

LAND USE
BOARD OF APPEALS

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

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MEDFORD ASSEMBLY OF GOD,
an Oregon nonprofit
organization,

Petitioner,

v.

CITY OF MEDFORD,

Respondent.

LUBA NO. 82-010

FINAL OPINION
(ORDER OF DISMISSAL)

Appeal from City of Medford.

Karen C. Allan, Medford, filed a brief and argued the cause for petitioner. With her on the brief were Foster & Purdy.

William J. Scheiderich, Medford, filed a brief and argued the cause for respondent. With him on the brief was Eugene F. Hart, Jr.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

DISMISSED 7/15/82

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 Petitioner appeals Medford City Council Resolution No.
3 4541, dated January 21, 1982. The resolution upheld the
4 Medford City Planning Commission's interpretation of Section
5 10-165 of the Medford City Code, requiring the First Assembly
6 of God Church to obtain a conditional use permit for operation
7 of a school within the City of Medford.¹

8 FACTS

9 Petitioner has operated a church at its present site since
10 1952. Prior to 1973, the church was a non-conforming use in a
11 C-2 (commercial) zoning district. In 1973, the church obtained
12 approval of a zone change from C-2 to R-4 for the main church
13 premises and adjacent property. A church is a permitted use in
14 the R-4 zone.

15 Petitioner operates a day care center on the church
16 property, a kindergarten, a preschool and grades 1 through 3.
17 Grades 1 and 2 were initiated in 1979, and grade 3 was
18 initiated in 1981. At issue in this case is the operation of
19 the three elementary grades.

20 The challenged resolution, Resolution 4541, finds the
21 petitioner is operating "an elementary (primary) school meeting
22 State of Oregon compulsory attendance requirements on church
23 premise at 1108 West Main Street and in separate structures at
24 25 and 29 Quince Street, Medford, and has been operating that
25 school since 1979." A "public, parochial" or "private school"
26 is a conditional use within the R-4 district.²

1 The city has considered the issue of church schools
2 before. In January of 1980, the city council adopted
3 Resolution 3950 which includes a determination that the term
4 "church" as used in the ordinance "includes a school meeting
5 state compulsory attendance requirements operated as part of
6 the church ministry on the church premises * * * *" At issue
7 in the proceeding giving rise to Resolution 3950 was a school
8 operated by Open Standard Bible Church. The church operated
9 the school under the Church's own conditional use permit. The
10 effect of the Resolution was to require no additional permit
11 for operation of a school.

12 On July 3, 1980, the city council in an apparent reaction
13 to Damascus Comm. Church v. Clackamas Co., 45 Or App 1065, 610
14 p2d 273 (1980), adopted Resolution 4108 which referred to the
15 city's earlier Resolution 3950 and repealed Resolution 3950, at
16 least in part. The city's Resolution 4108 found that an
17 ordinance similar to Medford's was tested in the Clackamas
18 County case. The city interpreted the Damascus case to require
19 that Resolution 3950 be repealed and that churches must obtain
20 separate conditional use permits in order to operate full-time
21 parochial schools on church premises. However, in what appears
22 to be a finding of a vested right for the Open Bible Standard
23 Church, the city exempted the Open Bible Standard Church from
24 this new ordinance interpretation.

25 "NOW, THEREFORE, BE IT RESOLVED BY THE CITY
26 COUNCIL OF THE CITY OF MEDFORD, OREGON, that the
zoning ordinance of the Cit of Medford shall be

1 interpreted in accordance with the opinion in Damascus
2 Comm. Church v. Clackamas Co. and the interpretation
3 announced in Resolution No. 3950 shall not be followed
4 in the future; provided, however, that the Open Bible
Standard Church located at 2715 Table Rock Road shall
continue to enjoy the privilege of operating its
school, in its presently existing facilities only, as
provided in Resolution 3950."

5 In October of 1981, the code enforcement officer for the
6 City of Medford notified Petitioner Medford Assembly of God
7 that operation of a school on church premises required a
8 conditional use permit. Petitioner's attorney then requested
9 an interpretation by the staff of the city planning department
10 that a conditional use permit was not, in fact, required. On
11 October 26, 1981, Mr. Eisenhard, Planning Director, notified
12 petitioner that a conditional use was required. His
13 determination was appealed to the planning commission on
14 October 29, 1981. On December 17, the planning commission
15 issued a formal denial of the petitioner's request, and on
16 December 14, petitioner appealed the matter to the city
17 council.

18 The city council heard the appeal on January 7, 1982, and
19 on January 21, 1982 the city issued Resolution 4541 upholding
20 the decision of the planning commission and denying the
21 appeal. An appeal to this Board followed.

22 Resolution 4541 recites, among other things, that the
23 church is operating an elementary school meeting State of
24 Oregon compulsory attendance requirements on church property;
25 that the church lies in the R-4 zone; that public, parochial or
26

1 private schools are conditional uses in the R-4 zone; that the
2 church has not sought a conditional use for the school; that
3 Resolution 3950 stated that the term "church" as used in the
4 zoning ordinance included schools; that Resolution 4108
5 reconsidered Resolution 3950 and did away with the above
6 interpretation of "church" in Resolution 3950 and that the
7 First Assembly of God did not act in reliance upon Resolution
8 3950 in continuing to operate and expanding its school on
9 January 17, 1980. After these recitations, the city concludes
10 that the church existed for many years before the school
11 started. The city recognizes the school is an inseparable part
12 of the ministry of the church, but "the interpretation and
13 application of the zoning ordinance is independent of church
14 doctrine." The city states that the operation of a school is
15 not "an accessory use to the permitted use (the church) but is,
16 instead, a separate conditional use in the R-4 zoning district,
17 requiring a conditional use permit for operation. The city
18 states that operation of the school without a valid conditional
19 use permit is an "illegal use of those properties under the
20 zoning ordinances then and now existing." The city disclaims
21 any notion that Resolution 3950 operated to amend the zoning
22 ordinance, and the city states that the Assembly of God Church
23 did nothing so as to vest a right in the church to continue to
24 operate the school after Resolution 3950 was rescinded by
25 Resolution 4108. The city holds that the code provision
26 listing a school as a conditional use, subject to a conditional

1 use permit, is not a law respecting the establishment of
2 religion or prohibiting the free exercise of religion such as
3 to violate the First and Fourteenth Amendments to the United
4 States Constitution or any other provision of the U. S.
5 Constitution or State of Oregon Constitution. The city finally
6 resolves

7 "The appeal of the planning commission's
8 interpretation of Section 10-165, Medford Code, to
9 require First Assembly of God Church to obtain a
10 conditional use permit for operation of its compulsory
attendance school at 1108 West Main and 25 and 29
Quince Street, Medford, be and same is hereby denied."

11 OPINION

12 ASSIGNMENT OF ERROR NO. 1

13 "Respondent erred in requiring a conditional use
14 permit for petitioner's school operated on church
15 premises as part of its ministry in violation of
16 Article I, Sections 2 and 3, of the Oregon
17 Constitution and Amendments I and XIV to the United
18 States Constitution."

19 ASSIGNMENT OF ERROR NO. 2

20 "Respondent erred in deciding that petitioner's
21 school is not within the scope of permitted church use
22 or is not an accessory use under the Medford zoning
23 ordinance."

24 ASSIGNMENT OF ERROR NO. 3

25 "Respondent erred in deciding that petitioner did
26 not acquire a vested right to operate a school as a
nonconforming use on church premises.

ASSIGNMENT OF ERROR NO. 4

"Respondent erred in prohibiting petitioner from
operating a school without a conditional use permit
while permitting another church in virtually identical
circumstances to do so. Respondent thereby denies to
petitioner the equal protection of the laws."³

1 Before responding to each assignment of error, the
2 respondent makes a general argument opposing the petition.
3 Respondent argues that its act was an attempt to enforce the
4 zoning ordinance according to its plain terms, and this attempt
5 did not become a "land use decision" within the meaning of
6 Oregon Laws 1979, ch 772, as amended Oregon Laws 1981, ch 748,
7 simply because petitioner sought exemption from enforcement
8 before the city council. Respondent states the only
9 application of its ordinance made in this proceeding was the
10 city's statement that the ordinance in question read as it
11 did. In other words, respondent argues that the resolution at
12 issue was not a land use decision made pursuant to the city's
13 ordinance, but a statement in writing of the meaning of the
14 ordinance. The city characterizes the proceeding complained of
15 as a denial of petitioner's claim that the ordinance could not
16 be enforced against the petitioner. Respondent City states
17 there is no statutory authority for LUBA to limit a city's
18 statutory cause of suit to enforce its own ordinances.

19 "The city submits that had it exempted petitioner
20 from enforcement of this ordinance, as petitioner
21 sought, and a third party were dissatisfied with that
22 result, the Board [LUBA] would have no jurisdiction to
23 hear that party's petition that the city be ordered to
24 enforce its ordinance. That petitioner has 'appealed'
25 from the opposite result is a distinction without a
26 difference. A Board decision on the merits for city
in the instant proceeding would still leave city to
seek judicial enforcement of its ordinances under ORS
30.315.⁴ This contrived petition for review of an
alleged land use decision should be found without
Board subject-matter jurisdiction and dismissed."
Brief of Respondent at 8.

1 In a reply brief, petitioner characterizes respondent's
2 argument as to LUBA jurisdiction as two-fold. First,
3 petitioner advises that respondent is asserting it merely
4 enforced a plain and unambiguous zoning ordinance and,
5 therefore, did not make a land use decision. To this
6 assertion, petitioner argues Resolution 4541 was a "final
7 decision made by a local government which applied several of
8 respondent's zoning ordinance to the present situation." Reply
9 Brief at 2.

10 Secondly, petitioner characterizes the city's argument as
11 one announcing that the city simply refused to interpret its
12 ordinance and, therefore, did not make a quasi-judicial
13 decision. To this argument the petitioner responds that a
14 quasi-judicial decision is one which applies pre-existing
15 criteria to a circumscribed factual situation. Citing
16 Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm., 287 Or
17 591, 601 P2d 769 (1979). Petitioner claims the criteria in
18 Section 10-165 of the Medford Code were applied in the present
19 fact situation and reflected in the findings of fact and
20 conclusions made in Resolution 4541.⁵

21 We agree that Resolution 4541 is not a land use decision
22 but for somewhat different reasons than those advanced by the
23 respondent. Resolution 4541 does nothing except declare what
24 the city understands to be the meaning of terms in its own
25 ordinance. Resolution 4541 does not deny or in any way affect
26 application for a building permit or any other permit to

1 construct, maintain or operate a school or any other use in the
2 R-4 zone. It is advice to the applicant that if it wishes to
3 continue operation of its school, it must apply for and receive
4 a conditional use permit from the city. If the applicant
5 refuses, the city can seek to enjoin continued use of the
6 school in circuit court. The city, however, would have to
7 prove in circuit court that the use was in violation of the
8 zoning ordinance. The city's own determination the use was in
9 violation of the ordinance would be of no effect.⁶ In this
10 sense, the determination is much like a city's determination
11 that a person has a vested right. Once challenged, the city's
12 determination means nothing. It has no force except that it
13 provides guidance to the city in how to proceed. See Forman v.
14 Clatsop County, ___ Or LUBA ___ (LUBA No. 82-006, 1982).⁷
15 The city's determination in this case about the church's use of
16 the property for school purposes only provides guidance to the
17 applicant as to what the city expects from the applicant. The
18 determination may also provide guidance to the city in what
19 action to take should the church not apply for a conditional
20 use permit or cease operation of a school on the property.
21 Determinations such as this which merely provide advice but do
22 not in and of themselves affect the use of land are not land
23 use decisions within the meaning of ORS 197.015(10).⁸

24 This matter is dismissed.⁹

FOOTNOTES

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4 The zoning ordinance of the City of Medford at Section
10-275 provides

5 "In the event of an ambiguity in this code affecting
6 enforcement thereof, the planning commission shall
7 have power to hear and decide appeals from
8 administrative interpretations and to declare the
9 meaning, intent, and interpret the provisions, of this
10 code. In thus resolving ambiguities on appeal, the
11 planning commission shall so interpret the code as to
12 carry out Section 10-105 [the "purpose" section of the
13 ordinance] and the expressed purpose of the zoning
14 district involved."

15 Section 10-275 allows appeals of the planning commission
16 interpretation to the city council. Appeals under Section
17 10-275 are conducted in the same manner as appeals of other
18 city land use actions. See Section 10-270.

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20 At the time petitioner sought and obtained city approval
21 for the zone change to R-4, the city required that the
22 petitioner submit plans and specifications for remodeling the
23 church. Those plans and specifications as submitted made no
24 mention of operation of a school.

25 3

26 This assignment of error is about Resolution 3950 and 4108
and the exemption granted the Open Standard Bible Church. We
note the record of Resolutions 3950 and 4108 are not before
us. We believe, therefore, we would not be able to "review"
this allegation of error under Oregon Laws 1979, ch 772, sec 4,
as amended by Oregon Laws 1981, ch 748, even if we were to find
Resolution 4541 to be a "land use decision."

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28 ORS 30.315 provides

29 "(1) An incorporated city or a county have a charter
30 adopted pursuant to ORS 203.710 to 203.770 may, instead of
31 penal enforcement, maintain civil proceedings in courts of
32 this state against any person to enforce requirements or
33 prohibitions of its ordinances or resolutions when it seeks:

1 ** * *

2 "(c) To require or enjoin the performance of an act
3 affecting real property;

4 "(d) To enjoin continuance of a violation that has existed
5 for 10 days or more; or

6 "(e) To enjoin further commission of a violation that
7 otherwise may result in additional violations of the
8 same or related penal provisions affecting the public
9 morals, health or safety."

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11 Section 10-165 of the Medford Code describes the various
12 uses available in the R-4 zone.

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14 Under ORCP 79A, a party must show that he is entitled to
15 relief before a temporary restraining order or injunction will
16 be granted. The city, like any other entity seeking an
17 injunction, must show that it is entitled to the injunction. A
18 statement of the city's belief as to the meaning of its own
19 code is not a judicially enforceable decree as to what the
20 ordinance means. The city will have to prove what the
21 ordinance means and that the church is in violation of the
22 ordinance and "appeal" of the resolution and a declaration by
23 this Board as to its validity will, therefore, have no effect
24 on a circuit court determination pursuant to an injunction.

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26 Matters of vested rights and nonconforming use are
27 determined in circuit court. See Union Oil Company v.
28 Clackamas County, 5 Or LUBA 150 (1982), Eagle Creek Rock
29 Products v. Clackamas County, 27 Or App 371, 556 P2d 150
30 (1976), rev den (1977); 1000 Friends of Oregon v. Bd. of Co.
31 Comm. of Clackamas Co., 29 Or App 617, 564 P2d 1080 (1977) and
32 Eklund v. Clackamas Co., 36 Or App 73, 583 P2d 567 (1978).

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34 ORS 197.015(10) states:

35 "(10) 'Land use decision means:

36 "(a) A final decision or determination made by a
37 local government or special district that concerns the

1 adoption, amendment or application of:

2 "(A) The goals;

3 "(B) A comprehensive plan provision; or

4 "(C) A land use regulation; or

5 "(b) A final decision or determination of a state
6 agency other than the commission with respect to which
the agency is required to apply the goals."

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9 See Grant County v Oregon Dept of Fish and Wildlife, 1
10 Or LUBA 214 (1980), wherein we dismissed a challenge to a
directive to the staff of the Fish and Wildlife Commission
11 to secure a proposal for an exchange of property. We said
the directive had "no effect on the use of land," and
concluded that it was not a land use decision. See also,
Union Oil v Clackamas County, 5 Or LUBA 150 (1982).