

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 ARTHUR COLLIER, JAMES MARAS, LARRY)
5 McCAMMON, LES HILDERBRAND, HENRY)
6 COX, WILMA GOSS, BRUCE PATTERSON,)
7 and RENEE CLARK,)

8)
9))
10 Petitioners,)
11 vs.)
12) FINAL OPINION
13 MARION COUNTY,)
14) AND ORDER
15 Respondent,)
16))
17 and)
18))
19 RICK SMART and KELLY SMART,)
20))
21 Intervenors-Respondent.)

LUBA No. 95-013

FINAL OPINION
AND ORDER

22
23
24 Appeal from Marion County.
25

26 John W. Shonkwiler, Tigard, filed the petition for
27 review and argued on behalf of petitioners.
28

29 Jane Ellen Stonecipher, Assistant County Counsel,
30 Salem, filed a response brief and argued on behalf of
31 respondent. With her on the brief was Robert C. Cannon,
32 County Counsel.
33

34 M. Chapin Milbank, Salem, filed a response brief and
35 argued on behalf of intervenors-respondent.
36

37 GUSTAFSON, Referee; SHERTON, Chief Referee; LIVINGSTON,
38 Referee, participated in the decision.
39

40 REMANDED 07/27/95
41

42 You are entitled to judicial review of this Order.
43 Judicial review is governed by the provisions of ORS
44 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision approving a
4 conditional use permit allowing temporary placement of a
5 mobile home for medical hardship purposes.

6 **MOTION TO INTERVENE**

7 Rick and Kelly Smart (intervenors), the applicants
8 below, move to intervene on the side of respondent. There
9 is no opposition to the motion, and it is allowed.

10 **FACTS**

11 Intervenors applied for a conditional use permit for a
12 temporary mobile home on their 3.68 acre parcel, located
13 outside the City of Salem in the county's Acreage
14 Residential (AR) zone. The county permits temporary
15 placement of mobile homes for medical hardships as
16 conditional uses in the AR zone. Intervenors propose to use
17 the mobile home as a residence for intervenor Rick Smart's
18 parents. Rick Smart's father has a verified medical
19 hardship.

20 Intervenors' property is rectangular, 179 feet wide and
21 890 feet long. Intervenors' residence is located at the
22 east end of their property, near 84th Place S.E. Their
23 septic tank is located 12 feet west of the residence, and
24 the septic drain field extends 150 feet further west.
25 Beyond the drain field, intervenors have installed a fenced
26 corral. Intervenors propose to locate the temporary mobile

1 home beyond the corral, approximately 500 feet from
2 intervenors' residence. The proposed location is
3 approximately 50 feet lower in elevation than intervenors'
4 residence, and is not visible from their residence.
5 Intervenors propose to locate a separate septic tank and
6 drain field west of the mobile home.

7 Intervenors previously applied for a minor partition to
8 permit the mobile home in the same location. This Board
9 remanded a county decision approving that minor partition in
10 Hilderbrand v. Marion County, 28 Or LUBA 703 (1995).

11 The county planning division initially reviewed the
12 application administratively. The planning division
13 approved the conditional use, but not the proposed location.
14 The planning division conditioned its approval to require
15 that the temporary mobile home be placed within 50 feet of
16 intervenors' residence and share the residence's septic
17 system. Petitioners appealed that decision to the hearings
18 officer on the basis that intervenors' current septic system
19 is failing and is not adequate to handle an additional
20 residence, but that there is adequate area for a full
21 replacement of the system that could accommodate both
22 residences. Petitioners did not oppose the approved
23 location for the mobile home.

24 During the appeal hearing before the hearings officer,
25 intervenors contested both the location required by the
26 planning division's decision, and the requirement that the

1 mobile home share intervenors' existing septic system.
2 Intervenor argued instead for the location proposed in
3 their application, 500 feet west of intervenors' residence,
4 using a new septic system. Intervenor argued there is no
5 location within 50 feet of their residence to accommodate
6 the mobile home because the existing septic system cannot
7 serve an additional dwelling. Intervenor presented
8 evidence from a septic system provider that, with the
9 existing drain field extending 150 feet west of intervenors'
10 residence, the mobile home must be located at least 170 feet
11 west. Considering the slope of the property, the septic
12 system provider concluded it would be "impossible" to
13 connect to the existing system. The septic system provider
14 also stated the proposed location is the "best" location
15 from a septic perspective because of the cost of removing
16 and rebuilding the fence around the corral.

17 Petitioners argued against intervenors' proposed
18 location and for a specific alternative location within 50
19 feet northwest of intervenors' residence, with a new septic
20 system to serve both residences.

21 The hearings officer approved intervenors' request that
22 the mobile home be located 500 feet from their residence,
23 with a separate, permanent septic system. The hearings
24 officer found that the temporary mobile home would have to
25 be located at least 170 feet west of intervenors' residence
26 due to the location of the existing drain field; that the

1 existing corral precluded a location closer than 400 feet
2 from intervenors' residence; and that it was economically
3 unfeasible for the current septic system to serve an
4 additional residence, since connecting to the existing
5 septic system from a lower elevation would require a pumping
6 system, the cost of which would exceed the cost of a new
7 system to serve the additional residence.

8 The hearings officer also considered and rejected
9 several other potential locations: in front of intervenor's
10 residence, immediately behind intervenors' residence, and
11 on either side of intervenors' residence. The hearings
12 officer did not address either the location petitioners
13 advocated or the feasibility of using a single new septic
14 system to serve both intervenors' residence and the
15 temporary mobile home.

16 The county board of commissioners declined to hear
17 petitioners' appeal of the hearings officer's decision, and
18 issued a final order affirming the hearings officer's
19 decision. This appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 Petitioners contend the county's findings (1) violate
22 the language, purpose and intent of Marion County Zoning
23 Ordinance (MCZO) 120.040, which allows for temporary
24 placement of mobile homes for medical hardships; (2) are
25 inadequate to show compliance with MCZO 120.040(f)(1) and
26 (3) because an adequate alternative location exists within

1 50 feet of intervenors' residence and there is no
2 determination on the feasibility of using the existing
3 septic system; and (3) are not supported by substantial
4 evidence.

5 **A. Purpose of MCZO 120.040**

6 Petitioners argue the purpose of MCZO 120.040 is to
7 allow for care of medically infirm or aged individuals who
8 cannot provide basic self care, and to limit impacts of
9 temporary mobile homes used for such purposes. Petitioners
10 contend the purpose of MCZO 120.040 is defeated by
11 permitting a temporary mobile home down a hill, 500 feet
12 away from, and out of view of the residence of the
13 individuals providing the care. Petitioners do not,
14 however, identify under this subassignment any specific code
15 provision they contend is violated by the county's decision.

16 Where petitioners fail to identify any applicable legal
17 standard allegedly violated by the county's decision,
18 petitioners have supplied no basis for reversal or remand of
19 the challenged decision. City of Barlow v. Clackamas
20 County, 26 Or LUBA 375, 380 (1994).

21 This subassignment of error is denied.

22 **B. Adequacy of Findings**

23 MCZO 120.040 allows for temporary placement of a mobile
24 home to care for an individual with a hardship.
25 MCZO 120.040(a) defines "hardship" for purposes of this
26 section as "a medical hardship or hardship for the care of

1 an aged or infirm person or persons."¹

2 MCZO 120.040(f) provides:

3 "The mobile home shall to the extent permitted by
4 the nature of the property and existing
5 development:

6 "(1) Be located as near as possible to other
7 residences on the property;

8 "* * * * *

9 "(3) Be connected to the existing wastewater
10 disposal system if feasible. The disposal
11 system shall be approved by the County
12 Sanitarian."

13 With regard to these criteria, the hearings officer
14 characterized intervenors' request as follows:

15 "[Intervenors] propose locating the manufactured
16 home approximately 500' from the existing
17 dwelling. [Intervenors] also propose using a
18 separate septic system for the manufactured home.
19 [Intervenors] claim that the current system cannot
20 handle the flow from an additional dwelling, and
21 claim the temporary dwelling cannot be sited any
22 closer to the existing dwelling due to problems
23 with the current development on the subject
24 property. [Intervenors] have not applied for an
25 Authorization Notice from the County Sanitarian to
26 use the existing septic system. The sanitarian is
27 the authority for determining whether an existing
28 septic system can handle the existing flow. Even
29 if the existing system could handle the additional
30 flow, [intervenors] claim other factors render
31 hook up to the system impossible." Record 5-6.

32 The hearings officer then evaluated the potential for

¹MCZO 120.040(b) requires verification from a medical doctor or psychologist that a medical hardship exists. Intervenors provided such verification and petitioners do not dispute that the proposed mobile home would serve an individual with a medical hardship.

1 locating the mobile home in front of intervenors' residence,
2 behind intervenors' residence, and on either side of
3 intervenors' residence. The hearings officer determined
4 none of those locations was feasible. The hearings officer
5 also considered a site west of the existing drain field, 170
6 feet west of intervenors' residence, and determined that,
7 due to the elevation decrease, the existing septic system
8 could not service a dwelling there without a pumping system,
9 the cost of which would exceed the cost of a new system. The
10 hearings officer concluded:

11 "Although it may be possible to receive an
12 authorization notice to use the existing septic
13 system for the temporary dwelling, it is not
14 reasonable or feasible to require the applicants
15 to put in a pumping system for a temporary use. A
16 separate septic system shall be allowed, provided
17 [intervenors] submit proof that such a system is
18 approved for hardship purposes. * * *

19 "It is not possible to locate a mobile home any
20 closer to the existing dwelling than 170' due to
21 the location of the existing dwelling and the
22 existing and replacement drain fields. Beyond the
23 170' mark, applicants have developed their
24 property with cross fencing for their small horse
25 operation. This current development need not be
26 altered to accommodate the hardship dwelling. The
27 temporary dwelling shall be located west of the
28 fenced portion of the property." (Emphasis in
29 original.) Record 9-10.

30 Petitioners argue the hearings officer's findings
31 violate MCZO 120.040(f)(1) and (3) because the proposed
32 location is not "as near as possible" to the other residence
33 on the property; and the hearings officer did not determine
34 whether the existing system could serve the temporary

1 dwelling.

2 **1. MCZO 120.040(f)(1)**

3 The hearings officer's findings evaluate and dismiss
4 several potential locations closer than 500 feet from
5 intervenors' residence. The findings do not, however,
6 evaluate or even mention the location petitioners urged.²

7 When specific issues relevant to compliance with
8 applicable approval standards are raised in the proceedings
9 below, the county's findings must address and respond
10 specifically to those issues. Norvell v. Portland Area
11 LGBC, 43 Or App 849, 853, 604 P2d 896 (1979); Testa v.
12 Clackamas County, 26 Or LUBA 357, 370 (1994); Heiller v.
13 Josephine County, 23 Or LUBA 551, 556 (1992). The planning
14 division decision, upon which the appeal hearing was based,
15 required that the mobile home be placed within 50 feet of
16 intervenors' residence.³ Petitioners presented a specific
17 alternative location within 50 feet of intervenors'

²Intervenors assert that the planning division "ultimately acknowledged" that the mobile home could not, technically, "be located any closer than 170' from the present residences," and "ultimately concurred that the original 50' site was not feasible." Response Brief 3-4. However, intervenors do not cite where in the record this acknowledgment occurs. We will not search the record for evidence to support intervenors' contention. See Eckis v. Linn County, 110 Or App 309, 313, 821 P2d 1127 (1991).

³All parties acknowledge the planning division's approval contemplated a particular location within 50 feet of intervenors' residence. However, the planning division's approval does not specify a particular location. It requires only that the mobile home be within 50 feet of intervenors' residence. The parties acknowledge the location petitioners advocate is the same location contemplated by the planning division.

1 residence. When such a specific alternative location is
2 raised, the county must address that alternative location in
3 order to adequately evaluate the application for compliance
4 with MCZO 120.040(f)(1).

5 This subassignment of error is sustained.

6 **2. MCZO 120.040(f)(3)**

7 The county's approval allows intervenors to install a
8 new, separate septic system for the temporary mobile home.
9 In finding that intervenors need not use the existing system
10 for the temporary mobile home, the county relies on
11 intervenors' contention that "the current system cannot
12 handle the flow from an additional dwelling."⁴ The
13 findings acknowledge intervenors have not applied for
14 authorization from the county sanitarian, and finds the
15 sanitarian is the authority to determine whether the
16 existing septic system can handle the flow. Record 8.
17 However, the county makes no determination on the
18 feasibility of using the existing system. Rather, the

⁴At oral argument, intervenors contended petitioners should not be heard to complain that intervenors must consider a location which requires use of the existing septic system or that the county did not address the feasibility of using the existing system, because their appeal from the planning division decision was based on a contention that the existing system is deficient. Petitioners' local appeal argues that, while the existing system is inadequate, a replacement system in that location could serve both residences. The county did not respond to that issue. In their petition for review, petitioners appear to take a position that the existing system is adequate. However, regardless of petitioners' perspective, MCZO 120.040(f)(3) requires a determination of the feasibility of using the existing system. Petitioners are not precluded from challenging the county's findings of compliance with that criterion.

1 hearings officer concludes, "[a]lthough it may be possible
2 to receive an authorization notice to use the existing
3 septic system for the temporary dwelling, it is not
4 reasonable or feasible to require the applicants to put in a
5 pumping system for a temporary use." Id.

6 MCZO 120.040(f)(3) requires that the temporary mobile
7 home be connected to the existing septic system "if
8 feasible." The county acknowledges intervenors have not
9 applied for the authorization necessary to determine
10 feasibility. Without that determination, the county's
11 findings are inadequate to establish compliance with MCZO
12 120.040(f)(3).⁵

13 This subassignment of error is sustained.

14 **C. Substantial Evidence**

15 Petitioners contend the county's findings of compliance
16 with MCZO 120.040 are not supported by substantial evidence.
17 Petitioners argue there is not substantial evidence that the
18 approved location, 500 feet from intervenors' residence, is
19 as close as possible to intervenors residence when (1) there

⁵The MCZO does not define the scope of the evaluation of "feasibility" for purposes of MCZO 120.040(f)(3). The hearings officer based her decision on the economic feasibility of installing a pumping system for a temporary use. The code does not preclude such an analysis. However, if economic feasibility is to be the standard, the county must explain why it is economically unfeasible to require a pumping system for a temporary use, but not economically unfeasible to require a new septic system for the same temporary use. The county must compare the cost of a pumping system to the cost of installing a new system for that same temporary use, as well as to the cost of replacing the existing system with one that could serve both residences.

1 is an alternative location within 50 feet of the residence;
2 and (2) the county has not shown why the fenced area between
3 170 feet and 500 feet cannot be reconfigured to accommodate
4 a temporary mobile home.

5 Because we have determined the county's findings are
6 inadequate, no purpose would be served by determining
7 whether they are supported by substantial evidence. DLCD v.
8 Columbia County, 16 Or LUBA 467, 471 (1988); DLCD v.
9 Columbia County, 15 Or LUBA 302, 305 (1987); McNulty v. City
10 of Lake Oswego, 14 Or LUBA 366, 373 (1986).

11 This subassignment of error is sustained.

12 The first assignment of error is sustained, in part.

13 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

14 Petitioners contend the county's decision violates
15 MCZO 110.800 and 119.070(b) and (c).⁶ The county and
16 intervenors respond that petitioners did not raise these
17 issues below and, therefore, have waived the right to raise
18 them for the first time before this Board.

19 Petitioners attempted to raise these issues for the
20 first time in their appeal to the board of commissioners.

⁶MCZO 110.800 restricts new dwellings along private drives. MCZO 119.070(b) and (c) require conditional uses to be in harmony with the purpose and intent of the zone, and that conditions imposed be necessary for the public health, safety and welfare. Petitioners contend street improvements and maintenance along 84th Place S.E. are needed for the proposed use to be in harmony with the residential area and to protect the existing road. Petitioners contend the county was required to evaluate the condition and capacity of 84th Place S.E. before permitting an additional dwelling on it.

1 Because the board of commissioners declined to consider
2 petitioners' appeal, these issues were never formally raised
3 before the county.⁷

4 ORS 197.835(2) limits a petitioner's ability to raise
5 issues before LUBA to those issues raised before the local
6 hearings body, as provided in ORS 197.763. However, a
7 petitioner may raise new issues for the first time at LUBA
8 if:

9 "The local governing body made a land use decision
10 * * * which is different from the proposal
11 described in the notice to such a degree that the
12 notice of the proposed action did not reasonably
13 describe the local government's final action."
14 ORS 197.835(2)(b).

15 The county's final decision bears little resemblance to
16 the planning division decision upon which petitioners based
17 their appeal to the hearings officer. Intervenors requested
18 approval of a conditional use permit to allow them to place
19 a mobile home 500 feet west of their residence, with a
20 separate septic system.⁸ The planning division "approved"
21 the application, but not the proposed location of the

⁷MCZO 122.120(c) allows the board of commissioners to affirm the hearings officer's decision summarily upon finding that the facts "do not warrant any further hearing." MCZO chapter 122 applies to variances, but MCZO 110.680(h) makes variance appeal procedures applicable to any appeals to the board of commissioners from either the hearings officer or planning commission. Petitioners do not argue the board of commissioners was required to grant them an evidentiary hearing.

⁸Intervenors contend their application did not specify a location for the mobile home. However, the plot plan attached to the application illustrates the mobile home, with a new septic system, approximately 500 feet west of intervenors' residence. Record 129, 132.

1 temporary mobile home. Rather, the planning division issued
2 a "notice of decision" which approved the conditional use,
3 subject to conditions that:

4 * * * * *

5 "3. The proposed hardship mobile home shall be
6 located within 50 feet of the existing
7 residence.

8 * * * * *

9 "7. The proposed mobile home shall use the
10 existing septic system." Record 123.

11 The notice of the public hearing before the hearings
12 officer on petitioners' appeal does not describe the
13 planning division approval. Rather, it generally states
14 that the purpose of the hearing is:

15 [T]o receive testimony on an application to place
16 a temporary mobile home for medical hardship
17 purposes on a 3.68 acre parcel in an AR (ACREAGE
18 RESIDENTIAL) zone on property located at 1453 84th
19 Place, SE." Record 119.

20 The issue before us is whether the county's final
21 decision is "different from the proposal described in the
22 notice to such a degree that the notice of the proposed
23 action did not reasonably describe the local government's
24 final action." ORS 197.835(2)(b). The county issued two
25 "notices" relevant to this issue -- first, the "notice of
26 decision" of the planning division describing the approval
27 and conditions; and second, the "notice of public hearing"
28 based on petitioners' appeal, which generally describes the
29 proposal but mentions neither the planning division decision

1 which formed the basis of the hearing on appeal, nor
2 intervenors' original proposal.

3 The description of the proposal in the notice of
4 hearing is the relevant notice against which the decision
5 must be compared under ORS 197.835(2)(b). However, in this
6 case the notice of hearing was so vague as to preclude a
7 full understanding of the nature of the hearing.
8 Petitioners appealed the planning division decision on very
9 specific grounds.⁹ The notice of hearing provided no
10 indication that the hearing on their appeal would be to
11 consider a proposal substantially different than the one
12 described in the planning division's notice of decision.

13 On a similar issue, we have determined that where
14 petitioners could not have reasonably known that the local
15 government would adopt a particular interpretation of local
16 ordinances, ORS 197.835(2) and 197.763(1) do not require
17 petitioners to have challenged the interpretation during the
18 local proceedings in order to challenge it before LUBA.

⁹Petitioners' appeal document states, in part:

"The present septic system is not a size large enough to
service the present dwelling and the additional mobile home.
However, the area for full system replacement is available."
Record 121.

The appeal document also notes a Department of Environmental Quality
regulation that limits an authorization for use (presumably for a temporary
use) to no more than two years. The appeal language was continued to the
reverse side of the form, but that reverse side was not made part of the
record. The record does not, therefore, reflect whether other issues were
appealed.

1 Washington Co. Farm Bureau v. Washington Co., 21 Or LUBA 51,
2 57 (1991); see Larson v. Multnomah County, 24 Or LUBA 629
3 (1993). We find here that where the notice of the
4 evidentiary hearing on a local appeal is so vague as to
5 preclude petitioners from understanding the proposal under
6 review, and where the proposal approved is substantially
7 different from the administrative decision upon which the
8 appeal hearing is based, petitioners may raise issues for
9 the first time before this Board under ORS 197.835(2)(b).
10 See Wuester v. Clackamas County. 25 Or LUBA 425 (1993).

11 We are required to review the governing body's
12 interpretation of its enactment, as expressed in the
13 challenged decision, and may not interpret the local
14 enactment ourselves in the first instance. Weeks v. City of
15 Tillamook, 117 Or App 449, 453, 844 P2d 914 (1992). In this
16 case, the county's decision does not address either MCZO
17 110.080 or 119.070(b) and (c). We must remand the decision
18 for that interpretation.

19 The second and third assignments of error are
20 sustained.

21 The county's decision is remanded.