



1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioner appeals the city's adoption of a resolution  
4 interpreting the Medford City Code. The interpretation  
5 classifies petitioner's parochial school, which petitioner  
6 operates in and adjacent to its church building, as a  
7 conditional use requiring issuance of a permit.

8 FACTS

9 This appeal is before the Board for the second time. We  
10 first ruled the city's resolution did not constitute a  
11 reviewable "land use decision" under ORS 197.015(10). Medford  
12 Assembly of God v. City of Medford, 6 Or LUBA 68 (1982). That  
13 ruling was ultimately reversed by the state Supreme Court.  
14 Medford Assembly of God v. City of Medford, 297 Or 138, \_\_\_\_  
15 P2d \_\_\_\_ (1984).

16 Our initial opinion set forth the relevant facts. We  
17 reiterate some of the facts in the course of discussing the  
18 assignments of error raised by the petition.

19 FIRST ASSIGNMENT OF ERROR

20 The ordinance in question classifies petitioner's church as  
21 a permitted use in the R-4 zoning district. Section  
22 10.165(2)(e), Medford Zoning Ordinance. A separate provision  
23 classifies public, private and parochial schools as conditional  
24 uses. Id at Section 10.165(4). The city takes the position  
25 that operation of a parochial school is precluded on or  
26 adjacent to church premises unless a conditional use permit is

1 obtained.

2 Petitioner claims the city's position violates the rights  
3 of its members<sup>1</sup> to freely exercise their religious beliefs  
4 under the state and federal constitutions. The constitutional  
5 challenge can be summarized as follows:

6 1. One of the tenets of the Assembly of God church  
7 is that education is inseparable from worship.  
8 Petitioner's weekday school is considered a  
9 ministry of the church. The city's insistence on  
a separate permit for the school thus constitutes  
a burden on religious activities conducted by the  
church.

10 2. Given the burden on religious activity, the city  
11 is obligated to demonstrate that ordinance  
12 enforcement serves a compelling governmental  
13 interest. The city asserts an interest in land  
use regulation but has not factually demonstrated  
that differences between churches and day schools  
justify different zoning treatment.

14 3. Even if the city has demonstrated a compelling  
15 governmental interest, it has failed to show  
16 there are no alternative means by which that  
17 interest can be pursued with less restrictive  
18 impacts on religious activity. That is, the city  
has "declined to seek an accommodation which  
preserves at least a portion of its interests and  
minimally intrudes on petitioner's free exercise  
rights." Petitioner's Supplemental Brief at 8.

19 We begin our analysis by taking note that the free exercise  
20 guarantee in the state constitution is to be interpreted in  
21 accord with cases construing its federal counterpart.

22 Jehovah's Witnesses v. Mullen, 214 Or 281, 330 P2d 5 (1958),  
23 app dis, 359 US 436 (1959). Those cases have long recognized  
24 that the First Amendment does not guarantee the right to  
25 express one's view at all times and places or in any manner  
26

1 that may be desired. To the contrary, restrictions on the  
2 time, place and manner of the exercise of protected rights may  
3 be imposed by government if they (1) are justified without  
4 reference to the content of the protected expression, (2) serve  
5 a significant governmental interest and, (3) leave open ample  
6 alternative channels for communication. Heffron v.  
7 International Society for Krishna Consciousness, 452 US 640,  
8 648 (1980); Grayned v. City of Rockford, 408 US 104 (1972). We  
9 believe the challenged ordinance meets this three part test.<sup>2</sup>

10 Petitioner's attack bears close resemblance to the issues  
11 raised and resolved in Damascus Community Church v. Clackamas  
12 County, 45 Or App 1065, 610 P2d 273 (1980), rev den 289 Or 587  
13 (1980), app dis 450 US 902 (1981). In 1967, plaintiff obtained  
14 a conditional use permit for a church in an RA-1 (Rural  
15 Agricultural) zone in Clackamas County. In 1975, county zoning  
16 officials became aware plaintiff was operating a full-time  
17 parochial school on church premises. The county then notified  
18 plaintiff that a separate conditional use permit was required  
19 for operation of the school in the RA-1 zone. Eventually the  
20 county brought suit to enjoin operation of the school as a  
21 violation of the zoning ordinance.

22 As in this case, plaintiff claimed that by requiring a  
23 separate permit for the parochial school, the county ordinance  
24 deprived plaintiff of its constitutionally right to the free  
25 exercise of religion. This claim was rejected on grounds that  
26 the ordinance did not infringe on religious beliefs but instead

1 imposed reasonable limits on religious practices. The court  
2 stated:

3 "The county ordinance is clearly intended as land use  
4 regulation, and it permits both churches and parochial  
5 schools, but not necessarily on the same site if the  
6 requirements are not met. There is no contention that  
7 the county, as a matter of practice, has not permitted  
8 parochial schools or has discriminated in favor of, or  
9 against, any schools sponsored by any particular  
10 sect. A full-time school is a more intensive use than  
11 a church, and there is no constitutional prohibition  
12 against the county's adopting different requirements  
13 for the two uses." 45 Or App at 1073.

14 Damascus Community Church, supra, recognizes that  
15 content-neutral restrictions on the place and manner of the  
16 exercise First Amendment freedoms may be imposed by local  
17 zoning authorities. The case specifically recognizes that  
18 separate zoning treatment of churches and parochial schools  
19 represents such a restriction. An even broader recognition  
20 that enforcement of reasonable land use regulations does not  
21 unduly interfere with religious liberties appears in 1000  
22 Friends of Oregon v. Wasco County Court, 62 Or App 75, 659 P2d  
23 1001 (1983). In that case a religious organization proposed to  
24 incorporate a city (deemed part of the ministry of the  
25 religious organization) in a rural agricultural area. The  
26 proposal was challenged on grounds it conflicted with statewide  
land planning law. In response to the challenge, the  
organization and certain of its members claimed the challenge  
was constitutionally impermissible because of its potential  
effect on civil liberties. The court addressed this contention  
as follows:

1 "Respondents assert that petitioners' appeal is  
2 equivalent to requiring respondents to obtain a  
3 license before engaging in their activities. To an  
4 extent, of course, the land use laws do require some  
5 prior approval, but that requirement does not  
6 interfere unconstitutionally with respondents'  
7 liberties. The land use laws are permissible  
8 impositions of reasonable limitations designed to  
9 protect the public welfare. See Christian Retreat  
Center v. Commission for Washington County, 28 Or App  
673, 680-681, 560 P2d 1100, rev den (1977), and serve  
a significant governmental interest. See 1000 Friends  
of Oregon v. LCDC, 292 Or 735, 744-750, 642 P2d 1158  
(1982). If they restrict First Amendment freedoms,  
they do so by time, place and manner restrictions that  
are not based on the content or subject matter of  
speech, at least so far as anything in the present  
record discloses." 62 Or App at 83.<sup>3</sup>

10 We read the foregoing authorities to warrant rejection of  
11 petitioner's First Amendment challenge. The challenged zoning  
12 regulation is "content-neutral" - it applies uniformly to all  
13 sponsors of parochial schools in the city. The ordinance  
14 serves a significant governmental interest by assuring, through  
15 the conditional use permit process, that operation of a school  
16 in a residential area will not adversely affect that area.<sup>4</sup>  
17 Finally, the regulatory ordinance leaves ample room for the  
18 exercise of protected rights. There is no allegation or proof  
19 in this appeal that Medford has applied the permit requirement  
20 to prohibit or severely restrict locations for parochial  
21 schools.

22 The challenged measure qualifies as a reasonable  
23 restriction on the time, place and manner of the exercise of  
24 petitioner's rights. Heffron v. International Society for  
25 Krishna Consciousness, supra. We conclude petitioner's first  
26

1 assignment of error must be denied.<sup>5</sup>

2 SECOND ASSIGNMENT OF ERROR

3 Petitioner next contends the parochial school is an  
4 accessory use<sup>6</sup> to the church and is therefore allowable under  
5 the Medford Zoning Ordinance without issuance of a conditional  
6 use permit. The city responds by pointing out that its  
7 ordinance specifically lists parochial schools as conditional  
8 uses in the R-4 district. We are urged therefore to reject  
9 petitioner's "accessory use" argument.

10 The reasonable interpretation of a local enactment by local  
11 officials is to be given weight by reviewing tribunals,  
12 including this Board. Fisher v. City of Gresham, 69 Or App  
13 441, \_\_\_ P2d \_\_\_ (1984). The city's ordinance interpretation  
14 in this case is reasonable. The specific classification of  
15 parochial schools as conditional uses clearly reflects an  
16 intent to exclude such schools from the more general category  
17 of "accessory uses."<sup>7</sup> As the Court of Appeals stated in  
18 Damascus Community Church v. Clackamas County, supra:

19 "It may be that certain types of ancillary uses  
20 'usually connected with a church' are implicitly  
21 encompassed by conditional use permits for churches  
22 issued under the county ordinance, notwithstanding the  
23 absence of language in the ordinance so providing.  
24 However, we need not decide that question here,  
25 because it is clear that full-time parochial schools  
26 are not among the uses which could be regarded as  
implicit in a conditional use permit for a church  
under this ordinance. The section of the ordinance  
governing conditional uses treats churches under one  
subsection and parochial and private schools under  
other subsections. The minimum conditions for the  
church and for the school use differ. Thus, the  
ordinance clearly manifests the county's legislative

1 decision to make the granting of and criteria for  
2 conditional use permits for churches and for parochial  
3 schools different and independent. We accordingly  
4 conclude that, under the ordinance, a conditional use  
5 permit for a church does not automatically authorize  
6 the operation of a full-time parochial school." 45 Or  
7 App at 1071. (Emphasis in original). (Footnote  
8 omitted).

9 We find no significant distinction between the ordinance at  
10 issue in Damascus Community Church v. Clackamas County, supra,  
11 and the ordinance at issue here. Both ordinances separately  
12 classify churches and parochial schools. Although the  
13 Clackamas County ordinance did not provide specifically for  
14 "accessory uses" the appellate court assumed that such uses  
15 were implicitly authorized. Nonetheless, the specific  
16 classification of parochial schools as separate conditional  
17 uses was the controlling aspect of the ordinance.

18 Based on the foregoing, this assignment of error is denied.

19 THIRD ASSIGNMENT OF ERROR

20 Petitioner next contends its parochial school constitutes a  
21 lawful non-conforming use which the city may not now subject to  
22 conditional use permit requirements. The claim to  
23 non-conforming use status is predicated on the following facts:

- 24 1. Petitioner has operated as a church at its  
25 present location since 1952. In 1973, the lot  
26 occupied by the church and the two adjacent lots  
were rezoned from C-2 (Commercial) to R-4  
(Residential).
2. As a result of the rezoning, the church became a  
permitted (i.e., conforming) use.
3. Between 1977 and 1980 petitioner established a  
full-time parochial school on the R-4 lots  
adjacent to the church. The city did not notify

1 petitioner that the school could not be  
2 established in the R-4 district without a  
3 separate permit, although the district classified  
4 parochial schools as conditional uses.

5 4. In early 1980 the city reviewed the zoning status  
6 of another parochial school operating in  
7 connection with a church (The Open Bible  
8 Standard Church). By Resolution 3950, the city  
9 concluded the conditional use permit for the Open  
10 Bible Standard Church also authorized operation  
11 of the school. The city resolved as follows:

12 "1. That the term 'church' as used in the  
13 Medford Zoning Ordinance includes a school  
14 meeting state compulsory attendance  
15 requirements operated as part of the church  
16 ministry on the church premises; and

17 "2. That such a school being operated by the  
18 Open Bible Standard Church is permitted  
19 under its original conditional use permit  
20 for a 'church.'" Resolution 3950.

21 As we understand it, petitioner's non-conforming use claim  
22 rests on the idea that, although the ordinance is now  
23 interpreted to require a conditional use permit for a parochial  
24 school in the R-4 district, petitioner's school was in  
25 operation when the city interpreted the ordinance more  
26 permissively. Accordingly, the facility is claimed to be a  
"lawfully established" non-conforming use under §10.260 of the  
Medford ordinance:

"Non-Conforming Uses. A use lawfully occupying a  
structure or site on the effective date of this code  
or of amendments thereto, which does not conform to  
the use regulations for the district in which it is  
located, shall be deemed to be a non-conforming use  
and may be continued,...."

The city's resolution rejects the non-conforming claim on  
grounds petitioner's school was never established as a "lawful

1 use." That determination is within our review jurisdiction.

2 Foreman v. Clatsop County, 297 Or 129, \_\_\_ P2d \_\_\_ (1984).

3 We do not accept petitioner's contention the "lawful use"  
4 requirement in the city ordinance has been satisfied in this  
5 case. The record discloses that petitioner began to operate  
6 its school without city authorization when the zoning ordinance  
7 required a conditional use permit for any "parochial school" in  
8 the R-4 district. The ordinance was never amended to eliminate  
9 that requirement; therefore, petitioner's school never became a  
10 lawful use.

11 Petitioner places emphasis on Resolution 3950, adopted by  
12 the city in 1980. The resolution interpreted the zoning  
13 ordinance permissively in connection with another religious  
14 institution. However, it did not amend the ordinance to make  
15 petitioner's school a lawful use under Section 10.260. We do  
16 not construe the resolution to determine petitioner's rights  
17 under the Medford ordinance.<sup>8</sup>

18 We conclude that on and after the effective date of the  
19 Medford zoning code, a conditional use permit was required for  
20 a parochial school in the R-4 district. Petitioner established  
21 a parochial school without obtaining a permit and has never  
22 obtained one. The code was never amended to relieve petitioner  
23 of this requirement. Therefore, the school can not qualify  
24 under the city's definition of "non-conforming use." See also,  
25 Polk County v. Martin, 292 Or 69, 76, 636 P2d 952 (1981).

26

1 Petitioner's third assignment of error is denied.

2 FOURTH ASSIGNMENT OF ERROR

3 The final contention is that the city's failure to exempt  
4 petitioner's parochial school from the conditional use permit  
5 requirement in the R-4 district denies petitioner the equal  
6 protection of the law, in violation of the state and federal  
7 constitutions.<sup>9</sup> This claim is predicated on the city's  
8 express decision not to enforce its permit requirement against  
9 a parochial school (the Open Bible Standard Church) allegedly  
10 indistinguishable from petitioner's facility.<sup>10</sup>

11 We reject this claim. In essence, the charge is that the  
12 city has selectively enforced its ordinance against  
13 petitioner. To be constitutionally improper, however,  
14 selectivity of enforcement must be deliberately based on an  
15 unjustifiable standard such as race, religion or other  
16 arbitrary classification. Dyler v. Boles, 368 US 448 (1962).  
17 The mere fact a city chooses to direct its enforcement efforts  
18 against one, and not other violators, does not itself render  
19 the action unconstitutional. As the Court of Appeals stated in  
20 City of Eugene v. Crooks, 55 Or App 351, 634 P2d 1373 (1981):

21 "It is clear that defendants have failed to allege  
22 that any selective enforcement against them was based  
23 upon their membership in a suspect class.  
24 Accordingly, defendants can prevail on their equal  
25 protection argument only if there are no rational  
26 basis to justify the alleged selectivity in  
enforcement. Defendants allege that plaintiff  
prosecuted their violation only because a complaint  
was received. We can easily imagine sensible reasons  
(e.g., lack of funds) why plaintiff might distinguish  
between violations of which it is generally aware and

1 violations about which a complaint is received. Such  
2 selective enforcement is not irrational." 55 Or App  
at 355. (Citations omitted).

3 Petitioner has not demonstrated the city deliberately  
4 singled it out for ordinance enforcement because of its  
5 religious beliefs. The fact an exemption was granted to  
6 another institution does not constitute the necessary  
7 proof.<sup>11</sup> Accordingly, the city's enforcement of the  
8 ordinance must be upheld if supported by a rational basis. We  
9 believe the city passes this test for the same reasons stated  
10 in City of Eugene v. Crooks, supra.

11 Based on the foregoing, the Fourth Assignment of Error is  
12 denied.

13 The city's decision is affirmed.

FOOTNOTES

1

2

3 1

In this assignment of error, petitioner appears to be asserting the constitutional rights of its members, not its own rights. Respondent makes no objection on standing or other grounds. We therefore do not consider whether the approach is permissible under ORS Chapter 197. See Benton County v. Friends of Benton County, 294 Or 79, 81-82, 653 P2d 1249 (1982).

7

2

Petitioner relies heavily on the tests set forth in Sherbert v. Varner, 374 US 398 (1963) and Wisconsin v. Yoder, 406 US 205 (1972), but we believe those cases do not provide guidance here. The cited cases involve the validity of laws which required plaintiffs to set aside their religious beliefs in order to obtain governmental benefits or to avoid governmental sanctions. Sherbert struck down a state's denial of unemployment compensation benefits to a Seventh Day Adventist who refused to work on Saturdays. Yoder struck down a state compulsory attendance law which required members of the Old Order Amish religion to send their children to public schools beyond the eighth grade, in violation of their religious beliefs.

By contrast, the present case involves a permit regulation governing the siting of a religious facility. We believe it is appropriate to analyze this sort of regulatory measure as a time, place and manner restriction on the exercise of First Amendment rights. Heffron v. International Society of Krishna Consciousness, supra.

18

3

This discussion of the relationship between the state's land use laws and religious liberty arose in the unusual context of a standing challenge. Certain respondents claimed that to grant standing to those who would challenge the incorporation would unduly interfere with respondents' exercise of religious liberty. The court noted respondents had confused standing with a challenge on the merits, 62 Or App 82, but then discussed the constitutional issue in terms which could apply in either context. For this reason we consider the opinion in Wasco County persuasive on the substantive constitutional law issue presented here.

25

26

1

4

2 Petitioner argues its school is small and will have fewer  
3 negative impacts on the neighborhood than are already  
4 associated with the church itself. We are invited to take this  
5 fact into account in striking a balance between the city's  
6 regulatory interests and petitioner's interests. However, we  
7 believe it would be incorrect to evaluate the validity of the  
8 ordinance in terms of the threat to the city's objectives  
9 presented by this specific facility. As the U.S. Supreme Court  
10 stated in Heffron v. International Society for Krishna  
11 Consciousness:

7

8 "As we see it, the Minnesota Supreme Court took too  
9 narrow a view of the state's interest in avoiding  
10 congestion and maintaining the orderly movement of  
11 fair patrons on the fairgrounds. The justification  
12 for the Rule should not be measured by the disorder  
13 that would result from granting an exemption solely to  
14 ISKCON. That organization and its ritual of sankirtan  
15 have no special claim to First Amendment protection as  
16 compared to that of other religions who also  
17 distribute literature and solicit funds." 452 US at  
18 652.

13

14 5

15 In reaching this result we accept petitioner's claim the  
16 weekday parochial school is an integral activity of the  
17 church. However, we note petitioner does not claim its  
18 religious beliefs require that this activity take place on  
19 church premises. This supports our decision to characterize  
20 the city's ordinance as a control over the location of a  
21 religious activity, rather than over the exercise of a  
22 religious belief. See Damascus Community Church v. Clackamas  
23 County, 45 Or App 1065, 1073, 610 P2d 273 (1980).

19

20 6

21 Section 10.115 of the Medford Ordinance provides:

22 "Accessory structure or use shall mean a structure or  
23 use incidental and subordinate to the main structure  
24 or use on the same lot."

25 Section 10.165 of the ordinance provides a list of  
26 accessory uses in the R-4 district. The section includes the  
27 following:

28 "f. Other accessory uses and accessory buildings  
29 and structures customarily appurtenant to

1 a permitted use, but fences shall comply  
2 with Section 10.245(19)."

3 7

4 Fundamentally, petitioner's "accessory use" claim is  
5 closely tied to its constitutional argument. That is,  
6 petitioner urges us to construe the school as an "accessory  
7 use" because to do otherwise would infringe on its  
8 constitutionally protected right to exercise its religious  
9 beliefs. In view of our disposition of the First Amendment  
10 issue, however, we can not accept this argument. The Medford  
11 ordinance clearly classifies this school as a conditional use,  
12 wholly distinct from the church. We find no constitutional  
13 defect in this regulatory approach.

9 8

10 Petitioner urges us to construe Resolution 3950 as evidence  
11 of the city's belief its ordinance was not intended to  
12 distinguish between requirements for churches and parochial  
13 schools. We decline to so construe the ordinance in light of  
14 the unambiguous distinction in the text itself. City of  
15 Hillsboro v. Housing Development Corp., 61 Or App 484, 657 P2d  
16 726 (1983).

17 We view Resolution 3950 only as a declaration of the rights  
18 of the Open Bible Standard Church under the Medford Zoning  
19 Ordinance. See Medford Assembly of God v. City of Medford, 297  
20 Or 138, 140-41, \_\_\_ P2d \_\_\_ (1984) (city procedure for  
21 ordinance interpretation is analogous to declaratory order under  
22 ORS 183.410; such orders are "binding between the agency and  
23 the petitioner on the state of facts alleged, unless it is  
24 altered or set aside by a court.") (emphasis added).  
25 Petitioner's rights vis a vis the non-conforming use claim  
26 should not be determined by reference to that resolution, but  
by the ordinance text itself.

20 9

21 See Article I, Section 20, Oregon Constitution; Section 1,  
22 Amendment XIV, U.S. Constitution. The parties have treated the  
23 state and federal constitutional provisions as co-extensive.  
For purposes of this appeal we do likewise.

24 10

25 The record indicates that in January, 1980, the city  
26 interpreted its ordinance to authorize the Open Bible Standard  
Church to operate a parochial school under the church's  
conditional use permit. See Medford Resolution 3950. The

1 resolution, which is quoted at page 9 of this opinion,  
2 expressed the interpretation in general terms, although its  
3 subject was a specific use. Six months later, the city adopted  
4 another resolution, withdrawing the previous ordinance  
5 interpretation. See Medford Resolution 4108. However, that  
6 resolution expressly provided that the Open Bible Standard  
7 Church "shall continue to enjoy the privilege of operating the  
8 school, in its presently existing facilities only, as provided  
9 in Resolution No. 3950." Neither resolution referred to  
10 petitioner.  
11

---

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
Presumably, the exemption of the Open Bible Standard Church  
from ordinance enforcement was allowed on the theory the  
institution had relied on the city's prior ordinance  
interpretation concerning its rights. The city concluded in  
this case that petitioner had not relied on the prior  
interpretation, since petitioner's school was commenced before  
the interpretation was issued.