

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

4 DALE L. BURGHARDT,)
5)
6 Petitioner,)
7)
8 vs.)
9) LUBA No. 91-125
10 CITY OF MOLALLA,)
11) FINAL OPINION
12 Respondent,) AND ORDER
13)
14 and)
15)
16 LOREN L. McLEOD,)
17)
18 Intervenor-Respondent.)

19
20
21 Appeal from City of Molalla.

22
23 Walter T. Aho, Molalla, filed the petition for review
24 and argued on behalf of petitioner.

25
26 Thomas J. Rastetter, Oregon City, filed a response
27 brief and argued on behalf of respondent.

28
29 Paul D. Schultz, Oregon City, filed a response brief
30 and argued on behalf of intervenor-respondent. With him on
31 the brief was Hibbard, Caldwell, Bowerman & Schultz.

32
33 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
34 Referee, participated in the decision.

35
36 REMANDED 11/25/91

37
38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the city council
4 approving a conditional use permit for a mobile home park.

5 **MOTION TO INTERVENE**

6 Loren L. McLeod filed a motion to intervene on the side
7 of respondent in this appeal proceeding. There is no
8 objection to the motion, and it is allowed.

9 **FACTS**

10 The subject property is an unimproved, rectangular
11 19.32 acre parcel, located between property zoned Industrial
12 and property zoned Residential. The subject parcel is
13 currently zoned Multifamily Residential (R-3). It was
14 rezoned from Light Industrial (M-1) to R-3 on October 1,
15 1990. The ordinance approving the rezoning to R-3 contains
16 a condition of approval that if an application for a
17 conditional use permit for a mobile home park is not
18 submitted within six months or is not approved once
19 submitted, the zoning of the property will revert to M-1.
20 Record 172. Petitioner appealed the rezoning decision to
21 this Board, but that appeal was dismissed because no
22 petition for review was timely filed. Burghardt v. City of
23 Molalla, ____ Or LUBA _____ (LUBA No. 90-127, February 1,
24 1991).

25 After the subject parcel was rezoned to R-3,
26 intervenor-respondent (intervenor) filed an application for

1 a conditional use permit for a 106 unit mobile home park.
2 The city hearings officer approved the application and
3 petitioner appealed to the city council. The city council
4 affirmed the decision of the hearings officer, and this
5 appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 "The subject property is located in a hybrid zone
8 not having mobile home parks as a conditional
9 use."

10 **SECOND ASSIGNMENT OF ERROR**

11 "The city's action relating to the subject
12 property was a [re]zoning decision] rather than
13 the granting of a conditional use application, and
14 the city failed to follow the designated
15 procedures and make the requisite findings
16 appropriate for a zone change."

17 In these assignments of error, petitioner complains the
18 challenged decision approving a conditional use permit
19 really approves an unlawful zone change. Petitioner argues
20 that rezoning the parcel to R-3 is unlawful in several
21 particulars.

22 Petitioner's arguments under these assignment of error
23 essentially challenge the legality of the 1990 conditional
24 rezoning of the property to R-3. However, in this appeal we
25 may not review the lawfulness of the 1990 decision to rezone
26 the property to the R-3 designation. Petitioner's earlier
27 appeal of that decision was dismissed, and the time for
28 challenging the 1990 rezoning decision has expired.

29 The only city decision properly before this Board is

1 the decision approving a conditional use permit for a mobile
2 home park. This decision does not change the zoning of the
3 subject property, rather it authorizes a mobile home park as
4 a conditional use on the property. The mere fact that the
5 conditional use permit decision also satisfies a condition
6 of approval of the 1990 rezoning decision, does not make the
7 merits of the 1990 rezoning decision now subject to our
8 review.

9 The first and second assignments of error are denied.

10 **THIRD ASSIGNMENT OF ERROR**

11 "There was no evidence that the public schools, as
12 'public facilities,'[are] adequate to support the
13 increased enrollment the proposed use would
14 generate."

15 **FOURTH ASSIGNMENT OF ERROR**

16 "It was error for the city to apply a 'balancing
17 test' in determining if public facilities are
18 adequate. It must determine that public
19 facilities are in fact adequate."

20 Molalla Zoning and Development Ordinance
21 (MDZO) 18.76.010(3) requires the city to determine:

22 "The site and the proposed development is [sic]
23 timely, considering the adequacy of transportation
24 systems, public facilities and services existing
25 or planned for the area affected by the use."

26 There is no dispute that the definition of "public
27 facilities" in the Molalla Comprehensive Plan (plan)

1 includes "public schools."¹ Further, the parties do not
2 dispute the city is required to determine the proposal
3 complies with MDZO 18.76.010(3), and that public schools
4 must be considered in making such a determination. The
5 parties' dispute focuses on the proper interpretation of
6 MDZO 18.76.010(3), and how the city is required to establish
7 compliance with MDZO 18.76.010(3).

8 Petitioner argues the city must establish that public
9 schools in the area of the proposed development are
10 currently adequate to serve the proposed mobile home park.

11 The challenged decision reflects the following city
12 interpretation of MDZO 18.76.010(3):

13 " * * * the Plan contemplates accommodating the
14 needs of the school system by making it easier for
15 the school districts themselves to address
16 overcrowding through coordinating expansion of the
17 facilities as they are needed and allowing modular
18 structures to be used as classrooms. * * * We
19 find that these provisions in the Plan, when
20 viewed in light of the criterion addressing the
21 adequacy of public facilities, does not require us
22 to deny discretionary permits when overcrowding
23 exists. Rather, we believe it means that the
24 City, before approving a discretionary permit such
25 as this, must consider the impact of the proposal
26 on the school system, and then minimize any land-
27 use impediments which hinder the school districts
28 from themselves addressing the overcrowding
29 problem." (Emphasis in original.) Record 7.

30 The city argues its interpretation properly balances:

¹We have not been provided with a copy of the relevant portions of the city's plan.

1 "* * * the problems of school overcrowding with
2 the competing considerations dictating a need for
3 more affordable housing with[in] the city. [The
4 City] determined that the considerations requiring
5 more affordable housing outweighed the problem of
6 school overcrowding and therefore found that the
7 proposed development was timely."² Respondents'
8 Brief 5.

9 While this Board will give some weight to a local
10 government's interpretation of its own ordinances, it is the
11 Board's function to determine the correct interpretation of
12 such ordinances. McCoy v Linn County, 90 Or App 271, 275-
13 76, 752 P2d 323 (1988).

14 We do not agree with petitioner's argument that MDZO
15 18.76.010(3) requires the city to determine that public
16 facilities currently are adequate to serve the proposal.
17 However, MDZO 18.76.010(3) does require the city to
18 determine the proposal is timely considering the adequacy of
19 public facilities, including the adequacy of public schools,

²The city also argues the findings of compliance with Statewide Planning Goal 11 (Public Facilities and Services), in the 1991 ordinance rezoning the property to R-3, essentially determined that area schools would be adequate to accommodate the proposed mobile home park, and petitioner may not collaterally attack that prior determination. The 1990 ordinance contains the following findings:

"Goal 11 requires that the City consider the proposed change in light of [the] adequacy of public facilities and services. The Council finds that the site is adequately served by both sewer and water. Other urban facilities and services are adequate to accommodate any growth resulting from the development."
Record 178.

However, we do not believe these findings constitute a prior determination that the proposed mobile home park satisfies MZDO 18.76.010(3) concerning the timeliness of the proposal considering the adequacy of public schools in the area.

1 in the area served by the development. This means the city
2 must determine when it authorizes the conditional use that
3 at the time the proposed mobile homes are placed on the
4 subject property, public facilities, including public
5 schools, will be adequate to serve the needs of the mobile
6 home park. We express no view concerning whether, in view
7 of the current level of overcrowding, adequate school
8 facilities will be available to serve the mobile home park.
9 However, the city's interpretation of MDZO 18.76.010(3) as
10 not requiring such a finding is rejected.³

11 The third and fourth assignments of error are
12 sustained, in part.

13 **FIFTH ASSIGNMENT OF ERROR**

14 "Applicant's site plan was not in conformance with
15 City Code requirements because it lacked requisite
16 detail required by [MDZO] 18.56.150. * * *"

17 MDZO 18.76.030 provides:

18 "Application for a conditional use shall include,
19 in addition to any any specific requirements under
20 the use, the following information:

21 "* * * * *

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

³In Dickas v. City of Beaverton, 17 Or LUBA 578, 590-92 (1989) we agreed with the city that "adequate" facilities need not be "ideal," and that a variety of measures are possible to expand the capacity of schools so that they will be adequate.

1 "* * * * *" (Emphasis supplied.)

2 MDZO 18.56.150 provides specific requirements for
3 applications for mobile home parks as follows:

4 "With each application for a mobile home park the
5 applicant shall submit three sets of construction
6 plans and specifications. * * *"

7 What follows the above quoted sentence in MDZO 18.56.150 is
8 a detailed list of information required to be included on
9 mobile home park "plot" plans, as well as on utilities and
10 improvements plans for a proposed mobile home park.

11 The city and intervenor (respondents) argue the
12 requirements of MDZO 18.56.150 need only be satisfied at the
13 time the applicant applies for a building permit.
14 Respondents argue the detailed requirements of MDZO
15 18.56.150 for an application for a mobile home park are too
16 burdensome for an applicant to be required to satisfy before
17 a determination has been made through the conditional use
18 permit process concerning whether the proposed mobile home
19 park is allowable.

20 While respondents' arguments have some appeal in a
21 practical sense, the city's ordinance does not support this
22 interpretation of the requirements of MDZO 18.56.150. MDZO
23 Chapter 18.45 ("Development Review") establishes a process
24 like the one the city argues should be followed in
25 determining compliance with MDZO 18.56.150. Under MDZO
26 Chapter 18.45, certain kinds of information need only be
27 submitted at or before the time an application for a

1 building permit is submitted. MDZO 18.45 references several
2 different MDZO sections as containing information that need
3 only be submitted at or before the time of building permit
4 approval. However, the informational requirements of
5 MDZO 18.56.150 are not among those informational
6 requirements to be acted upon under MDZO Chapter 18.45 at
7 the building permit stage or at some other stage separate
8 from the time of development approval.

9 We have previously determined the omission of required
10 information from an application is a harmless procedural
11 error if the information is located elsewhere in the record.
12 McConnell v. City of West Linn, 17 Or LUBA 502, 525 (1989).
13 We have also determined that if the required information is
14 not found in the record, and is necessary for a
15 determination of compliance with applicable standards, then
16 such an error is not properly considered a harmless
17 procedural error. Id.

18 There is no dispute that an application for a
19 conditional use permit must include a site plan. In view of
20 the requirement in MDZO 18.76.030(C) that the site plan for
21 a proposed conditional use also include information
22 specifically required for the proposed use, it appears the
23 conditional use permit application must also include the
24 information required for an application for a mobile home
25 park under MDZO 18.56.150.

26 As far as we can tell, the record does not include

1 either a site plan as required by MDZO 18.76.030(C) or the
2 specific mobile home park information required under MDZO
3 18.56.150. Further, we cannot tell whether any of the
4 individual parts of this information is contained in the
5 record. In addition, respondents do not argue that the
6 information required by MDZO 18.56.150 is unnecessary to
7 determine compliance with the approval standards for a
8 conditional use permit. In this regard, at least some of
9 the information required to be submitted with an application
10 for a mobile home park under MDZO 18.56.150 (e.g.,
11 requirements that the applicant provide information
12 concerning the general layout of the mobile home park,
13 permanent buildings, park streets, location of light
14 fixtures for lighting streets and walkways, etc.) is
15 relevant to determining compliance with the conditional use
16 permit approval standards contained in MDZO 18.76.010 and
17 MDZO 18.76.040.⁴ Consequently, the conditional use permit
18 application's failure to include the information required
19 under MDZO 18.56.150 is not a harmless procedural error.

⁴MDZO 18.76.040 provides:

"In addition to the requirements * * * in [MDZO] 18.76.010, the [decision maker] shall also consider whether the following special requirements and criteria are satisfied when an application is made for a conditional use for a mobile home park:

"A. Any adverse impacts on adjacent properties shall be minimized by methods such as landscaping, buffering, access, location and other site design provisions."

- 1 The fifth assignment of error is sustained.
- 2 The city's decision is remanded.