

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

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THE ROBERT RANDALL COMPANY,)
an Oregon corporation,)
Petitioner,)
vs.)
THE CITY OF WILSONVILLE,)
OREGON,)
Respondent.)

LUBA No. 86-016
FINAL OPINION
AND ORDER

Kenneth H. Fox, Portland, filed the Petition for Review and argued on behalf of petitioners. With him on the brief were O'Donnell, Ramis, Elliott and Crew.

Michael E. Kohlhoff, Wilsonville, filed a response brief and argued on behalf of respondent.

Michael A. Holstun, Salem, filed a state agency brief on behalf of the Department of Land Conservation and Development.

BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

KRESSEL, Referee, Concurring.

REMANDED 10/06/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals denial of its request for a zone change
4 to permit construction of a mobile home park in the City of
5 Wilsonville. Petitioner asks us to reverse the decision.

6 FACTS

7 Petitioner applied for a zone change from RA-1 (Residential
8 Agricultural) to PDR (Planned Development Residential) for a 21
9 acre parcel.¹ Petitioner's request was heard and approved by
10 the Wilsonville Planning Commission in December 1985. The
11 approval was submitted to the city council for final action.
12 However, the council found that the application did not comply
13 with the city's comprehensive plan and denied the requested
14 change. This appeal followed.

15 FIRST ASSIGNMENT OF ERROR

16 "The Wilsonville City Council misconstrued its own
17 Comprehensive Plan and zoning ordinance by denying
18 that a mobile home park is an outright permitted use
19 in an area designated for medium density residential
20 development on the Comprehensive Plan. LCDC has
21 already ruled that the applicable standard governs
22 how, but not whether such a development is to be
23 approved." (Emphasis in original.)

24 The city based its denial on Objective 4.3.3 of the
25 comprehensive plan. Under the objective, the city must:

26 "Encourage the development of diverse housing types,
but maintain a balance in the types and location of
housing available, both currently and during future
development. Such housing types shall include, but
not be limited to, apartments, single family detached,
commonwall single family, manufactured homes, mobile
homes, and condominiums in various structural forms."
City of Wilsonville Comprehensive Plan, Objective 4.3.3.

1 Citing this plan objective, the council stated that
2 "Wilsonville is out of balance in the number of mobile homes
3 placed within the city limits." Record at 23. The city
4 council concluded that it was justified in denying the
5 development.

6 Petitioner argues the city's design violates the
7 comprehensive plan. Petitioner states that under the
8 comprehensive plan, the subject property is a Medium Density
9 Residential (MDR) area, and adds that the following
10 comprehensive plan provision requires the city to approve the
11 application:

12 "The city will provide for development of mobile home
13 parks and subdivisions by establishing them as
14 outright permitted uses in urban medium density
15 residential areas. Where economically feasible and
16 where adequate compatible provisions can be made
existing mobile home parks shall be protected and
allowed to continue." City of Wilsonville
Comprehensive Plan, Policy 4.4.2.

17 Petitioner also argues that acknowledgement of the city's
18 plan by the Land Conservation and Development Commission was
19 predicated, in part, on LCDC's understanding that mobile home
20 development proposals in MDR areas on the plan would be treated
21 as permitted uses by the city. According to petitioner, the
22 plan, as acknowledged, requires an upzone to PDR upon
23 application for any property within a medium density
24 residential area over 2 acres. See Record at 519.

25 Intervenor Department of Land Conservation and Development
26 seconds petitioner's complaints and states that during the

1 acknowledgement process, the city represented to LCDC that it
2 was the intent of the plan to allow mobile homes outright in
3 medium density areas.² See "Summary Analysis of Findings
4 Related to LCDC Acknowledgement Review Report" submitted by the
5 Wilsonville Planning Commission on March 24, 1982, page 15.
6 The department insists that the plan is clear and unambiguous
7 in its grant of permitted use status to mobile homes in the MDR
8 areas.³

9 The city defends by stating it is entitled to determine
10 when development authorized by the plan is to be allowed. The
11 city argues it found too many mobile homes now exist in the
12 area sought to be developed. Under the city's plan calling for
13 a balance of housing types, the city claims it is entitled to
14 deny the development so as to maintain a balance between mobile
15 homes and other housing types.

16 We find the city was entitled to consider this application
17 against its comprehensive plan objective calling for a balance
18 of housing types. The city's plan is divided into goals,
19 objectives, and policies. The plan provides that

20 "[W]hen any ambiguity or conflict appears to exist,
21 Goals shall take precedence over Objectives, Policies,
22 Text and Map; Objectives shall take precedence over
Policies, Text and Map; Policies shall take precedence
over Text and Map."

23 In this case, the plan policy that mobile homes be treated
24 as permitted uses in urban medium density residential areas is
25 a clear statement appearing to require approval of this
26 application. The policy is stated in mandatory terms.

1 Objective 4.3.3, however, also requires the city to "maintain a
2 balance in the types and location of housing available...."
3 Maintaining a balance of housing types is also obligatory. The
4 plan objective, then, is placed in conflict with the plan
5 policy by the application for a mobile home park. Satisfaction
6 of one provision will violate the other. Where provisions are in
7 conflict, the plan itself provides a method to resolve the
8 conflict - the objective controls over the policy.

9 We conclude the city was justified in applying Objective
10 4.3.3 to this application.

11 The first assignment of error is denied.

12 SECOND ASSIGNMENT OF ERROR

13 "The Wilsonville City Council went beyond its
14 authority under its own zoning ordinance by applying
15 Comprehensive Plan objective 4.4.3 [sic] to
16 Petitioner's application."

17 Aware that the city rests its decision on a plan objective,
18 petitioner next argues the city code does not require a zone
19 change to satisfy a comprehensive plan "Objective." Petitioner
20 asserts the rezoning criterion provides that a proposed
21 development must be "consistent with all applicable policies in
22 the comprehensive plan." (Emphasis added) Wilsonville City
23 Code, Section 4.187. Record at 271.

24 The code does not state clearly that either plan
25 "objectives" or "policies" must be satisfied. Rather, the
26 zoning code appears to require compliance with the
comprehensive plan, generally. We decline to find the city in

1 error simply because it considered objectives as well as
2 policies.

3 The second assignment of error is denied.

4 THIRD ASSIGNMENT OF ERROR

5 "The Wilsonville City Council misconstrued LCDC's area
6 of special concern designation."

7 In making its decision, the city council found that the
8 subject property was entitled to protection as an "area of
9 special concern." The council also found that design criteria
10 in the comprehensive plan protects the environment in areas of
11 special concern. Petitioner argues the area of special concern
12 criteria are not applicable to this application for the same
13 reasons that its application should be considered an outright
14 permitted use.

15 We understand the city plan to designate particular
16 geographical areas as "areas of special concern." The areas
17 are given a number designation, and within each particular
18 geographical area, certain plan provisions must be applied.

19 The city's order states

20 "The Comprehensive Plan further, emphasizes protection
21 and enhancement of the pleasant, comfortable living
22 environment presently enjoyed by local residents. It
23 specifically designates this area as an Area of
24 Special Concern and sets forth design criteria to
protect the existing suburban low-density development
in this area. Therefore, in interpreting compliance
and balance, it is necessary for the Council to
consider both subjective and objective factors."
Record 23.

25 The city's order does not identify within which area of
26 special concern petitioner's property lies. We are therefore

1 unable to determine the particular criteria applicable, or
2 potentially applicable, to petitioner's application. Indeed,
3 it is not clear that the city applied any area of special
4 concern criteria to this application. It is also not clear
5 that the area of special concern criteria may be used to deny
6 an application.

7 Without further guidance on which of the several areas of
8 special concern is applicable to this development and upon what
9 criteria the city measures this application, we are unable to
10 sustain the city's use of this particular portion of its plan.

11 The first assignment of error is sustained.

12 FOURTH ASSIGNMENT OF ERROR

13 "The Wilsonville City Council has violated the
14 applicable laws by amending its Comprehensive Plan
15 without following statutory procedures."

16 Petitioner argues the City of Wilsonville failed to comply
17 with the procedural requirements for amending comprehensive
18 plans found in ORS 197.610-650. Petitioner claims the
19 statutory notice requirements were not adhered to. Petitioner
20 also states the following:

21 "The first time its new interpretation of the
22 Comprehensive Plan was made public was upon acceptance
23 of the findings which denied Petitioner's
24 application. This is in violation of the procedures
25 established for plan amendments and should not be
26 permitted." Petition for Review at 18.

27 We understand petitioner to argue that the city has
28 effectively amended its comprehensive plan by interpreting away
29 (or effectively writing out) a comprehensive plan policy

1 requiring mobile homes be treated as permitted uses in urban
2 medium density zones. According to petitioner's theory, the
3 alleged "amendment" was not preceded by appropriate notice;
4 and, therefore, the city is in violation of procedural
5 requirements governing amendments to the comprehensive plan.

6 We reject this challenge. The city has not amended its
7 plan. It has denied a zone change request. The alleged
8 misinterpretation of the plan is not a plan amendment.

9 FIFTH ASSIGNMENT OF ERROR

10 "The Wilsonville City Council has interpreted its Plan
11 in a manner that violates the state's 'St. Helens'
policy as codified at ORS 197.295 et seq."

12 Petitioner claims the city 's denial of the mobile home
13 development on property designated Urban Medium Density
14 Residential is a violation of the LCDC acknowledgement and a
15 violation of state policy codified at ORS 197.295 - ORS
16 197.312. The quoted statutes require local governments to
17 provide affordable, decent, safe and sanitary housing for
18 persons of lower, middle and fixed income. When a need has
19 been shown for such housing within an urban growth boundary,
20 such needed housing must be permitted under ORS 197.307(3).
21 The local government approval process must be under "clear and
22 objective" standards. ORS 197.307(5). These statutes are
23 commonly known as the state's "St. Helen's" policy.

24 The Department of Land Conservation and Development joins
25 in this assignment of error and also asserts that the city's
26 interpretation of its plan "results in a failure to provide

1 needed housing in a zone or zones with sufficient buildable
2 lands to satisfy housing needs...."⁴ The Department states
3 that the city's action is not based on clear and objective
4 standards, in violation of ORS 197.307(5); and, indeed, the
5 city's action discourages provision of needed housing.

6 The City of Wilsonville argues that nothing in the record
7 shows the city does not have a sufficient inventory of lands to
8 meet housing needs.

9 The statute requires that a need must be shown before the
10 local government is obliged to provide for certain kinds of
11 housing. We are cited to nothing in the record showing a need
12 for additional mobile home subdivisions or similar housing for
13 low, middle or fixed income. Without showing need,
14 petitioner's challenge under ORS 197.295 et seq must fail.

15 The fifth assignment of error is denied.

16 SIXTH ASSIGNMENT OF ERROR

17 "The Wilsonville City Council's findings do not
18 support the Council's conclusion and are not supported
by substantial evidence in the record."

19 SEVENTH ASSIGNMENT OF ERROR

20 "The Wilsonville City Council failed to define the
21 standard which must be met to obtain approval of a
22 zone change application for a mobile home park
development."

23 In these two assignments of error, petitioner argues that
24 the city may not use its "balance" objective because the city
25 did not define the objective. According to petitioner, the
26 city council did not inform petitioner of how the standard

1 could be met, and petitioner was left in the position of trying
2 to second guess the council as to what evidence it must present
3 in order to show compliance with the balance criterion.

4 Further, petitioner argues that the city's findings do not show
5 that too many mobile homes now exist in the city or that the
6 proposed development would upset any balance which does exist
7 between mobile homes and other housing types.

8 The city does not fully explain what it means by a "balance
9 of housing types." The city's order states that its
10 comprehensive plan "seeks a diversity and balance in housing
11 types with a starting point of 24 percent mobile homes."
12 Record at 23. We are cited to nothing in the plan that
13 discloses what "balance" means. The plan cites a housing
14 "report" showing that mobile homes "are distributed at about 25
15 percent per housing type as of May 19, 1979." City of
16 Wilsonville Comprehensive Plan, Objective 4.3.2. However,
17 there is no plan provision establishing 24 percent or (25
18 percent) as a desirable "balance" of mobile homes to other
19 housing types.

20 In addition, we do not understand the city's order to state
21 that a ratio of 24 percent mobile homes to other kinds of
22 housing is an appropriate balance under the city's plan. The
23 findings only state that the plan seeks diversity and balance
24 in housing types "with a starting point of 24 percent mobile
25 homes." (Emphasis supplied.)

26 We therefore agree with petitioner. The comprehensive plan

1 is quite vague on the matter of what is an appropriate
2 "balance" of housing types. Similarly, the city's order does
3 not articulate what constitutes a proper balance. The city has
4 not even given a range of ratios or balances between housing
5 types that it would consider acceptable under its plan. In
6 order to effectively use this criterion, the city must explain
7 what it means by an appropriate or proper balance of housing
8 types. Commonwealth Properties v. Washington County, 35 Or App
9 387, 582 P2d 1384 (1978).⁵

10 The sixth and seventh assignments of error are sustained.

11 EIGHTH ASSIGNMENT OF ERROR

12 "The Wilsonville City Council's decision is outside
13 the range of discretion allowed under its
14 Comprehensive Plan and zoning code, in violation of
ORS 197.840."

15 Petitioner here urges us to order approval of the
16 application. ORS 197.835(9) requires us to approve a
17 development where petitioner shows the local government "is
18 outside the range of discretion allowed the local government
19 under its comprehensive plan and implementing ordinances."
20 Petitioner claims that the city's decision clearly flies in the
21 face of the provisions of its plan. Petitioner also claims
22 that we should assess attorney fees against the city under this
23 same statute.

24 In order to agree with petitioner's request, we must find
25 that the city was obliged to rezone petitioner's property for
26 the reasons claimed in the first assignment of error. We do

1 not accept this view. We find the city was entitled to apply
2 plan Objective 4.3.3. The fact that it may have done so
3 improperly, however, does not mean that petitioner must be
4 given approval for the rezone. We therefore deny this
5 assignment of error.

6 This assignment of error is denied.

7 This matter is remanded to the City of Wilsonville for a
8 complete explanation and application of its balance criteria.
9 Also, the city should explain any application of the "area of
10 special concern" in the plan provisions.

1 Kressel, Concurring.

2 I differ with the majority's reasoning (but not the result)
3 in the first assignment of error. The majority believes that
4 Plan Policy 4.4.2 is "mandatory". By that I assume they mean
5 the policy would entitle petitioner to the requested rezoning,
6 but for the conflicting plan objective. This analysis gives
7 more weight to the plan policy than is warranted by its text.

8 Policy 4.4.2 declares that

9 "The city will provide for development of mobile home
10 parks and subdivisions by establishing them as
11 outright permitted uses in urban medium density
12 residential areas. Where economically feasible and
13 where adequate compatible provisions can be made
14 existing mobile home parks shall be protected and
15 allowed to continue."

16 Insofar as pertinent in this case, the text says nothing more
17 than that the city will allow certain uses in the medium
18 density areas of the plan. Neither this policy nor any other
19 regulation cited by petitioner dicatates when the city will
20 take this action. More to the point in this case, the plan
21 leaves completely unanswered the question of whether land shown
22 on the plan map as "medium density residential," but currently
23 zoned for less intensive use (e.g., Residential-Agricultural)
24 must automatically be "upzoned" to accommodate a proposed
25 mobile home park. That is precisely the question raised in
26 this case.

27 Petitioner argues that the requested upzoning is dictated
28 by policy 4.4.2 but the text of the policy does not go that
29 far. The policy does not say when the zone must be brought

1 into conformance with the plan. There is no statutory or other
2 rule barring the city from maintaining property in a zoning
3 district less intensive than shown on the plan. See Porphman v.
4 Klamath County, 25 Or App 613, 618-19, 550 P2d 1236 (1976). As
5 a result, I believe the city could deny the rezoning
6 application, supporting the denial by citation to other
7 segments of the plan designed to have legal effect (i.e.,
8 objectives and policies).

9 My objection to the majority's stance is that it paves the
10 way for a practice I believe can erode much of a city's plan.
11 That practice, which petitioner has some reason to believe is
12 at work in this case, is the use of highly general plan
13 "objectives" to override or eviscerate more specific, mandatory
14 portions of a plan whenever the specific mandate proves to be
15 unpopular. If the text of Policy 4.4.2 clearly supported
16 petitioner's claim to an automatic rezoning for a mobile home
17 park (as the majority seems to believe), the city should not be
18 permitted to negate that text by invoking a "conflict" with the
19 hierarchically superior, but far more general, plan objective.
20 In land planning law as in other areas of the law, specific
21 provisions should govern over general ones. This principle is
22 incautiously overlooked by the majority opinion.

FOOTNOTES

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The PDR zone allows mobile home parks as permitted uses.

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Medium density is 5 to 12 units per acre.

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We are aware of no authority requiring us to interpret the city's plan in the light of a DLCD acknowledgement report. The "Summary Analysis of and Findings Related to LCDC Acknowledgement Review Report" relied upon by the department in support of its interpretation of the city plan is a planning commission document, not a statement of the governing body.

4

The Department does not cite us to any city housing inventory which might show whether the city's action affects its ability to provide needed housing.

5

The city has not explained why it chose this particular geographical area when discussing its housing type balance. On remand, the city's choice of area of study should be explained.