

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

4 RONALD BREWSTER,)
5))
6 Petitioner,)
7) LUBA No. 94-008
8 vs.)
9) FINAL OPINION
10 CITY OF KEIZER,) AND ORDER
11))
12 Respondent.)
13
14

15 Appeal from City of Keizer.
16

17 G. Frank Hammond and Jeff H. Bachrach, Portland, filed
18 the petition for review on behalf of petitioner and an
19 amicus brief on behalf of Oregon Manufactured Housing
20 Association. With them on the briefs was O'Donnell, Ramis,
21 Crew & Corrigan. G. Frank Hammond argued on behalf of
22 petitioner.
23

24 E. Shannon Johnson, Keizer, and M. Chapin Milbank,
25 Salem, filed the response brief. With them on the brief was
26 Lien, Hobson & Johnson. M. Chapin Milbank argued on behalf
27 of respondent.
28

29 SHERTON, Referee; HOLSTUN, Referee, participated in the
30 decision.
31

32 REMANDED 06/27/94
33

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council order denying his
4 application for a conditional use permit to place a
5 single-family manufactured home on a 9,200 square foot
6 parcel.¹

7 **FACTS**

8 The subject parcel is designated Low Density
9 Residential by the city comprehensive plan and is zoned
10 Urban Transition (UT). Single-family dwellings are a
11 conditional use in the UT zone.

12 The adjoining property to the south and east is zoned
13 Single Family Residential (SR) and is part of the Orchard
14 Crest subdivision. The majority of the lots in the
15 subdivision are developed with single-family dwellings. The
16 covenants of this subdivision prohibit manufactured homes.
17 Most of the homes in the subdivision have two stories,
18 composition shingle roofs and lap siding facing the street,
19 with T-111 siding on other sides.

20 Petitioner applied for a conditional use permit to
21 place a 1991 model Silvercrest "Presidential" manufactured
22 home on the subject parcel. Petitioner's manufactured home
23 is 1,600 square feet in size. It has a bluish-gray exterior

¹The challenged order also approves the partitioning of a 0.48 acre property to create the subject 9,200 square foot parcel and a 12,400 square foot parcel. However, the portion of the decision approving the partition is not at issue in this appeal.

1 with white trim and a three tab shingle roof with at least a
2 3/12 pitch. The exterior finish is T-111 siding on all
3 sides.

4 The city zoning administrator approved petitioner's
5 conditional use permit. Residents of the neighboring
6 Orchard Crest subdivision appealed this decision to the city
7 hearings officer. After a public hearing, the hearings
8 officer also approved the permit. The neighbors appealed to
9 the city council. After an additional public hearing, the
10 city council issued the challenged order denying the
11 conditional use permit.

12 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

13 The city's sole basis for denying the requested
14 conditional use permit is noncompliance with the following
15 applicable approval standard:

16 "The manufactured home shall have exterior siding
17 and roofing which in color, material and
18 appearance is similar to the exterior siding and
19 roofing material commonly used on residential
20 dwellings within the community or which is
21 comparable to the predominant materials used on
22 surrounding dwellings[.]" (Emphasis added.)
23 Keizer Zoning Ordinance (KZO) 12.03(e).

24 Petitioners challenge the city's interpretation and
25 application of the above standard.

26 **A. Interpretation of KZO 12.03(e)**

27 In the challenged decision, the city interprets
28 KZO 12.03(e) as follows:

29 "[KZO 12.03(e)] really creates two criteria. The

1 Keizer City Council has interpreted [KZO 12.03(e)]
2 to mean that the City may choose which standard
3 would apply in a particular case depending on the
4 proximity of and the consistency of exterior
5 materials on surrounding dwellings. The City
6 Council determined the second standard applies
7 here because of the close proximity of the
8 surrounding dwellings and the fact that the
9 proposed manufactured home physically appears to
10 be part of the [Orchard Crest] subdivision and
11 because the other homes are consistent in the type
12 of exterior materials used.

13 * * * * *

14 "In cases where there are other homes which are
15 consistent in type of exterior materials and in
16 close proximity to the subject property, the City
17 Council has interpreted [KZO 12.03(e)] to require
18 that the second portion of the paragraph after the
19 'or' applies, i.e., the proposed manufactured home
20 must have exterior material comparable to the
21 predominant materials used on surrounding
22 dwellings. Under that interpretation,
23 [petitioner] fail[s] to meet this criterion
24 because the T-111 siding of [petitioner's]
25 proposed manufactured home is not comparable to
26 the lap siding consistently used on the
27 surrounding dwellings.

28 "Because [petitioner does] not meet this
29 criteri[on], the conditional use permit
30 application must be denied." Record 13-14.

31 Petitioner contends KZO 12.03 was adopted to implement
32 ORS 197.307(5), which provides that local governments may
33 adopt the standards set out thereunder, or any less
34 restrictive standard, for the approval of manufactured homes
35 outside of mobile home parks. Petitioner specifically
36 contends KZO 12.03(e) implements ORS 197.307(5)(d), quoted
37 infra, which is similarly worded. According to petitioner,

1 the city has improperly interpreted KZO 12.03(e) to be more
2 restrictive than ORS 197.307(5)(d). Petitioner argues that
3 under ORS 197.829(4), the city cannot interpret its code
4 standard inconsistently with the state statute the code
5 standard implements. Therefore, petitioner maintains, the
6 city must interpret KZO 12.03(e) to be satisfied if the
7 exterior materials of petitioner's manufactured home are
8 either similar to the exterior materials commonly used on
9 dwellings in the community or comparable to the materials
10 predominantly used on the surrounding dwellings.

11 Under ORS 197.829(4), we are required to reverse or
12 remand a local government's interpretation of its land use
13 regulations if we determine the local government's
14 interpretation is "contrary to a state statute * * * that
15 the * * * land use regulation implements." We agree with
16 petitioner that KZO 12.03(e) implements the following
17 provisions of ORS 197.307(5):

18 "A local government may adopt any or all of the
19 following placement standards, or any less
20 restrictive standard, for the approval of
21 manufactured homes located outside mobile home
22 parks:

23 * * * * *

24 "(d) The manufactured home shall have exterior
25 siding and roofing which in color, material
26 and appearance is similar to the exterior
27 siding and roofing material commonly used on
28 residential dwellings within the community or
29 which is comparable to the predominant
30 materials used on surrounding dwellings as
31 determined by the local permit approval

1 authority.

2 "* * * * *" (Emphases added.)

3 ORS 197.307(5)(d) expresses an alternative standard,
4 i.e. one that is satisfied if an applicant demonstrates the
5 exterior materials of its manufactured home either (1) are
6 similar those commonly used on dwellings in the community
7 (hereafter community standard), or (2) are comparable to the
8 predominant materials used on surrounding dwellings
9 (hereafter surrounding dwellings standard).² Consequently,
10 under the standard set out in ORS 197.307(5)(d), approval
11 for a manufactured home outside of a mobile home park can be
12 denied only if the decision maker determines the exterior
13 materials of the mobile home meet neither the community
14 standard nor the surrounding dwellings standard.

15 The city interprets KZO 12.03(e) to allow it to
16 require, in a particular instance, that a manufactured home

²A comparison with the following standard set out in ORS 197.307(5)(f) is instructive:

"The manufactured home shall have a garage or carport constructed of like materials. A jurisdiction may require an attached or detached garage in lieu of a carport where such is consistent with the predominant construction of immediately surrounding dwellings." (Emphasis added.)

The first sentence of the standard quoted above is similar to the statutory standard at issue in this case. Standing alone, it would be satisfied if an applicant proposed either a garage or a carport (constructed of the same materials as the manufactured home). However, the second sentence specifically allows a local government, in certain instances, to require that a manufactured home must have a garage, rather than a carport. There is no corresponding provision in ORS 197.307(5)(d) allowing a local government, in certain instances, to require that an applicant satisfy the surrounding dwellings standard, rather than the community standard.

1 must satisfy the surrounding dwellings standard. Thus, the
2 city interprets KZO 12.03(e) to be more restrictive than
3 ORS 197.307(5)(d), contrary to the requirement of
4 ORS 197.307(5) limiting the city to adoption of standards
5 that are the same or less restrictive than those set out in
6 ORS 197.307(5)(a) through (g). Consequently, we agree with
7 petitioner that the city's interpretation of KZO 12.03(e)
8 must be reversed. The city must interpret KZO 12.03(e) to
9 be satisfied if an applicant demonstrates that the exterior
10 materials of its mobile home meet either alternative
11 standard expressed therein.

12 This subassignment of error is sustained.³

13 **B. Application of KZO 12.03(e) in the Challenged**
14 **Decision**

15 Petitioner contends the challenged decision determines
16 his manufactured home satisfies the alternative community
17 standard of KZO 12.03(e) and, therefore, this Board must
18 reverse the city's decision and order approval of the
19 subject conditional use permit. Petitioner relies on the
20 fact the city's findings say the proposed manufactured home

³Petitioner's third assignment of error contends the city's interpretation of KZO 12.03(e), as allowing it to require compliance with the surrounding dwellings standard in some instances, regardless of compliance with the community standard, violates the requirement of ORS 227.173(1) that approval or denial of a discretionary permit be "based on standards and criteria * * * set forth in the development ordinance." Because we determine the city cannot interpret KZO 12.03(e) in this manner, and must find compliance with KZO 12.03(e) if either the community or surrounding dwellings standard is satisfied, we do not address the third assignment of error.

1 "can satisfy the development standards * * * with the
2 exception noted in Section 11 below." Record 13. According
3 to petitioner, the only exception "noted in Section 11
4 below" is that the manufactured home does not comply with
5 the surrounding dwellings standard of KZO 12.03(e).
6 Therefore, petitioner contends the city must have found
7 compliance with the alternative community standard of
8 KZO 12.03(e). Petitioner also argues the city council
9 effectively adopted the hearings officer's prior
10 determination that the proposed manufactured home complies
11 with the community standard of KZO 12.03(e).

12 The city argues it did not determine compliance with
13 the KZO 12.03(e) community standard in the challenged
14 decision, because it determined that standard to be
15 inapplicable in this instance. The city further argues the
16 challenged decision does not incorporate any portion of the
17 hearings officer's prior decision.

18 The challenged decision determines all approval
19 standards are met "with the exception noted in Section 11
20 below." Record 13. Section 11 determines the manufactured
21 home does not satisfy KZO 12.03(e). Fairly read, those
22 findings, quoted in the text supra, determine that only the
23 surrounding dwellings standard of KZO 12.03(e) is
24 applicable. We agree with the city that the challenged
25 decision does not determine whether the manufactured home
26 complies with the community standard of KZO 12.03(e) and

1 does not adopt the determination of the hearings officer on
2 this issue. Consequently, the challenged decision must be
3 remanded for the city to determine whether petitioner's
4 manufactured home complies with the KZO 12.03(e) community
5 standard.⁴

6 This subassignment of error is denied.

7 The first and second assignments of error are
8 sustained, in part.

9 The city's decision is remanded.

⁴Under ORS 197.835(9)(b) we are required to affirm a challenged decision, even though the findings supporting the decision are "defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the [applicable] standards or their relation to the facts," if the parties "identify relevant evidence in the record which clearly supports the decision." (Emphasis added.) ORS 197.835(9)(b) does not authorize us to reverse a challenged decision that fails to determine compliance with an applicable standard, on the basis that parties identify evidence in the record that clearly supports a different decision. In any case, petitioner does not cite evidence in the record clearly supporting a determination that his manufactured home complies with the KZO 12.03(e) community standard, but rather cites only the hearings officer's finding on that issue.