BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANINE SARTI, BRUCE KUBLER, JOE DeFRANCESCO, JOAN DeFRANCESCO, LYNN RYAN, MARGARET RYAN, ANN HERTZBERG, MARY SHARP, RUBY PAULSON, ANN SAVAGE, ROBERT BANKHEAD, and MARTY BANKHEAD,	)	
Petitioners,	)	LUBA No. 90-116
vs.	)	FINAL OPINION AND ORDER
CITY OF LAKE OSWEGO,	)	
Respondent,	)	
and	)	
BEV LINDEMANN,	)	
Intervenor-Respondent.	)	

Appeal from City of Lake Oswego.

Steven W. Abel, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Schwabe Williamson & Wyatt.

John H. Hammond, Jr., West Linn, filed a response brief and argued on behalf of respondent. With him on the brief was Hutchinson, Hammond, Walsh, Herndon & Darling.

J. Kristen Pecknold, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Reeves, Hahn & Elder.

HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

REVERSED 01/07/91

You are entitled to judicial review of this Order.

Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a city decision granting a conditional use permit to operate a private dance school.

MOTION TO INTERVENE

Bev Lindemann moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The challenged conditional use permit grants intervenor permission to operate a dance school in the city's medium density residential (R-7.5) zone. The dance school would be located in an existing church, which the city characterizes as a nonconforming use. The city denied intervenor's request to expand the existing church structure. In granting approval to operate the dance school, the city imposed a number of conditions concerning site improvements, the number of students and hours of operation, sales of dance related items to students and parking requirements. In addition, the city's decision limits the areas of instruction to "tap, jazz, ballet and tumbling * * *." Record 14.

The R-7.5 zone does not explicitly allow "dance schools" as a permitted or conditional use. However, "institutional uses" are allowable as a conditional use in all of the city's residential zones, including the R-7.5

zone.[1] Lake Oswego Code (LOC) 48.125(4); 48.200(1). LOC 48.015(28) defines "institutional use" as follows:

> "Institutional Use: private educational, cultural, religious or social welfare facilities."

The city found that the proposed dance school is both a "private educational facility" and a "cultural facility" and therefore qualifies as an "institutional use." The city also found the dance school complies with the applicable conditional use approval standards.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners claim the proposed use is not an "institutional use" and, therefore, is not allowed as a conditional use in the R-7.5 zone.

As we have noted on numerous occasions, challenges to a

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[1]LOC 48.200 provides as follows:

> "Conditional uses in the R-7.5, R-10 and R-15 zones are as follows:
>
> "1. Institutional uses.
>
> "2. Golf course, hunt club, or other similar open land private recreational uses.
>
> "3. Major public facilities."

Standards for approval of conditional uses are provided in LOC 48.815. LOC 48.815(2)(a) provides that a conditional use must conform with the comprehensive plan. LOC 48.815(2)(b)(ii) requires that conditional uses comply with the conditional use standards specified in LOC 48.555. LOC 48.555(1)(d) requires that "the functional characteristics of the proposed conditional use are such that it can be made to be reasonably compatible with uses in its vicinity."

local government's interpretation of its land use regulations present a question of law, and we review the challenged interpretation for correctness. See e.g. Kellogg Lake Friends v. Clackamas County, 17 Or LUBA 277, 285 (1988); Sevcik v. Jackson County, 16 Or LUBA 710, 713 (1988); Territorial Neighbors v. Lane County, 16 Or LUBA 641, 648 (1988). In reviewing a local government's interpretation of its own zoning ordinance, we attempt to ascertain the intent of the enacting body and give meaning to the overall policy embodied in the zoning ordinance. See Clatsop County v. Morgan, 19 Or App 173, 178, 526 P2d 1393 (1974). Although our review of a local government's interpretation is to determine whether it is correct, in performing our review function we generally give some weight to the local government's interpretation where it is not inconsistent with the language of the zoning ordinance. Fifth Avenue Corp. v. Washington County, 282 Or 591, 599-600, 581 P2d 50 (1974).

In this case, although the city defines the term "institutional use" as including several types of facilities (i.e., "private educational, cultural, religious or social welfare facilities"), the definitional terms are potentially as subjective and open ended as the defined term "institutional use." "Private educational facilities" could include pre-schools, elementary and secondary schools, vocational and trade schools, colleges and universities, as

well as a potentially endless list of speciality educational facilities. See 2 Anderson, American Law of Zoning § 12.12 (3d rev ed 1986). The scope of what may be classified as "cultural, religious or social welfare facilities" is also imprecise.[2]

Petitioners contend a narrow construction of "institutional use" was intended. Petitioners' arguments are largely founded on their contention that, under the city's zoning ordinance, "institutional uses" and "commercial uses" are mutually exclusive. Petitioners make several points in support of their contention that the private dance school at issue in this appeal is properly viewed as a commercial rather than an institutional use.

A. Plan Definition of Commercial Use

Although the zoning ordinance does not provide a definition of "commercial use," the Lake Oswego Comprehensive Plan (Plan) Commercial Land Use Policy Element describes commercial uses as including "all those activities which involve the exchange of goods, provision of services and related activities." Plan 95. Petitioners contend the proposed use clearly falls within this broad definition of commercial use and, therefore, it cannot be considered an

[2]While a church would almost certainly qualify as a religious facility, it may not be clear whether a proposed use is a church. Additionally, whether a use is a church related or accessory use may present difficult interpretative questions. The nature of facilities that may be associated with diverse cultures may also be diverse. The scope of "social welfare facilities" is also subjective and potentially very broad.

institutional use.

As respondent correctly notes, there is nothing in the above quoted definition of "institutional uses" that provides a basis for distinguishing between nonprofit and profit making "private educational, cultural, religious or social welfare facilities." Respondent contends there is nothing in the definitions of either "institutional use" or "commercial use" to support petitioners' assumption that the two terms necessarily are mutually exclusive.

We agree with respondent that the above quoted definitions do not support petitioners' assumption that a particular use cannot be both an institutional use and a commercial use.

B. Plan Policies

Petitioners cite a number of plan policies which discourage the intrusion of commercial uses into residential neighborhoods, and which encourage physical and visual separation of residential and commercial neighborhoods and identify the Rosewood Neighborhood Commercial District as serving the area where the subject property is located. Petitioners contend these policies demonstrate the city did not intend that "institutional uses" include commercial uses.

As respondent correctly notes, none of the policies cited by petitioners preclude the location of commercial uses in residentially developed areas, but rather envision

that such uses may, if appropriate measures are taken, coexist. The plan policies do not support petitioners' contention that institutional uses may not include some uses that are also considered commercial uses.

C. Explicit Provision for Dance Schools in Commercial Zones

In three of the city's seven commercial zones, "dance schools" are allowed as either a use permitted outright or a conditional use. LOC 48.305(11)(D).[3] Petitioners contend that because the zoning ordinance specifically provides for dance schools as a "commercial use," it is improper to interpret "institutional uses" as including dance schools.

We disagree with petitioners that by specifically allowing dance schools in the commercial district the city necessarily intended that dance schools could not also be allowed in residential districts as "private educational

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[3]LOC 48.305(11) provides as follows:

"Services - Amusement:

"A. Art galleries * * *

"B. Billiard & pool parlors * * *

"C. Bowling alleys

"D. Dance studios and dance schools * * *

"E. Skating rinks, ice and/or roller * * *

"F. Racquet clubs, health clubs (within building, except paths and tennis courts allowed) * * *

"G. Theaters, indoor * * *."

[or] cultural * * * facilities." However, we do agree with petitioners that the explicit provision for such uses in three commercial zones provides some indication of the city's intended scope of the very general category "private educational [or] cultural * * * facilities." As we explained in Sevcik v. Jackson County, 16 Or LUBA at 713:

> "A comprehensive zoning ordinance assigns specific permitted or conditional uses to each zoning district. Where a zoning ordinance expressly permits a particular use in one zone, an inference is created that the ordinance expresses an intent that that use not be carried on in another zone when that use is not expressly permitted. Clatsop County v. Morgan, 19 Or App [173, 178-179, 526 P2d 1393 (1974)] * * *."

The general principle expressed in Sevcik v. Jackson County and Clatsop County v. Morgan is that where a zoning ordinance specifically lists a use as allowed in one zoning district and fails to specifically list that use in a second zoning district, but includes in the list of permitted uses in the second zoning district a more subjective and open ended category of uses, there is an "inference" that the use specifically allowed in the first zoning district is not also allowed in the second zoning district under the open ended use category.[4]

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[4]In Sevcik v Jackson County, 16 Or LUBA at 711, we concluded that a use described as "retail firewood sales" and "firewood storage, loading and unloading, cutting, splitting and seasoning and a repair shop for equipment and trucks" was not correctly classified within a zoning category allowing "other retail trade or service commercial establishment." In reaching that conclusion, we relied in part on the existence of specific provision in a different zoning district for "[f]uel storage facilities, including

Applying the above principle in this case, the explicit provision for dance schools in three of the city's commercial districts suggests, but does not conclusively demonstrate, that the city did not intend that such dance schools be allowed in its residential districts as an institutional use (i.e., as an educational or cultural facility).

As respondent points out, the city also provides for a variety of schools in a number of its commercial districts and lists those schools under a general category entitled "Services - Educational." LOC 48.305(12).[5] However, we do not believe that by including a general "Services - Educational" category of use in the section of the zoning ordinance concerning commercial districts, and by allowing under that general category a variety of types of schools in

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manufacturing and processing plants." In Clatsop County v. Morgan, 19 Or App at 175-176, the Court of Appeals concluded a zoning district allowing "open land recreation such as boating and fishing establishment and riding stable" did not encompass a facility offering "motorcycle, go-kart and dune buggy rides, children's motorized rides (train, bumper cars, merry-go-round, 'whip,' 'tiltawhirl,' 'skat'), a slide and picnic facilities." In reaching that conclusion, the Court of Appeals relied in large part on the express provision for "commercial amusement establishment[s]" in a different zoning district.

[5]LOC 48.305(12) provides in part:

"Services - Educational:

"A. Nursery, day care centers * * *

"B. Private or public educational institutions * * *

"C. Vocational schools * * *

"D. Music schools * * *."

certain commercial districts, the city means private schools and public schools are not allowed as "private educational facilities" or as "major public facilities" in residential districts.[6] Rather, the city intends to allow public and private educational facilities both in residential districts and in certain commercial districts.

We must therefore consider whether, under the LOC, a private dance school is considered a private educational facility. In this regard, we note that under the city's categories of uses allowable in its commercial districts, dance schools are not listed under the "Services - Educational" category with other types of schools. See n 5, supra. Rather, dance schools are listed under the general category "Services - Amusement." See n 3, supra. The city's decision not to categorize dance studios and dance schools as "Services - Educational" is some indication that it does not view such facilities as educational facilities.[7]

D. Other Jurisdictions

We are aware of no Oregon cases which construe similar ordinance provisions and determine whether a dance school is properly considered an "educational facility." While the

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[6]See n 1, supra. Public schools are defined as "major public facilities." LOC 48.015(51).

[7]Although dance schools are categorized differently than other schools, we note dance schools are allowed in the same commercial zoning districts which allow music schools, vocational schools, and private or public educational institutions.

appellate courts in some states have construed zoning ordinance provisions for educational facilities broadly,[8] the majority of courts in other states have taken the view that institutions engaged in instruction in "arts, crafts or sports" are not educational uses or schools. 2 Anderson, American Law of Zoning § 12.20 (3d rev ed 1986); see also Annot. 64 ALR 3d 1087 (1975).

In Kurz v. Board of Appeals, 341 Mass 110, 113, 167 NE 2d 672 (1960), the Massachusetts Supreme Court first recognized that "in a broad sense, anything taught might be considered, to a greater or lesser degree, educational." However, the court nevertheless agreed with the zoning board of appeals that a dance school offering instruction in "modern jazz, tap, musical comedy and classical ballet, toe and acrobatic dancing, tumbling, and baton" was not an "educational use in the ordinary sense." Id. at 111-113. In a case involving a zoning ordinance structured similarly to the Lake Oswego Zoning Ordinance, the Missouri Supreme Court determined that a dancing school was not allowed as an "educational institution" in a residential district where dancing schools were specifically allowed in the city's commercial district. State ex rel Koegel v. Holekamp, 151

[8]See Imbergamo v. Barclay, 77 Misc 2d 188, 352 NYS 2d 337 (1973) (facility where art classes were taught by nonprofit association found to be educational institution); Langbein v. Board of Zoning Appeals, 135 Conn 575, 67 A2d 5 (1949) (summer day camp determined to be a school); Flegg v. Murdock, 172 Misc 1048, 15 NYS 2635 (1939)(dance school for small children conducted in basement of apartment building held to be a school).

SW2d 685, 690 (1941). See also Annot., 85 ALR 2d 1150 (1962).

Decisions from other jurisdictions concerning the scope of a general term such as "educational facilities" are of little value where a local government makes it clear in its zoning ordinance that a particular meaning is intended. In such circumstances, the language of the zoning ordinance controls over the view of the meaning of such terms in other jurisdictions. See Anderson v. Peden, 284 Or 313, 315, 587 P2d 59 (1978). However, such is not the case here. The city provides no indication in its zoning ordinance that the very broad construction it has given the term "educational facilities" in the appealed decision was intended by the drafters, and such a broad construction is not consistent with the interpretation given "educational facilities" and similar terms in most other jurisdictions.

E. Conclusion

An expansive interpretation of the term "educational facilities" introduces the possibility that a large number of uses which include some form of instruction could be "educational facilities" allowable in the city's residential zones. The city provides no clear indication in the zoning ordinance that a expansive construction was intended. If the city intends such an expansive meaning, it can amend its zoning ordinance to clearly state that intent. As the zoning ordinance is now structured and worded, we find no

basis for concluding the city intended "educational facilities" to have a meaning broader than that observed in a majority of other jurisdictions. To the contrary, the city specifically provides for dance schools in its commercial districts under a different category of use. See Sevcik v. Jackson County and Clatsop County v. Morgan, supra. We, therefore, reject the city's expansive interpretation of the term "private educational facilities" to include private dance schools as incorrect.[9]

Whether a private dance school may properly be considered a "cultural facility" presents a somewhat closer question. However, for many of the same reasons discussed above concerning the city's intended scope of the term "educational facilities," we conclude the term "cultural facilities" was not intended to include private dance schools. There is no explicit indication in LOC 48.200 that such a broad meaning was intended, and dance schools are explicitly allowed in three of the city's commercial districts. There are, no doubt, a variety of facilities that some segment of any community would classify as

[9]Petitioners also point out the definitions of "educational services" and "private school" in ORS 345.505 do not include dance schools. Although respondent correctly notes there is nothing in the language of the zoning ordinance suggesting the city intended to adopt the narrower meaning given "educational services" and "private school" in ORS 345.505 when it used the term "private educational facilities" in LOC 48.015(28), there is also no suggestion in the zoning ordinance language that a broader meaning was intended.

"cultural." However, we do not believe a private dance school is properly classified as a "cultural facility," any more than a football or soccer camp is properly viewed as a cultural facility, for planning and zoning purposes. If the city intends that the scope of the term "cultural facilities" be broad enough to include private dance schools, it must amend the zoning ordinance to state that intent clearly. We conclude that the city's broad interpretation of the term "cultural facilities" goes beyond its ordinary meaning, in the planning and zoning context, and we reject that interpretation.

The first assignment of error is sustained.

The city improperly construed the applicable law by interpreting "institutional uses" in LOC 48.200 as including the proposed dance school. Because a correct interpretation of the applicable law requires that the application be denied, the city's decision must be reversed. ORS 197.835(7)(a)(D); OAR 661-10-071(1)(c).

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue that several comprehensive plan provisions are violated by the city's decision. The city adopted findings explaining why those plan provisions are either inapplicable or satisfied by the challenged decision. Petitioners make no attempt to challenge these findings or explain why the city's findings concerning the plan policies are inadequate.

Therefore, the second assignment of error is denied.

The city's decision is reversed.