

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

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DALE BURGHARDT, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CITY OF MOLALLA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

LUBA No. 92-209

MOLALLA ELEMENTARY SCHOOL )  
DISTRICT 35, )  
 )  
Petitioner, )  
 )  
and )  
 )  
DALE BURGHARDT, )  
 )  
Intervenor-Petitioner, )

FINAL OPINION  
AND ORDER

vs. )  
 )  
CITY OF MOLALLA, )  
 )  
Respondent, )  
 )  
and )  
 )  
LOREN L. McLEOD, )  
 )  
Intervenor-Respondent. )

LUBA No. 92-228

Appeal from City of Molalla.

Walter T. Aho, Molalla, filed a petition for review and argued on behalf of petitioner/intervenor-petitioner Dale Burghardt.

Steven R. Schell, Portland, filed a petition for review

1 and argued on behalf of petitioner Molalla Elementary School  
2 District 35. With him on the brief was Black Helterline.

3  
4 No appearance by respondent.

5  
6 Paul D. Schultz, Oregon City, filed the response brief  
7 and argued on behalf of intervenor-respondent. With him on  
8 the brief was Hibbard, Caldwell & Schultz.

9  
10 KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,  
11 Referee, participated in the decision.

12  
13 REMANDED 03/11/93

14  
15 You are entitled to judicial review of this Order.  
16 Judicial review is governed by the provisions of ORS  
17 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision approving a  
4 conditional use permit for a 106 unit mobile home park.

5 **MOTIONS TO INTERVENE**

6 Loren McLeod moves to intervene on the side of  
7 respondent in LUBA No. 92-228. Dale Burghardt moves to  
8 intervene on the side of petitioner in LUBA No. 92-228.  
9 There is no objection to the motions, and they are allowed.

10 **MOTION TO SUPPLEMENT THE RECORD**

11 At oral argument, intervenor-respondent moved to  
12 supplement the local record with the record from a prior  
13 local decision involving the subject property.

14 Petitioners and intervenor-petitioner (petitioners)  
15 object to the request to supplement the record at this late  
16 point in the proceeding. Petitioners point out that the  
17 city did not include the record of any prior local decision  
18 in the record submitted in this appeal, and the time for  
19 filing record objections has long since expired.  
20 OAR 661-10-026(2). They argue that to supplement the record  
21 at this point would require further briefing and would delay  
22 the proceedings, causing them prejudice.

23 OAR 661-10-005 provides, in part:

24 "Technical violations [of LUBA's rules] not  
25 affecting the substantial rights of parties shall  
26 not interfere with the review of a land use  
27 decision \* \* \*."

1 While intervenor-respondent's failure to file a record  
2 objection within the time provided by OAR 661-10-026(2) is a  
3 technical violation of our rules, to allow the motion to  
4 supplement the record at this point in the proceedings would  
5 cause prejudice to petitioners' substantial rights.  
6 Accordingly, we deny intervenor's motion to supplement the  
7 record. See Clark v. Jackson County, 19 Or LUBA 220,  
8 224-25, rev'd on other grounds 103 Or App 377 (1990), aff'd  
9 313 Or 508 (1992).

10 **FACTS**

11 This is the second time an appeal of a city decision  
12 approving a mobile home park on the subject property has  
13 been appealed to this Board. In Burghardt v. City of  
14 Molalla, 22 Or LUBA 369, 370-71 (1991) (Burghardt I), we  
15 stated the following facts:

16 "The subject property is an unimproved,  
17 rectangular 19.32 acre parcel, located between  
18 property zoned Industrial and property zoned  
19 Residential. The subject parcel is currently  
20 zoned Multifamily Residential (R-3). It was  
21 rezoned from Light Industrial (M-1) to R-3 on  
22 October 1, 1990. The ordinance approving the  
23 rezoning to R-3 contains a condition of approval  
24 that if an application for a conditional use  
25 permit for a mobile home park is not submitted  
26 within six months or is not approved once  
27 submitted, the zoning of the property will revert  
28 to M-1. \* \* \* Petitioner appealed the rezoning  
29 decision to this Board, but that appeal was  
30 dismissed because no petition for review was  
31 timely filed. Burghardt v. City of Molalla, 20 Or  
32 LUBA 431 (1991).

33 "After the subject parcel was rezoned to R-3,  
34 intervenor-respondent \* \* \* filed an application

1 for a conditional use permit for a 106 unit mobile  
2 home park. \* \* \*

3 We remanded the city's decision approving the  
4 conditional use permit in Burghardt I, based on the city's  
5 failure to demonstrate whether the proposal was "timely  
6 considering the adequacy of public facilities" and whether  
7 the site plan conformed to certain other code requirements.  
8 On remand, the city council conducted two public hearings.  
9 After these public hearings, the city council reapproved the  
10 proposal, and this appeal followed.

11 **FIRST AND SECOND ASSIGNMENTS OF ERROR (BURGHARDT)**

12 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (MOLALLA**  
13 **ELEMENTARY SCHOOL DISTRICT 35)**

14 Molalla Zoning and Development Ordinance  
15 (MZDO) 18.76.010(3) requires the city to determine:

16 "The site and the proposed development is [sic]  
17 timely, considering the adequacy of transportation  
18 systems, public facilities and services existing  
19 or planned for the area affected by the use."

20 There is no dispute that the definition of "public  
21 facilities" in the Molalla Comprehensive Plan includes  
22 "public schools." Further, the parties do not dispute the  
23 city is required to determine the proposal complies with  
24 MZDO 18.76.010(3), and that public schools must be  
25 considered in making such a determination. Finally, there  
26 is no dispute that at the time of the adoption of the  
27 challenged decision, Molalla Elementary School District 35  
28 was overcrowded.

1           The city adopted the following findings of compliance  
2 with MZDO 18.76.010(3):

3           "2. In a recent election, the voters of the  
4 Molalla Elementary School District voted to  
5 merge the Elementary [School] District into  
6 the \* \* \* High School District.

7           "3. The merger will permit the surviving unified  
8 school district much greater flexibility in  
9 assigning students from one existing  
10 attendance area to another than now exists.  
11 An additional 200 seats will be made  
12 available by the merger. Therefore, if  
13 overcrowding exists in the Molalla Elementary  
14 [School] District, students will be assigned  
15 to other attendance areas within the unified  
16 district.

17           "4. Based upon the adopted budget of the Molalla  
18 Elementary School District for 1992-93, there  
19 are \$298,000 of funds budgeted for additional  
20 buildings. This amount is sufficient to  
21 provide for at least portable classrooms  
22 leased by the District to house any increase  
23 in students that might be generated by  
24 allowing the requested conditional use.

25           "5. Molalla Elementary School District 1992-93  
26 budget also has funds budgeted as follows:

27           "\$50,000 to cover existing play area;

28           "\$14,000 to pave play area;

29           "\$50,000 [in] planned reserves.

30           "These sums constitute an additional  
31 \$114,000, which could be redirected to  
32 resolve any overcrowding problems that might  
33 exist.

34           "6. The Molalla Union High School District Budget  
35 shows that there are:

36           "\$37,800 in unappropriated fund balance  
37 in the building construction fund; and

1           "\$23,800 has been set aside as a reserve  
2           in the capital payments fund.

3           "These unappropriated funds constitute an  
4           additional \$61,200 that could be appropriated  
5           to provide resources to educate additional  
6           students.

7           "7. There has been no recent effort by either the  
8           Elementary or the High School District to  
9           explain any perceived overcrowding to the  
10          voters by way of a proposed bond issue to  
11          provide additional facilities, the Council  
12          declines to find that a bond issue submitted  
13          solely for the purpose of financing  
14          construction of needed additional facilities  
15          could not be passed, especially if spread  
16          over the entire population served by the \* \*  
17          \* unified school district that will result  
18          from the merger \* \* \*.

19          "\* \* \* \* \*

20          "9. The Council finds that  
21          [intervenor-respondent] to the extent  
22          permitted by federal law, intends to  
23          encourage occupancy of the proposed park by  
24          senior citizens, not having school-age  
25          children.

26          "[T]he Council concludes, based upon the evidence  
27          in the whole record that the proposed use is  
28          timely considering public facilities, including  
29          [public] schools; that it is feasible to meet any  
30          additional demands placed upon the school system  
31          by the proposed use so that such schools will be  
32          adequate to serve the needs of the mobile home  
33          park." Record 2-3.

34          As in Burghardt I, the parties' dispute in this case  
35          focuses on the proper interpretation of MZDO 18.76.010(3),  
36          whether the above quoted findings reflect the proper  
37          application of that standard and whether the findings are  
38          supported by substantial evidence in the whole record.

1           Petitioners argue the above quoted findings fail to  
2 establish the proposal is timely considering the adequacy of  
3 "existing or planned" public facilities, as required by  
4 MZDO 18.76.010(3). Petitioners contend the city improperly  
5 determined the proposed project is "timely" because the  
6 elementary and high school districts could redirect funds  
7 budgeted by those districts for other purposes to create  
8 additional classroom space. Petitioners contend the city  
9 may not base a determination that the proposed development  
10 complies with MZDO 18.76.010(3) on a city decision that  
11 certain school district budget items, like covered play  
12 yards and contingency funds, have a lower priority than  
13 classroom space. Petitioners also contend that under  
14 MZDO 18.76.010(3), the city may only consider the timeliness  
15 of the development proposal considering existing or planned  
16 school facilities; and there is no finding establishing the  
17 existence of either (1) adequate facilities at present, or  
18 (2) additional school facilities planned by the school  
19 district to meet the demands generated by the proposed 106  
20 space mobile home park.

21           In addition, petitioners argue the city erred in  
22 determining that the merger of the high school and  
23 elementary school districts will result in a surplus of 200  
24 classroom seats available to serve the proposed development.  
25 Petitioners argue the city erred in this regard because it  
26 failed to consider the cumulative effects of other approved

1 development in determining the availability of those 200  
2 classroom seats. Petitioners contend that viewed in the  
3 context of the development already approved within the  
4 district, those 200 seats do not establish the existence of  
5 a surplus available to serve the proposed development.

6 Intervenor-respondent argues the city is free to adopt  
7 a different interpretation of MZDO 18.76.010(3) than was  
8 sanctioned by this Board in Burghardt I.  
9 Intervenor-respondent goes on to argue that under Clark v.  
10 Jackson County, 313 Or 508, 836 P2d 710 (1992), we are  
11 required to defer to such a new interpretation.  
12 Intervenor-respondent asserts that we should sustain the  
13 city's interpretation of MZDO 18.76.010(3).

14 The city's findings interpret the requirement of  
15 MZDO 18.76.010(3), that public facilities adequate to serve  
16 the affected area be "existing or planned," to be satisfied  
17 in this case for two reasons. First, the city found  
18 MZDO 18.76.010(3) to be satisfied because it identified  
19 unspent money in the school districts' budgets. Second, the  
20 city found MZDO 18.76.010(3) to be satisfied because it  
21 identified 200 classroom seats to be added by the school  
22 district merger, without regard to development already  
23 approved within the school district.

24 We believe both of these reasons reflect an  
25 interpretation of MZDO 18.76.010(3) that is "clearly wrong."  
26 Goose Hollow Foothills League v. City of Portland, 117 Or

1 App 238, 243, \_\_\_\_ P2d \_\_\_\_ (1990). Under the plain words  
2 of MZDO 18.76.010(3), and as relevant here, the city is  
3 required to find that the site and the proposed development  
4 are timely, considering the adequacy of schools existing or  
5 planned for the area affected by the use. The city must  
6 determine that there are either adequate existing school  
7 facilities, or adequate school facilities planned by the  
8 jurisdiction charged with the responsibility for planning  
9 schools, to serve the proposed development at the time it is  
10 established. There is simply nothing in the city's code or  
11 plan of which we are aware that supports the city's position  
12 that unspent money in the school districts' budgets  
13 constitutes plans for school facilities adequate to serve  
14 the proposed mobile home park when it is established.

15 Similarly, concerning the 200 classroom seats which  
16 will be added to the elementary school district when the  
17 school districts merge, the city cannot ignore the effect of  
18 already approved development on the availability of these  
19 200 seats to serve the proposed development. This is  
20 particularly true where, as here, the evidence in the record  
21 raises a serious issue of whether the 200 classroom seats  
22 are already needed to accommodate approved development.  
23 Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d  
24 896 (1979). Under these circumstances, in determining  
25 whether existing or planned school facilities are adequate  
26 to serve the proposed development, it is not enough to

1 simply compare the raw number of classroom seats available  
2 with the number of school age children projected from the  
3 residences approved by the challenged decision; and from  
4 this conclude the proposal is timely because the public  
5 schools will be adequate to serve the development at the  
6 time it is established.<sup>1</sup> The city must consider the  
7 cumulative impact of other approved residential uses on the  
8 availability of the 200 classroom seats in determining  
9 whether the proposed mobile home park complies with  
10 MZDO 18.76.010(3).<sup>2</sup>

11 Petitioner Burghardt's first and second assignments of  
12 error and petitioner Molalla Elementary School District 35's  
13 first, second and third assignments of error are sustained.

14 **THIRD ASSIGNMENT OF ERROR (BURGHARDT)**

15 "The city erred in not following the notice and  
16 hearing procedures prescribed in the [MZDO] in  
17 granting the conditional use application."

18 **FIFTH ASSIGNMENT OF ERROR (BURGHARDT)**

19 "Neither the hearing request nor the hearing were  
20 timely."

21 Under these assignments of error, petitioner Burghardt  
22 alleges various procedural defects during the local remand

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<sup>1</sup>The city's finding that the developer will encourage senior citizens to reside in the mobile home park adds nothing to the challenged decision. Nothing in the challenged decision prevents families with school age children from residing in the proposed mobile home park.

<sup>2</sup>Because we determine the findings supporting the decision's compliance with MZDO 18.76.010(3) are inadequate, no purpose is served in reviewing the evidentiary support for those findings.

1 proceedings leading to the challenged decision. However,  
2 petitioner does not allege that these alleged procedural  
3 defects in any way affect his substantial rights, either  
4 here or below; and we do not see that they do. Accordingly,  
5 these assignments of error provide no basis for reversal or  
6 remand of the challenged decision. ORS 197.835(7)(a)(B).

7 Petitioner Burghardt's third and fifth assignments of  
8 error are denied.

9 **FOURTH ASSIGNMENT OF ERROR (BURGHARDT)**

10 "There was no evidence from which the city could  
11 make a determination that the site plan conformed  
12 to the requirements of [MZDO] 18.76.030."

13 Under this assignment of error, petitioner Burghardt's  
14 entire argument is as follows:

15 "The record is without any evidence relating to  
16 whether the use as described in the site plan and  
17 other aspects of the proposed use were such as to  
18 minimize impacts on adjacent properties in  
19 compliance with [MZDO] 18.76.030." Petitioner  
20 Burghardt's Petition for Review 11.

21 MZDO 18.76.030 provides various requirements for  
22 applications for development approval and includes a  
23 provision which states that the following is required:

24 "A site plan of the property including existing  
25 and proposed improvements and other information  
26 necessary to address the requirements and  
27 conditions associated with the use."

28 We do not understand what it is that petitioner  
29 Burghardt is complaining the city did wrong under this  
30 assignment of error. In any event, it is petitioner's

1 burden to establish a basis for reversal or remand, and  
2 petitioner Burghardt has failed to provide such a basis  
3 under this assignment of error.

4       Petitioner Burghardt's fourth assignment of error is  
5 denied.

6       The city's decision is remanded.