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

GEORGE W. FENCE,)
)
Petitioner,)
) LUBA No. 94-137
vs.)
) FINAL OPINION
JACKSON COUNTY,) AND ORDER
)
Respondent.)

On remand from the Court of Appeals.

Tonia L. Moro, Medford, represented petitioner.

Georgia L. Daniels, Assistant County Counsel, Medford,
represented respondent.

LIVINGSTON, Chief Referee, participated in the
decision.

REMANDED 12/22/95

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's adoption of an
4 ordinance implementing a new Chapter 620 of the Codified
5 Ordinances of Jackson County (JCCO), which defines mass
6 gatherings and regulates extended mass gatherings.

7 **BACKGROUND**

8 In Fence v. Jackson County, 29 Or LUBA 147 (1995)
9 (Fence I), petitioner contended that some provisions of the
10 challenged county ordinance were inconsistent with ORS
11 433.735 to 433.770, which regulate outdoor mass gatherings.
12 Petitioner also challenged the ordinance on federal and
13 state constitutional grounds. Finally, petitioner contended
14 the ordinance violated the Federal Religious Freedom
15 Restoration Act of 1993 (the Restoration Act), 42 USC 2000bb
16 et seq.

17 Our analysis in Fence I focused almost exclusively on
18 the relationship between ORS 433.735 to 433.770 and the
19 challenged ordinance. We did not reach any of the
20 constitutional issues raised by petitioner. However, we
21 attempted to determine whether the ordinance violates the
22 Restoration Act. In sustaining petitioner's subassignment
23 of error contending that it does, we stated:

24 "[T]his federal statute prohibits a state from
25 'substantially burdening' a person's exercise of
26 religious freedom unless such burden is imposed to
27 serve a compelling state interest and is the least
28 restrictive means to further that interest. Our

1 review of this portion of petitioner's brief is
2 troublesome because the conditional use permit
3 standards to which an outdoor mass gathering of
4 more than 120 hours duration is subject are
5 uncertain. Specifically, it is difficult at best
6 to determine which regulations in the county
7 comprehensive plan apply and how those regulations
8 are satisfied. Further, it is also difficult, if
9 not impossible, to determine what additional
10 standards referred to in LDO 260.040(3) apply to
11 outdoor mass gatherings of more than 120 hours
12 duration when such gatherings are not listed as a
13 permitted or conditional use in any zoning
14 district. Therefore, we cannot determine whether
15 the challenged ordinance employs the least
16 restrictive means to achieve a compelling state
17 interest." 29 Or LUBA at 156-57. (Footnotes
18 omitted.)

19 We remanded to the county for further proceedings.

20 Both parties appealed Fence I to the Court of Appeals.
21 Fence v. Jackson County, 135 Or App 574, ___ P2d ___ (1995)
22 (Fence II). The Court of Appeals reversed our invalidation
23 of certain provisions of the challenged ordinance and
24 remanded for consideration of the constitutional issues
25 raised by petitioner. The court explained:

26 "Respondent contends, in effect, that LUBA
27 rejected several of his statutory arguments,
28 thereby leaving intact portions of the ordinance
29 at which his constitutional arguments are partly
30 aimed. He is correct. Accordingly, we conclude
31 that consideration of the constitutional issues
32 respondent raises is necessary, and we remand for
33 LUBA to address the issues that are germane to the
34 parts of the ordinance that remain viable in the
35 light of LUBA's opinion and ours." Id. at 582.
36 (Footnote omitted.)

37 However, in a footnote, the Court of Appeals stated:

38 "If LUBA concludes that it is likely that some or

1 all of the constitutional issues will be
2 substantially affected by the county's proceedings
3 on remand, we do not foreclose it from holding
4 that the issues in that category are premature at
5 this time." Id. at 582 n3.

6 The Restoration Act expressly enlarges the protections
7 of the First Amendment to the United States Constitution, as
8 interpreted by the United States Supreme Court in Employment
9 Division v. Smith, 494 US 872 (1990). 42 USC 2000bb.
10 Compliance with the Restoration Act will almost certainly
11 ensure compliance with the First Amendment and possibly with
12 the Oregon Constitution. Because no distinction has been
13 made so far in this case between state and federal
14 constitutional issues, we hold that consideration of both
15 would now be premature.¹

¹We note that in any subsequent appeal, before reaching federal constitutional claims, we will be required to look first at state constitutional law. Until its opinion in Salem College & Academy, Inc. v. Emp. Div., 298 Or 471, 695 P2d 25 (1985), the Oregon Supreme Court viewed the guarantees of religious freedom in the U.S. Constitution as identical in meaning to Article I, sections 2-5, of the Oregon Constitution, although expressed in different language. See Jehovah's Witnesses v. Mullen, 214 Or 281, 291, 330 P2d 5 (1958), appeal dismissed, 359 US 436 (1959); City of Portland v. Thornton, 174 Or 508, 512, 149 P2d 972 (1944). It is now clear, however, that the Oregon Supreme Court will interpret Oregon's constitutional guarantees independently, sometimes with results contrary to those reached by the United States Supreme Court.

"The religion clauses of Oregon's Bill of Rights * * * are more than a code. They are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths or modes of worship. The cumulation of guarantees, more numerous and more concrete than the opening clause of the First Amendment, reinforces the significance of the separate guarantees." Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 371, 723 P2d 298 (1986).

1 The county's decision is remanded.

The Petition for Review is so imprecise that we cannot ascertain which sections of Article I of the Oregon Constitution form the basis for petitioner's assignments of error. Petitioner must adequately brief his arguments pertaining to the Oregon Constitution before asking us to invalidate a state statute or rule under the federal constitution. Cooper, 301 Or 358, 370 n12.