

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

JUN 15 12 53 PM '87

1
2
3 LANE COUNTY SCHOOL DISTRICT 71)
4) Petitioner,)
5) vs.)
6 LANE COUNTY,)
7) Respondent,)
8) and)
9 JASPER MOUNTAIN CENTER,)
10) Respondent-Intervenor.)

LUBA No. 86-078
FINAL OPINION
AND ORDER

11
12 Appeal from Lane County.

13 Alan Couper, Eugene, filed the petition for review and
Larry O. Gildea, Eugene, argued on behalf of petitioner.

14 William Van Vactor, Eugene, filed a response brief and
15 argued on behalf of Respondent City.

16 William Kloos, Eugene, filed a response brief and argued on
17 behalf of Respondent-Intervenor Jasper Mountain Center. With
him on the brief were Johnson & Kloos.

18 DuBAY, Chief Referee; BAGG, Referee, participated in the
19 decision.

20 REMANDED 06/15/87

21 You are entitled to judicial review of this Order.
22 Judicial review is governed by the provisions of ORS 197.850.
23
24
25
26

1 Opinion by DuBay.

2 NATURE OF DECISION

3 This appeal challenges the county's approval of a special
4 use permit which allows Jasper Mountain Center (JMC) to expand
5 a group care home for children under 12.

6 FACTS

7 JMC operates a group care home for physically and sexually
8 abused children in a Rural Residential zone. The proposed
9 expansion will increase the maximum number of children cared
10 for from 10 to 22. The expansion project first required an
11 exception to Statewide Planning Goal 4, a comprehensive plan
12 change and a zone change from Forest to Rural Residential.
13 After the county adopted those changes, they were appealed to
14 LUBA. We affirmed the county's decision in Lane County School
15 District 71 v. Lane County, ___ Or LUBA ___, (1986) (LUBA No.
16 86-049, December 10, 1986), aff'd 84 Or App 428 (1987).

17 Petitioner objected to the expansion on the ground that it
18 will substantially increase the district's financial burden to
19 provide special education services. The district argued before
20 the county that it is a small district and cannot afford large
21 increases for special education services required by state and
22 federal law. The county responded by conditioning the
23 comprehensive plan and zone change approvals by limiting to 10
24 the number of children needing special education.

25 To carry out this provision in the ordinance, the special
26 permit included the following condition:

1 "(3) The scope of this special use permit is limited
2 to the servicing by the group care facility of 22
3 children, only 10 of which, at any one time, shall
4 require special education services at School District
5 71. For purposes of this decision, 'special education
6 services' do not include the evaluation by the
7 District of the special educational needs of the
8 children housed at the facility."

9
10 ASSIGNMENTS OF ERROR

11 Petitioner asserts two assignments of error. The first
12 alleges the exclusion of services that are to be considered as
13 special education services described in Condition 3 is
14 erroneous as a matter of law. Petitioner also alleges the
15 condition on appeal here fails to carry out the comprehensive
16 plan and zone change approvals. We combine our discussion of
17 these assignments of error.

18 Petitioner contends that statutorily mandated special
19 education services include evaluation and testing children to
20 determine their eligibility for placement in a program of
21 specially designed instruction. According to petitioner, the
22 effect of the county's exclusion of these services in its
23 condition negates the purpose of the condition in the ordinance
24 approving the zone and plan changes.

25 The ordinance approving the comprehensive plan change (PA
26 900-A) states:

 "The County finds that there is an impact if there is
 not a cap placed on the number of children in the
 facility who need special education. The county
 places that cap at 10 as a condition of the zone
 change and plan amendment. Since the facility has a
 non-conforming use right to shelter 10 children, the
 expansion to 22 children does not increase the school
 district's potential liability for special education

1 beyond what it is today but it does permit the
2 facility to take on 12 additional non-special
3 education students. This means of the 22 children in
4 this expansion no more than 10 can be special
5 education students unless there is education provided
6 by the facility that is accepted by the Department of
7 Education." Record at 155.

8 The ordinance provision sets forth in specific terms that
9 no more than 10 children at the expanded facility are to
10 receive special education.¹ Any provision in the special use
11 permit that would authorize special education for more than 10
12 JMC residents is less restrictive than the condition imposed by
13 Ordinance PA 900-A and would violate the ordinance. It follows
14 that resolution of petitioner's challenge depends on whether
15 the exclusion in the special use permit will allow more than 10
16 children residing at the facility to receive special
17 education.

18 To make this analysis first requires a determination what
19 services are within the scope of special education as used in
20 PA 900-A. Special education is not defined in any county
21 ordinances, including Ordinance PA 900-A. However, Ordinance
22 PA 900-A does explain the rationale for the condition limiting
23 the number of students eligible to receive special education.
24 It notes that ORS 339.185(1) requires admission of JMC
25 residents to public schools, and that ORS 339.185(2) requires
26 the school district to provide appropriate education that
includes:

"the identification and evaluation of such children
for purposes of determining their eligibility as
handicapped children to receive special education

1 services enumerated in ORS 343.035(4) and 343.650(2)."
2 The findings in Ordinance PA 900-A add that the 10 student
3 cap

4 "is a reasonable accommodation in balancing the public
5 interest in providing shelter care facilities and
6 protecting Lowell School District taxpayers from open
7 ended liability." Record at 155.

8 As we read these provisions, the county imposed the
9 condition in Ordinance PA 900-A to protect petitioner from
10 excessive financial burdens imposed by state law. Special
11 education is defined by state law as follows:

12 "(4) 'Special education' means specially designed
13 instruction to meet the unique needs of a handicapped
14 child, including regular classroom instruction,
15 instruction in physical education, home instruction,
16 related services, and instruction in hospitals,
17 institutions and special schools." ORS 343.035(4).

18 This definition includes "related services" as a component
19 of special education. The definition of related services in
20 the statute lists such items as transportation, special
21 equipment, medical services for diagnostic and evaluation
22 services and includes "early identification and assessment of
23 handicapping conditions in children." ORS 343.035(5).

24 Although the county did not incorporate the statutory
25 definition in PA 900-A, nothing in the ordinance indicates an
26 intention to utilize a different definition.

27 Evaluation of some handicapping conditions in children is
28 not an informal procedure limited to observation of behavior
29 and classroom performance. Evidence in the record includes a
30 letter from the supervisor of a provider of special education
31 services for children who are seriously emotionally disturbed.

1 The program director describes the identification of seriously
2 emotionally disturbed students as a formal procedure that
3 begins with referral of the child for evaluation because of
4 learning or behavioral problems in the school. The director
5 explains:

6 "This process involves a multi-disciplinary team
7 composed of the child's teacher, parents or surrogate
8 parents, school psychologist and other educational
9 professionals who meet to consider the data gathered
10 regarding the needs of the child. By law, this
11 process must be complete within 60 days of the formal
12 referral. This process involves extensive collection
13 of direct observational data, testing data, and
14 historical data regarding the child. The school
15 psychologist typically conducts the investigation with
16 the assistance of other school professionals, such as
17 speech and hearing professionals or the school nurse.
18 In addition, a medical examination is required by law
19 for children identified as seriously emotionally
20 disturbed." Record Item 41 at 7-3.

21 After gathering information, the evaluation process ends
22 with a classification determination and preparation of an
23 individual education plan for the child. Record Item 41 at
24 7-3.

25 This evaluation process to identify handicapping conditions
26 in children would not be considered special education under the
27 terms of the special use permit. The evaluation would be
28 considered special education defined by state law under the
29 condition in Ordinance PA 900-A.

30 Respondents contend that the federal, rather than state,
31 definition of special education should control. The
32 definition, in 20 U.S.C. 1401, is similar to the Oregon statute
33 but omits related services.

1 As we noted above, Ordinance PA 900-A refers to the
2 financial impact on the district imposed by state law.
3 Although portions of ORS Chapter 343 have been adopted to
4 conform the Oregon statutes to federal law, see Stewart v.
5 Salem School Dist. 24J, 65 Or App 188, 670 P2d 1048 (1983), we
6 find no reference to the federal law in Ordinance PA 900-A.
7 Respondents contention that the federal definition must apply
8 is rejected.

9 We interpret Ordinance PA 900-A to rely on the definition
10 of special education as defined in state law. The definition
11 includes identification and assessment of handicapping
12 conditions in children. By excluding evaluation of special
13 educational needs from the scope of special education services
14 provided by the district, children being evaluated for
15 classification as handicapped children would not be counted in
16 the cap formula established in Ordinance PA 900-A. By
17 restricting the definition of special education in the special
18 use permit, the county has misconstrued the limitation on use
19 established by the ordinance. The error is grounds for remand.

20 The decision is remanded.
21
22
23
24
25
26

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1
Since special education services must be provided at state schools, the district may not refuse such services to any resident of the JMC facility attending school in the district. The import of the condition, then, is that it requires JMC to reduce the number of its residents receiving special education services in the event the number exceeds 10.