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

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SOUTHWEST HILLS RESIDENTIAL )  
LEAGUE, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CITY OF PORTLAND and )  
PORT SERVICES INVESTMENT CO., )  
 )  
Respondents. )

LUBA No. 87-024

FINAL OPINION  
AND ORDER

Appeal from the City of Portland.

Susan G. Whitney, Portland, filed the petition for review and argued on behalf of Petitioner. With her on the brief were Seifer, Yeats, Whitney and Mills.

Kathryn Beaumont Imperati, Portland, and James S. Smith, Portland, filed a response brief and argued on behalf of Respondents City of Portland and Port Services Investment Company. With them on the brief were Ragen, Tremaine, Krieger, Schmeer and Neill.

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

AFFIRMED 07/09/87

You are entitled to judicial review of this Order.  
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals Portland City Council conditional use  
4 permit CU 99-86. The conditional use permit authorizes Port  
5 Services Investment Company (Port Services) to operate  
6 broadcast and radio communication facilities on residentially  
7 zoned property.

8 FACTS

9 Port Services owns a 175 foot high radio transmission tower  
10 on Healy Heights in southwest Portland. The company uses the  
11 tower for two-way mobile radio dispatch services and other  
12 kinds of radio transmission.<sup>1</sup>

13 Beginning in 1972, Port Services made periodic adjustments  
14 to its facilities without seeking permission from the city. In  
15 late 1984, the city's Bureau of Buildings notified Port  
16 Services that the adjustments required conditional use  
17 approval. In response, Port Services applied for a conditional  
18 use and a "master plan" for a tower and associated facilities  
19 at the tower. The city's land use hearings officer heard the  
20 application on October 6, 1986 and approved the conditional  
21 use, but not the master plan. See, Record 476-691.<sup>2</sup>

22 Petitioner herein, Southwest Hills Residential League,  
23 appealed the hearings officer's decision to the city council,  
24 and the council held hearings between November, 1986 and March,  
25 1987. The city's final order approving the conditional use and  
26 master plan was issued on March 13, 1987. This appeal followed.

1        FIRST ASSIGNMENT OF ERROR

2            "There is not substantial evidence in the whole record  
3            to support the finding that 'Port Services causes  
4            extremely limited interference with consumer  
5            appliances in the surrounding residential  
6            neighborhood,' nor to support the decision that 'the  
7            use at the particular location is desirable to the  
8            public convenience and welfare and not detrimental or  
9            injurious to the public health, peace, or safety, or  
10           to the character and value of the surrounding  
11           properties."

12           Petitioner argues the applicable standard requires the  
13           applicant to prove that its operations will have no detrimental  
14           or injurious affects. The code provides

15           "[i]n permitting such uses, it shall be determined  
16           that the use at the particular location is desireable  
17           [sic] to the public convenience and welfare and not  
18           detrimental or injurious to the public health, peace,  
19           or safety, or to the character and value of the  
20           surrounding properties." Portland City Code (PCC),  
21           Section 33.106.010.

22           Petitioner complains the city's finding of no interference with  
23           public health is without evidentiary support. Additionally,  
24           petitioner argues no evidence shows the use at this location  
25           will benefit the neighborhood and surrounding properties.

26           Petitioner cites evidence in the record from residents near  
27           the tower who experience interference with television, stereo,  
28           garage door openers, furnance controls, telephones and alarm  
29           systems. Evidence also shows that interference has increased  
30           in the past two years following Port Services's expansion.  
31           Record 227-228. Petitioner cites a letter from Thomas W.  
32           MacEan, Jr., an electronics engineer and resident of the Healy  
33           Heights area stating

1 "[s]ubstantial additional transmitters had been  
2 installed at the Port Services facility within the  
3 past three years and the affects [sic] on telephone,  
4 television and radio usage are severe and very  
5 noticeable." Record 241.

6 Our review is limited to determining whether substantial  
7 evidence supports the city's decision. Substantial evidence  
8 exists if the record contains evidence which a reasonable mind  
9 might accept as adequate to support the decision. Christian  
10 Retreat Center v. Committee for Washington County, 28 Or App  
11 673, 560 P2d 1100 (1977); see also, Younger v. City of  
12 Portland, \_\_\_ Or App \_\_\_, \_\_\_ P2d \_\_\_ (Slip Opinion of June 24,  
13 1987, affirming Younger v. City of Portland, \_\_\_ Or LUBA \_\_\_  
14 (LUBA No. 86-046, January 30, 1987). For the reasons set forth  
15 below, we find the decision is supported by substantial  
16 evidence and deny petitioner's claim.

17 With respect to interference, respondents point to the  
18 testimony of a Port Services expert who conducted a study at  
19 two houses nearest the tower. One of the two houses was owned  
20 by Michael H. Schmeer, an attorney representing the applicant.  
21 The second house, which the expert did not enter, is owned by a  
22 Mr. Zimmerman. Record 151. Electronic monitoring equipment  
23 was used in the Schmeer household while none was used at the  
24 Zimmerman house.

25 The method used to test for interference included "keying"  
26 or activating all the transmitters operated by Port Services.  
The expert testified that utilizing this method provides radio  
emission of 100% of the transmitters, a condition not likely to

1 occur during normal usage. The expert concluded that one  
2 transmitter at the Port Services' site caused intermittent  
3 interference on cable television channel. Transcript of city  
4 council meeting 01/28/87 at p. 23.

5 Respondent also cites the testimony of a neighborhood  
6 resident that no significant interference with television  
7 exists. The resident added that there is only minor  
8 interference with radio. Transcript of city council meeting  
9 1/28/87 at p. 30.

10 The testimony of the engineer in this case provides  
11 specific technical evidence about the interference problem,  
12 transcript of 1/28/87, pp. 20-25, and whether the Port Services  
13 use is the cause of interference. Id. We find this evidence  
14 to be evidence a reasonable person might accept as adequate to  
15 support the city's conclusion that the Port Services operation  
16 does not cause the interference complained of by local  
17 residents.<sup>3</sup>

18 With regard to the locational factors in PCC 33-106.010,  
19 the city found the use at this location served the public  
20 convenience because the site provides certain technical  
21 broadcast advantages. See, Record 439-442 for evidence of  
22 these advantages. See also, our discussion about the public  
23 service issue at pp. 12-13, infra. The city's findings and  
24 evidence about tower uses and transmissions from this site are  
25 sufficient to meet the ordinance requirement that the use "at  
26 this particular location is desirable to the public convenience

1 and welfare...." PCC 33.106.010.

2 With respect to the character and value of surrounding  
3 properties, the city found that the conditional use permit  
4 would cause no detriment to surrounding properties. Evidence  
5 supporting this finding is that there is little physical change  
6 or other outward indicia of change which might adversely affect  
7 property values. Record 734-746. This evidence, along with  
8 the above described evidence about the environmental effects of  
9 the tower is sufficient to support the city's finding that the  
10 proposal will not cause detriment to the character and value of  
11 surrounding properties.

12 We conclude the city satisfies PCC 33.106.010. This  
13 assignment of error is denied.

14 SECOND ASSIGNMENT OF ERROR

15 "The decision and conclusion that this proposal  
16 'consists of a continuation of a substantially  
17 identical use with definite limits on expansion' is  
18 not supported by substantial evidence in the whole  
19 record, and, to the extent that the decision to grant  
20 the permit is based on the premise that it is an  
21 existing use, the decision is contrary to law."

19 Petitioner argues the city's findings show its "primary  
20 rationale" in granting the permit was its belief that the  
21 proposed use is an "existing use." Petitioner claims nothing  
22 in the city's ordinance scheme allows a conditional use permit  
23 on this basis.

24 In addition, petitioner insists that a conditional use  
25 permit for a new transmitter building, issued in 1982 (CU  
26 73-82), permitted only limited transmission facilities.

1 According to petitioner, the new conditional use permit  
2 legalizes facilities installed after 1982 in violation of CU  
3 73-82. Petitioner claims the city's decision must be based on  
4 the criteria set forth in Section 33.106.010 "and not with  
5 reference to whether or not the facilities might already  
6 'exist.'" Petition for Review at 27.

7 Respondents reply that the city is not basing its decision  
8 on a claim the tower and its facilities is an existing use.  
9 Indeed, the city rejected this characterization when offered by  
10 the applicant. The city found

11 "[t]he applicant states that the present use and  
12 subject of this application is a pre-existing use (see  
13 Page 2, "Applicant's Statement"). However, by  
14 definition (33.106.010), the site's use has undergone  
15 significant change of use from the last approved use  
16 (see Section I, B, "History"). The site's former use  
17 as a public broadcast facility included fewer but more  
18 powerful transmitters, employed a different frequency  
19 of emission, different duty cycles and other important  
20 factors. The Bureau of Planning disagrees that the  
21 subject use is an approved Conditional Use or a  
22 pre-existing use and the Council adopts the Planning  
23 Bureau's interpretation of the Code. (Rec. 27-28)."

18 We conclude the city did not base its decision on an  
19 "existing use theory," but on its belief the applicant complied  
20 with city approval standards. We note even if the city did  
21 erroneously conclude the applicant is entitled to a permit  
22 based on existing use, and we make no finding on this issue,  
23 the applicable standard is still Section 33.106.010 of the  
24 city's code. Providing the city shows compliance with the code  
25 elsewhere in its order, the fact that it may make an erroneous  
26 additional finding about pre-existing use does not require

1 reversal or remand. Bonner v. City of Portland, 11 Or LUBA 40  
2 (1984).

3 The second assignment of error is denied.

4 THIRD ASSIGNMENT OF ERROR

5 "The decision is prohibited as a matter of law because  
6 it violates Ordinance No. 156583, as extended,  
7 imposing a moratorium on land use approvals for radio  
8 and television towers, antenna, and transmitters, and  
9 there is not substantial evidence in the whole record  
10 to support the finding and decision that the  
11 applicant's facility is exempt from the moratorium  
12 under Exemptions 1, 2 and 6."

13 On September 19, 1984, the city enacted a moratorium on  
14 certain new radio transmission facilities. The moratorium has  
15 been extended and is now in effect until August 1 of this  
16 year. It provides

17 "a moratorium shall be imposed until July 1, 1985, on  
18 the issuance of land use approvals for radio and  
19 television towers, antennae, transmitters or other  
20 major sources of RF emissions located within all  
21 residential zones...within an effective radiated power  
22 of 500 watts or greater...." Ordinance No. 156583.  
23 Record 402.

24 As part of its final opinion and order in this matter, the  
25 council concluded that this moratorium does not apply to the  
26 applicant's request for a conditional use and master plan.

Petitioner recognizes the tower existed prior to enactment  
of the city's moratorium. See, p. 3, supra. However,  
petitioner claims this conditional use permit further increases  
the number of antenna and transmitters in violation of the  
moratorium. Petitioner discounts the city's finding the  
moratorium was not intended to preclude uses existing at the

1 time of its enactment (Record 17) and argues there is no  
2 evidence whatever to support this "finding."<sup>4</sup> Petitioner  
3 states the conditional use permit goes far beyond simply  
4 approving existing operations and authorizes replacement of  
5 equipment and addition of new equipment.

6 Mindful that the city's approval does not rest on its view  
7 that the tower is exempt from the moratorium, petitioner next  
8 attacks the city's conclusion that the Port Services's facility  
9 is exempt under three of six exception provisions in the  
10 moratorium ordinance. The first of these, that low power  
11 sources with an effective radiated power of less than 500 watts  
12 are exempt, is not applicable to this application, according to  
13 petitioner. Petitioner claims it is clear that the radiated  
14 power of the tower is well in excess of 500 watts and that  
15 there is no evidence to the contrary except for "Port  
16 Services's conclusory statements that effective radiated power  
17 is less than 500 watts." Petition for Review at 33.

18 The second of the exemptions, for mobile communication  
19 devices and repeaters, is also not applicable, according to  
20 petitioner. Petitioner claims there is no evidence about what  
21 a repeater is.

22 Port Services also claimed to be exempt under Exemption No.  
23 6 which applies to two-way communication devices "necessary for  
24 the health, safety and welfare of the citizens." The city  
25 agreed. Petitioner says there is no evidence in the record to  
26 support the finding that this service is "necessary for the

1 health, safety and welfare of the citizens." Petitioner bases  
2 this argument on the customer list supplied by the applicant  
3 which shows only four non-commercial users on the tower. We  
4 understand petitioner to argue that a public service use does  
5 not include the vast majority of profit making enterprises.

6 The moratorium ordinance was adopted to prevent new high  
7 power, or major, radio and television broadcast facilities from  
8 commencing operation until new regulations were adopted. The  
9 city found that the ordinance did not prevent existing  
10 facilities from operating.<sup>5</sup> Since the purpose of the  
11 ordinance is to prevent only new major transmitting and  
12 associated devices, the applicant's proposal is outside the  
13 scope of the moratorium, according to the city.

14 The uses approved under the conditional use permit do not  
15 exceed an effective radiated power of 500 watts or greater.  
16 See Record 402. As noted below, the effective radiated power  
17 at this site is under 400 watts.

18 The city's finding is supported by substantial evidence in  
19 the record. Evidence about the radiated power of the facility  
20 appears at Record 262-263, 388 and 265. We can not say that  
21 the calculations used to arrive at the facilities' effective  
22 radiated power (376.84 watts) is not responsive to applicable  
23 criteria or is not substantial evidence.

24 We are aware petitioner's calculations show the effective  
25 power to be higher. However, we do not believe that the city's  
26 calculation is unreasonable. See, Record 493-495, wherein the

1 applicant's engineer lists transmission sources, their power  
2 and other technical information. We conclude that the city's  
3 finding that the facility is exempt under Exemption No. 1 of  
4 the moratorium ordinance is supported by substantial evidence.

5 The finding that the application falls within the second  
6 exemption for mobile communication devices and associated  
7 repeaters is also supported by substantial evidence. The city  
8 found that the tower serves as a repeater because none of the  
9 messages transmitted originates at the tower. Record 18.

10 While the parties disagree regarding its relevance, 47 CFR Sec.  
11 98.7 defines mobile repeater station as a

12 "mobile station authorized to re-transmit  
13 automatically on a mobile service frequency,  
communications to or from hand-carried transmitters."

14 It is clear from the record that the transmitters at the tower  
15 perform precisely this function. That is, they receive  
16 messages originating from some other site and transmit them.

17 See Record 636.

18 The last claim is based upon the city's finding that the  
19 facility is "necessary for public health, safety and welfare."  
20 The city notes the facility serves police departments, fire  
21 departments, medical personnel, hospitals, security services,  
22 Port of Portland, taxi cab companies and businesses. All  
23 provide public services, according to the city. Respondent  
24 claims support for this finding in that one-third to one-fourth  
25 users on the towers are companies serving the public. Record  
26 364.

1 The city found

2 "that the two-way radio communication devices that  
3 operate from this facility are necessary for the  
4 health, safety and welfare of the citizens of  
5 Portland, in that they serve police, fire, medical,  
6 hospital, security, the Port of Portland and taxi  
7 companies, and provide communications for business  
8 which promote efficiency and reduce traffic and  
9 pollution;"

10 Health, safety and welfare standards, such as the one here,  
11 are broadly worded and invite somewhat general consideration.  
12 However, the city's finding makes it clear that it believes  
13 providing two-way communications facilities is needed for basic  
14 public services. We can not say as a matter of law that the  
15 city's finding is erroneous. Indeed, it appears reasonable.  
16 Alluis v. Marion County, supra. The finding is supported by  
17 evidence in its record. See, Record 332-344, 363-364, wherein  
18 users are listed. Users include Holladay Park Hospital;  
19 Multnomah County Medical Society; Washington County Sheriff;  
20 several security alarm companies; Good Samaritan Hospital and  
21 an ambulance company.

22 The third assignment of error is denied.

23 FOURTH ASSIGNMENT OF ERROR

24 "There is not substantial evidence in the whole record  
25 to support the condition that Port Services submit  
26 only a general landscaping plan, without a further  
condition that Port Services remove the chain link  
fence, which is detrimental to the character of the  
surrounding properties."

Petitioner argues a chain link barbed wire fence was  
erected without a building permit while this conditional use  
request was pending. The applicant later obtained a building

1 permit and in doing so referenced this conditional use  
2 application, even though the fence was not a part of this  
3 application. Petitioner claims as follows:

4 "Consequently, the fence becomes a part of the status  
5 quo and is approved along with everything else, with  
6 only the condition that the applicant provide a  
7 landscape plan and ground maintenance program."  
8 Petition for Review at 35-36.

9 We do not understand petitioner to make a claim for which  
10 we are empowered to reverse or remand the city's decision. ORS  
11 197.875. The building permit for the fence, if appealable to  
12 us as a land use decision, is not part of this appeal  
13 proceeding.<sup>6</sup> We note in addition that the permit was granted  
14 on October 17, 1986, and the notice of intent to appeal was not  
15 filed until March 31, 1987. Petitioner's complaints about the  
16 building permit are not timely filed, and we will not consider  
17 them. ORS 197.830(7); OAR 661-10-015.

18 The fourth assignment of error is denied.

19 The city's decision is affirmed.

FOOTNOTES

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In January, 1983, Port Services obtained a conditional use permit to construct an addition to the transmitter building. At that time, the tower was used by 20 two-way radio dispatch services. A condition of the permit for the transmitter building states

"no additional transmission facilities or increases in transmission levels are approved by this decision." Record 193.

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The "master plan" provided for improvements to Port Services' facilities over a ten year period. The hearings officer felt it unwise to approve such a long term program. He felt that such an order "could be unintentionally preempting City Council action in creating a framework for the Regulation of Emissions from this site and elsewhere." (Emphasis in original). Record 489.

The council approved Port Services' request for improvements, but provided a condition as follows:

"Nothing contained in this approval was intended, nor shall it, preempt any regulations which the City Council shall enact radio frequency emissions. In the event of conflict between this decision and future Council regulations, it is the intention of this decision that the later shall control." Record 10.

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We note the evidence of the neighbors, including that of a radio technician, is certainly sufficient to raise doubt as to the evidence offered by the applicant. Our job, however, is not to balance competing evidence and decide which we find most credible. Younger v. Portland, supra.

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The city's discussion about the intent of the moratorium is more a legal conclusion than a finding of fact.

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We understand the city's reference to a "major" transmission source as one of 500 watt output or more.

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Ordinarily, issuance of a building permit is not a land use decision subject to our review. ORS 197.010(10)(b).