BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DALE L. BURGHARDT, Petitioner, vs. CITY OF MOLALLA, Respondent, and LOREN McLEOD and SANDRA McLEOD, Intervenors-Respondent.	LUBA No. 94-180 FINAL OPINION AND ORDER

Appeal from City of Molalla.

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

No appearance by respondent.

Gregory S. Hathaway and James Stuart Smith, Portland, filed the response brief. With them on the brief was Davis Wright Tremaine. Gregory S. Hathaway argued on behalf of intervenors-respondent.

SHERTON, Chief Referee, participated in the decision.

REMANDED 05/04/95

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a city council order approving a conditional use permit for a mobile home park.

MOTION TO INTERVENE

Loren McLeod and Sandra McLeod, the applicants below, move to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is an unimproved, rectangular 19.32-acre parcel, bordered by Toliver Road on the south and Silverton Road (Highway 213) on the west. Property to the south is designated Light Industrial on the Molalla Comprehensive Plan (plan) map and is zoned Light Industrial (M-1). Property to the west, north and east of the subject property is designated and zoned for residential use.

In 1990, the plan designation and zone of the subject property were changed from Light Industrial/M-1 to Multi-Family Residential/R-3. The ordinance approving the plan and zone change to Multi-Family Residential/R-3 contains a condition of approval that if an application for a conditional use permit for a mobile home park is not submitted within six months, or is not approved once submitted, the plan designation and zone will revert to Light Industrial/M-1.

After the subject property was redesignated and rezoned to Multi-Family Residential/R-3, intervenors filed an application for a conditional use permit for a 106-unit mobile home park. We remanded the city's decision approving the conditional use permit in Burghardt v. City of Molalla, 22 Or LUBA 369 (1991) (Burghardt I). Our decision was based on the city's failure to demonstrate whether the proposal was "timely considering the adequacy of * * * public facilities and services existing or planned for the area affected by the use," as required by Molalla Zoning and Development Ordinance (MZDO) 18.76.010.3, and whether the site plan conformed to certain other MZDO requirements. After further proceedings on remand, the city again approved intervenors' application. In Burghardt v. City of Molalla, 25 Or LUBA 43 (1993) (Burghardt II), we remanded the city's second decision approving intervenors' application, based solely on failure to comply with MZDO 18.76.010.3 with regard to schools.

Sometime after the conditional use permit application at issue in Burghardt I and II was filed, the city amended MZDO 18.76.010.3.[1] After MZDO 18.76.010.3 was amended, on February 10, 1994, intervenors filed a new application for a

[1]The ordinance amending MZDO 18.76.010(3) was not appealed and, therefore, is considered acknowledged under ORS 197.625(1).

100-unit mobile home park on the subject property.[2] After a public hearing, a city hearings officer approved intervenors' new application, with conditions. Both petitioner and intervenors appealed the hearings officer's decision to the city council. After further public hearings, the city council affirmed the hearings officer's decision and approved intervenors' new application, modifying three of the conditions.

This appeal followed.[3]

FIRST ASSIGNMENT OF ERROR

The 1990 ordinance changing the plan designation and zone of the subject property to Multi-Family Residential/R-3 includes the following "reversion clause":

> "As a condition of approval of the foregoing Comprehensive Plan change and zone change, the property is hereby limited to development as a mobile home park. Should a conditional use [permit] for a mobile home park not be applied for within six (6) months from the adoption of this ordinance, or upon application, should a final order denying a conditional use [permit] be made, this ordinance shall automatically become void and the subject property shall revert to the Light

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[2]The new mobile home park proposal is substantially the same as the previous one, except that the number of units was reduced from 106 to 100 "to reflect the need for recreation/open space and to address the possible existence of a wetland on the site." Record 106. There is no dispute that the new application is subject to the amended version of MZDO 18.76.010.3.

[3]The Supplemental Record submitted by the city includes three separately page numbered documents -- a transcript of the hearings officer's March 29, 1994 hearing on the subject application, the local record in Burghardt II (hereafter cited as Record II ____), and the local record in Burghardt I (hereafter cited as Record I ____).

> Industrial plan designation and M-1 zone designation." Record I 172.

The challenged decision interprets and applies the above quoted provision:

> "[T]he original conditional use permit application was filed by [intervenors] within six months from the date Ordinance 90-5 was adopted. Therefore, the first contingenc[y has] not been triggered.
>
> "[T]here has never been a final order issued by the City or by LUBA 'denying a conditional use permit.' The City approved the original permit. LUBA did not reverse the City's approval, but rather remanded the City's decision back to the City for further proceedings. The City has not yet disposed of LUBA's remand and the original application is still pending. Under these circumstances, the City has not taken final action on [intervenors' first] application. Therefore, the second contingency has not been triggered.
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> "Since neither of the contingencies in [the reversion clause] of Ordinance 90-5 [has] occurred, the property has not reverted back to M-1 zoning, and it remains zoned as R-3 for purposes of this application." (Emphasis in original.) Record 3-4.

Petitioner contends the plan designation and zone of the subject property have reverted to Light Industrial/M-1, under which a mobile home park is not permitted. Petitioner contends the above quoted interpretation of the reversion clause is erroneous. Petitioner argues the city's interpretation is inconsistent with the apparent purpose of the reversion clause to require that the plan and zone designation of the subject property revert to industrial if a conditional use permit application for a mobile home park

filed within six months of the 1990 ordinance is not approved by the city. According to petitioner, intervenors' first conditional use permit application cannot be considered to remain pending, either because the city did not act on it within a reasonable time after LUBA's remand in Burghardt II, or because intervenors' filing of a second application impliedly withdrew or abandoned the first application.

Intervenors argue that the city properly found that neither of the contingencies identified in the reversion clause has occurred. Intervenors also note petitioner fails to identify any provision of state statute or the MZDO that requires the city to act upon a permit application within a certain time after remand of its decision by LUBA, or that requires a permit application to be considered withdrawn or abandoned if the applicant files a second application.

This Board is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Gage v. City of Portland, 319 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992).[4]

[4]ORS 197.829 was enacted to codify Clark, but was not in effect when this Board made the decision reviewed in Gage. Nevertheless, the court of

This means we must defer to a local government's interpretation of its own enactments, unless that interpretation is "clearly wrong." Reeves v. Yamhill County, 132 Or App 263, 269, ___ P2d ___ (1995); Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992); West v. Clackamas County, 116 Or App 89, 93, 840 P2d 1354 (1992).

There is no dispute that an application for a conditional use permit for a mobile home park on the subject property was filed within six months after Ordinance 90-5 was adopted. The city's determination that a final order denying that application has not been made and, therefore, that the second contingency identified in the reversion clause has not occurred, is well within its interpretive discretion under ORS 197.829 and Clark.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

As amended, MZDO 18.76.010.3 establishes the following approval standard for a conditional use permit:

> "The site and the proposed development are timely, considering:
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> "a. The adequacy of transportation, water, sewer and storm drainage systems existing or planned for the area affected by the use; and
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> "b. Whether it is feasible to meet any projected

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appeals has stated that it will interpret ORS 197.829 to mean what the Supreme Court, in Gage, interpreted Clark to mean. Watson v. Clackamas County, 129 Or App 428, 431-32, 879 P2d 1309, rev den 320 Or 407 (1994).

> increased demand for other types of public facilities within a reasonable time."

There is no dispute that schools are "other types of public facilities" under MZDO 18.76.010.3.b.

A. Projected Increased Demand for School Facilities

The challenged decision interprets "projected increased demand" as follows:

> "[P]rojected [increased] demand should be based on current enrollment data, plus the demand created by the proposed development, plus the demand created by any other new development that has received final approval from the City since the date that the last enrollment figures were computed."[5] Record 14.

1. Demand from Infill Development

Petitioner contends the city's interpretation of "projected increased demand" is incorrect because the city fails to consider future growth in enrollment due to infill development of residentially zoned land within the city, where dwellings are outright permitted uses.

Intervenors respond MZDO 18.76.010.3.b does not require the city to consider the effects on school enrollment of full build out of all residentially zoned land within the city. According to intervenors, the ordinance requires only that the city evaluate the current situation and the impact of the proposed development.

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[5]The challenged decision predicts the proposed mobile home park will increase school district enrollment by 52 primary school students and 11 high school students. Record 14. These figures are not contested.

The decision includes findings explaining the city's decision not to consider projected increases in school enrollment due to infill development:

> "Unless 'projected [increased] demand' is based on enrollment expected from the proposed project and on the enrollment expected from other projects that have received approval since the last enrollment figures were computed, it will be difficult to draw the line as to whether the potential impact from all undeveloped or underdeveloped residentially zoned land in the City should or should not be considered in the projection. For example, any parcel of vacant residentially zoned land inherently carries with it the potential to create a demand for school services. * * *"[6] Record 13.

The city's interpretation of "projected increased demand" with regard to not considering demand from future infill development, as explained in its findings, is not clearly wrong.

This subassignment of error is denied.

2. Development Outside City

Petitioner argues the relevant school district includes land outside the City of Molalla. According to petitioner, the city erred by not considering demand for school services resulting from residential development outside the city.

Intervenors argue that most of the school district's

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[6]The sentence immediately following the quote states "[s]chool districts do not normally project demand based on this type of potential demand." Id. Petitioner contends this sentence is not supported by substantial evidence in the record. However, we regard this sentence as surplusage, because what is at issue here is how the city determines "projected increased demand" for school services.

enrollment comes from within the city. Intervenors also argue that most of the land outside the city is zoned for less intense uses (including exclusive farm use), which will not have a significant impact on school enrollment.

Petitioner essentially contends the city must interpret "projected increased demand" for school services to include demand from future, as yet unapproved, residential development outside the city. In the preceding section, we uphold the city's interpretation that it need not consider future, as yet unapproved, development of residential land within the city in determining "projected increased demand" under MZDO 18.76.010.3.b. In the absence of any contention by petitioner that the city failed to consider demand from residential development outside the city that has received final approval from the relevant county we fail to see the city erred.

This subassignment of error is denied.

B. Feasibility of Meeting Projected Increased Demand Within a Reasonable Time

The challenged decision finds the projected increased demand for high school facilities exceeds the capacity currently available by 45 students.[7] Record 14. The decision goes on to find:

"* * * 'The school district plans to build

[7]However, the decision finds that primary school capacity exceeds demand by 439 students. Id.

> sufficient capacity to house 1400 students' as the result of a voter approved bond measure to construct a new high school. * * *.
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> "[I]t is 'feasible' for the [school] district to accommodate these 45 additional high school students, because the voters have approved funds to replace the South Campus High School, which will increase high school capacity [from the current 872] to 1,400.
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> "[This] demonstrates that it is feasible for the planned high school facility to meet the projected demand 'within a reasonable period of time.' [The] City Council interprets the evidence in the record to reflect the intent of the [school] district to construct a new school facility within a reasonable period of time to carry out the vote of the citizens * * *." (Emphasis added.) Id.

Petitioner contend the city's determination of feasibility improperly fails to determine what specific time in the future constitutes "a reasonable time," and is not supported by substantial evidence in the record.[8] Petitioner points to one portion of the challenged decision, which states the "use of the phrase 'within a reasonable period of time' indicates that some sort of 'reasonable time' must be identified within which the [necessary school facilities] will be provided." Record 11. Petitioner also argues the fact that the voters have approved a bond measure for the construction of a new high school "does not

[8]Petitioner also contends a condition imposed by the city regarding the adequacy of school facilities is not an adequate substitute for a determination of compliance with MZDO 18.76.010.3.b with regard to school facilities. Because we conclude the challenged decision properly determines compliance with MZDO 18.76.010.3.b with regard to school facilities, we do not consider this issue further.

establish that the [projected increased demand] will be met; it is a mere abstraction from which no conclusions can be drawn." Petition for Review 14. Petitioner contends there is no evidence in the record as to when any such new high school facility will be available.

MZDO 18.76.010.3.b does not explicitly require the city to identify a specific date in the future as the "reasonable time" within which it is feasible to meet projected increased demand for public facilities. Therefore, that the city failed to do so does not provide a basis for reversal or remand.

With regard to petitioner's evidentiary challenge, this Board is authorized to reverse or remand a challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(7)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991).

We have reviewed the evidence in the record cited by the parties. This includes evidence that a city high school was severely damaged by a 1994 earthquake, that the current high school enrollment of 872 students is being provided for by the school district, that partial federal funding is

available to replace the damaged high school, and that the voters passed a $9,800,000 bond measure representing the school district's estimated share of the funds needed to replace the damaged high school with a school having surplus capacity. Record 176-86. Based on this evidence, a reasonable person could conclude, as did the city, that it is feasible for the projected demand for high school facilities for 45 additional students to be met within a reasonable period of time.

This subassignment of error is denied.

The second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

MZDO 18.56.230 provides:

> "A recreation/open space area shall be located and maintained within the mobile home park. A minimum of two hundred square feet per unit space shall be provided for the recreation/open space area."

The challenged decision addresses this requirement as follows:

> "[Intervenors'] preliminary plan shows an area devoted to open space and wetlands. It is not clear what the size of this area is, although it appears to be roughly 20,000 [square] feet. The [MZDO] requires at least 200 square feet of open space per unit. Since [intervenors] are proposing 100 units, the [MZDO] requires at least a 20,000 square foot recreation/open space area for this development. Prior to issuance of final development permits, [intervenors] must demonstrate that the required amount of

> recreation/open space will be provided.[9] Therefore, it appears that this requirement can be met." Record 6-7.

"Recreation/open space area" is not defined in the MZDO. Petitioner contends the city cannot interpret this term to include wetlands, because wetlands cannot be used for recreational purposes. According to petitioner, the city must interpret "recreation/open space area" to mean an area that is both open space and available for recreation.

We agree with intervenor that it is entirely reasonable for the city to interpret "recreation/open space area," as used in MZDO 18.56.230, to include wetlands.

Petitioner also argues the city failed to determine, and the record fails to support a determination, that the area intervenors propose to designate as a recreation/open space area is at least 20,000 square feet in size. According to petitioner, the city must do more than say the area "appears to be roughly 20,000 square feet." Record 7.

We understand the city's finding to state the area designated on intervenors' site plan as a recreation/open space area is approximately 20,000 square feet, and that a precise determination of the area's size will be made when detailed construction plans are submitted prior to

[9]This apparently refers to MZDO 18.56.150.B.3, which requires that after conditional use approval, but prior to issuance of a development permit for a mobile home park, the applicant must submit construction plans and specifications to the city, including necessary information on the required recreation/open space area.

development plan approval, under MZDO 18.56.150. See n9, supra. We see nothing wrong with the city's approach to this determination.[10]

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

As quoted supra, MZDO 18.76.010.3.a requires that the site and proposed development be timely, considering the adequacy of existing and planned transportation systems. The city finds compliance with MZDO 18.76.010.3.a based on a transportation study submitted by intervenors, dated May 1990, which concludes that the affected intersections will continue to operate at level of service B or better through 1995, with the proposed development and recommended certain street improvements. Record 8. The city also relies on conditions of approval requiring intervenors (1) to construct a half street improvement along the property's frontage on Toliver Road, including curbs, gutters and sidewalks, and (2) to participate financially in the construction of a southbound left turn lane from Highway 213 onto Toliver Road and to dedicate any frontage along Highway 213 required for such improvements. Record 8-9, 17-18.

Petitioner contends the city's determination of

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[10]We also agree with intervenors that the application of a ruler to intervenors' site plan (which has a scale of 1 inch to 50 feet) clearly indicates the area shown as "Open Space and Wetlands" is closer to 30,000 square feet than 20,000 square feet.

compliance with MZDO 18.76.010.3.a with regard to transportation systems is not supported by substantial evidence, because the traffic study in the record is five years old, was prepared in support of intervenors' first conditional use permit application, and does not predict the adequacy of traffic facilities beyond 1995.

We have reviewed the evidence cited by the parties, which consists primarily of the 1990 traffic study. Record I 36-71. We agree with intervenors that a reasonable person could rely on that evidence to reach the conclusion the city did.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

MZDO 18.76.010.3.a also requires that the site and proposed development be timely, considering the adequacy of existing and planned sewer and water systems. The city approved the proposed development based on findings that the city's sewer and water systems currently have capacity to handle the proposed development. Record 9.

Petitioner contends the city's interpretation of MZDO 18.76.010.3.a with regard to sewer and water systems is incorrect, because it gives applicants for conditional use permits "the same right to [sewer and water] services on a first-come, first-served basis that owners of undeveloped land in the city enjoy for the primary uses allowed [on] their property." Petition for Review 20. According to

petitioner, under MZDO 18.76.010.3.a the city should not approve a conditional use permit unless it has sewer and water capacity to provide those services to permitted development on all undeveloped land within the city.

We see no reason why the city must interpret MZDO 18.76.010.3.a to require it to find that there is adequate sewer and water capacity to supply those services to all undeveloped land in the city before it can approve a conditional use permit. The city's interpretation of MZDO 18.76.010.3.a in this regard is reasonable and well within the discretion afforded by ORS 197.829 and Clark.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

MZDO 18.76.010.3.a also requires that the site and proposed development be timely, considering the adequacy of existing and planned storm drainage systems. With regard to this requirement, the city finds:

> "In the absence of conflicting testimony, [the city] relies upon the judgment of the Director of Public Works who indicates that the natural drainage channel on the south side of Toliver Road will handle most of the run off from this development. The portion that will not drain to the south will flow west to Highway 213 and south to Bear Creek. To the extent that [the development] will impact the [Oregon Department of Transportation (ODOT)] drainage system along Highway 213, [intervenors] will be required to comply with any related requirements of ODOT concerning the use of ODOT's drainage system.
>
> "Therefore, * * * it appears that the storm drainage system will be adequate to accommodate

> this development. [MZDO 18.76.010.3.a] will be met, so long as the conditions of approval are met insuring that the final storm drainage plan is acceptable to the City, the county and ODOT, as necessary." (Emphases added.) Record 9-10.

The challenged decision also includes the following condition (condition 10):

> "To the extent that this proposed development may impact the ODOT drainage system along Highway 213, [intervenors] shall be required to demonstrate that they will comply with any relevant ODOT requirements concerning its drainage system, prior to final site plan approval." (Emphasis added.) Record 18.

Petitioner points out the record indicates, and the city found, that a portion of the storm water runoff from the subject property would flow to the west, onto property controlled by ODOT. Petitioner contends there is no evidence in the record as to the amount of this runoff, the adequacy of any ODOT storm drainage system to accommodate such runoff, or whether ODOT will permit such a use of its storm drainage system. Therefore, according to petitioner, the record does not contain substantial evidence to support a determination of compliance with MZDO 18.76.010.3.a with regard to storm drainage. Petitioner further contends condition 10 is not an adequate substitute for a determination of the adequacy of storm drainage systems at the time of conditional use permit approval.

A local government may properly grant permit approval based on either (1) a finding that an applicable approval standard is satisfied, or (2) a finding that it is feasible

to satisfy an applicable approval standard and the imposition of conditions necessary to ensure that the standard will be satisfied.[11] Rhyne v. Multnomah County, 23 Or LUBA 442, 447 (1992). However, in this case, the evidence cited in the record is inadequate to support either a finding that MZDO 18.76.010.3.a is satisfied with regard to storm drainage systems for runoff from the subject property to the west, or a finding that it is feasible to satisfy MZDO 18.76.010.3.a in this regard.

The challenged decision finds that some storm water runoff from the subject property to the west will occur. Record 9. The only evidence in the record to which we are cited regarding storm drainage systems to handle runoff from the subject property to the west is the following statement from the city Public Works Director:[12]

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[11]We have also held that a local government may defer a determination of compliance with an applicable approval standard, if its decision or regulations ensure that the later approval process to which the decision making is deferred provides any notice and opportunity for input required as part of the original approval process. Eppich v. Clackamas County, 26 Or LUBA 498, 507-08 n8 (1994); Holland v. Lane County, 16 Or LUBA 583, 596-97 (1988). Here, the challenged decision refers to insuring that a "final drainage plan" is acceptable to the city, and to requiring certain demonstrations prior to "final site plan" approval. Record 10, 18. However, we do not see any references to such requirements or approval processes in the MZDO, and the challenged decision itself does not establish any process for notice and input prior to "final drainage plan" or "final site plan" approval. Therefore, the imposition of condition 10 is not a sufficient basis for allowing a determination of compliance with MZDO 18.76.010.3.a regarding storm drainage to be deferred.

[12]We note that the oversize "Overall Utility Plan" included in the record as part of intervenors' site plan does not appear to contain any information regarding storm drainage.

> "There is a natural drainage channel on the south side of Toliver Road that will handle most of the run off from this development. That portion that will not drain to the south will flow west to Highway 213 and south to Bear Creek." (Emphasis added.) Record 170.

The above emphasized statement says nothing about the existence of any storm drainage system to handle runoff to the west, the adequacy of any such system, or the feasibility of making the existing or planned storm drainage system adequate to handle runoff from the proposed development to the west. A reasonable person could not conclude, based on the above statement, that MZDO 18.76.010.3.a is satisfied with regard to storm drainage or that it is feasible to satisfy MZDO 18.76.010.3.a with regard to storm drainage.

The seventh assignment of error is sustained.

The city's decision is remanded.