BEFORE THE LAND USE BOARD OF APPEALS

PHILIP DIONNE, Petitioner, v. MULTNOMAH COUNTY, Respondent.	LUBA NO. 83-045
	FINAL OPINION AND ORDER

Appeal from Multnomah County.

Rex Armstrong, Portland, filed a petition for review and argued the cause for Petitioner.

Laurence Kressel, Portland, filed a brief and argued the cause for Respondent. With him on the Brief was John B. Leahy.

BAGG, Board Member.

REVERSED 10/14/83

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

BAGG, Board Member.

STATEMENT OF THE CASE

The land use decision at issue is the adoption of a zoning ordinance by Multnomah County which restricts where adult bookstores and theaters can be located within the unincorporated area of the county. Petitioner seeks a determination that the ordinance is invalid because it violates Article I, §8 of the Oregon Constitution or, in the alternative, the First and Fourteenth Amendments to the United States Constitution.

FACTS

Petitioner Phillip Dionne owns a building in the 700 block of Southeast 122nd Avenue near the City of Portland in Multnomah County. One of the tenants in this building is the Peep Hole Bookstore. The Peep Hole is an assumed business name of Maple Leaf Enterprise, Inc., which owns and operates the bookstore. Maple Leaf Enterprise, Inc. is a subchapter S corporation owned by petitioner and his wife, Marjorie Dionne.

On April 6, 1983, Multnomah County adopted Ordinance No. 373. The ordinance amends the Multnomah County code by adding controls on adult bookstores and theaters.

> "'Adult bookstore' means an establishment having, as a substantial or significant portion of its merchandise, items such as books, magazines or other publications, films or video tapes which are for sale, rent or viewing on premise and which are distinguished or characterized by their emphasis on matters depicting specified sexual activities. Any bookstore or similar establishment which bars entry by persons 17 years old or younger is an adult bookstore.

"'Adult theater' means an establishment used primarily for presenting material for observation by patrons therein, having as a dominant theme material distinguished or characterized by an emphasis on matter depicting specified sexual activities. Any theater which bars entry by persons 17 years old or younger is an adult theater.

"'Specified sexual activities' means real or simulated acts of human sexual intercourse, masturbation, sadomasochistic abuse, of sodomy; or human genitals in a state of sexual stimulation or arousal."
Multnomah County Ordinance No. 373, §1(E).

Under the ordinance, adult bookstores and theaters cannot be located within 1,000 feet of the following "protected districts and uses," and those adult uses not in conformity must leave:

"1. A residential district;
"2. A church;
"3. A library;
"4. A hospital;
"5. A day care center;
"6. A public or private elementary, junior high or high school;
"7. A nursing home;
"8. A park or public playground; and
"9. Another adult bookstore or adult theater.
"10. A mortuary.
"11. A cemetery.
"12. Clinics."
Multnomah County Ordinance No. 373, §1(B).

"Any existing adult bookstore which does not conform with the locational and spacing requirements of Ordinance No. 373 is declared a nuisance and shall be removed and/or relocated to a conforming location within six months of the effective date of said ordinance." Multnomah County Ordinance No. 373, §1(E).

None of the adult bookstores known to have been in operation at the time the ordinance was adopted meet the distance

requirements imposed by the ordinance.

By operation of the ordinance, there are several areas in the county where adult bookstores and theaters can locate, assuming the bookstore or theater satisfies all other land use requirements for those areas. Only one of the areas contains commercially zoned land; the others consist of industrially zoned land. At the evidentiary hearing held to consider this matter, respondent's planner stated and the Board finds that one possible area, zoned for commercial use, (Jantzen Beach Center) is not in fact available for use by adult bookstores and theaters because the owner of the property is unwilling to lease space for this type of use.[1] See also Record 52, 61, 81 and Dionne Affidavit, p. 2. The remaining sites zoned for industrial use consist mostly of undeveloped land clustered along the Columbia River. One exception exists near SE Foster Road and 111th Avenue. This site is owned by Multnomah County. Use of these sites (except the Foster Road site) is subject to the county's conditional use process because adult bookstores and theaters are conditional uses, not permitted uses, in the industrial areas. See Record 75-76, 85-86. The planner's testimony at this Board's hearing reveals that although there are several areas which satisfy the locational requirements imposed by the ordinance, probably only five sites are available for use by adult bookstores.

SCOPE OF REVIEW

This case represents one of the few cases in which the

Board has been asked to exercise the power granted it to take evidence under 1979 Or Laws, ch 772, §4(7), as amended.[2] The law provides the Board may take evidence and make findings of fact on

> "disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand * * * *"

In some cases, that evidence can go to supply a factual justification that was not part of the record before the legislative body when it adopted the ordinance. See Morey v. Doud, 354 US 457, 1 L Ed 2d 1485, 777 S Ct 1344 (1957) wherein the court stated:

> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Id. 34 US at 464.

The Board understands the county to view the rule in Morey v. Doud to be applicable to this proceeding. The county, therefore, presented evidence not only about the effects of the ordinance on adult uses in Multnomah County and where they might be allowed, but also evidence about the kinds of problems that exist in and around adult bookstores and theaters. This latter testimony was presented to show that facts exist which support the adoption of such an ordinance.

In this case, however, the basic right of freedom of speech is at issue, no matter whether one is proceeding under the Oregon Constitution or the U.S. Constitution. The Board

believes, therefore, that given the fundamental quality of this right, the Board must inquire into whether there are legitimate state interests which justify the ordinance. The Board believes the following statement of Chief Judge Miles in CLR Corp. v. Henline, 520 F Supp 76 (1981), aff'd 702 F2d 637 (1983) sets the appropriate scope of the Board's review of the evidence in and out of this record. In his decision, Chief Judge Miles considered the leading U. S. Supreme Court case on adult bookstores, Young v. American Mini-Theaters, Inc., 427 US 73, 49 L Ed 2d 310, 96 S Ct 2040 (1976) and concluded as follows:

> "Defendants' position misapprehends the nature of the equal protection analysis required by Young. Were the standard merely one of a rational basis, then the Court might consider possible, rather than actual, state interests to justify the ordinance. Such would be the case were there no First Amendment issue involved, Schad, 101 S. Ct. at 2182-2184. But Young requires more, under a standard that approximates strict scrutiny though it is rarely labeled as such: that is, an underlying factual basis to support the conclusion of the legislative body that the ordinance, narrowly drawn, further a substantial or important state interest which a narrower restriction will not. Even if this is so, the court still inquired whether the resulting burden on First Amendment interests is too severe. Young requires actual state interests, actually considered upon a factual basis before the legislative body at the time the action is taken, not speculation in the course of subsequent litigation." Id. 520 F Supp at 768.[3]

The Board believes this statement is the correct evidentiary standard whether under the U. S. or the Oregon Constitution. In its review of this case, therefore, the Board considers the entire record as submitted by the county and only

that portion of the evidentiary hearing held before the Board in which evidence was introduced as to the effects of the challenged ordinance.

ASSIGNMENTS OF ERROR

Petitioner's first two assignments of error allege the ordinance violates (1) the Oregon Constitution and (2) the U.S. Constitution. The Board is mindful of its responsibility under State v. Bruce Alan Kennedy, 295 Or 260, ___ P2d ___ (1983) to consider all questions of state law before reaching a claim based on the federal constitution.[4] The Board will discuss petitioner's challenge under the U. S. Constitution first, however, simply for the sake of clarity. The Board holds hearin that the ordinance violates the Oregon Constitution whether interpreted to provide the same or greater protection than the federal constitution.

ASSIGNMENT OF ERROR NO. 2

"ORDINANCE NO. 373 VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

Under this assignment of error, petitioner makes three arguments. Petitioner first argues that adoption of the ordinance was motivated by a desire to suppress sexually explicit material. This motivation is not permissible under the U. S. Constitution. Erznoznik v. City of Jacksonville, 422 US 205, 210, 45 L Ed 2d 125, 95 S Ct 2268 (1975). Petitioner claims the record includes statement of witnesses speaking of a moral need to control this type of material. Petitioner argues

no evidence was submitted to the Board of Commissioners about the effects of adult bookstores and theaters on surrounding land uses. Petitioner also points to the inclusion of cemeteries and mortuaries as uses that are protected from intrusion by adult bookstores under the ordinance and argues there is no evidence as to how the operation of cemeteries and mortuaries would be affected by having an adult bookstore next door.

Second, petitioner claims there was no evidence about the effects of the Peep Hole bookstore on the community; and, more importantly, petitioner argues the county failed to consider less restrictive alternatives to the one finally enacted. According to petitioner, the county was under a duty to explore a range of less restrictive alternatives before enacting an ordinance that petitioner believes severely restricts adult materials.

Finally, petitioner makes a separate claim that access to the material sold in adult bookstores (sexually explicit books and films) will be severely restricted under this ordinance. Petitioner claims the Young decision stands for the view that availability of the material must not be substantially restricted. Petitioner says there must be more than the few locations available in Multnomah County in order for the ordinance to be valid under the Young analysis. Petitioner reminds the Board that in the Young case, there were "myriad" locations in the City of Detroit where adult theaters and

bookstores could be located.

Respondent argues the evidence shows the county acted in furtherance of a legitimate land use planning aim--to preserve neighborhood stability and prevent urban blight. The county advises that if the goal had been the total suppression of sexually explicit material, the county would have banned adult uses altogether.

The county made findings explaining its reasons for controlling adult bookstores. Among them are the following:

> "1. The County regularly receives a large number of complaints about adult bookstores from residents, neighborhood associations and businesses. These complaints concern criminal activities: vandalism, public display of activities being conducted on the premises, and late night traffic and noise. The County is advised that the City of Portland receives similar complaints regarding adult theaters located in the City. There are presently no adult theaters in unincorporated Multnomah County."
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> "3. These zones sometimes abut residential zones or include residential neighborhoods. Consequently, some of these businesses are located in close proximity to residential uses and other uses which are incompatible with 'adult entertainment.'
>
> "4. Adult bookstores and theaters are inherently incompatible with residential zones and related uses such as schools and religious institutions because these businesses adversely affect the quality and stability of nearby residential and commercial areas."
>
> "8. The potential for clustering of adult bookstores and adult theaters within the area where such businesses are allowed deserves attention. Residents, neighborhood organizations, and businesses located in these areas have stated that clustering of adult businesses in the allowable areas will increease [sic] crime, create or accelerate blighted conditions, and

make the areas more resistant to the County's revitalization efforts.

"9. The concerns expressed by residents of urban neighborhoods in which adult businesses are allowed have been raised at various public hearings and have been deemed valid. The Board finds that the measures contained herein to avoid the ill effects of uncontrolled concentrations of adult businesses are a necessary response to these conditions."

"11. Establishing minimum distances of 1000 feet between adult businesses will effectively discourage clusters of such businesses in the allowable areas. These prescribed distances, however, will allow reasonable opportunity forr [sic] existing businesses required to relocate and for new businesses to be established." Record 3-5.

As to the claim there was no evidence about adverse impact of these uses on surrounding land uses, respondent replies the record shows evidence of increased criminal and anti-social activities, noise, late night traffic and general downgrading of the quality of nearby areas. In support of this assertion, respondent attaches to its brief a transcript of a portion of the testimony taken at the Board of County Commissioner's meeting of April 5, 1983. Respondent adds it could rely on evidence of adverse impact from other jurisdictions. The county was not required to await the deteoriation of neighborhoods before taking action to control these uses. See Genusa v. City of Peoria, 619 F2d 1203, (7th Circuit 1980).

Lastly, in answer to petitioner's argument the ordinance is too restrictive, respondent says one must consider the size and nature of the jurisdiction, the effect of the ordinance on existing uses, whether there is a "de facto" ban on adult uses

and the size of the areas recognized in the ordinance as suitable for adult uses. Respondent calls petitioner's assertion that there would be severe limitation on these uses "pure speculation" without such an analysis. Respondent points to a map in the record showing there are accessible portions of the county where adult uses are allowed. Respondent posits petitioner should be required to show why these are inadequate to satisfy the need for access to such materials. Only when such a showing is made may the Board find the ordinance overly restrictive, according to respondent.

In Young, supra, an ordinance restricting adult uses within 1000 feet of similar uses was upheld. The court found the record to contain sufficient evidence that the 1000 foot restriction was necessary to prevent clustering of such uses and a consequent degradation of neighborhoods. In other words, the court in Young found a legitimate state concern, supported by evidence, to enable the city to pass an ordinance which would prevent the clustering of adult uses. In that case, however, there were facts showing "myriad locations" existed in which such uses could be placed. Further, the existing adult uses were not affected under the provisions of the ordinance. There was no claim the restrictions imposed would severely limit places where adult theaters and bookstores could exist. The question, therefore, of whether sufficient access to such materials existed in the community was not presented in Young.

The court's ruling let stand the district court ruling in

Nortown Theater, Inc. v. Gribbs, 373 F Supp 363 (1974), on another part of the ordinance. The invalid portion provided that such uses would not be permitted within 500 feet of residential uses. The district court found no evidence that a 500 foot ban on adult uses from residential uses was necessary to achieve the legitimate municipal aim of preventing degradation of neighborhoods. See also Schad v. Mount Ephraim, 452 US 61, 68 L Ed 2d 671, 101 S Ct 2176 (1982); CLR Corp. v. Henline, 702 F2d 637 (1983).

The Board, therefore, understands Young v. American Mini-Theaters, Inc. to allow zoning based on content of communication where certain criteria are met. First, the regulations must be motivated not by distaste for the speech itself but a desire to eliminate its adverse affects. Second, even properly motivated legislation may be unconstitutional if it severely restricts First Amendment rights. Third, even a properly motivated ordinance with only limited impact on free expression may be unconstitutional under Young if the county cannot demonstrate an adequate "factual basis" for its conclusion that the ordinance will minify the evils at which it is aimed.

With respect to the question of motivation, the Board finds the county acted in furtherance of a legitimate land use planning objective. The minutes of the county commission meeting (Record 27) show the county wished to preserve neighborhood stability and prevent blight. The Board does not

find the county's chief desire was the prevention of the distribution of this material. The fact that witnesses before the county commission expressed a moral outrage at the existence of adult theaters and bookstores does not mean the county commission acted only out of that same outrage. See United States v. O'Brien, 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673 (1968). Also, there was evidence before the county commission that offensive activities including urination, masturbation and solicitation by prostitutes occurred around the bookstores. The Board believes this evidence sufficient to show the county found a legitimate need to control adult uses in some fashion so as to prevent or diminish this activity. See Findings 1 and 8 at page 9-10, supra.

The Board believes the question of whether or not the ordinance is unconstitutional because it too severely restricts access to adult theaters and bookstores is one of fact. There were three adult bookstores and no adult theaters in the unincorporated area of Multnomah County at the time the ordinance was adopted. Ordinance 373 will eliminate the existing bookstores while designating areas for possible relocation. Within those areas are five possible sites. These locations are removed from population and traffic. The Board finds that whether or not these locations are sufficient to allow access has not been answered by the county. There is no explanation of what the county means in Finding 11 by "reasonable opportunity" for the businesses to relocate and new

businesses to be established. The Board believes the county was under an obligation, given the restrictive nature of its ordinance, to make inquiry into the demand for such communication and whether the regulations will stifle this demand. Without this analysis, the county can not show it has restricted access to no greater extent than necessary to achieve the county's legitimate aim. See O'Brien, supra.

The third criteria is whether a factual basis exists to support the decision. The Board does not agree with respondent that the county may now present evidence to the Board that was not before the county commission in order to prove a factual basis. The Board agrees the county was free to adopt the findings made by the City of Detroit and used with success in Young. However, it is not clear from this record that the county has done so. The Board believes the county must do so; it may not claim reliance on facts it is not clear the county knew existed at the time it adopted its ordinance. CLR Corp. v. Henline, 702 F 2d 637 (1983). See also discussion at pp. 4-7, supra.

> "Also like Schad but unlike Young, the defendants have failed to justify the infringement of constitutional rights by showing a compelling governmental interest. First, the Wyoming City Council made no factual findings that the spacing requirements would prevent urban blight. Wyoming need not have conducted its own research in this area. However, the District Court found no evidence in city council meetings or elsewhere that the ordinance was enacted for-the-purpose-of preventing urban blight through deconcentrating restricted uses. It is equally likely that Wyoming enacted the ordinance to prevent adult bookstores from locating in the city." Id. 702 F2d at 639.

While the Board does not question the county's motive, given the county's findings quoted at page 9, the Board does question any claim to justify the 1000 foot separation without a showing that (1) the county in fact adopted the City of Detroit's findings; and (2) the City of Detroit and Multnomah County are sufficiently comparable jurisdictions to make Multnomah County's adoption of Detroit's findings relevant and probative.[5]

Also, the Board finds no evidence in the record to explain the choice of 1000 feet between protected uses such as cemeteries and adult uses. Even if the Board were to consider the evidence given by the county at the evidentiary hearing, there is still no showing of the effacy of the 1000 foot separation from protected uses.[6] There is no explanation, supported by facts, showing that the desire in protecting neighborhoods from blight would be served by such distances. In the absence of such evidence, the county is unable to demonstrate that an adequate factual basis exists for its conclusion that the ordinance will control the evils the county has identified. Schad v. Mount Ephriam, 452 US 61, 68 L Ed 2d 671, 101 S Ct 2176 (1982); CLR Corp. v. Henline, 702 F2d 637 (1983).

Under the analysis in Young, then, the Multnomah County Ordinance violates the United States Constitution in that the county has not shown the restriction to be the minimum required

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in order to achieve the legitimate aim of prevention of degradation of neighborhoods and reduction in crime. With this understanding of Ordinance 373's lack of conformance to the federal standard, the Board turns to petitioner's first assignment of error in which petitioner alleges a violation of Article I, §8 of the Oregon Constitution.

ASSIGNMENT OF ERROR NO. 1

"ORDINANCE NO. 373 VIOLATES ARTICLE I, SECTION 8, OF THE OREGON CONSTITUTION."

This assignment of error concerns whether Article I, §8 of the Oregon Constitution should be construed as providing greater protection for freedom of expression than does the free speech guarantee in the First Amendment of the U. S. Constitution.[7] Petitioner's argument is premised on the theory that the Oregon Constitution absolutely prohibits content-based regulation of expression, except for certain historically recognized exceptions. According to petitioner, Ordinance No. 373 is a content-based regulation that impermissibly restricts expression because it limits the locations at which certain types of sexually oriented books and films can be sold. Petitioner adds the restrictions imposed by the ordinance do not fit within any historical exception and consequently violate Article I, §8 of the Oregon Constitution.

As authority for its position, petitioner cites State v. Robertson, 293 Or 402, 412, 649 P2d 569 (1982). That case involved an appeal from a conviction under a statute making

"coercion" a crime, and the defendant challenged the statute on the ground it was unconstitutionally vague. Justice Linde wrote for the majority saying that Article I, §8 of the Oregon Constitution

> "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." [citation omitted] Robertson, 293 Or at 412.

Respondent's position is that the Oregon Constitution should not be interpreted more restrictively than the federal constitution. Respondent argues Robertson was a criminal law case, and its holding should not control a civil law decision. Anderson v. Peden, 284 Or 313, 587 P2d 59 (1978). In addition, respondent argues that even if LUBA accepts the claim that the Oregon Constitution imposes a stricter standard for protection of communication than the federal constitution, the Board should not overturn the ordinance because all the Multnomah County Ordinance does is control the place and manner of sale of "erotic" material. Respondent advises the matter of whether an ordinance is content-neutral rests on whether the government maintains neutrality towards "the point of view expressed by the speaker, not the genre or vehicle used for expression." Brief of Respondent at 5. This ordinance, according to

Multnomah County, is content-neutral in that all it does is regulate where certain materials may be sold. According to respondent, this ordinance does not concern itself with a point of view or idea, but singles out adult bookstores and theaters for special treatment as to location because of the special land use impacts these bookstores and theaters have.

The Oregon Court has not ruled directly on the matter of whether the Oregon Constitution provides greater protection for speech and expression of adult materials than does the federal constitution. There has been development in Oregon case law that touches on the subject, however.

In State v. Childs, 252 Or 91, 447 P2d 304 (1968), a case involving obscene literature, Justice Holman wrote that the Supreme Court of Oregon could construe Article I, §8 as providing greater freedom of expression than the federal First Amendment, but he found there was no legal basis for such a construction. Id. at 99. Subsequent cases, however, strongly suggest that Justice Holman's statement is limited to the facts of that case.

Writing for the majority in Deras v Myers, 272 Or 47, 535 P2d 541 (1975), Chief Justice O'Connell spoke of Article I, §8 as an "unqualified constitutional prohibition" on restrictions on speech. The case involved statutes limiting campaign expenditures for public office and required judicial interpretation of Article I, §8. The court found the citizen interest protected under Article I, §8 clearly outweighed

government interest protected by the campaign statutes. This finding eliminated any need to decide the nature of the constitutional prohibition; nevertheless, the opinion created an inference that Article I, §8 is a ban on content-based regulation.

Justice O'Connell observed that the difference in the language of the Oregon Constitution, as compared to the federal constitution, could point to an intent to provide greater protection to free expression under the Oregon Constitution. He proceeded to hold that federal cases were not controlling where "this court is of the opinion that our constitution should provide a larger measure of protection to the citizen." Id., 272 Or at 64.[8]

The Court of Appeals considered the matter of adult entertainment in Film Follies, Inc. v. Haas, 22 Or App 365, 539 P2d 669 (1975), rev den (1975). The Court of Appeals noted

> "that the Oregon Supreme Court has since decided that certain Oregon campaign spending statutes violate Article I, Section 8 and 26 of the Oregon Constitution. Based on this determination, the court found it unnecessary to decide the federal First Amendment Issues. Deras v. Myers, 272 Or 47, 535 P2d 541 (1975). It is not entirely clear whether this represents a willingness to take a more expansive view of Article I, Section 8 than the United States Supreme Court takes of the First Amendment." 22 Or App 371 at note 7.

Thereafter, the Supreme Court's intention was somewhat clarified in Wheeler v. Green, 286 Or 99, 593 P2d 777 (1979). The court held that punitive damages in libel and slander actions are entirely prohibited by Article I, §8 of the Oregon

Constitution. Such a prohibition goes beyond federal court application of the United States Constitution to libel and slander actions.[9]

The Board concludes that the Robertson decision may indeed provide a basis for holding the Oregon Constitution absolutely prohibits content-based ordinances regulating adult uses, such as Ordinance No. 373. Although Ordinance 373 embodies an intent to prevent degradation of neighborhoods, it does so through regulation of a particular kind of communication, communication that is "distinguished or characterized by [its] emphasis on matters depicting specified sexual activities." Multnomah County Ordinance No. 373, §5.[10] In order to make the ordinance content-neutral and pass through the Robertson prohibition, the county would be limited to regulating the undesirable effects of the adult uses. For example, the county could in some part control the effect of the uses on the neighborhoods by limiting hours of operation and by controlling design of the stores.[11]

However, Robertson has not expressly overruled the earlier cases, and the Board does not believe it must undertake to decide the impact of the Robertson decision on this case in order to sustain this assignment of error. Whether Article I, §8 is to be interpreted as urged by petitioner or whether Article I, §8 is to be interpreted consistent with the federal constitution thereby embodying the Young analysis, the county ordinance fails.

The first assignment of error is sustained.

ASSIGNMENT OF ERROR NO. 3

"THE REQUIREMENT IN ORDINANCE NO. 373 THAT EXISTING ADULT BOOKSTORES AND THEATERS CLOSE OR RELOCATE WITHIN SIX MONTHS VIOLATES ORS 215.130(5)."

Petitioner asks the Board for leave to amend its petition for review to include this assignment of error. Petitioner makes the request because of two cases in which the Court of Appeals held that decisions about non-conforming uses were subject to review by LUBA. See Turner v. Lane County, 63 Or App 611, 665 P2d 371 (1983) and Forman v. Clatsop County, 63 Or App 617, 665 P2d 365 (1983). Prior to issuance of these cases, LUBA had held that it did not have jurisdiction to consider disputes about non-conforming uses. See Union Oil Company v. Clackamas County, 5 Or LUBA 150 (1982).

The Board will not consider the assignment of error. The Board believes it is not obliged to interpret its rule allowing amendments to petitions for review as petitioner requests in this particular case. See LUBA Rule 7(D), OAR 661-10-030(4). Petitioner has a remedy should the county proceed against petitioners under the provisions of Ordinance 373. Petitioner may assert the defense of an existing and prior non-conforming use under the provisions of ORS 215.130(5).[12]

Ordinance 373 is reversed consistent with the discussion herein.

FOOTNOTES

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1 See discussion under Scope of Review, infra at pp. 4-7.

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2 The provision is carried over in 1983 Or Laws, ch 827, §31(11).

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3 The "Schad" citation is to Schad v. Borough of Mount Ephraim, 452 US 61, 101 S Ct 2176, 68 L Ed 2d 671 (1981), another case finding insufficient evidence to support an ordinance limiting certain forms of adult entertainment.

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4 Note, however, the new provision controlling those cases where the petition for review, unlike here, is filed after October 1.

> "Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of subsection (12) of section 31 of this 1983 Act, the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (8) of this section." 1983 Or Laws, ch 827, §31(9)

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5 In the case of Genusa v. City of Peoria, 619 F2d 1203 (1980), the court found the City of Peoria did not violate the U. S. Constitution by imposing a 500 foot separation requirement on adult use establishments and certain other protected uses. The court stated

> "Even though here, unlike in Young [footnote omitted] the city has not demonstrated the past history of congregated adult uses causing neighborhood deterioration. We agree with the District Court, the city need not await deterioration in order to act. A legislative body is entitled to rely on experience and

findings of other legislative bodies as a basis for action. There is no reason to believe that the effect congregated adult uses in Peoria is likely to be different than the effect of such congregations in Detroit. The Peoria City Council found, in the preamble in the ordinance, that congregated adult uses cause 'deleterious effects' and the Supreme Court in Young found that such effects were sufficient to justify a zoning requirement that adult uses not be located in close proximity to one another." Id. 619 F2d at 1211.

It is not clear from this case, however, whether the City of Peoria did indeed rely on the particular findings of the City of Detroit in the proceedings leading to the adoption of its ordinance. The Board believes this case should be contrasted with that of CLR Corp. v. Henline, 702 F2d 637 (1983), supra, wherein the court declined the efforts of the City of Wyoming, Michigan to attempt to justify its ordinance with the introduction of facts showing a need for the ordinance after adoption.

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6 Chris Kassard, a businessman who owned a building next to an adult use, testified that the image of his business neighborhood was adversely affected by the adjacent adult use. He testified potential renters of space in his building refused space because of the existence of the adult use next door. Next door hardly means 1000 feet.

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7 Article I, §8 of the Oregon Constitution provides as follows:

"Section 8. Freedom of Speech and Press. No law shall be passed restraining the free expression of opinion or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

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8 It is clear from Deras v. Myers, supra, that the Oregon Constitution provides that

"not even a compelling state interest in the regulation of the non-communicative aspects of expression can justify infringement of fundamental rights when less drastic means to the desired end are available. Shelton v. Tucker, 364 US 479, 5 L Ed 2d

231, 81 S Ct 247 (1960)." 272 Or at 64.

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9 See, e.g., New York Times v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710 (1964).

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10 It is important at this point to note that no party to this proceeding has argued that the material sold in adult bookstores or exhibited in adult theaters are obscene and, therefore, illegal under the provisions of ORS 167.060 to 167.100. Rather, the parties have proceeded as though the kind of material sold in adult bookstores is speech protected to one degree or another by the Oregon and U. S. Constitutions. See State v Spencer, 289 Or 225, 611 P2d 1147 (1980). Respondent correctly points out that Spencer defined obscene speech by federal constitutional standards and acknowledged that obscene speech is unprotected by Article I, §8. The court in Spencer explained

> "whether words commonly regarded as obscene fall within or without the protection of the constitutional protection of expression depends upon the circumstances in which the words are used. The utterance of words which are commonly regarded as obscene is not constitutionally protected if, among other requirements, the dominant theme of the material [words] taken as a whole must appeal to a prurient interest in sex." State v Childs, 252 Or 91, 95-96, 447 P2d 304 (1969).

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11 The county could not single out these uses for restrictions that would have the effect of driving them out of business or restricting access to them. Also, the controls could not burden adult communication outlets with regulations not applicable to other communication outlets.

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12 The Board notes this is not a case in which some new law or rule which the Board is required to apply has been handed down and under which the Board is required to act notwithstanding complaints raised in the petition for review. See McGreer v. Wasco County, ___ Or LUBA ___ (LUBA No. 82-085/086, 1983) and State Housing Division v. City of Forest Grove, ___ Or LUBA ___ (Slip Opinion September 28, 1983).