

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner appeals Multnomah County's denial of
4 petitioner's request for a use permit to enable petitioner to
5 locate an adult bookstore and theater in the county's
6 commercial zone. Under the county's commercial zoning
7 ordinance, an adult bookstore and theater is a permitted use
8 "provided that at the time of the location, the site is not
9 within 660 feet of property used for a church, clinic, day care
10 center, hospital, library, nursing home, park, playground or
11 school." Ordinance No. 100, Section 4.405(A). The county's
12 denial was based upon its conclusion that petitioner's proposed
13 use was located within 660 feet of a dental office operated by
14 a sole practitioner, determined by the county to be a "clinic"
15 within the meaning of the above quoted provisions of its
16 ordinance.

17 Petitioner assigns as error the county's interpretation of
18 its ordinance to include a sole practitioner's dental office as a
19 "clinic." Petitioner also asserts two constitutional claims
20 under the United States Constitution. The first claim is that
21 the county's ordinance violates the first amendment to the
22 United States Constitution guaranteeing freedom of expression.
23 Petitioner's second constitutional claim is that the ordinance
24 is unconstitutionally vague and overbroad. Finally, petitioner
25 argues that the county's final order and findings were not
26 filed within five business days of the date of the announced

1 decision contrary to Multnomah County Ordinance Section 12.36.2.

2 OPINION

3 Petitioner's first assignment of error is that the county
4 erred in its interpretation of Ordinance No. 100, Section
5 4.405(A) in deciding that a sole practitioner's dental office was
6 a "clinic" within the meaning of this ordinance. The county
7 found that a dentist had an office within 250 feet of the
8 location of petitioner's proposed use. Petitioner cites
9 numerous dictionary definitions of the term "clinic" to support
10 its argument that a sole practitioner's dental office does not
11 equal a clinic. Each of the definitions includes as a possible
12 construction of the term clinic the notion that a group of
13 medical practitioners practices together. The definitions also,
14 however, indicate that a clinic is a place where patients are
15 treated outside of a hospital setting. Petitioner's basic
16 argument is that these definitions exclude a sole practitioner
17 because he is not practicing with a group of other
18 practitioners. Petitioner also refers to the hearings officer's
19 decision, which was reversed by the Board of Commissioners, in
20 which the hearings officer said that had the county intended
21 for a sole practitioner's office to be covered under the
22 definition of "clinic," the Board of Commissioners could have
23 clearly said so.

24 Petitioner also says that one can look to more than just a
25 dictionary definition and determine that the word "clinic" does
26 not include a sole practitioner's dental office. Petitioner says

1 that if one looks to the other words used in the ordinance such
2 as "church, day care center, hospital, library, nursing home,
3 park, playground or school" it is clear that the Board of
4 Commissioners was concerned about locating adult bookstores
5 near areas where large numbers of people would be expected to
6 gather. In addition, petitioner argues these are all
7 facilities which are open to the public. Because a sole
8 practitioner's dental office would not attract large numbers of
9 people, this is further reason why a sole practitioner's dental
10 office should not be considered to be a clinic.

11 Respondent argues that its interpretation should be upheld
12 because it is not unreasonable or contrary to the express terms
13 of the ordinance. Respondent argues that it was not required
14 to construe the term clinic in accordance with the dictionary
15 definitions of the term because, as one of the commissioners
16 noted, dictionary definitions are "merely conservative
17 estimates of what the word means." Respondent says that it
18 based its interpretation of the word clinic "on accepted common
19 usage of the term and on an evaluation of the relationship
20 between the term clinic and the objectives of the ordinance."
21 Respondent's brief, p. 3. The Board of Commissioners focused
22 on what it felt was the important part of the term clinic, that
23 is, the provision of out-patient health services. Respondent
24 says that a clinic may involve one or more practitioners and is
25 not necessarily limited to a group of practitioners. Respondent
26 also argues that there used to be an optometric clinic in the

1 building which now houses the dentist's office and that such a
2 use may again be made of the building in the future. To allow
3 an adult bookstore to locate within the area, says respondent,
4 would frustrate such a potential future use.

5 The precise responsibility of this Board in reviewing a
6 county's interpretation of its own ordinance has heretofore not
7 been fully addressed by this Board. We have stated in fairly
8 general terms that we are bound by a local governing body's
9 interpretation of its own ordinance so long as that
10 interpretation is reasonable. See, e.g., Tribbett v Benton
11 County, 2 Or LUBA 161 (1981). However, in Hoffman Industries,
12 Inc. v Beaverton, 2 Or LUBA 411 (1981), it first came to our
13 attention that perhaps this was not a particularly accurate
14 statement of our scope of review. The parties in that case
15 argued at length as to the proper scope of our review of the
16 city's interpretation of its ordinance. The city argued that
17 so long as its interpretation was reasonable we were bound by
18 the city's interpretation. The petitioner, in Hoffman,
19 relying upon Fifth Avenue Corporation v Washington County, 282
20 Or 591, 581 P2d 50 (1978), argued that the city's
21 interpretation was only entitled to some weight unless it was
22 clearly contrary to the expressed language and intent of the
23 ordinance. We declined in Hoffman, however, to reach the
24 question of the proper scope of our review because the city
25 erred in failing to adopt findings required for a
26 quasi-judicial proceeding. The absence of findings was deemed

1 to be particularly critical:

2 "****In the present case, without a statement of
3 facts and a statement of reasons why the facts found
4 led the City Council to the conclusion which it
5 reached, we run the grave risk in reviewing the city's
6 determination we will be simply substituting our
7 judgment for that of the city as to the important
8 facts and will review the city's conclusion without
9 the benefit of a complete statement of the city's
10 reasons why it believed the facts found led it to the
11 conclusion which it reached. In this case, we believe
12 it is a close question whether the use proposed by the
13 applicant Metro is of the same general type and is
14 similar to the permitted uses in the IP Zone or
15 whether the proposed use is similar to or of the same
16 general type as a salvage yard which is conditional
17 use in the IP Zone. In such a case the necessity of
18 findings and reasons is critical for our review:****"
19 Hoffman v Beaverton, 2 Or LUBA 4 at 420.

20 In determining in Hoffman that findings were necessary in
21 order for us to know whether the city had properly interpreted
22 its ordinance, we relied heavily upon the recent Supreme Court
23 decision in Springfield Education Association v The School
24 District, 290 Or 217, ___ P2d ___ (1980). It is this case
25 which we believe most completely sets forth the responsibility
26 of a judicial or a quasi-judicial body in the review of
27 administrative decisions requiring interpretation of
28 legislative enactments. We believe Springfield Education
29 Association v The School District, supra, also describes how an
30 administrative body must apply legislation by which it is
31 bound.¹

32 In Springfield, the Supreme Court noted the following three
33 classes of statutory terms

34 "...each of which conveys a different
35 responsibility for the agency in its initial

1 application of the statute and for the court on review
of that application. They may be summarized as follows

2 "(1) Terms of precise meaning, whether of
3 common or technical parlance, requiring only fact
4 finding by the agency and judicial review for
substantial evidence;

5 "(2) Inexact terms which require agency
6 interpretation and judicial review for
consistency with legislative policy; and

7 "(3) Terms of delegation which require
8 legislative policy determination by the agency
and judicial review of whether that policy is
within the delegation." 290 Or 217 at 223.

9 The Court first addressed the category of terms referred to
10 as "exact." This category, according to the court, includes

11 "Terms which impart relatively precise meaning,
12 e.g., 21 years of age, male, 30 days, Class II farm
land, rodent, Marion County.***" 290 Or 217 at 223.

13 The Court stated that an agency's responsibility in applying
14 exact terms was basically a fact finding responsibility to
15 determine whether the particular term applied. The Court's
16 responsibility on review of the agency's determination was
17 limited to whether there was substantial evidence in the record
18 to support the facts found.

19 The second category of terms discussed in Springfield
20 include inexact terms. With respect to these terms the Court
21 stated:

22 "***Whether certain things are included will
23 depend upon what the user intended to communicate or
24 accomplish by the use of the word. To determine the
25 intended meaning of inexact statutory terms, in cases
26 where their applicability may be questionable, courts
tend to look to extrinsic indicators such as the
context of the statutory term, legislative history, a
cornucopia of rules of construction, and their own

1 intuitive sense of the meaning which legislators
2 probably intended to communicate by use of the
3 particular word or phrase. In any event, however, the
inquiry remains the same: what did the legislature
intend by using the term." 290 Or at 217 at 224.

4 Inexact terms contain "complete expressions of legislative
5 meaning, even though that meaning may not always be obvious."

6 Id at 224. The agency's task in applying inexact terms to
7 specific facts "is to determine whether the legislature
8 intended the compass of the words to include those facts." Id
9 at 224. The Court said that whether a given set of facts fell
10 within the "compass" of inexact terms is the responsibility,
11 ultimately, of the Court. The Court refined the above
12 statements in the following paragraph:

13 "In saying that the legislature has completely
14 stated its meaning and that the Court ultimately
15 discerns and applies that meaning as a matter of law,
16 we recognize that imprecise terms in this second class
17 [i.e., 'unemployment,' Taylor v Employment Division,
18 286 Or 711, 597 P2d 780 (1979)] are capable of
19 contradictory applications, all of which are within
20 the dictionary meanings of the term. We refer to the
21 legislature having expressed itself not in the
semantic sense, but rather in the sense of having made
a complete policy statement. Whether any possible
meaning comes within the intended meaning depends upon
the policy which the word or phrase is intended to
convey. Thus, when we refer to a term representing a
complete legislative expression, we refer to a
completed legislative policy judgment having been
made." 290 Or 217 at 225.

22 To determine whether a given set of facts was intended to
23 fall within the "compass" of an inexact term depends, according
24 to the Court, "upon the policy that inheres in the term by its
25 use in a statute which is intended to accomplish certain
26 legislative purposes." Id at 225. Thus, it is necessary for

1 the administrative agency to determine what the legislative
2 purpose is, and then, what the particular term means in the
3 context of the statute in which it is used. The reasoning of
4 the agency as to what a particular term means and why a
5 particular set of facts falls within the "compass" of the term
6 must, in a contested case proceeding, be set forth in the
7 agency's order. The order "is the instrument by which an
8 agency demonstrates that a particular interpretation or
9 application of a statute is within a generally expressed
10 legislative policy." 290 Or 217 at 227. If the agency
11 interpretation as expressed in the order "coincides with the
12 legislative policy which inheres in the meaning of the
13 statute," the agency interpretation will be upheld on appeal.
14 290 Or 217 at 228.

15 The third category of terms discussed in Springfield
16 involves "delegative terms." These are terms which "express
17 non completed legislation which the agency is given delegated
18 authority to complete." What is left to the agency to
19 "complete" is the policy only generally expressed by the
20 legislature. The agency's responsibility is to refine that
21 policy and apply it to various individual fact situations. The
22 Court's function on review of an agency's refinement of
23 delegative terms is to ascertain whether the refinement and
24 application to specific facts falls within the generally
25 expressed policy of the statute. Examples of delegative terms
26 cited by the Supreme Court and involved in other cases include

1 "good cause," "fair," "unfair," "undue," "unreasonable," or
2 "public convenience and necessity."

3 In order to properly follow the approach outlined by the
4 Supreme Court in Springfield Education Association v The School
5 District, supra, as it relates to our scope of review in the
6 present case, we must first determine into which of the three
7 categories the term "clinic" falls as it is used in Multnomah
8 County's ordinance. We believe we can discard fairly easily
9 any argument that the term "clinic" is an "exact" term with a
10 precise meaning. The range of dictionary definitions contained
11 in just the record of this case is proof enough that clinic
12 could be used to describe many different things. The only real
13 question is whether the term "clinic" as used in Multnomah
14 County's ordinance was intended to embody a "complete meaning"
15 (although the meaning may not be obvious, i.e., an inexact
16 term) or whether the term only expresses a general policy which
17 the county was required to refine through individual
18 applications of the term to specific facts (i.e., a delegative
19 term). We believe the better view, given what we find in the
20 county's order, is that Multnomah County completely expressed
21 its meaning when it used the word "clinic" in the ordinance.
22 It left unto itself no policy decisions to make in the future
23 in applying the ordinance, its sole responsibility was to
24 determine whether the facts in a particular case fell within
25 the already expressed meaning of the ordinance.²

26 Because we view the term "clinic" to be an inexact term, we

1 must determine what meaning Multnomah County intended to
2 communicate by use of the term in the ordinance. We need look
3 no further than the county's order to determine the county's
4 intent. That order recited the purpose to be achieved by the
5 restrictions placed on the location of adult bookstores and
6 theaters by Section 4.405(A)(11) of the Multnomah County Zoning
7 Ordinance:

8 "(1) Young people (i.e., minors), infirmed
9 people and those attending or related to them, and
10 people in need of medical, psychiatric or religious
11 care and counseling are commonly in a state of
12 heightened anxiety and personal distress or reduced
13 personal control.

14 "(2) Individuals operating in a state of
15 heightened anxiety and personal distress are sensitive
16 to impacts generated by uses in the vicinity of the
17 treatment facilities they are to frequent. Where
18 those impact-generating uses increase the level of
19 anxiety and distress, those uses are dysfunctional and
20 reduce the potential benefit of treatment or reduce
21 the willingness of those individuals to seek necessary
22 treatment.

23 "(3) It is a legitimate function of government
24 to prescribe what uses may be located in what areas so
25 that the mix of land uses is appropriate to the needs
26 of an area and its residents. Separation of sensitive
27 uses from other uses is frequently used as a technique
28 to promote the best mix of land uses. Section
29 4.405(A)(11) separates adult uses from the uses and
30 people who would be most sensitive to them.

31 "(4) The provisions of Section 4.405(A)(11) do
32 not unreasonably restrict establishment of adult uses,
33 because they are premitted in the GC and EC Zones."

34 We believe that by using the term "clinic," Multnomah
35 County intended to only mean those businesses or agencies to
36 which would come persons "commonly in a state of heightened
37 anxiety and personal distress or reduced personal control" for

1 some form of help or treatment. Nothing in the county's
2 findings indicates that by use of the term "clinic," the county
3 intended to insulate from adult bookstores and theaters all
4 businesses or agencies just because they might fit within a
5 dictionary definition of the term "clinic."

6 The county determined in this case that a sole practitioner's
7 dental office was a "clinic" within the meaning of the county's
8 ordinance. While it is perhaps possible that a particular
9 dentist's practice could include persons who "are commonly in a
10 state of heightened anxiety and personal distress or reduced
11 personal control," we do not believe this possibility to be
12 self evident in any sense of the word. The county made no
13 findings nor is there any evidence in the record as to the
14 nature of the dentist's practice. It could be that this
15 particular dentist does provide treatment to many children or
16 to elderly people who are, in fact, "commonly in a state of
17 heightened anxiety and personal distress or reduced personal
18 control." In the absence of more detailed facts and a
19 statement of reasons explaining why the facts found led the
20 county to conclude as it did, we cannot say that the county
21 correctly applied its ordinance in concluding that a sole
22 practitioner's dental office constituted "a clinic" within the
23 meaning of the county's ordinance. For this reason, we must
24 reverse the county's decision.³

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FOOTNOTES

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4 We recognize that Springfield Education Association v The
5 School District, supra, dealt with the responsibility of a
6 state administrative agency in applying its statute and the
7 responsibility of a court in reviewing the agency's application
8 of the statute. We see no practical difference, however,
9 between the dual roles discussed in Springfield Education
10 Association v The School District, supra, and the dual roles of
11 local governing bodies and this Board in the context of the
12 making and review of land use decisions. Just as a state
13 agency is bound by its governing statute, a governing body such
14 as a county is bound by and must properly interpret and apply
15 its own ordinances. See generally: 5 McQuillan Municipal
16 Corporations, sec 15.14 (3rd Ed 1969); Cannady v Roseburg, 2 Or
17 LUBA 134 (1981); Scappoose Drainage District v Columbia County,
18 2 Or LUBA 174 (1981). While a court's responsibility in review
19 of a state agency's decision is to determine whether "the
20 agency has erroneously interpreted a provision of law" (ORS
21 183.482(8)(a)), this Board's responsibility is to determine
22 whether the governing body "improperly construed the applicable
23 law" (1979 Oregon Laws, ch 772, sec 5(4)(D)).

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19 Ultimately, we are unsure that it makes a great deal of
20 difference whether we decide the term "clinic" is an inexact
21 term or delegative term. In either case, the question will be
22 asked whether the interpretation or application of the term
23 "clinic" is consistent with the legislative intent or purpose.

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19 We do not reach petitioner's constitutional challenges in
20 this case. Not only is it unnecessary for us to do so in order
21 to dispose of this appeal, but we seriously question whether we
22 have authority to declare unconstitutional Multnomah County's
23 ordinance which was adopted well more than 30 days prior to
24 petitioner's filing of the Notice of Intent to Appeal. See
25 1979 Oregon Laws, ch 772, sec 4(4). Petitioner's
26 constitutional attack goes to the validity of the underlying
ordinance and not to the application of that ordinance which
resulted in the decision being appealed.