

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 In this consolidated appeal proceeding, petitioner
4 appeals two orders of the county hearings officer. One
5 order approves a conditional use permit for a recreational
6 parachuting center. The other determines that a conditional
7 use permit for the parachuting center approved in 1988
8 expired by its own terms, three years after the date of
9 approval.

10 **FACTS**

11 The subject property consists of 40 acres and is zoned
12 Rural Residential Farm Forest (RRFF-5).¹ To the east of the
13 subject property is a residential subdivision. To the south
14 is a small heliport and another residential subdivision. To
15 the west of the subject property is agricultural land. To
16 the north of the subject property are agricultural
17 operations and residential uses.

18 A 1969 conditional use permit allows the subject
19 property to be used as a "public air park." The property is
20 developed with an airport and certain aircraft related
21 businesses. A building on the property houses the disputed
22 recreational parachuting center.

23 In 1988, a conditional use permit was approved for the

¹Commercial recreational uses are conditionally allowed in the RRFF-5 zoning district.

1 recreational parachuting center on the subject property.²
2 Condition 10 of that conditional use permit limited the
3 duration of the 1988 permit to a period of three years.

4 In 1991, the county planning director advised
5 petitioner that petitioner's 1988 conditional use permit
6 expired, and that another conditional use permit was
7 necessary to continue operation of the recreational
8 parachuting center. Petitioner appealed the planning
9 director's determination that the 1988 conditional use
10 permit had expired and also disputed the county's authority
11 to regulate any aspect of petitioner's recreational
12 parachuting center business.

13 The county hearings officer affirmed the decision of
14 the planning director and determined the 1988 conditional
15 use permit expired by its own terms. The hearings officer
16 also determined that the county had authority to require
17 petitioner to obtain another conditional use permit to
18 continue operating the recreational parachuting center.³

19 Thereafter, petitioner sought conditional use approval
20 for the recreational parachuting center. The hearings

²The 1988 conditional use permit was secured by petitioner's predecessor in interest -- "1000 Friends of Aviation." For convenience, in this opinion, we refer to petitioner as the holder of the 1988 conditional use permit.

³Petitioner appealed that decision to this Board. However, the parties agreed to suspend our proceedings on that appeal pending petitioner's submission of another application for a conditional use permit, and the county's resolution of that application.

1 officer approved the application for a conditional use
2 permit, subject to several conditions of approval. Three of
3 those conditions are the subject of this appeal. One
4 condition limits the duration of the conditional use permit
5 to 5 years. One condition requires that parachute landings
6 occur on the subject property and no other property. One
7 condition requires that petitioner promptly pay, from a
8 policy of insurance, for damage to properties resulting from
9 parachuting activities, regardless of negligence, and
10 requires an automatic fine in the amount of \$100 to be
11 levied against petitioner for any parachute landing which is
12 not on the subject property. This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 Petitioner contends the county lacks authority to
15 require a conditional use permit to conduct recreational
16 parachuting activities on the subject property and also that
17 the county lacks authority to require that parachutists land
18 on the subject property. According to petitioner,
19 parachuting is an "aeronautical activity" and "[f]ederal law
20 preempts any state law in the regulation of aeronautical
21 activity." Petition for Review 12. Among other things,
22 petitioner cites a 1982 Clackamas County Circuit Court
23 decision determining that the use of land for parachuting
24 activities is not subject to local land use regulation
25 because it is not a "land use" and because local regulation

1 is preempted by federal regulation of parachuting.⁴
2 Petitioner also argues that all aspects of the disputed
3 recreational parachuting center were previously allowed by
4 the 1969 conditional use permit covering the subject
5 property and approving a "public air park," and suggests
6 that the county may not now require a specific conditional
7 use permit for the proposal. Record 457-65.

8 We agree with respondent that we are not bound by the
9 1982 circuit court decision either with regard to whether
10 parachuting activity is a "land use" or with regard to
11 whether local regulation of the ground aspects of
12 parachuting is preempted. We are not bound by the 1982
13 circuit court decision because as it relates to the review
14 of local land use decisions, the circuit court is not a
15 superior authority. Rather, LUBA is vested with
16 jurisdiction to review land use decisions and is not bound
17 by precedents in circuit court cases. See Campbell v. Bd.
18 of County Commissioners, 107 Or App 611, 615, 813 P2d 1074
19 (1991); Doughton v. Douglas County, 90 Or App 49, 52, 750
20 P2d 1174 (1988) (no overlap is contemplated between the
21 jurisdiction of the circuit court and LUBA).

22 Regarding the effect of the 1969 conditional use
23 permit, that decision says nothing about approving a
24 recreational parachuting center. Rather, it approves a

⁴Petitioner was not a party to this circuit court proceeding.

1 "public air park" as shown on a site plan. The site plan
2 shows no recreational parachuting center was either
3 contemplated or approved. Record 457-465. Accordingly, we
4 do not see that the 1969 conditional use permit forecloses
5 the county from at this point requiring a conditional use
6 permit for the recreational parachuting center.

7 Concerning whether the proposed use is a "land use,"
8 while we recognized in Tylka v. Clackamas County, 22 Or LUBA
9 166, 171 (1991), that there may be some uses of land that
10 are so incidental as not to rise to the level of a
11 regulatable "land use," the subject activity is not such a
12 de minimus, incidental use. The proposed use involves a
13 relatively large structure, employees, and people and
14 equipment falling out of the air onto land below. We
15 conclude that the use of land for a recreational parachuting
16 center and for parachute landings is a "land use" that may
17 be regulated by local land use ordinances, subject only to
18 federal preemption. We turn to petitioner's preemption
19 arguments.

20 49 U.S.C. 1421(a)(6) authorizes:

21 "* * * such reasonable rules and regulations, or
22 minimum standards, governing other practices,
23 methods, and procedures, as the Secretary of
24 Transportation may find necessary to provide
25 adequately for national security and safety in air
26 commerce." (Emphasis supplied.)

27 The Federal Aviation Administration (FAA) has been delegated
28 exclusive responsibility for the regulation of the navigable

1 airspace of the United States.⁵ 49 U.S.C. 1348(C); City of
2 Burbank v. Lockheed Air Terminal, 411 US 624, 626-27, 93 S
3 Ct 1854, 1856-57, 36 L Ed2d 547 (1973) (City of Burbank).
4 Pursuant to this grant of authority, the FAA has promulgated
5 rules entitled "Parachute Jumping." 14 CFR Part 105.
6 14 CFR 105.1 provides:

7 "(a) This part prescribes rules governing
8 parachute jumps made in the United States
9 except parachute jumps necessary because of
10 an inflight emergency.

11 "(b) For purposes of this part, a parachute jump
12 means the descent of a person, to the surface
13 from an aircraft in flight, when he intends
14 to use or uses, a parachute during all or
15 part of that descent."

16 Consistent with the FAA's charge to regulate navigable
17 airspace, 14 CFR Part 105 regulates the type of aircraft
18 that can carry parachute jumpers, the circumstances
19 surrounding a jump, and prohibits parachute jumping into
20 certain airspace. However, there are no regulations
21 addressing the ground aspects or off site impacts of
22 recreational parachuting.

23 In determining whether a local enactment is preempted
24 by a federal regulatory scheme, courts are careful to point
25 out that preemption is not presumed. Rather:

26 "[the courts] start with the assumption that the
27 historic police powers of the States were not to
28 be superseded by [a] Federal Act unless that was

⁵The FAA is an agency within the Department of Transportation.

1 the clear and manifest purpose of Congress." City
2 of Burbank, supra, 93 S Ct at 1859, citing Rice v.
3 Santa Fe Elevator Corp., 331 US 218 (1947).

4 Determining the "clear and manifest" Congressional
5 purpose is not a simple task. In the first place, the
6 expression of Congressional intent to preempt local
7 regulatory authority need not be expressed in the federal
8 legislation itself or in the regulations adopted pursuant to
9 that legislation. Rather, expression of a "clear and
10 manifest" Congressional purpose to preempt local regulation
11 of an activity may be shown in three other ways. First, the
12 federal legislation may be so pervasive as to lead to a
13 reasonable inference that Congress left no room for states
14 to supplement that legislation. Id. Second, the federal
15 legislation may cover an area where "the federal interest is
16 so dominant that the federal system will be assumed to
17 preclude enforcement of state laws on the same subject."
18 Id. In these circumstances, any local regulation is deemed
19 to interfere with the federal enactment or impair the
20 attainment of federal objectives. See Derenco v. Benj.
21 Franklin Sav. and Loan, 281 Or 533, 540-41, 577 P2d 477
22 (1978). Third, if the local regulation directly conflicts
23 with the federal policy expressed in the federal
24 legislation, then it will be said to be preempted by the
25 federal legislation. Id.

26 There is no express statement in federal legislation
27 that local land use regulation of the ground based aspects

1 of a recreational parachuting center, which results in
2 conditions of approval requiring that the landings of
3 recreational parachutists must occur on the property covered
4 by a local conditional use permit, is preempted.
5 Nevertheless, 14 CFR Part 105 is comprehensive insofar as it
6 regulates the technical aspects of parachuting and prohibits
7 certain jumps into particular kinds of airspace. This
8 requires that we determine whether preemption should be
9 implied.

10 In Blue Sky Entertainment, Inc. v. Town of Gardiner,
11 711 F Supp 678 (N.D.N.Y. 1989) (Blue Sky), the federal
12 district court reviewed a comprehensive local regulatory
13 scheme designed to regulate small airports and parachuting
14 generally. Among other things, the local regulations
15 challenged in that case (1) required a town issued business
16 license and a licensing fee, (2) required that liability
17 insurance be carried naming the town as an insured, (3)
18 prohibited the sale, possession or consumption of alcoholic
19 beverages at small airports, and (4) regulated parachuting.
20 The local parachuting regulations prohibited nighttime
21 parachute jumps, even though 14 CFR Part 105 allows night
22 jumps in certain circumstances. Finally, the local
23 regulations also provided:

24 "No person is permitted to authorize, permit or
25 otherwise allow any parachutist to land on any
26 property other than a drop zone or target area
27 within a licensed parachute jumping center at a
28 small airport, unless so authorized by the [FAA]

1 on a once or twice per annum basis." Blue Sky,
2 supra, 711 F Supp at 682.

3 In Blue Sky, the FAA took the position that it viewed
4 its authority as "pervasive in the realm of parachute
5 jumping." Id. at 696. The court deferred to the FAA's
6 interpretation of its authority and determined that the
7 local parachute landing regulation quoted above (and other
8 aspects of the local regulations as well), were preempted by
9 the federal regulatory scheme expressed at 14 CFR Part 105.
10 The court concluded:

11 "Since the Town may not regulate parachute
12 jumping, the court sees no legitimate reason why
13 it may inquire into potential parachute jump sites
14 * * *." (Emphasis supplied.) Blue Sky, supra,
15 711 F Supp at 693.

16 The court gave no other explanation of why the local
17 regulation of parachute landing sites is preempted by 14 CFR
18 Part 105, other than (1) its deferral to an FAA assertion
19 concerning its authority, and (2) that the town advanced no
20 legitimate reason for regulating parachute landing sites.

21 In Blue Sky no argument was made that the regulation of
22 parachute jump sites was a part of a well developed land use
23 system that required the town to protect adjacent farmland.
24 We believe it is important that in this case, the
25 application of the county's regulations to the recreational
26 parachuting center implements a comprehensive state and
27 local land use regulatory scheme under which commercial
28 recreational activity may only be allowed in the underlying

1 RRF-5 zone, as a conditional use. One of the applicable
2 conditional use approval criteria is Clackamas County Zoning
3 and Development Ordinance (ZDO) 1203.01(C), which requires a
4 county determination that:

5 "The proposed use [will] not alter the character
6 of the surrounding area in a manner which
7 substantially limits, impair, or precludes the use
8 of surrounding properties for the primary uses
9 listed in the underlying zoning district."

10 The challenged decision includes findings that unless
11 parachute landings are limited to the subject property, the
12 proposed use seriously interferes with nearby farm uses. In
13 other words, the challenged decision purports to apply
14 county land use provisions to regulate the ground based
15 on-site and off-site impacts of the proposed recreational
16 parachuting center. We regard these differences between the
17 instant case and Blue Sky to be significant.

18 In this regard, a related statement by the court in
19 Blue Sky is instructive:

20 "To the extent the [challenged] ordinance
21 regulates land use in the Town of Gardiner, it is
22 not preempted by federal regulation of aviation."
23 Id. at 683.

24 This principle is reflected in other court decisions
25 addressing preemption arguments in connection with airports
26 and local airport related regulations.

27 In Faux-Burhans v. County Com'rs of Frederick County,
28 674 F Supp 1172 (D.MD. 1987) (Faux-Burhans), the court held
29 that local zoning regulation of a small airport was not

1 preempted by federal regulation. The court determined:

2 "* * * The ordinance in question does not regulate
3 noise emissions or the actual conduct of flight
4 operations within navigable airspace. Rather, the
5 Frederick County zoning law regulates intensity of
6 use (by number of aircraft), the type of aircraft
7 that can use the facility (by takeoff distance
8 required), the clear zone at the runway ends (by
9 prohibiting buildings thereon), the locale of the
10 operation (by set back requirements), and the type
11 of aircraft operations (by prohibiting
12 instructional flights). Certainly, these are all
13 areas of valid local regulatory concern, none of
14 which is federally preempted, and none of which
15 inhibits in a proscribed fashion the free transit
16 of navigable airspace. And just as certainly, no
17 federal law gives a citizen the right to operate
18 an airport free of local zoning control."
19 Faux-Burhans, supra, 674 F Supp at 1174.

20 In Wright v. County of Winnebago, 73 Ill App3d 337, 391
21 NE2d 772 (1979), the court determined a local government
22 acting under land use regulations had the power to deny
23 approval for an airstrip, even though the act of landing an
24 aircraft is, itself, a federally regulated activity.
25 Further, in Garden State Farms, Inc. v. Bay, 77 NJ 439, 390
26 A2d 1177 (1978), the court upheld a local government's
27 denial of an application for a small helistop based on local
28 land use regulations; accord Condor Corp. v. City of St.
29 Paul, 912 F2d 215 (8th Cir. 1990).

30 Finally, in Pacific Gas and Electric Co. v. State of
31 California, 103 S Ct 1713, 75 L Ed2d 752, 461 US 190 (1983)
32 (Pacific Gas and Electric), the United States Supreme Court
33 determined that the stated reasons justifying state
34 regulating of an activity heavily regulated by federal

1 legislation, is a critical factor in determining whether the
2 state regulation is preempted. In Pacific Gas and Electric,
3 the State of California enacted legislation prohibiting the
4 construction of nuclear power plants unless it was
5 determined, by the State, that there would be adequate
6 storage facilities and means of disposal available for a
7 proposed nuclear power plant's spent fuel at the time the
8 plant required such storage. Pacific Gas and Electric,
9 supra, 461 US 194. The court stated:

10 "A state moratorium on nuclear construction
11 grounded in safety concerns falls squarely within
12 the prohibited field. Moreover, a state judgment
13 that nuclear power is not safe enough to be
14 further developed would conflict directly with the
15 countervailing judgment [of the federal agency
16 charged with the regulation of nuclear power
17 plants]. * * * A state prohibition on nuclear
18 construction for safety reasons would also be in
19 the teeth of the Atomic Energy Act's objective to
20 insure that nuclear technology is safe enough for
21 widespread development and use -- and would be
22 preempted for that reason. * * *

23 "That being the case, it is necessary to determine
24 whether there is a nonsafety rationale for [the
25 state legislation]. California has maintained * *
26 * that [the legislation] was aimed at economic
27 problems, not radiation hazards. The California
28 Assembly Committee on Resources, Land Use, and
29 Energy, which proposed a package of bills
30 [including the disputed legislation] reported that
31 the problem was 'largely economic or the result of
32 poor planning, not safety related.' * * *
33 Without a permanent means of disposal, the nuclear
34 waste problem could become critical, leading to
35 unpredictably high costs to contain the problem or
36 worse, shutdowns in reactors. * * *

37 ** * * * *

1 "Therefore, we accept California's avowed economic
2 purpose as the rationale for enacting the
3 [challenged legislation]. Accordingly, the
4 statute lies outside the occupied field of nuclear
5 safety regulation." (Emphasis in original.)
6 Pacific Gas and Electric, supra, 461 US at 214-15.

7 In addition, the court acknowledged the limits of the Atomic
8 Energy Act as follows:

9 "Even a brief perusal of the Atomic Energy Act
10 reveals that, despite its comprehensiveness, it
11 does not at any point expressly require the States
12 to construct or authorize nuclear power plants or
13 prohibit States from deciding, as an absolute or
14 conditional matter, not to permit the construction
15 of any further reactor. * * * Congress in passing
16 the [Atomic Energy Act] * * * intended that the
17 federal government should regulate the
18 radiological safety aspects involved in the
19 construction and operation of a nuclear plant, but
20 that the states retain their traditional
21 responsibilities in the field of regulating
22 electrical utilities for determining questions of
23 need, reliability, cost and other related state
24 concerns." Pacific Gas and Electric, supra, 461
25 US at 204-206.

26 As we read the Pacific Gas and Electric case, while the
27 federal nuclear regulatory scheme preempts state authority
28 to establish safety regulations applicable to nuclear power
29 plants, a state is not preempted from regulating nuclear
30 plants to the extent that it simply regulates to protect its
31 legitimate economic interests. Further, in the absence of
32 federal preemption, state and local governments retain their
33 traditional authority over issues of state and local
34 concern. As the last quoted section of Pacific Gas and
35 Electric acknowledges, this authority includes the right to

1 conditionally deny a federally regulated use. Similarly, we
2 believe that in Oregon as well as in Clackamas County where
3 there is a significant state and local interest in the
4 regulation of land uses, including the authority and
5 interest in conditionally approving uses, conditional
6 approval of a recreational parachuting center is permissible
7 so long as the conditions themselves do not impinge on a
8 pervasively federally regulated aspect of a use.

9 Here, there is nothing in the federal regulatory scheme
10 relating to the regulation of parachute jumping which
11 purports to foreclose state and local land use regulation of
12 the ground based impacts of parachuting, under state and
13 local zoning laws. Thus, we believe the presence of a state
14 and local comprehensive land use scheme provides the
15 legitimate reason for a local government, in a local
16 permitting process, to regulate the ground based operations
17 and off site impacts of a recreational parachuting center,
18 including the prohibition of jumps onto property other than
19 the property which is the subject of the conditional use
20 permit. In this regard, there is nothing about 14 CFR Part
21 105 to indicate that it is in any way intended to foreclose
22 the application of a local land use regulation directed at
23 affecting a recreational parachuting business like the kind
24 of regulation at issue here. There is simply nothing in 14
25 CFR Part 105 establishing that the regulatory scheme
26 embodied therein is intended to be so pervasive as to

1 prevent the county from requiring a conditional use permit
2 for a recreational parachute center or from prohibiting
3 parachute jumpers to land on any but the particular property
4 subject to the conditional use permit.

5 Further, to the extent petitioner argues to the
6 contrary, we see nothing in 14 CFR part 105 to suggest that
7 the federal interest in parachuting is so dominant that a
8 local government cannot (1) require a conditional use permit
9 as a prerequisite to operating a recreational parachuting
10 center in certain zoning districts, or (2) impose conditions
11 requiring that parachutists land on the property that is the
12 subject of the conditional use permit. Such local
13 regulations are not inconsistent with the federal objectives
14 expressed by 14 CFR Part 105.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Under this assignment of error, petitioner asserts the
18 county determined the proposal satisfies all standards
19 listed in the ZDO. Petitioner argues the conditions of
20 approval imposed by the county are gratuitous and
21 unwarranted.

22 We agree with the county that the challenged decision
23 determines compliance with the relevant ZDO standards based
24 on the proposed use's compliance with the conditions of
25 approval. Therefore, the conditions of approval are a
26 fundamental part of the county's determination that the

1 application is approvable. To the extent that petitioner is
2 arguing the record establishes as a matter of law that the
3 application could be approved in the absence of the disputed
4 conditions of approval, we do not agree. Further, even if
5 we did, that alone would not make the imposition of
6 conditions of approval improper.

7 The second assignment of error is denied.

8 **THIRD, FOURTH, AND FIFTH ASSIGNMENTS OF ERROR**

9 Petitioner challenges three conditions of approval.⁶

10 They are:

11 "Condition 5. All landings of skydivers shall
12 occur on the subject property, and shall not be
13 directed to other properties within this area.

14 " * * * * *

15 "Condition 7. The applicant shall obtain and keep
16 on file at all times a bond or other security, or
17 a policy of insurance acceptable to the county,
18 which assures payment to surrounding property
19 owners for any damage resulting from flying or
20 skydiving activities on the subject property. It
21 is the specific intent of this condition that the
22 applicant be strictly liable for any damage
23 resulting from these activities, and that the form
24 of security provides for prompt payment for any
25 damage, including not less than \$100 as liquidated
26 damages for any trespass by people or equipment.

27 "Condition 8. Approval of this permit is limited

⁶Under these assignments of error, petitioner repeats its arguments that federal regulations preempt the county's authority to regulate petitioner's recreational parachuting business. We determine, supra, that the county is not preempted from applying its land use regulations to petitioner's ground based parachuting activities and the off site impacts of petitioner's parachuting activities. We do not revisit those arguments here.

1 to five (5) years from this date. Any renewal of
2 this permit shall be considered at a public
3 hearing and may be granted if the use satisfies
4 applicable zoning regulations then in effect."
5 Record 6-7.

6 ORS 215.416(4) authorizes counties to impose conditions
7 of approval that are "authorized by statute or county
8 legislation." ZDO 1303.12 provides the following concerning
9 the county's authority to impose conditions of approval:

10 "Approval of any administrative action^[7] request
11 may be granted subject to conditions. The
12 following limitations shall be applicable to
13 conditional approvals:

14 "A. Conditions shall be fulfilled within the time
15 limitations set forth in the approval, or, if
16 no time is set forth, within a reasonable
17 time.

18 "B. Such conditions shall be reasonably
19 calculated to fulfill public needs; emanating
20 from the proposed land uses as set forth in
21 the application in the following respects:

22 "1. Protection of the public from the
23 potentially deleterious effects of the
24 proposed use; or

25 "2. Fulfillment of the need for public
26 service demands created by the proposed
27 use."

28 In the challenged decision, the county justifies the
29 imposition of the disputed conditions based on the following
30 findings:

31 "There is no question that the skydiving activity

⁷There is no dispute that a conditional use permit is an administrative action as that term is defined in ZDO 1301.01(A).

1 conflicts with the operation of these nearby
2 farms. However, the incidence of trespass has
3 decreased as the applicant has intensified
4 instruction to avoid trespass and to retain all
5 equipment. The Hearings Officer is satisfied that
6 the incidents of trespass can be minimized in the
7 future through the applicant's on-going
8 precautions. Conditions of approval will provide
9 a method of compensating surrounding property
10 owners for any damage resulting from the skydiving
11 activity." Record 5.

12 These findings are supported by substantial evidence in the
13 whole record. Specifically, there is substantial evidence
14 that trespass is reasonably avoidable and that in the
15 absence of petitioner taking reasonable precautions to avoid
16 trespass, trespass has occurred and has caused damage to a
17 nearby farm and farmer. Accordingly, there is substantial
18 evidence in the whole record to support the county findings
19 justifying the imposition of conditions of approval to
20 minimize conflicts between the proposed recreational
21 parachuting center and nearby farm as well as other uses.

22 The remaining issues are whether the conditions exceed
23 the county's authority to impose the conditions under
24 ZDO 1303.12, whether the conditions reasonably further a
25 legitimate planning purpose (Benjamin Franklin Dev. Inc., v.
26 Clackamas County, 14 Or LUBA 758 (1986)), whether conditions
27 are reasonably related to the proposed use (Wheeler v.
28 Marion County, 20 Or LUBA 379, 385 (1990)), and whether the
29 conditions of approval are supported by substantial
30 evidence. Regarding the latter question, determining
31 whether there is substantial evidence in the whole record to

1 support the imposition of conditions of approval, is simply
2 a question of:

3 "* * * whether the evidence in the record could
4 lead a reasonable person to conclude that
5 considering the impacts of the proposed
6 development, there is a need for the condition to
7 further a legitimate planning purpose." Sherwood
8 Baptist Church v. City of Sherwood, ____ Or LUBA
9 ____ (LUBA No. 92-207, February 12, 1993), slip
10 op 6.

11 **A. Condition 5**

12 Petitioner contends Condition 5 is unreasonable.
13 Petitioner argues that because certain persons who are not
14 parties to either the local or LUBA proceedings have
15 previously granted petitioner authority to parachute onto
16 their property, the conditions restricting landings to the
17 subject property are unreasonable.

18 We see nothing unreasonable in the county approving the
19 proposed use subject to the condition that parachute
20 landings occur only on the property subject to the
21 conditional use permit. Further, we fail to see how the
22 fact that third parties may have given consent to allow
23 parachute landings onto their property makes the condition
24 unreasonable or unlawful. Finally, we believe there is
25 substantial evidence in the whole record from which a
26 reasonable person could conclude Condition 5 is necessary
27 for the legitimate planning purpose of minimizing conflicts
28 with other uses.

29 **B. Condition 7**

1 Petitioner argues that Condition 7, requiring
2 petitioner to maintain insurance to pay for damage to
3 property resulting from its recreational parachute jumping
4 activities, is unreasonable and inconsistent with ZDO
5 1303.12. Petitioner makes much of the fact that the
6 condition is said to impose "strict liability" for damages
7 caused due to petitioner's parachuting activities.

8 The fact that the county phrased Condition 7 in terms
9 of "strict liability" makes little difference to the
10 validity of the condition itself. All "strict liability"
11 means in this context is that it does not matter to the
12 county whether the particular action of petitioner which
13 causes damage to property was an intentional act or whether
14 the action occurred despite the exercise of reasonable care.
15 Rather, under Condition 7, petitioner is required to secure
16 insurance that will promptly pay for such damage to
17 properties caused by its recreational parachuting
18 operations, regardless of whether petitioner was negligent.
19 By using this methodology, the county creates a solution for
20 conflicts between the proposed use and nearby agricultural,
21 as well as other, properties. We believe that this portion
22 of Condition 7 is reasonably related to the legitimate
23 planning purpose of preventing the alteration of the
24 character of the surrounding agricultural area.

25 Concerning the evidentiary support for this portion of
26 Condition 7, there is undisputed evidence in the record that

1 the proposed use has resulted in damage claims from a nearby
2 farmer. In this regard, we note that there is little or no
3 evidence in the record that petitioner's parachute
4 activities have resulted in deleterious effects on nearby
5 residential activities.⁸ Nevertheless, we believe "the
6 evidence in the record could lead a reasonable person to
7 conclude that considering the impacts of the proposed
8 development, there is a need for the condition to further a
9 legitimate planning purpose." Sherwood Baptist Church v.
10 City of Sherwood, supra. There is evidence in the record
11 that the proposed use can have off site impacts that can
12 result in damage and trespass due to errant landings. This
13 is an adequate evidentiary foundation to support this
14 portion of Condition 7.

15 With regard to the portion of Condition 7 requiring
16 that when petitioner's customers or petitioner's equipment
17 trespass onto property in violation of Condition 5
18 (requiring all parachute landings to occur on the subject
19 property), \$100 is to be paid, the question is closer.

20 ZDO 102.03 provides that any violation of the ZDO is
21 "punishable upon conviction" by:

22 "A. A fine of not more than one hundred dollars
23 (\$100) for each day of violation where the
24 offense is a continuing offense, but such
25 fine may not exceed one thousand dollars

⁸Condition 7 is not limited to damage caused to agricultural properties only.

1 (\$1,000).

2 "B. A fine of not more than five hundred dollars
3 (\$500) where the offense is not a continuing
4 offense."

5 The portion of Condition 7 which requires payment of
6 \$100, regardless of the amount of actual damage, is not
7 "reasonably calculated to fulfill public needs emanating
8 from the proposed land uses" and that it does not "Protec[t]
9 of the public from the potentially deleterious effects of
10 the proposed use," or fulfill a "need for public service
11 demands created by the proposed use" as required by
12 ZDO 1303.12. The \$100 fine provision simply has no
13 relationship to the problems associated with the proposed
14 use, as articulated by the challenged decision. It is
15 intended to punish petitioner for violating the terms of the
16 conditional use permit, a function to be performed under ZDO
17 102.3.

18 While the portion of Condition 7 requiring insurance to
19 cover claims of, and immediate payment for, actual damage
20 caused by the proposed use is reasonable, in view of the
21 purposes of conditions of approval expressed in ZDO 1303.12,
22 the portion of Condition 7 requiring payment of a fine of
23 \$100 for any trespass, amounts to a fine for violating the
24 terms of the conditional use permit. However, as stated
25 above, the means of exacting a fine to punish for a
26 violation of the ZDO is established by ZDO 102.3. As a
27 prerequisite to exacting a fine, ZDO 102.3 requires a

1 "conviction" for violations. Accordingly, we believe the
2 portion of Condition 7 requiring a \$100 fine is beyond the
3 authority of the county under ZDO 1303.12.

4 **C. Condition 8**

5 Petitioner argues it is unfair to limit approval of the
6 recreational parachuting center to five years. Petitioner
7 argues it has made a substantial investment in the
8 recreational parachuting business and that five years is not
9 a long enough period of time to amortize the investment.

10 Petitioner's subjective determination that Condition 8
11 is unfair is not the test of that condition's validity.
12 Petitioner made investments in the subject property under
13 the 1988 conditional use permit, which had a limited
14 duration of three years. Petitioner continued to make
15 investments in the subject property apparently hoping that
16 the challenged conditional use permit would be extended for
17 a very long or an indefinite period of time. The issue
18 concerning the validity of Condition 8 is whether the county
19 has the authority to limit the proposed use to five years
20 and whether that condition is reasonable in view of the
21 impacts of the proposed use. We conclude the answer to both
22 inquiries is yes. We also conclude that there is
23 substantial evidence in the whole record to support the
24 county's imposition of Condition 8.

25 In sum, we believe the three disputed conditions of
26 approval, as explained in the above quoted findings, are

1 reasonably connected to the proposed recreational
2 parachuting center. In addition, except as explained,
3 supra, concerning the condition requiring an automatic \$100
4 fine, all three of the disputed conditions of approval serve
5 planning purposes expressed in the ZDO, viz. to protect
6 nearby farm uses as well as other land uses from the
7 documented deleterious effects associated with the proposed
8 use.

9 The third, fourth and fifth assignments of error are
10 sustained, in part.

11 **CONCLUSION**

12 The county relied upon the disputed conditions to
13 justify approval of the challenged decision. We determine
14 above that the portion of Condition 7 relating to the \$100
15 fine is invalid because it exceeds the county's authority.
16 Under these circumstances, we must remand the challenged
17 decision for the county to determine whether the proposal is
18 approvable without the automatic \$100 fine portion of
19 Condition 7. See Olson Memorial Clinic v. Clackamas County,
20 21 Or LUBA 418, 424 (1991).

21 The county's decision is remanded.