This statement does not  
12 establish that Councilor Nuckles was unable to be impartial or review the  
13 applications based on the evidence. Councilor Nuckles expressed sympathy for  
14 petitioner's position, but they concluded that the material that the city said it  
15 needed to evaluate the applications against the criteria had not been submitted,  
16 so their vote would be to deny the applications. *Id.* at 38:14 - 41:29.

17 The first assignment of error is denied.

18 **C. Conflation**

19 Petitioner's second assignment of error is, like petitioner's first assignment  
20 of error, procedural. Petitioner states that the "City procedurally erred in that it  
21 conflated the two applications, often addressing the two applications

1 interchangeably in the public notice, deliberation, and in the Findings.”<sup>6</sup> Petition  
2 for Review 23. Substantial rights include the right to prepare and submit one’s  
3 case. In order to establish that the city council “[f]ailed to follow the procedures  
4 applicable to the matter before it in a manner that prejudiced the[ir] substantial  
5 rights,” petitioner must identify the procedures that the city council failed to  
6 follow. ORS 197.835(9)(a)(B) (emphasis added).

7 Petitioner does not identify a procedure violated by the content of the city’s  
8 hearing notices or a resulting prejudice to them. Similarly, although the city  
9 council and staff often used the singular “application” rather than the plural  
10 “applications,” petitioner does not identify any resulting prejudice to their

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<sup>6</sup> For example, the October 7, 2021 hearing notice stated:

“The Public Hearing is to consider a request for an after the fact [FDP] for a pedestrian bridge constructed in the Special Flood Hazard Area in the Low Density (R-1-20) zone (and associated [RP] for ongoing vegetation control within the riparian protection corridor) for property located at 128 Penny Lane, Shady Cove Oregon. Said parcel is legally described as 34-1W-21AA, Tax Lot 2600 and is currently zoned R-1-20 (Low Density Residential).” Record 3.

The Notification of Adjacent Property Use Proposal for the October 7, 2021 hearing stated, “The request is for after the fact approval to construct a pedestrian bridge in the Special Flood Hazard Area and Riparian Setback as well as approval for a Riparian Protection Corridor vegetation maintenance plan.” Record 6. The initial staff report summarized the proposal as follows: “Receive after the fact approval for the placement of a pedestrian bridge across a portion (branch arm) of the Rogue River, and [RP] for ongoing vegetation maintenance.” Record 10.

1 substantial rights. Petitioner applied for two approvals, expressly stated in their  
2 November 24, 2021 submittal to the city council that each application was subject  
3 to specific criteria, and addressed the criteria accordingly. Record 192-210.  
4 Petitioner's arguments therefore do not establish that the notices or references to  
5 a singular application prejudiced their substantial rights.

6       Petitioner also argues that the city council's  
7       "failure to address the applications separately in hearing and in  
8       Findings, prejudiced the substantial rights of the Petitioner as the  
9       applicant was engaged in a guessing game of what was needed and  
10      for which application; therefore, he was unable to adequately  
11      address the criteria, he could not anticipate the mingled Findings;  
12      therefore, his rights to a full and fair hearing were impaired."  
13      Petition for Review 23-24.

14       In addressing this argument, it is helpful to begin with both the content and  
15      the structure of the findings and the city's Flood Damage Prevention regulations  
16      and Riparian Ordinance.

17       The city council findings begin with recitals which describe the matter  
18      under review as "[a]n application for [an FDP] for after the fact approval for a  
19      pedestrian bridge built in the floodway and [an RP] to permit after the fact  
20      development within the riparian protection corridor and to allow ongoing riparian  
21      vegetation maintenance." Record 246. The city council's recitals then identify  
22      the applicable criteria as follows:

23       "3) Chapter 151, §§151.045, 151.046, & 151.049; and Procedures  
24       151.009 and 154.379 of the [SCC] govern [FDPs] within the  
25       corporate limits of the City; and

1           “4) Ordinance 279 Sections III, IV, and VII govern activities  
2           within the identified riparian protection corridor in the City of  
3           Shady Cove[.]” *Id.*

4       These recitals explain that the bridge construction and related vegetation removal  
5       are subject to the provisions set out in Recitals 3 and 4, and the ongoing  
6       vegetation removal is subject to the provisions set out in Recital 4.

7           Consistent with the recitals, the findings are organized under two headings:  
8       “Approval Criteria and Findings – Provisions For Flood Hazard Reduction,”  
9       which is followed by findings addressing SCC 151.045, SCC 151.046, and SCC  
10      151.049, and “Approval Criteria and Findings – Provisions for Riparian  
11      Development Permit,” which is followed by findings addressing the Riparian  
12      Ordinance. Record 247-54 (italics and underscoring in original).

13          The findings state that “[t]he staff recommendations, as submitted to the  
14      City Council, are contained in reports which are part of the record and specifically  
15      incorporated herein as thoughtfully set forth.” Record 246. The second staff  
16      report is structured the same way as the final decision and, for the most part,  
17      contains the same findings as the final decision.

18          A party who wishes to assign procedural error at LUBA must have entered  
19      an objection to the procedural error before the local government, if the party was  
20      given an opportunity to object. *ODFW v. Crook County*, 72 Or LUBA 316, 327  
21      (2015). Where a party has the opportunity to object to a procedural error before  
22      the local government but fails to do so, that error cannot be assigned as grounds  
23      for reversal or remand of the local government decision in an appeal to LUBA.



1 *Skrepetos v. Jackson County*, 29 Or LUBA 193, 199 (1995). Petitioner filed an  
2 objection after the October 7, 2021 city council hearing, requesting that the city  
3 council reopen the record to allow petitioner to submit additional material. The  
4 city council did so, and petitioner submitted additional material. Despite having  
5 an opportunity to do so, petitioner did not object that they were unable to  
6 understand how the city was applying its standards to the applications, and  
7 petitioner may not do so for the first time before LUBA. Petitioner clearly could  
8 have anticipated the “mingled” findings, given that they are largely the same as  
9 those in the second staff report.

10 The second assignment of error is denied.

11 The first and second assignments of error are denied.

### 12 **THIRD AND PORTION OF FIFTH ASSIGNMENTS OF ERROR**

13 Petitioner’s third assignment of error is that substantial evidence does not  
14 support the city council’s findings that neither application meets the requirements  
15 of the Riparian Ordinance and, where applicable, SCC chapter 151. Petitioner’s  
16 fifth assignment of error is, in part, that substantial evidence does not support the  
17 city council’s findings that the FDP application did not meet SCC chapter 151.

#### 18 **A. Standard of Review**

19 We will remand a local government decision that is “not supported by  
20 substantial evidence in the whole record.” ORS 197.835(9)(a)(C); *see also* OAR  
21 661-010-0073(2)(b). Substantial evidence is evidence that a reasonable person

1 would rely upon to reach a decision. *Dodd v. Hood River County*, 317 Or 172,  
2 179, 855 P2d 608 (1993).

3 **B. Ongoing Vegetation Removal**

4 Riparian Ordinance Section III is divided into three subsections: “(A)  
5 **Preexisting Activities** in the Riparian Corridor,” “(B) **Allowed Activities** in the  
6 Riparian Corridor,” and “(C) **Prohibited Activities** in the Riparian Corridor.”  
7 (Boldface in original.)

8 **1. Evidence Supporting the City Council’s Finding that the**  
9 **Ongoing Vegetation Removal Is Not Allowed as a**  
10 **Preexisting Activity**

11 Riparian Ordinance Section III(A) provides, in part, that preexisting  
12 activities allowed in the riparian corridor include:

13 “1. *Any use, sign, or structure, and the maintenance* thereof,  
14 *lawfully existing on the date of adoption of the provisions*  
15 *herein, is permitted within a riparian corridor. Such use, sign,*  
16 *or structure may continue at a similar level and manner as*  
17 *existed on the date of adoption of the provisions herein.*  
18 **Preexisting uses existing fully or partially within the**  
19 **riparian corridor may be expanded, provided the**  
20 **expansion does not occur within the riparian corridor.**

21 “2. *The maintenance, alteration, and replacement of pre-existing*  
22 *landscaping is permitted within a riparian corridor as long*  
23 *as no additional riparian vegetation is disturbed. Any*  
24 *herbicide, pesticide, or fertilizer applications must strictly*  
25 *comply with the manufacturer’s label and avoid saturation,*  
26 *drift, or runoff to water bodies. Maintenance trimming of*  
27 *existing trees is permitted, but under no circumstances can the*  
28 *trimming maintenance be so severe as to compromise the*

1 tree's health, longevity, and resource functions." (Boldface in  
2 original; emphases added.)

3 Petitioner argued that the proposed vegetation removal is allowed under Riparian  
4 Ordinance Section III(A)(1) as a preexisting use and is consistent with Riparian  
5 Ordinance Section III(A)(2).<sup>7</sup>

6 The city council found that Riparian Ordinance Section III(A)(1) was  
7 "[n]ot satisfied. [Petitioner] has not demonstrated that mowing of vegetation  
8 across the entire 'island' is a preexisting use." Record 252. In their third  
9 assignment of error, petitioner argues, in part, that the city council's findings are  
10 not supported by substantial evidence because "mowing of vegetation across the  
11 entire 'island'" was not proposed and because maintenance of vegetation on the  
12 island is a preexisting use on the subject property.

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<sup>7</sup> With respect to Riparian Ordinance Section III(A)(1), petitioner maintained, in part:

"[Petitioner] has submitted substantial evidence into the record that the use of the island for recreational and scenic purposes has been occurring for several decades and also that the maintenance thereof has also been occurring for that same time. These activities fall within the meaning of a 'use' under this provision and therefore [petitioner] respectfully contends that these uses may lawfully be continued." Record 207.

With respect to Riparian Ordinance Section III(A)(2), petitioner contended that "the proposed plan for vegetation maintenance conforms to this criterion. No herbicides, pesticides, or fertilizer use is proposed." *Id.*

1 First, substantial evidence supports the city council’s characterization of  
2 the proposed activity as mowing. In the RP application, petitioner advised the  
3 city as follows:

4 “I am requesting a permit to do island maintenance on the property  
5 referred to as Map No. 34-1W-21AA Tax lot 2600. This  
6 maintenance entails trimming or pruning of *primarily* invasive  
7 vegetation. The only box that comes close to this activity is the  
8 ‘Clearing of trees, vegetation, or debris.[’] I have no desire or intent  
9 to clear any vegetation or trees as this protects wildlife in the spring  
10 through mid-summer. The trimming will not occur until early  
11 August. This is necessary to mitigate against fire that could  
12 endanger the property. This also opens visibility to the river from  
13 my property. *As I have stated before this activity has been going on*  
14 *for at least the last 20 years.*”<sup>8</sup> Record 62 (emphases added).

15 Petitioner’s counsel later submitted a letter stating:

16 “[*Petitioner*] *proposes to maintain the subject property in the same*  
17 *manner and to the same degree that the previous owners have done*  
18 *for the past several years. [*Petitioner*] does not propose to clear cut*  
19 *the land. [*Petitioner*] does not propose to remove any trees or*  
20 *vegetation from the subject property. The proposal is to conduct*  
21 *limited pruning of grasses once per year so that the grasses do not*  
22 *become so overgrown as to be a fire hazard and so that [*petitioner’s*]*  
23 *family can walk across the subject property. [*Petitioner*] does not*  
24 *propose to prune any grasses near trees or any vegetation along the*  
25 *riverbank.*” Record 193 (underscoring in original; emphasis added).

26 Petitioner and their counsel stated that petitioner wished to continue the type of  
27 removal that had occurred on the property for years. Whether or not the activity

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<sup>8</sup> Because the application form includes a space for the applicant to describe “[o]ther development not listed,” we do not agree that petitioner was required by the form to select “[c]learing of trees, vegetation or debris.” Record 61.

1 was properly described as “mowing” was disputed below and is at the core of this  
2 subassignment of error.

3 The city council’s final order describes the RP application as one for  
4 “ongoing riparian vegetation maintenance.” Record 246. *Webster’s* describes  
5 “ongoing” as “actually in process.” *Webster’s Third New Int’l Dictionary* 1576  
6 (unabridged ed 2002). The application was made in response to notice from the  
7 city that the vegetation removal observed on the property must cease until the  
8 city approved an RP. The application was for ongoing vegetation removal, and  
9 we understand it to address both the previous and future removal of vegetation  
10 on the property. Although petitioner’s counsel argued that the city council could  
11 approve the future removal without approving the past removal, separate  
12 applications were not submitted, and petitioner provides no basis for us to  
13 conclude that the city council was required to approve part of the application  
14 rather than all. Given this, and petitioner’s contention that they sought to continue  
15 past practices, the question is whether substantial evidence supports the city  
16 council’s finding that past vegetation removal on the property included mowing.<sup>9</sup>

17 Petitioner has not provided a definition of “mowing” but maintains that the  
18 vegetation removal performed on the island was not so extreme as to constitute  
19 mowing. *Webster’s* defines “mow” as “to cut down (as standing grass, grain) with

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<sup>9</sup> The city council’s conclusion that past activity on the property included mowing does not require that the city council conclude that mowing is a land use.

1 a scythe or sickle or machine.” *Webster’s* at 1480. Petitioner argues that they did  
2 not mow yet cites testimony from an owner of land on the island stating:

3 “I’ve lived there since 2005. And so I’d like to say that to begin with,  
4 when somebody says that there hasn’t been evidence that the island  
5 has been maintained, I would say that’s absolutely incorrect.  
6 Because I’ve maintained several of the lots for my neighbors, Randy  
7 Stringer being one before Carl had purchased his property. I know  
8 that Severino [Ballesteros], he, he has done work for me. *And he has*  
9 *mowed those lots for years and years.*” Petition for Review 35  
10 (quoting Audio Recording, Shady Cove City Council, Dec 2, 2021,  
11 at 1:00:37 (statement of Mark Degner) (emphasis added)).

12 The Oregon Department of Fish and Wildlife (ODFW) commented that the level  
13 of vegetation on the property appeared inconsistent with limited maintenance and  
14 that “[t]his ‘annually maintained’ area along the Rogue River is visibly barren  
15 and likely would have native trees and shrubs were it not being removed yearly  
16 for the last 20 years (according to the application).” Record 150. Neighbors  
17 reported observing the use of gas-powered tools to remove vegetation. Petition  
18 for Review App D. Petitioner submitted testimony that the vegetation removal  
19 observed on their property included the use of a weed eater and a hedger. Record  
20 28. This is consistent with the above definition of “mow” as to cut with a machine  
21 or tool. There is substantial evidence in the whole record that petitioner’s island  
22 property has been mowed in the past. Given that petitioner stated that he wished  
23 to continue past levels of vegetation removal, there is substantial evidence in the  
24 record that future vegetation removal may be characterized as mowing.

1           Petitioner also argues that there was no evidence that petitioner sought to  
2 perform vegetation removal on the “entire” island. The findings identify the  
3 decision as being related to petitioner’s property, referencing it by address and  
4 tax lot. Record 246. There is substantial evidence in the record to support the city  
5 council’s conclusion that Riparian Ordinance Section III(A)(1) was not met,  
6 including evidence that petitioner sought to be able to perform vegetation  
7 removal on all of the portion of the island owned by them.

8           The city council also found that Riparian Ordinance Section III(A)(2) was  
9 “[n]ot satisfied. The intent of [petitioner’s RP] is to approve routine mowing of  
10 riparian vegetation to prohibit vegetative growth within the riparian corridor.  
11 This would clearly disturb riparian vegetation and is in fact what the Riparian  
12 Protection Ordinance was approved to prevent.” Record 252. Petitioner was clear  
13 that they intended to remove both riparian and invasive vegetation. No reference  
14 was made to landscaping. Substantial evidence supported the city council’s  
15 finding that the mowing was not allowed as landscape maintenance pursuant to  
16 Riparian Ordinance Section III(A)(2).

17           This element of the third assignment of error is denied.

18                           **2. Evidence Supporting the City Council’s Finding that the**  
19                           **Ongoing Vegetation Removal Is Not Allowed as a New Use**

20           Substantial evidence also supports the city council’s finding that the  
21 vegetation removal is not a new use allowed under Riparian Ordinance Section  
22 (III)(B).

1           Petitioner proposed vegetation removal impacting both native and non-  
2 native species. Petitioner stated that the vegetation removal included pruning  
3 both riparian and non-native vegetation, that it allowed them to enjoy the river  
4 view and provided fire protection for their residence, and that they believed the  
5 portion of Riparian Ordinance Section III(A)(2) allowing the pruning of trees  
6 should be interpreted to allow the pruning of bushes.<sup>10</sup> Petitioner’s counsel stated,

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<sup>10</sup> A letter petitioner sent to the city responding to the vegetation removal complaint includes the following statement:

“[T]he accusation of vegetation removal is false if you define removal as permanently extracted, burned, or poisoned. No vegetation was removed or damaged as to compromise the vegetations health, longevity, and resource functions. This would include trees that were lightly pruned. As property owners we recognize the value of these plants, although primarily invasive (scotch broom, and variants of and Himalayan blackberries), they provide safe cover for nesting wild fowl and turkeys. Additionally, deer will have cover while birthing. All pruned vegetation grows back the following year generally thicker and healthier than the previous year. We suspect the reason of healthier growth is the pruning maintenance and the decomposing of the cuttings.

“Looking over your city of Shady Cove Riparian Ordinance attachment under section III ‘Activities Within the Riparian Area[’] pp (A) #2 states maintenance pruning of existing trees is permitted if the trimming maintenance is not so severe as to compromise the tree’s health. We believe this interpretation of trees also translates to shrubs. Under ‘Allowed Activities’ pp (B) #9 states perimeter mowing and other cutting necessary for fire hazard prevention is allowed. Further, non-native vegetation is exempt from regulations against cutting, mowing, burning, or poisoning. Again, most of the vegetation pruned is invasive. Our primary reason for doing this



1 “The existing use of the property include[s] residential use, vegetation  
2 maintenance, and recreational and scenic uses.” Record 209. An engineer that  
3 petitioner engaged to perform the No-Rise analysis required for the FDP stated  
4 that the purpose of the bridge is to access the island for recreational purposes,  
5 including fishing and wildlife viewing. Record 109. The city council found that  
6 the Riparian Ordinance allowed the removal of landscaping but prioritized  
7 retaining riparian vegetation, and that petitioner’s use of the island was  
8 recreational.

9 The city council did not view the vegetation removal as a “use” but, rather,  
10 an activity in service of a use. Riparian Ordinance Section III(B)(7) provides that  
11 activities allowed in the riparian corridor include “[r]emoval of vegetation  
12 necessary for the development of water-related or water-dependent uses.”  
13 Riparian Ordinance Section II(A) defines the following uses:

14 “19) ‘Water-dependent use’ means a use or activity which can be  
15 carried out only on, in, or adjacent to water areas because the  
16 use requires access to the water body for water-borne  
17 transportation, recreation, energy production, or source of  
18 water.

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pruning is to prevent the potential of wildfire that tends to strike in late September. As noted by the previous owner of 128 Penny Lane, the trimming activity has been going on for at least 20+ years. It was started due to a fire on the island and to provide visibility for rafters and fishermen that needed rescue. A secondary rational[e] is to have visibility to the primary river on our private property. Some property owners listed below are not able to get to the main river, so we rely on being able to enjoy it from the deck of our property.” Record 48.

1           “20) ‘Water-related’ means uses which are not directly dependent  
2           upon access to a water body, but which provide goods or  
3           services that are directly associated with water-dependent  
4           land or waterway use, and which, if not located adjacent to  
5           water, would result in a public loss of quality in the goods or  
6           services offered. Except as necessary for water-dependent or  
7           water-related uses or facilities, residences, parking lots, spoil  
8           and dump sites, roads and highways, restaurants, businesses,  
9           factories, and trailer parks are not generally considered  
10          dependent on or related to water location needs.”

11 Findings by the city council reflect its determination that the “maintenance” was  
12 in support of a use rather than the use. The city council found that Riparian  
13 Ordinance Section III(B)(7) was:

14           “Not satisfied. *While [petitioner] states that the mowing is*  
15           *necessary to allow walking to the river and fishing this seems an*  
16           *excessive removal of vegetation to allow the identified water-related*  
17           *uses. A path or identified areas for river access may be appropriate.*  
18           City Council finds that the excessive ‘trimming’ of vegetation does  
19           not meet the intent of the Riparian Protection Ordinance.” Record  
20           253 (emphasis added).

21 Substantial evidence supports the city council’s conclusion that the vegetation  
22 removal was not itself a use but, rather, in service of water-related recreational  
23 uses of the property.

24           This element of the third assignment of error is denied.

1                   **3. Evidence Supporting the City Council’s Finding that the**  
2                   **Landscape Plan for the Ongoing Vegetation Removal Was**  
3                   **Inadequate**

4                   Petitioner relied upon the same landscape plan to support both the ongoing  
5                   vegetation removal discussed in this section of this opinion and the bridge-related  
6                   vegetation removal discussed below. Record 204-05, 209.

7                   Riparian Ordinance Section IV is titled “Development Review  
8                   Procedures.” Riparian Ordinance Section IV(C) provides:

9                   “[A] landscape plan will be required for newly disturbed areas in the  
10                  riparian corridor prior to issuance of permits. The plan shall include  
11                  the extent of vegetation removal proposed, characteristics of the  
12                  existing vegetation (types, density), proposed riparian enhancement  
13                  or restoration measures, proposed alterations of topography or  
14                  drainage patterns, and existing uses on the property. The plan will  
15                  be referred to [ODFW] for recommendation.”

16                  The city found that Riparian Ordinance Section IV(C) was:

17                  “Not Satisfied. ODF&W staff provided comment that they had  
18                  concerns about the ‘pre-existing trimming area’ and the location of  
19                  trees to be planted as mitigation for the bridge construction,  
20                  suggesting that all trees should be planted on the eastern bank of the  
21                  tributary or on the mainstem Rogue. ODF&W final comment stated  
22                  that the City should not approve the landscape plan.” Record 253.

23                  The city council also made findings concerning the landscape plan when  
24                  addressing Riparian Ordinance Section III(B)(8), discussed below, wherein they  
25                  described the landscape plan as too vague and too disruptive.

26                  In their third assignment of error, petitioner argues, in part, that substantial  
27                  evidence does not support the city council’s finding that ODFW did not  
28                  recommend approval of the landscape plan because it considered the landscape

1 plan to be vague and disruptive to too much vegetation. Petitioner maintains that  
2 there is no evidence that ODFW recommended against approving the landscape  
3 plan or that it did so for the reasons set out in the findings. Contrary to petitioner’s  
4 argument, the statement that ODFW did not recommend approval because the  
5 plan is too vague and disrupts too much vegetation is supported by substantial  
6 evidence in the whole record.

7 Riparian Ordinance Section I(C) provides that the activities subject to its  
8 regulations include “[r]emoving, cutting, mowing, clearing, burning, or  
9 poisoning native vegetation. Nonnative vegetation is exempt from the  
10 regulations, except that if it is removed, it must be replaced with native vegetation  
11 \* \* \*. Removal of other vegetation is prohibited, but limited management of that  
12 vegetation may be approved.” Again, the preexisting activities allowed in the  
13 riparian corridor include:

14 “The maintenance, alteration, and replacement of pre-existing  
15 landscaping is permitted within a riparian corridor as long as no  
16 additional riparian vegetation is disturbed. Any herbicide, pesticide,  
17 or fertilizer applications must strictly comply with the  
18 manufacturer's label and avoid saturation, drift, or runoff to water  
19 bodies. *Maintenance trimming of existing trees is permitted, but*  
20 *under no circumstances can the trimming maintenance be so severe*  
21 *as to compromise the tree’s health, longevity, and resource*  
22 *functions.”* Riparian Ordinance Section III(A)(2).

23 ODFW advised the city that it had

24 “reviewed the application from 128 Penny Lane, Shady Cove (Mr.  
25 Kretzer) to perform annual ‘maintenance’ along the banks of the  
26 Rogue River. ODFW recommends against approval of the

1 application as submitted. This ‘annually maintained’ area along the  
2 Rogue River is visibly barren and likely would have native trees and  
3 shrubs were it not being removed yearly for the last 20 years  
4 (according to the application). ODFW supports the removal of  
5 nonnative plant species along the Rogue River (in conjunction with  
6 a landscape plan on record) but does not support removal of native  
7 vegetation.” Record 150.

8 The city council’s finding that the landscape plan is too vague and disrupts too  
9 much vegetation was made in response to a standard applicable to the “permanent  
10 alteration of the riparian area by placement of structures or impervious surfaces  
11 within the riparian corridor” and therefore applicable to the bridge-related  
12 vegetation removal. Riparian Ordinance Section III(B)(8). In any event, however,  
13 the above ODFW testimony is substantial evidence in the whole record that  
14 ODFW considered the landscape plan too vague and too disruptive for purposes  
15 of the RP. No mitigation for the removal of invasive plants was proposed and  
16 ODFW concluded that native vegetation has been removed.

17 The city council’s findings that the ongoing vegetation removal did not  
18 meet the activity restrictions in Riparian Ordinance Sections III(A)(1) and (2), or  
19 the landscape requirements in Riparian Ordinance Section IV(C), are supported  
20 by substantial evidence.

21 This element of the third assignment of error is denied.

1           **C.     Bridge Construction and Related Vegetation Removal**

2                   **1.     Evidence Supporting the City Council’s Finding that the**  
3                   **Bridge Does Not Comply with the Riparian Ordinance**

4           Riparian Ordinance Section III(B)(8) provides that new uses allowed in  
5 the riparian corridor include:

6           “Permanent alteration of the riparian area by placement of structures  
7 or impervious surfaces within the riparian corridor boundary  
8 established under subsection (II)(B) upon a demonstration that equal  
9 or better protection for identified resources will be ensured through  
10 restoration of riparian areas, enhanced buffer treatment, or similar  
11 measures including, stormwater controls that infiltrate stormwater  
12 and are characteristic of Low Impact Development or green  
13 infrastructure such as bioswales, rain gardens, and vegetated filter  
14 strips \* \* \*. In no case shall alterations occupy more than 50 percent  
15 of the width of the riparian area measured from the upland edge of  
16 the corridor. This adjustment affects only the Rogue River riparian  
17 area; it is not permitted along tributaries.”

18   Petitioner removed blackberry plants in the riparian corridor as part of their  
19 construction of the bridge. As explained above, petitioner relied on the same  
20 landscape plan to address the requirements for the ongoing vegetation removal  
21 as it did to satisfy the requirements for the bridge-related vegetation removal.

22   Record 204-05, 209. The city council found that Riparian Ordinance Section  
23 III(B)(8) was:

24           “Not Satisfied. Based on ODF&W comment the planting of 6 trees  
25 of a type and in a location approved by ODF&W will satisfy this  
26 criteria as adequate mitigation for the bridge construction  
27 interference with the riparian vegetation, however ODF&W do not  
28 recommend approval of the landscape plan as it is too vague and  
29 disrupts too much vegetation unnecessarily.” Record 253.

1           Again, the city council adopted the staff reports as findings. Record 246.  
2           The second staff report includes statements that ODFW expressed concerns about  
3           the submitted landscape plan, in part due to petitioner’s failure to specify the  
4           location of trees to be planted as mitigation for the bridge construction. Record  
5           143, 149. The record contains copies of communications from ODFW addressing  
6           the landscape plan. These include an email from ODFW stating:

7           “I recommended mitigation of 6 native trees to be planted at 8-10  
8           foot intervals on the house side of the channel to mitigate for the  
9           permanent concrete [pad], paths and bridge itself. However, if  
10          [petitioner’s] property extends to the main channel of the Rogue  
11          River ODFW would accept 3 trees planted along the Rogue River  
12          and 3 along the side channel on the bank closest to the house. Trees  
13          should be typical to the area and choices include but are not limited  
14          to alder, big leaf maple, cottonwood or further upland, ponderosa  
15          pine. *A maintenance plan needs to be included which should include*  
16          *watering and replacing dead trees for 5 years to ensure 80%*  
17          *survival. A general map showing what is being planted where*  
18          *should also be included in the application.”* Record 64 (emphasis  
19          added).

20          The location of replacement trees, what ODFW describes as “showing what is  
21          being planted where,” is not visible on the landscape plan included in the record.<sup>11</sup>  
22          Assuming a legible version was provided to the city, ODFW stated that a  
23          maintenance plan, including watering and replacement for five years to ensure  
24          80 percent survival, needed to be included for the bridge-related vegetation

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<sup>11</sup> Petitioner identifies Record 189 as containing the landscape plan. Petition for Review 36.

1 removal. Petitioner does not identify a maintenance plan in the record. Although  
2 notes on the landscape plan include a general statement that trees will be replaced  
3 for five years to achieve at least 80 percent survival, they do not provide details  
4 of maintenance. Instead, the notes state that maintenance will be consistent with  
5 the Riparian Ordinance and supplier recommendations. There is no reference to  
6 watering. There is substantial evidence in the record supporting the city council's  
7 finding that the landscape plan was too vague and too disruptive for purposes of  
8 the RP.

9 This element of the third assignment of error is denied.

10 **2. Evidence Supporting the City Council's Findings that the**  
11 **Bridge Does Not Comply with the Flood Damage**  
12 **Prevention Regulations in SCC Chapter 151**

13 SCC 151.045(A) provides:

14 "All plans and permits for proposed new site improvements,  
15 subdivisions, and manufactured home parks shall be consistent with  
16 the need to minimize flood damage and ensure that building sites  
17 will be reasonably safe from flooding. The test of reasonableness is  
18 a local judgment and includes historical data, high water marks,  
19 photographs of past flooding, and the like."

20 The city council found that SCC 151.045(A) was:

21 "Not Satisfied. [Petitioner] has submitted photographic evidence as  
22 well as an Engineer prepared 'No-Rise' analysis indicating that the  
23 pedestrian bridge structure will minimize flood damage. However,  
24 no description of any engineered anchoring of the structure has been  
25 provided. The City Council cannot approve this permit as no  
26 engineered evidence can substantiate that it was constructed in a  
27 manner to meet reasonable flood damage prevention and to resist  
28 hydrostatic and hydrodynamic loads and effects of buoyancy."



1 Record 247.

2 In their fifth assignment of error, petitioner argues that city council's finding that  
3 this criterion is not met is not supported by substantial evidence in the whole  
4 record.

5 Petitioner points to a passage from their counsel's letter addressing bridge  
6 construction and materials, and a FEMA document that their counsel submitted  
7 with the letter describing flood-resistant materials. Petitioner maintains that there  
8 is no contrary evidence that any requirement related to anchoring and flood-  
9 resistant materials has not been met. Petitioner argues that their application was  
10 deemed complete by staff, and they therefore met the requirements. Petitioner  
11 does not believe that the city council may, in evaluating whether the bridge has  
12 been constructed so as to "minimize flood damage and ensure that building sites  
13 will be reasonably safe from flooding," as required by SCC 151.045(A), require  
14 that they submit an engineering analysis confirming that the bridge has been built  
15 in a manner to prevent flood damage and to resist hydrostatic and hydrodynamic  
16 loads and effects of buoyancy.

17 First, we held in *Caster v. City of Silverton* that a local government is not  
18 bound to conclude that an applicable criterion is met merely because an  
19 application has been deemed complete by staff:

20 "Simply stated, a permit applicant may submit a complete  
21 application, in the sense it includes all of the information that  
22 relevant land use regulations require a permit applicant to submit,  
23 but that information and other evidence that is submitted during the  
24 evidentiary phase of a land use permit review may nevertheless be

1 inadequate to demonstrate that all relevant approval criteria are  
2 met.” 54 Or LUBA 441, 452 (2007).

3 Second, petitioner argues that the evidence they submitted is evidence a  
4 reasonable person would rely upon and is therefore substantial evidence. We do  
5 not agree that the city council was required to conclude that petitioner’s counsel’s  
6 letter and the FEMA document were sufficient to establish that, as built, the  
7 bridge will minimize flood damage and ensure that building sites will be  
8 reasonably safe from flooding. SCC 151.045(A). SCC 151.009(A) provides that  
9 an FDP “shall be obtained prior to initiating development activities in any areas  
10 of special flood hazard established in § 151.007. The permit shall be for all  
11 improvements or structures including the placement of manufactured homes,  
12 fences or fill.” Here, the construction was completed, and petitioner asked the  
13 city council to approve the bridge after the fact. Petitioner advised the city council  
14 that “the proposed pedestrian walkway is firmly anchored in cement with 3/4’  
15 deep seated eye bolts with 3/4’ turnbuckles connected to 5/8’ cables with 15,400  
16 lbs breaking point. It is exceedingly improbable that the walkway could float  
17 away in the event of an extreme flood.” Record 200-01. The FEMA document  
18 that petitioner’s counsel submitted is titled “Flood Damage-Resistant Materials  
19 Requirements,” and petitioner cites its reference to metal and wooden boards and  
20 similar supports as acceptable flood-resistant materials. Record 200. Petitioner’s  
21 counsel’s letter argued:

22 “[Petitioner] has submitted more than substantial evidence that the  
23 proposal will minimize flood damage and ensure that any ‘building

1 sites' will be reasonably safe from flooding. This includes  
2 photographs already in the record, as well as a No-Rise analysis  
3 prepared by licensed engineer Scott J. Ferre and RogueTech Civil  
4 Engineering. This engineering analysis demonstrates that the  
5 pedestrian walkway will minimize flood damage." Record 194.

6 We cannot say, however, that a reasonable person was required to accept  
7 petitioner's evidence as sufficient to meet SCC 151.045(A).

8 The city council found that there was "no description of any *engineered*  
9 anchoring of the structure" and that "[n]o *engineering* analysis was submitted  
10 related to proper anchoring or to the flood resistance of materials used," resulting  
11 in the city being unable to "verify that the pedestrian bridge will meet flood  
12 damage prevention standards by resisting hydrostatic and hydrodynamic loads  
13 and effects of buoyancy" or meet "engineering requirements in FEMA  
14 construction guidelines." Record 247, 250, 251 (emphases added). Petitioner  
15 argues that there is no requirement in the SCC that they submit an engineering  
16 analysis of anchoring or evidence of resisting hydrostatic and hydrodynamic  
17 loads and the effects of buoyancy. The Flood Damage Prevention regulations are,  
18 however, broad, and the standards rely on early city involvement.

19 SCC 151.005 defines "development" as

20 "[a]ny man-made change to improved or unimproved real estate,  
21 including but not limited to buildings or other structures, mining,  
22 dredging, filling, grading, paving, excavation or drilling operations  
23 or storage of equipment or materials located within the area of  
24 special flood hazard. **DEVELOPMENT** does not include signs,  
25 markers, aids, and the like, placed by a public agency to serve the  
26 public." (Boldface and italics in original.)

1 Again, SCC 151.009(A) provides that an FDP “*shall be obtained prior to*  
2 *initiating development activities* in any areas of special flood hazard established  
3 in § 151.007. The permit shall be for all improvements or structures including the  
4 placement of manufactured homes, fences, and fill.” (Emphasis added.)

5 The bridge is a development—a man-made change to real estate—and it  
6 requires an FDP *prior to initiating activities in the flood hazard area*. Similarly,  
7 SCC 151.027 provides that applications for an FDP are required to be made prior  
8 to the start of development activities. Duties of the Floodplain Administrator  
9 include making “periodic inspections of areas of special flood hazard to establish  
10 that development activities are being performed in compliance with this chapter.”  
11 SCC 151.026(N). The evidence that the bridge, as constructed, is not a hazard  
12 consists of petitioner’s testimony explaining how they built it and photos of the  
13 result. Again, SCC 151.045(A) provides:

14 “All plans and permits for proposed new site improvements  
15 subdivisions, and manufactured home parks shall be consistent with  
16 the need to minimize flood damage and ensure that building sites  
17 will be reasonably safe from flooding. The test of reasonableness is  
18 a local judgment and includes historical data high water marks,  
19 photographs of past flooding and the like.”<sup>12</sup>

20 Where the city council is asked to approve an improvement after it has been  
21 constructed, we think that a reasonable person could conclude, based on the lack

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<sup>12</sup> The city council found that the remaining provisions of SCC 151.045 are satisfied or not applicable.

1 of expert evidence or an opportunity for the city to observe during construction  
2 how the bridge is anchored, that an applicant has not satisfied its burden of proof  
3 to establish that the standard is met.

4 Again, the city council found that SCC 151.045(A) was:

5 “Not satisfied. [Petitioner] has submitted photographic evidence as  
6 well as an Engineer prepared ‘No-Rise’ analysis indicating that the  
7 pedestrian bridge structure will minimize flood damage. However,  
8 no description of any engineered anchoring of the structure has been  
9 provided. The City Council cannot approve this permit as *no*  
10 *engineered evidence can substantiate that it was constructed in a*  
11 *manner to meet reasonable flood damage prevention and to resist*  
12 *hydrostatic and hydrodynamic loads and effects of buoyancy.”*  
13 Record 247 (emphasis added).

14 We see no reason why the city council could not conclude that the bridge is a site  
15 improvement and apply SCC 151.045(A) as an approval standard. Findings of  
16 fact for the Flood Damage Prevention regulations include:

17 “(A) The flood hazard areas of Shady Cove are subject to periodic  
18 inundation that may result in loss of life and property, health  
19 and safety hazards, disruption of commerce and  
20 governmental services, extraordinary public expenditures for  
21 flood relief and protection, and impairment of the tax base, all  
22 of which adversely affect the public health, safety and general  
23 welfare.

24 “(B) These flood losses are caused by structures in flood hazard  
25 areas, which are inadequately elevated, flood-proofed, or  
26 otherwise unprotected from flood damages, and by the  
27 cumulative effect of obstructions in flood hazard area causing  
28 increases in flood heights and velocities.” SCC 151.002

29 SCC 151.010 provides, in part:

1 “In the interpretation and application of this chapter all provisions  
2 shall be:

3 “(A) Considered as minimum requirements[.]”

4 We see no error in the city council explaining in its finding that, in determining  
5 whether the bridge, *as built*, is consistent with minimizing flood damage and  
6 ensuring that building sites are safe, it required engineering evidence of the  
7 manner of actual construction and resistance to loads and buoyancy.

8 SCC 151.046(G) provides, “All permitted and substantial improvements  
9 shall comply with all applicable flood hazard reduction provisions of this  
10 chapter.” Whether or not the bridge is a “substantial improvement,” it may be a  
11 “permitted improvement,” leaving it for the city council to identify the applicable  
12 flood hazard reduction provisions.<sup>13</sup> The city council concluded that SCC  
13 151.046(G) was:

14 “Not Satisfied. While [petitioner] has submitted details of the design  
15 and anchoring provided by the property owner. No Engineering  
16 analysis was submitted related to proper anchoring or to the flood  
17 resistance of materials used, the City cannot verify that the  
18 pedestrian bridge will meet flood damage prevention standards by  
19 resisting hydrostatic and hydrodynamic loads and effects of  
20 buoyancy.” Record 250.

21 This is consistent with the finding above that SCC 151.045(A) is not met.

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<sup>13</sup> Petitioner argues in their fourth assignment of error that SCC 151.046 applies to substantial improvements, that substantial improvements are “structures,” and that the bridge is not a structure under the SCC.

1            “In challenging a decision denying a request for land use approval, a  
2 petitioner must successfully challenge each of the bases the local government  
3 identifies as supporting its decision to deny the request.” *Carsey v. Deschutes*  
4 *County*, 21 Or LUBA 118, 122, *aff’d*, 108 Or App 339, 815 P2d 233 (1991).  
5 Petitioner also argues that the city council improperly applied standards in SCC  
6 151.046 and 151.049, and improperly denied the application for failure to provide  
7 an engineering analysis of flood worthiness. Because we sustain at least one of  
8 the bases for denial of the FDP, we need not address petitioner’s remaining  
9 arguments challenging those findings.

10            The fifth assignment of error is denied, in part.

11            The third assignment of error is denied, and the fifth assignment of error is  
12 denied, in part.

13            **FOURTH AND PORTION OF FIFTH ASSIGNMENTS OF ERROR**

14            Petitioner’s fourth and part of their fifth assignments of error are that (1)  
15 the city improperly characterized the bridge as a structure and, as a result, applied  
16 SCC 151.046, SCC 151.049, and Riparian Ordinance Section III(B)(8) in error  
17 and, (2) if the city can characterize the bridge as a structure, there is not  
18 substantial evidence in the record to support the findings that those provisions are  
19 not met.<sup>14</sup> The city council found that the FDP criteria set out in SCC 151.045

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<sup>14</sup> Petitioner concedes that they constructed the bridge. Record 27. The definitions in SCC chapter 151 apply unless the context or text require otherwise.

1 are not met and that the landscape plan did not meet the RP standards in Riparian  
2 Ordinance Section IV(C). We concluded that substantial evidence supports these  
3 findings. Because these criteria do not limit their applicability to “structures,”  
4 they provide a basis for denial of the applications independent of petitioner’s  
5 fourth and part of their fifth assignments of error, and we do not address the  
6 remaining assignments of error.

7 The city’s decision is affirmed.

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SCC 151.005. We observe that, if “structure” means “something constructed,” there is substantial evidence in the record that the bridge is a structure.