

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner challenges a City of North Bend (city) decision
4 granting a conditional use permit to the Oregon Department of
5 Corrections. The conditional use permit authorizes operation
6 of a correctional facility in downtown North Bend.

7 INTERVENTION

8 In addition to the City of North Bend, petitioner named
9 Coos County and the Oregon Department of Corrections
10 (department) as respondents. At the time a notice of intent to
11 appeal is filed with LUBA, the local government or state agency
12 that adopted the challenged decision is the only respondent.
13 Other persons are permitted to intervene on the side of
14 petitioner or respondent and participate in the LUBA appeal
15 proceeding if they meet the standards for intervention set
16 forth in ORS 197.830(5) and OAR 661-10-050.¹

17 Coos County did not appear in this proceeding. The
18 department filed a "respondent's brief." Presumably because it
19 was named in the notice of intent to appeal as a respondent,
20 the department did not file a motion to intervene. However,
21 the department was the applicant below, appeared during the
22 local proceedings and, therefore, meets the requirements for
23 intervention. ORS 197.830(5)(b); OAR 661-10-050. All parties
24 agreed at oral argument that the department would be considered
25 an intervenor-respondent.

26 ///

1 FACTS

2 The approved conditional use permit authorizes the
3 department to remodel the recently vacated Coos County jail
4 facility in North Bend. The department will use the structure
5 as a correctional facility to house chronic parole violators
6 from all parts of the state. The property is owned by Coos
7 County and is zoned Central Commercial (C-C). Under North Bend
8 Zoning Ordinance (NBZO) Section 50, the same conditional uses
9 allowed in the General Commercial (C-G) zone are allowed in the
10 C-C zone. NBZO Section 44 provides, as pertinent:

11 "In the C-G zone the following uses and their
12 accessory uses are permitted when authorized in
13 accordance with Sections 70 to 75 [concerning
14 conditional uses]:

15 "(1) Boarding house;

16 "(2) Church;

17 "(3) Governmental structure or use;

18 "(4) Hospital, sanitarium, rest home;

19 "(5) Improvement of an existing dwelling;

20 "(6) Processing, packaging, or storage of food or
21 beverages, but not including processes involving
22 distillation, fermentation, slaughtering, or
23 rendering of fats or oils;

24 "(7) Veterinary clinic and hospital;

25 "(8) Sheet metal shops;

26 "(9) Building supply outlets;

27 "(10) Day Nursery;

28 "(11) Manufacture of goods for retail sale on the
29 premises only; and

30 ///

1 "(12) Utility substations or pumping stations."
2 NBZO Section 44.

3 In approving the conditional use permit, the city
4 determined (1) the proposed correctional facility is a
5 "governmental structure or use," and (2) NBZO Section 70 to 75
6 are satisfied.

7 FIRST ASSIGNMENT OF ERROR

8 "The City of North Bend has failed to apply or address
9 the approval criteria required under the City's
10 ordinances for the approval of a conditional use."

11 SECOND ASSIGNMENT OF ERROR

12 "The City has failed to make findings that the
13 proposed use is appropriate, desirable, convenient, or
14 necessary in the district, as required by Section 70
15 of the ordinance."

16 Under his first two assignments of error, petitioner argues
17 NBZO Section 70 requires the city to find the proposed
18 correctional facility is "appropriate, desirable, convenient or
19 necessary in the [C-C] district * * *." Petition for
20 Review 9. Petitioner contends the city failed to adopt
21 adequate findings supported by substantial evidence showing
22 compliance with this requirement in NBZO Section 70.² We
23 address petitioner's code interpretation challenge before
24 turning to his challenge to the city's findings and the
25 evidentiary support for those findings.

26 A. Interpretation of NBZO Section 70

 NBZO Section 70 provides, in pertinent part:

"Authorization to Grant or Deny Conditional Uses.
 Uses, designated in this ordinance as conditional uses
 may be permitted, enlarged, or otherwise altered upon

1 authorization by the Planning Commission in accordance
2 with the standards and procedures set forth in Section
3 70 to 75. Conditional uses are those which may be
4 appropriate, desirable, convenient, or necessary in
5 the district [in] which they are allowed, but which by
6 reason of their height or bulk or the creation of
7 traffic hazards or parking problems or other adverse
8 conditions may be injurious to the public safety,
9 welfare, comfort, and convenience unless appropriate
10 conditions are imposed. Conditional uses shall be
11 allowed provided that they comply with all of the
12 standards and conditions imposed under the provisions
and procedures of this ordinance, any other applicable
ordinance of the City and laws of the State of
Oregon. These conditions may include increasing the
required lot size or yard dimensions, limiting the
height of buildings, controlling the location and
number of vehicle access points, increasing the street
width, increasing the number of off-street parking and
loading spaces required, limiting the number, size,
and location of signs, and requiring screening and
landscaping to protect adjacent property * * *."
(Emphasis added).

13 Petitioner argues, based on the language of NBZO Section 70
14 emphasized above and language in related sections of the
15 NBZO,³ the city retains both the discretion and the
16 obligation to determine whether an individual conditional use
17 permit application is "appropriate, desirable, convenient or
18 necessary in the district [in which it is allowed] * * *."
19 NBZO Section 70. In other words, according to petitioner, the
20 above emphasized language in NBZO Section 70 constitute
21 mandatory approval criteria which the city is required to
22 address and demonstrate compliance with in its findings. See
23 ORS 227.173(1).⁴

24 We also understand petitioner to argue the language in NBZO
25 Section 70, and in Sections 71-75, which envision the
26 possibility that a conditional use permit might be denied,

1 would be rendered meaningless if Section 70 is interpreted
2 not to require a determination that the proposal is
3 "appropriate, desirable, convenient or necessary * * *."
4 Petitioner argues the Oregon Supreme Court's decision in
5 Anderson v. Peden, 284 Or 313, 587 P2d 59 (1978), "is
6 dispositive of the issue in [the first assignment of
7 error]." ⁵ Petition for Review 9.

8 Petitioner argues the zoning ordinance provisions at issue
9 in this proceeding are similar to those at issue in Anderson v.
10 Peden, where the Oregon Supreme Court concluded the county
11 reserved authority to render discretionary decisions on
12 conditional use requests. Petitioner recognizes that while a
13 local government may retain authority to render discretionary
14 decisions on conditional use permits, the local government may
15 not exercise unfettered discretion. See Anderson v. Peden,
16 supra at 318; Columbia River Peoples Utility District v. City
17 of Columbia City, 9 Or LUBA 198, 203 (1983); ORS 227.173(1);
18 ORS 215.416(8). Rather, petitioner argues that just as it was
19 appropriate for the county in Anderson v. Peden to look to the
20 purpose statement in its zoning ordinance to identify standards
21 by which to judge the requested conditional use permit in that
22 case, the city must in this case interpret the cited language
23 in NBZO Section 70 as establishing conditional use permit
24 approval standards.

25 Petitioner bolsters his argument under the first assignment
26 of error by contending that unless the city must apply

1 NBZO Section 70 in the way he argues, any governmental use
2 "such as a hazardous waste disposal site, could be easily sited
3 in the downtown of North Bend * * *." Petition for
4 Review 12.⁶

5 Respondent and intervenor (respondents) dispute
6 petitioner's interpretation of NBZO Section 70. According to
7 respondents, the city is not required to determine, on a case
8 by case basis, whether a proposed conditional use is
9 "appropriate, desirable, convenient, or necessary in the
10 district * * *." According to respondents, the city interprets
11 this language in NBZO Section 70 to require that the uses
12 listed as conditional uses in each zoning district be
13 "appropriate, desirable, convenient, or necessary in the
14 district * * *." Under the city's interpretation, the city
15 determined "governmental structures or uses," and the other
16 uses listed as conditional in NBZO Section 44, are
17 "appropriate, desirable, convenient, or necessary in the
18 district" when it listed these uses as conditional uses in the
19 C-G and C-C zoning districts. Respondents argue that if uses
20 are listed as conditional uses in a zoning district, they must
21 be allowed if "they comply with all of the standards [of the
22 NBZO], any other applicable ordinance of the city and laws of
23 the State of Oregon." NBZO Section 70.

24 As the Oregon Supreme Court explained in Anderson v. Peden,
25 supra,

26 "zoning law is not common law but a branch of state

1 and local legislation and administrative law, created
2 by particular statutes, rules, charters, comprehensive
3 plans, ordinances, and resolutions, and the criteria
4 governing such matters as 'conditional uses' must be
sought there rather than cases from other cities,
counties, or states." (Footnote omitted). Id at 315.

5 Accordingly, it is the language in NBZO Section 70 through 75,
6 quoted supra, that governs our decision concerning the proper
7 interpretation of NBZO Section 70.⁷

8 Initially, we agree with petitioner that the language in
9 NBZO Section 70 and related NBZO Sections 71 to 75 envision the
10 possibility that a conditional use permit may be denied. NBZO
11 Sections 70 and 72 explicitly refer to denial. However, we
12 disagree with petitioner that the authority to deny a requested
13 conditional use permit is rendered meaningless under the city's
14 interpretation of NBZO Section 70. For instance, the
15 application of several of the standards in NBZO Section 75,
16 quoted supra at n 3, could result in denial of a particular
17 conditional use permit. See, e.g., NBZO Section 75(6) ("* * *
18 service stations may be permitted as a conditional use if
19 adjacent property is not adversely affected * * *"); NBZO
20 Section 75(7) (Waiver of minimum lot size allowed only if the
21 waiver "will not have a detrimental affect on adjoining
22 property").⁸

23 The language petitioner would have the city impose as a
24 mandatory approval standard easily could have been included in
25 NBZO Section 75, but was not. While this fact is not
26 dispositive, it supports the city's position that the language

1 in NBZO Section 70 is not applied as mandatory approval
2 standards applicable to individual conditional use permit
3 applications.⁹

4 Construing NBZO Section 70 as a whole, we agree with
5 respondents' interpretation of that section. The first
6 sentence of NBZO Section 70, quoted supra, simply provides that
7 uses identified in the NBZO as conditional uses may be allowed
8 following the procedures and applying the standards set forth
9 in NBZO Section 70 to 75. The second sentence describes the
10 nature of conditional uses. We agree with respondents'
11 interpretation that the time for the city to determine whether
12 a type of use is "appropriate, desirable, convenient, or
13 necessary" in a zoning district, but may require conditions, is
14 when it adopts or amends the list of conditional uses for a
15 zoning district.

16 On the other hand, the third and fourth sentences of
17 NBZO Section 70 identify the requirements for approving uses
18 that are listed as conditional uses in the NBZO. The third
19 sentence requires compliance with the standards of and
20 conditions that may be imposed under (1) the NBZO (e.g.,
21 Section 75 and the applicable zoning district standards), (2)
22 any other applicable city ordinance (e.g., the comprehensive
23 plan), and (3) state statutes and rules.¹⁰ The fourth
24 sentence provides examples of the kinds of conditions that may
25 be applied to assure applicable standards are met.

26 We conclude the city's interpretation is more consistent

1 with the language in NBZO Section 70 and the overall structure
2 of NBZO Sections 70 to 75.¹¹ We find the city's
3 interpretation to be reasonable and correct. McCoy v. Linn
4 County, 90 Or App 271, 275-276, 752 P2d 323 (1988).

5 Because we accept as correct the city's interpretation of
6 NBZO Section 70, we deny the first assignment of error. Our
7 denial of the first assignment of error also requires denial of
8 the second assignment of error, because the challenged findings
9 were not required. McCoy v. Linn County, ___ Or LUBA ___
10 (LUBA No. 87-046, December 15, 1987), slip op 9-10; Bonner v.
11 City of Portland, 11 Or LUBA 40, 52 (1984). However, we will
12 consider the parties' arguments under the second assignment of
13 error to determine whether the findings the city did adopt may
14 provide an additional basis for sustaining the city's decision,
15 in the event petitioner's interpretation of NBZO Section 70 is
16 correct.

17 B. Findings that the Proposed Use is Appropriate and
18 Necessary

19 Petitioner argues that the city has not adopted findings
20 demonstrating that the proposed use is "appropriate, desirable,
21 convenient, or necessary in the district." Petitioner points
22 out there is evidence in the record that the proposed facility
23 would have negative impacts on the district.

24 Citing from a report examining the impacts of correctional
25 facilities on the City of Salem (Salem Report), petitioner
26 points out several types of negative impacts. First, the

1 report shows families of correctional clients had numerous
2 police contacts running "the spectrum from suspect to victim."
3 Record 65. Second, petitioner notes the phenomenon of
4 institutional "groupies" who locate near correctional
5 facilities. Third, the report suggests that prisoners tend to
6 remain in the area upon release rather than returning to the
7 their former homes. Finally, petitioner points out that
8 whereas the Salem study concerned a city much larger than North
9 Bend, and with a concentration of correctional facilities, the
10 proposed "facility is proportionately as large to North Bend as
11 the state facilities are to the City of Salem." Petition for
12 Review 20. Petitioner argues similar impacts therefore can be
13 expected.

14 Petitioner also argues the proposed program will do nothing
15 to assist prisoners to rejoin the community upon release.
16 Petitioner cites a study by the Oregon Bureau of Governmental
17 Research and Service which shows there is a relatively high
18 risk of escape from facilities such as the one proposed.
19 Citing the Bureau of Governmental Research and Service study,
20 petitioner argues it is clear that the city will experience
21 increased crime rates by virtue of the proposed prison.
22 Record 307.

23 Petitioner argues the city may not simply find as it did
24 that the "circumstances cited in the [Salem] report are not
25 present here." Record 5. Petitioner argues this finding is
26 not sufficient to show similar impacts will not result.

1 Petitioner contends this is particularly so in view of the
2 other facilities in the area including the Oregon Department of
3 Corrections Work Release Center in North Bend, the minimum
4 security prison to be located in Hauser and the Coos County
5 jail in Coquille.

6 Petitioner argues the only finding adopted with respect to
7 these criteria concludes that the proposed facility is
8 "necessary in the area." Petitioner contends that this finding
9 is nonresponsive to NBZO Section 70. According to petitioner,
10 NBZO Section 70 requires that the use be necessary in the C-C
11 district. Petitioner argues the record shows that adequate
12 jail facilities exist to serve the C-C district.

13 Intervenor notes that the terms cited by petitioner as
14 approval standards in NBZO Section 70 are stated in the
15 disjunctive -- "appropriate, desirable, convenient, or
16 necessary." Intervenor also notes the city adopted the
17 following findings:

18 "(7) The proposed use of the facility is appropriate
19 under Section 70 because it is a continuation of
20 the conditional use of the premises as a
21 correctional facility in a zone allowing such
22 use. There are no changes to the height or bulk
23 of the premises. Traffic hazards or parking
24 problems can be remedied by imposing
25 conditions. Appropriate conditions will also
26 adequately address any adverse conditions which
may be injurious to public safety, welfare,
comfort and convenience, as discussed in these
findings." Record 4-5.

"(10) Evidence in the record submitted by law
enforcement officials and members of the
judiciary support the proposed use as necessary
in this area. City police services will also

1 benefit by use of the facility to temporarily
2 house arrestees. The City Council therefore
3 finds the proposed use is necessary to address
concerns about public safety and welfare."
Record 6.

4 Intervenor argues that finding (7) is sufficient to establish
5 that the proposed facility is "appropriate" and finding (10) is
6 sufficient to establish that it is "necessary."

7 We agree with intervenor that even if the city were
8 required to find the proposed use is "appropriate, desirable,
9 convenient, or necessary in the district," an adequate finding,
10 supported by substantial evidence in the record, that the
11 proposal meets any one of the four would suffice.

12 1. Appropriate

13 We disagree with petitioner's apparent assumption that the
14 city could only find the proposed facility is appropriate if it
15 will not have adverse impacts of the type he foresees. In
16 other words, we do not read NBZO Section 70 to preclude a
17 finding that the proposed facility is appropriate simply
18 because some of the impacts petitioner fears, based largely on
19 the Salem Report, are possible.

20 Finding (7) notes the structure on the property has been
21 used as a jail in the past. The finding also notes that
22 conditions have been imposed to limit the department's use of
23 the facility. We read the city's findings to conclude that
24 because this is a use similar to the prior use of the property,
25 and because the city council has imposed conditions to address
26 concerns about "public safety, welfare, comfort, and

1 convenience," the proposed use is appropriate. Assuming the
2 city was required to find the proposal is appropriate, we
3 believe the above quoted findings are sufficient and supported
4 by the record.

5 Of course, this does not mean the proposed use will have no
6 adverse impacts. It simply means that in the city council's
7 view, considering the past use of the site and the conditions
8 imposed, the use will be appropriate.

9 2. Necessary

10 Intervenor and respondent cite documents in the record from
11 members of the judiciary and law enforcement officials
12 supporting a need for the proposed facility. Petitioner does
13 not contend that this evidence is not substantial evidence that
14 a facility of the type proposed is needed. Rather, petitioner
15 argues the language in NBZO Section 70 requires the proposed
16 use be "appropriate, desirable, convenient, or necessary in the
17 district," not the larger region or the state as a whole.

18 The NBZO includes no statement of purpose for the C-C
19 district. However, looking at the conditional uses allowed in
20 the C-C district, it is obvious it was not intended that
21 conditional uses be limited to those satisfying needs generated
22 solely within the C-C district. See NBZO Section 44, quoted
23 supra. We do not believe the city intended to allow only
24 hospitals, governmental structures, veterinary clinics, and
25 manufacturing uses which meet a need for such uses generated
26 solely within the C-C district.

1 We need not determine whether the city could adopt the
2 extremely parochial view of the C-C district the petitioner
3 argues. If the city views appropriate conditional uses within
4 its C-C district to include those meeting needs that are in
5 part regional or statewide, we find nothing in the language of
6 NBZO Section 70 to preclude that interpretation.

7 The second assignment of error is denied.

8 THIRD ASSIGNMENT OF ERROR

9 "The conditions imposed on the use by the City of
10 North Bend do not mitigate against impacts that are
11 injurious to the public safety, welfare, comfort, and
12 convenience."

13 Petitioner argues that NBZO Section 70 requires that the
14 city impose conditions on its conditional use permit approval
15 that will "mitigate against any impact that would be injurious
16 to the public safety, welfare, comfort and convenience."

17 Petition for Review 23. Petitioner recognizes that the
18 conditions imposed by the city attempt to mitigate some of the
19 potential adverse effects of the proposed facility.¹²

20 However, petitioner argues that the conditions are not adequate
21 for that purpose. In addition, petitioner argues the city has
22 not imposed conditions to address escapes, relocation of
23 prisoner families, groupies, or an increased crime rate.

24 Petitioner argues the likelihood of these impacts is well
25 documented in the record and such impacts will be "injurious to
26 the public safety, welfare, comfort or convenience."

27 NBZO Section 70. Petitioner further argues:

1 "The city has made no affirmative finding that the
2 conditions will mitigate against conditions which will
3 be injurious to the public safety, welfare, comfort or
4 convenience." Petition for Review 24.

5 Petitioner's argument under this assignment is based on the
6 assumption that NBZO Section 70 establishes as a conditional
7 use permit approval standard that the proposed use not have any
8 adverse impact on the public safety, welfare, comfort and
9 convenience. In our view, petitioner again misreads the effect
10 of NBZO Section 70.¹³ As we explained under the first
11 assignment of error, NBZO Section 70 does not itself establish
12 mandatory approval standards for conditional use permits,
13 rather it refers to applicable provisions elsewhere in the
14 code, city ordinance and state statute. There are, however,
15 circumstances in which the NBZO does make elimination of
16 adverse impacts an approval standard for a conditional use
17 permit. See, e.g., NBZO Section 75(6) and (7). It simply does
18 not do so for the conditional use appealed in this case.¹⁴

19 Because NBZO Section 70 does not impose upon the city an
20 affirmative duty to assure that the proposed use will not have
21 any adverse impacts, or create a potential for injury to public
22 welfare, petitioner's argument under the third assignment of
23 error provides no basis for reversal or remand. The third
24 assignment of error is denied.

25 FOURTH ASSIGNMENT OF ERROR

26 "The City has failed to make findings that the
proposed conditional use complies with the applicable
ordinances of the City and the laws of the State of
Oregon."

1 Petitioner argues NBZO Section 70 requires that the city
2 comply with the "laws of the State of Oregon." According to
3 petitioner, this means the conditional use must be legally
4 permissible under state and federal law. Petitioner cites a
5 consent decree, dated March 12, 1982, in Orvin C. Stanwood v.
6 Jack L. Beebe, Robert A. Emmett, Edward E. Stevenson, Leslie D.
7 Miller, Gordon Ogden, Verl Tarno and Coos County, a political
8 subdivision of the State of Oregon, Case No. 72-981, in the
9 United States District Court for the District of Oregon.
10 Record 103. According to petitioner, this consent decree
11 provides that Coos County is not permitted to use the site as a
12 jail because it does not meet minimum federal constitutional
13 standards for a jail. Petitioner argues the city council in
14 approving the conditional use permit erroneously determined the
15 consent decree had no bearing on its conditional use permit
16 decision. Petitioner argues the State of Oregon is in "direct
17 contractual privity with Coos County." Petition for
18 Review 25. Accordingly, petitioner argues the city's decision
19 is inconsistent with the consent decree and violates NBZO
20 Section 70.

21 Respondent and intervenor answer that the consent decree
22 deals with how Coos County administered and operated the jail.
23 They respond that neither the City of North Bend nor the state
24 are bound by the decree. According to respondent and
25 intervenor, the consent decree is a settlement of a civil suit
26 to which neither were a party. As such, they argue the consent

1 decree provides no basis for denial of the requested
2 conditional use permit.

3 We agree with intervenor and respondent. NBZO Section 70
4 refers only to state law, whereas the consent decree apparently
5 is based on federal constitutional law. In addition, we fail
6 to see how the possible impact of a consent decree in a suit to
7 which neither the city nor the state were a party could affect
8 the city's decision under NBZO Section 70 on the state's
9 conditional use permit application.

10 The fourth assignment of error is denied.

11 The city's decision is affirmed.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

FOOTNOTES

1

2

3

1

ORS 197.830(5)(b) provides in pertinent part:

4

"* * * persons who may intervene in and be made a party to the review proceedings as set forth in subsection (1) of this section, are:

5

6

"(A) The applicant who initiated the action before the local government, special district or state agency; or

7

8

"(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

9

10

OAR 661-10-050(1) provides in pertinent part:

11

"The applicant and any person who appeared before the local government, special district or state agency may intervene in a review proceeding before the Board * * *."

12

13

14

2

Although petitioner's second assignment of error alleges only failure to adopt required findings, it is obvious from petitioner's arguments under his second assignment of error that petitioner also claims the findings the city did adopt are not supported by substantial evidence. Accordingly, we will treat the second assignment of error as both a findings and a substantial evidence challenge.

15

16

17

18

19

20

3

The other NBZO sections applicable to conditional use permits are as follows:

21

22

"Section 71. Application for a Conditional Use. A property owner or his authorized agent may initiate a request for a conditional use or the modification of an existing conditional use by filing an application with the City Recorder using forms prescribed for the purpose. The application shall be accompanied by a site plan, drawn to scale, showing the dimensions and arrangement of the proposed development and names and addresses of property owners within 300 feet * * *."

23

24

25

26



1 "Section 72. Public Hearing on a Conditional Use.
2 Before action shall be taken to permit or deny a
3 conditional use, a hearing shall be held before a
4 hearings officer, but if there is no hearings officer
5 then before the Planning Commission. The hearing shall
6 be held within 40 days after the application for the
7 conditional use is filed * * *.

8 "Section 73. Recess of Hearing. The hearings officer
9 or the Planning Commission may recess a hearing on a
10 request for a conditional use in order to obtain
11 additional information * * *.

12 "Section 74. Notification of Action. Within five
13 days after a decision has been rendered, the City
14 Recorder shall provide the applicant with written
15 notice of the City's action on the request for a
16 conditional use.

17 "Section 75. Standards Governing Conditional Uses. A
18 conditional use shall comply with the standards of the
19 zone in which it is located except as these standards
20 may have been modified in authorizing the conditional
21 use or as otherwise provided as follows:

22 "(1) Yards. In a residential zone yards shall be
23 a least two-thirds the height of the
24 principal structure * * *.

25 "(2) Height exception. A church or governmental
26 building may be built to exceed the height
27 limitations of the zone in which it is
28 located to a maximum height of 50 feet if
29 the total floor area of the building does
30 not exceed one and a half times the area of
31 the site and if the yard dimensions in each
32 case are equal to at least two-thirds of the
33 height of the principal structure.

34 "(3) Limitation on access to property and on
35 openings to buildings. The City may limit
36 or prohibit vehicle access from a
37 conditional use to a residential street and
38 it may limit or prohibit building openings
39 within 50 feet of residential property in a
40 residential zone * * *.

41 * * * * *

42 "(5) Schools

43 ///

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

"(a) Nursery schools shall provide and maintain at least 100 square feet of outdoor play area per child. A sight-obscuring fence at least four feet but not more than six feet high shall separate the play area from abutting lots.

"(b) Primary schools shall provide one acre of site area for each 90 pupils or one acre for every three classrooms, whichever is greater.

"(c) Elementary schools shall provide one acre of site area for each 75 pupils or one acre for every two and a half classrooms, whichever is greater.

"(6) Service stations. A service station may be permitted as a conditional use if adjacent property is not adversely affected by noise, smoke, odors, or glare and if the service station does not interfere with the shopping pattern of a retail business district.

"(7) Utility substation or pumping substation. In the case of a utility substation or pumping substation the City may waive the minimum lot size requirement only if it is determined that the waiver will not have a detrimental effect on adjacent property.

"(8) Row houses. Provision shall be made for row houses to have adequate access to rear yard areas.

"(9) Trailer and Mobile Home Parks.

"(a) Trailer and mobile home parks shall comply with all rules, regulations and standards of the State of Oregon.

"* * * * *

"(f) The minimum site size for a trailer or mobile home park is three acres * * *."

"* * * * *." NBZO Sections 71 to 75.

///

1

4

2

ORS 227.173(1) provides:

3

"Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

4

5

6

7

8

A nearly identical provision applicable to counties appears at ORS 215.416(8).

9

10

5

In Anderson v. Peden, supra, the Oregon Supreme Court observed the term "conditional use" can convey different meanings. In that case, the Supreme Court offered three possible meanings: (1) the use is permitted outright if certain conditions identified in the land use regulations or plan "exist or are satisfied," (2) the use is permitted outright, but the local government has reserved in its ordinance authority to impose special conditions on a case by case basis, and (3) approval of the use is discretionary. Id at 318. In practice, conditional use provisions frequently are a hybrid of two or more of the above possibilities involving both discretionary approval standards and reserved power to impose conditions of approval.

17

18

6

Petitioner also suggests in a footnote that the proposed facility is unlike other conditional uses listed in NBZO Section 44 and, therefore, should not be considered a "governmental structure or use." As intervenor points out, the proposed facility will be used by government agencies for government purposes. We find any dissimilarity between the proposed correctional facility and certain other uses listed in Section 44 to be an insufficient basis for concluding the proposed use is not a governmental structure or use. Cf Bennett v. City of Dallas, ___ Or LUBA ___ (LUBA No. 88-078, February 7, 1989).

24

25

7

It would be helpful if local jurisdictions would make it clearer in their zoning ordinances which provisions are

26

1 approval standards and which provisions are not approval
standards. See Anderson v. Peden, supra, 316; Pardee v. City
2 of Astoria, ___ Or LUBA ___ (LUBA Nos. 88-049/050/051,
December 14, 1988); Miller v. City of Ashland, ___ Or LUBA ___
3 (LUBA No. 88-038, November 22, 1988).

4 _____
8

5 The city found that the approval standards in NBZO Section
75 were either met by the proposal or were inapplicable.
6 Petitioner did not challenge this finding.

7 _____
9

8 We note the zoning ordinance at issue in Anderson v. Peden,
supra, also had a separate section of standards governing
9 conditional uses. Id at 317. However, while the Oregon
Supreme Court in that case upheld the county's decision to look
10 elsewhere in its zoning ordinance for additional approval
standards, it did not hold the county was required to do so.

11 _____
12 10

13 Petitioner points out that the third sentence of NBZO
Section 70 was adopted by Ordinance No. 1635, dated
September 22, 1981, and replaced the following language:

14 "In permitting a conditional use or the modification
15 of an existing conditional use, the city may impose,
in addition to those standards and requirements
16 expressly specified by this ordinance, any additional
conditions which the city considers necessary to
17 protect the best interests of the surrounding property
or the city as a whole."

18 We find this change, to the extent it is significant at all,
19 undercuts petitioner's argument that the current language of
NBZO Section 70 establishes independent approval criteria and
20 supports the respondents' contrary reading of NBZO Section 70.

21 _____
11

22 We also believe the city's interpretation is more
consistent with the requirement in ORS 227.173(1) that
23 decisions on permit applications

24 "be based on standards and criteria which shall be set
forth in the zoning ordinance or other appropriate
25 ordinance or regulation * * *."

26 We believe the intent of this statute is to enable parties in

1 land use proceedings to identify with reasonable certainty the
2 standards that will result in approval or denial of a permit
3 application. We note that at the time the Supreme Court
4 decided Anderson v. Peden, ORS 215.416(8), which applies the
5 same requirement in ORS 227.173(1) to counties, was not
6 applicable to the county's decision.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

12

The conditions imposed by the city include:

"(1) The user of the jail facility shall maintain sufficient parking on the premises so no staff parks on the street and shall schedule visits with the prisoners, except for clergy, attorneys, and health professionals, at times other than 8:00 am to 6:00 pm on weekdays, and 8:00 am to 2:00 pm on Saturdays.

"(2) The user of the jail facility shall maintain either equipment or procedures which will prevent bath or bed linens, clothing, excessive grease, and other prohibited materials from entering the sewer system.

"(3) The user of the jail facility will confine visits with the prisoners to the jail facility. When the prisoners are outside the jail facility for their public service or related jobs, they will be adequately supervised by a Corrections employee.

"(4) No felons under commitment for crimes involving personal violence will be incarcerated in this facility as part of the program proposed by the applicant.

"(5) The prisoners, upon their release, will be returned to their home of record and parole office of record, or county of commitment.

"(6) If the jail facility should be closed, inmates will be transferred to another state facility or returned to their county of commitment.

"* * * * *." Record 8-9.

13

It appears from the city's decision that it may partially share petitioner's confusion on this point. See, finding (7),

1 quoted supra. The city does not explain in its decision upon
2 which approval standards it bases its conditions. See, n 12.
3 The city may have based one or more of its conditions solely on
4 the language in NBZO Section 70, rather than on the approval
5 standards in NBZO Section 75, other portions of the code or
6 state statutes or rules. However, neither petitioner nor
7 intervenor-respondent challenges the city's authority to impose
8 the conditions it did impose.

5

6 14

7 Petitioner's position might have merit were the approval
8 standards applicable to the appealed conditional use permit
9 worded differently. For example, in West Hills and Island
10 Neighbors v. Multnomah County, ___ Or LUBA ___ (LUBA
11 No. 83-018, June 29, 1983), aff'd 68 Or App 782, 683 P2d 1032
12 (1984), the county was required by its zoning ordinance to find
13 a number of approval standards were met, including the
14 following:

11 "(A) Is consistent with the character of the area;

12 "(B) Will not adversely affect natural resources;

13 "* * * * *

14 "(F) Will not create hazardous conditions;

15 "* * * * *." Id at 784.

16 A local government might have to impose conditions eliminating
17 virtually any adverse impact to insure such approval standards
18 are met.

18

19

20

21

22

23

24

25

26