

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MULTI/TECH ENGINEERING SERVICES,
5 INC., an Oregon corporation,
6 *Petitioner,*

7
8 vs.

9
10 JOSEPHINE COUNTY,
11 *Respondent,*

12 and

13
14
15 STEVE DOOB, MARTIN SEYBOLD, NANCY
16 KLAPATCH and MARGARET JORDAN,
17 *Intervenors-Respondent.*

18
19 LUBA No. 99-049

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21 Appeal from Josephine County.

22
23 James R. Dole, Grants Pass, filed the petition for review and argued on behalf of
24 petitioner.

25
26 No appearance by respondent.

27
28 Steve Doob, Merlin, filed a response brief and argued on his own behalf.

29
30 BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member,
31 participated in the decision.

32
33 REMANDED

12/15/99

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

37

NATURE OF THE DECISION

Petitioner appeals the county’s denial of an application for a permit to site a manufactured home park.

FACTS

The subject property is an 8.38-acre parcel designated Moderate Density Residential under the county’s comprehensive plan and zoned Single and Two-Family Residential (R-2). The property is located within the City of Grants Pass Urban Growth Area (UGA), but outside the city limits.¹ Development within the UGA is governed by the City of Grants Pass Urban Growth Area Zoning Ordinance (UGAZO).

Petitioner filed an application with the county to site a 55-unit manufactured home park (MHP) on the property. An MHP is listed as a conditional use in the R-2 zone, “subject to Mobile Home Park Development Guidelines within the City and urbanizing area.” UGAZO 116.03(m). The Josephine County Urban Area Planning Commission approved petitioner’s application with conditions. The planning commission’s decision was appealed to the county board of commissioners, who conducted a *de novo* evidentiary hearing. On March 13, 1999, the board of commissioners reversed the planning commission’s decision, thus denying the application.

This appeal followed.

THIRD ASSIGNMENT OF ERROR

The challenged decision denies the proposed MHP based on findings of noncompliance with two sets of criteria: Exhibit A to the Urban Land Use Hearing Rules (Exhibit A),² which sets forth general criteria for approval of conditional use permits, and

¹Sometime after the county issued the decision challenged in this case, the City of Grants Pass annexed the area including the subject property.

²Exhibit A provides in relevant part:

1 UGAZO 128.07, which sets forth general criteria for site plan approval.³ The decision's
2 findings state:

"The following requirements must be proved by the applicant for issuance of a Conditional Use Permit:

- "1. The requested use is conditionally permitted by the zoning Ordinance within the affected zoning district.
- "2. The proposal is in accordance with the general purpose of the Zoning Ordinance which, at Section 2 states:

"To encourage the most appropriate use of the land; to conserve and preserve natural resources; to conserve and stabilize the value of property; to prevent undue concentrations of population; to [lessen] congestion of streets; to facilitate adequate provision for community utilities such as transportation, water, sewage, schools, parks, and other public requirements, and to promote the public health, safety and general welfare."
- "3. That the proposal is in accordance with the specific purpose of the affected zoning district. * * *
- "4. The proposed use will not be detrimental to the health, safety or general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to the property or improvements in the neighborhood or to the general welfare of the [UGA].
- "5. The proposed use conforms to the requirements of the applicable LCDC Goals.
- "6. The proposed use conforms to the General or Comprehensive Plan.
- "7. The proposed use conforms to applicable Oregon Revised statutes as such may apply.
- "8. The proposed use conforms to applicable ordinances and policies of the City and County for the [UGA], as such may apply."

³UGAZO 128.07 requires that the proposed site plan be reviewed according to the following criteria:

- "1. Complies with applicable elements of the Comprehensive Plan.
- "2. Complies with all other applicable provisions of this Ordinance.
- "3. Potential land use conflicts have been mitigated through specific conditions of development.
- "4. Public facilities and services are available or, if not, may be available as provided by the proposed project and are of adequate capacity to serve the development.
- "5. Traffic conflicts and hazards are minimized on-site and off-site.

1 “1. Commissioner Brock found that the application was an urban level
2 development in a rural setting; there were health and safety issues; the
3 property did not have adequate level of services (specifically, the lack
4 of city water); the [opponents] met the burden of proof on the fire
5 issue alone in that a 55 space mobile home park without adequate
6 water was a fire hazard.

7 “2. Commissioner Iverson found that the 55 space mobile home park did
8 not meet criteria #2 of [Exhibit A] which dealt with lessening
9 concentration and congestion or criteria #4 of [Exhibit A] in that it will
10 be injurious to the neighborhood.” Record 7.

11 Based on those findings, the decision states the following conclusion:

12 “The [board of commissioners] concludes that substantial, reliable, probative
13 evidence as supported by the record before it and testimony and other
14 evidence received by it as provided herein is sufficient to prove that
15 [petitioner] did not meet the criteria [in Exhibit A and UGAZO 128.07].”
16 Record 7.

17 In this assignment of error, petitioner argues that the county erred in applying the
18 conditional use standards at Exhibit A and the site design standards at UGAZO 128.07,
19 because such standards are inapplicable to the proposal as a matter of law by virtue of
20 ORS 197.480(5).

21 ORS 197.480(5) provides that

22 “(a) A city or county may establish clear and objective criteria and
23 standards for the placement and design of mobile home or
24 manufactured dwelling parks.

25 “(b) If a city or county requires a hearing before approval of a mobile home
26 or manufactured dwelling park, application of the criteria and
27 standards adopted pursuant to paragraph (a) of this subsection shall be
28 the sole issue to be determined at the hearing.

29 “(c) No criteria or standards established under paragraph (a) of this
30 subsection shall be adopted which would preclude the development of

“6. If phased development each phase contains adequate provision of services, facilities,
access, off-street parking, and landscaping.

“7. To the extent possible, natural features are incorporated into the design in a manner
that shall protect the scenic nature of the Rogue River.”

1 mobile home or manufactured dwelling parks within the intent of ORS
2 197.295 and 197.475 to 197.490.”

3 Petitioner explains that the City of Grants Pass has adopted a set of standards called
4 the “Mobile Home Park Development Guidelines” (Guidelines), and that UGAZO 132.23
5 specifically requires that MHPs comply with the Guidelines for development within the
6 UGA.⁴ Petitioner argues that the Guidelines are “clear and objective criteria” adopted
7 pursuant to ORS 197.480(5)(a) and thus that, pursuant to ORS 197.480(5)(b), the “sole
8 issue” to be determined in approving or denying the proposed MHP was whether it complied
9 with those clear and objective criteria. Petitioner contends that the county thus violated
10 ORS 197.480(5) by applying to the proposed MHP the conditional use standards at Exhibit
11 A, and the site plan review standards at UGAZO 132.23. According to petitioner, those
12 standards do not constitute “clear and objective criteria and standards for the placement and
13 design of mobile home or manufactured dwelling parks.” ORS 197.480(5)(a).

14 Intervenor-respondent Steve Doob (intervenor) responds that the county properly
15 applied its general conditional use and site review standards to the proposed use, because the
16 limitations of ORS 197.480(5) are not applicable to development of MHPs in the county’s R-
17 2 zone.⁵ Intervenor argues that ORS 197.480(5) applies only to proposed MHPs on lands
18 identified pursuant to ORS 197.480(1) and (2), which provide:

⁴UGAZO 132.23 provides that

“A mobile home park shall comply with both the State’s mobile home park standards and with the items listed as ‘shall’ in the [Guidelines]. In evaluating the plan for the proposed mobile home park, the Staff, the Hearings Officer, the Urban Area Planning Commission and the governing bodies shall use said Guidelines and shall consider items listed as ‘should’ in the Guidelines as recommended standards.”

⁵At oral argument, intervenor contended for the first time in this appeal that petitioner had not raised before the county the issues presented in this assignment of error, and thus had waived the right to raise those issues before LUBA, pursuant to ORS 197.763(1). However, OAR 661-010-0040(1) provides that “[t]he Board shall not consider issues raised for the first time at oral argument.” Even if it were permissible to consider intervenor’s untimely waiver argument, we agree with petitioner’s rebuttal to that argument, that the county’s failure to list UGAZO 132.23 or the Guidelines as applicable criteria in the notice of hearing allows petitioner to raise issues regarding those omitted criteria before LUBA for the first time. ORS 197.835(4)(a). The

1 “(1) Each city and county governing body shall provide, in accordance
2 with urban growth management agreements, for mobile home or
3 manufactured dwelling parks *as an allowed use*, by July 1, 1990, or by
4 the next periodic review after January 1, 1988, whichever comes first:

5 “(a) By zoning ordinance and by comprehensive plan designation
6 on buildable lands within urban growth boundaries; and

7 “(b) In areas planned and zoned for a residential density of six to 12
8 units per acre sufficient to accommodate the need established
9 pursuant to subsections (2) and (3) of this section.

10 “(2) A city or county shall establish a projection of need for mobile home
11 or manufactured dwelling parks based on:

12 “(a) Population projections;

13 “(b) Household income levels;

14 “(c) Housing market trends of the region; and

15 “(d) An inventory of mobile home or manufactured dwelling parks
16 sited in areas planned and zoned or generally used for
17 commercial, industrial or high density residential
18 development.” (Emphasis added).

19 Intervenor argues that the county has not identified the R-2 zone as an area where
20 MHPs are an *allowed* use, pursuant to ORS 197.480(1) and (2), but instead has listed MHPs
21 as a *conditional* use in the R-2 zone, subject to the necessity of obtaining a conditional use
22 permit. Because MHPs are conditional uses in the R-2 zone, intervenor contends that the
23 county is required by its ordinance to impose criteria applicable to conditional uses,
24 regardless of the restrictions of ORS 197.480(5). Further, intervenor argues that the UGAZO
25 has been acknowledged by the Land Conservation and Development Commission (LCDC) as
26 complying with the Statewide Land Use Planning Goals and therefore that application of the
27 county’s conditional use and site plan review criteria to MHPs must be consistent with
28 statewide requirements. Finally, intervenor notes that the R-2 zone allows a maximum

primary issue petitioner raises in this assignment of error is whether ORS 197.480(5) requires that the county apply only the Guidelines when considering the application for the proposed MHP.

1 density of 10 units per acre, and that ORS 197.480(1)(b) is directed at lands zoned for
2 residential density of six to 12 units per acre. Because the R-2 zone does not permit as great
3 a density as ORS 197.480(1)(b), intervenor argues, the requirements of ORS 197.480 should
4 not apply to the R-2 zone.

5 We agree with petitioner that the criteria at Exhibit A and UGAZO 128.07 are not
6 “clear and objective criteria and standards for the placement and design of mobile home or
7 manufactured dwelling parks.” See *Rogue Valley Assoc. of Realtors v. City of Ashland*,
8 ___ Or LUBA ___ (LUBA No. 97-260, September 24, 1998), slip op 20-21, *aff’d* 158
9 Or App 1, 970 P2d 685 (1999) (“clear and objective” standards for purposes of the needed
10 housing statutes include numerical and similar clear standards, but do not include standards
11 that require subjective, value-laden analyses designed to balance or mitigate impacts of the
12 development on the property to be developed or the adjoining properties or community).
13 MHPs “as provided in ORS 197.475 to 197.490” are “needed housing” for purposes of the
14 rule implementing Statewide Land Use Goal 10 (Housing). OAR 660-008-0005(11)(c).
15 Thus, if ORS 197.480(5) applies at all to the proposed MHP, the county’s application of
16 Exhibit A and UGAZO 128.07 to that use is inconsistent with the statute.

17 For the following reasons, we conclude that ORS 197.480(5) applies to the proposed
18 development of MHPs in the R-2 zone, and thus the county erred in applying Exhibit A and
19 UGAZO 128.07 to deny the proposed MHP.

20 The legislature adopted ORS 197.480 in 1987. HB 2259, 1987 Or Laws chapter 785,
21 section 4. ORS 197.480(1) requires that by July 1, 1990, *at the latest*, the county make
22 provision for MHPs as an “allowed use” on residential lands, sufficient to accommodate the
23 need identified pursuant to the projection and inventory required by ORS 197.480(2) and (3).
24 The county was required to implement ORS 197.480 at the time it became applicable, *i.e.* by

1 July 1, 1990, at the latest. ORS 197.646(1).⁶ However, even if the county fails to implement
2 ORS 197.480, the requirements of the statute apply directly to the county’s land use
3 decisions. ORS 197.646(3).⁷

4 The county has not appeared in this case, and it is not clear from the parties’
5 arguments or the record whether or not the county has implemented ORS 197.480(1) through
6 (3) with respect to lands zoned under the UGAZO. The version of the UGAZO applicable in
7 this case has been amended six times since 1987, but it is not apparent that those
8 amendments reflect the requirements of ORS 197.480.

9 The UGAZO describes four residential zoning classifications that appear to
10 correspond to similar classifications in the Grants Pass Development Code (GPDC): R-1, R-
11 2, R-3 and R-4. For each residential zone, the UGAZO sets forth a list of “permitted” uses
12 and “conditional” uses. The UGAZO does not list MHPs as either permitted or conditional
13 uses in the R-1 or R-4 zones. With respect to the R-2 and R-3 zones, the UGAZO lists
14 MHPs as “conditional” uses, “subject to Mobile Home Park Development Guidelines within
15 the City and urbanizing area.” Thus, the UGAZO does not provide for MHPs in *any*
16 residential zone except as a “conditional” use.⁸ While the characterization of MHPs under
17 the county’s code may not be critical, ORS 197.480 requires that the county provide for
18 MHPs in at least some residential zones sufficient to meet the identified need for that type of

⁶ORS 197.646(1) provides:

“A local government shall amend the comprehensive plan and land use regulations to implement new or amended statewide planning goals, Land Conservation and Development Commission administrative rules and land use statutes when such goals, rules or statutes become applicable to the jurisdiction. * * *”

⁷ORS 197.646(3) provides:

“When a local government does not adopt comprehensive plan or land use regulation amendments as required by subsection (1) of this section, the new or amended goal, rule or statute shall be directly applicable to the local government's land use decisions. * * *”

⁸The parallel provisions in the GPDC list MHPs as “permitted” uses in the R-2 and R-3 zones, subject to development permit review under the city’s Type III (notice and hearing) procedure. GPDC 12.131.

1 needed housing, *subject only to clear and objective criteria*. However, as the county has
2 applied the UGAZO here, *every* proposed MHP within the UGA is subject to conditional use
3 and site plan review criteria. Those criteria are not clear and objective. Absent some
4 explanation from the county as to why the MHP proposed in this case is not subject to the
5 requirements of ORS 197.480, we conclude that the county erred in applying the criteria in
6 Exhibit A and UGAZO 128.07.

7 Intervenor’s arguments to the contrary are not well-taken. If the UGAZO is read to
8 treat all MHPs in residential zones as conditional uses that must comply with the subjective
9 standards in Exhibit A, then the UGAZO is inconsistent with the statute.⁹ That the UGAZO
10 has been acknowledged to comply with statewide land use planning goals says nothing about
11 whether the UGAZO is consistent with applicable statutory law, including ORS 197.480.
12 *See Foland v. Jackson County*, 18 Or LUBA 731, 754, *aff’d* 101 Or App 632, 792 P2d 1228
13 (1990), *aff’d* 311 Or 167, 807 P2d 801 (1991) (statutory requirements do not become
14 inapplicable to counties after acknowledgment of their plans and land use regulations).
15 Finally, ORS 197.480(1)(b) describes a *range* of medium density local zoning that includes
16 zones allowing six to 12 units per acre; the R-2 zone allows a maximum density of 10 units
17 per acre and thus falls squarely within that range.

18 The third assignment of error is sustained.

19 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

20 In the first assignment of error, petitioner argues that the county’s notice of hearing
21 was procedurally defective in a manner that prejudiced petitioner’s substantial rights. In the
22 second assignment of error, petitioner argues that the county’s findings of noncompliance
23 with Exhibit A and UGAZO 128.07 are inadequate. However, as a consequence of our

⁹We leave open the possibility that the county can interpret the UGAZO to allow MHPs in the R-2 and R-3 zones without subjecting them to the criteria in Exhibit A and UGAZO 128.07. The only criteria that the UGAZO makes *expressly* applicable to MHPs are the Guidelines. UGAZO 116.03(m); 117.03(j).

1 resolution of the third assignment of error, the case must be remanded for new proceedings to
2 determine whether the proposed use complies with applicable clear and objective standards,
3 which do not include Exhibit A and UGAZO 128.07.¹⁰ Accordingly, no purpose would be
4 served in addressing the arguments under these assignments of error.

5 The first and second assignments of error are denied.

6 The county's decision is remanded.

¹⁰We express no opinion regarding petitioner's argument that the Guidelines constitute the *only* "clear and objective criteria and standards" described by ORS 197.480(1)(a) that the county can apply to MHPs in the R-2 zone.