

LAND USE  
BOARD OF APPEALS

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

JUN 16 3 18 PM '83

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2  
3 JOHN and CORINNE WERNEKEN, and )  
THE NORTHWEST DISTRICT )  
4 ASSOCIATION, )

5 Petitioners, )

6 v. )

7 CITY OF PORTLAND, a municipal )  
corporation, )

8 Respondent. )

LUBA NO. 83-021

FINAL OPINION  
AND ORDER

9 Appeal from City of Portland.

10 Steven L. Pfeiffer, Portland, filed a petition for review  
11 and argued the cause for petitioners.

12 Ruth Spetter, Portland, filed a brief and argued the cause  
for respondent.

13 Cox, Board Member; Bagg, Board Member; participated in the  
14 decision.

15 Affirmed.

6/16/83

16 You are entitled to judicial review of this Order.  
17 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 COX, Board Member.

2 NATURE OF PROCEEDING

3 Petitioners appeal Portland Ordinance No. 154188 adopted on  
4 January 20, 1983. The ordinance grants to Imogene M. Harding  
5 (hereinafter Harding), a revocable permit allowing the ground  
6 floor unit of a tri-plex to be used as a crew residence for a  
7 Portland Ambulance Service. The permit expires on January 1,  
8 1985.

9 ALLEGATIONS OF ERROR

10 Petitioners set forth three bases for their request that  
11 the revocable permit be reversed. Those arguments include:

12 "1. By exempting the approved use from  
13 applicable land use criteria, the revocable permit  
14 approved by respondent City of Portland violated the  
15 statutory requirements that discretionary permit  
16 approvals be based on standards and criteria which  
17 implement, not waive, the city's comprehensive plan  
18 and Zoning code.

16 "2. The City Council's decision fails to conform  
17 with all applicable comprehensive plan policies in  
18 violation of ORS 227.175(3).

18 "3. The challenged ordinance is based on an  
19 order which does not comply with ORS 227.173(2)."

20 FACTS

21 On September 8, 1982, deedholder Harding requested a  
22 revocable permit so that the bottom unit of her tri-plex could  
23 be used to house on duty paramedics employed by the Care  
24 Ambulance Service. The second and third floor units of  
25 applicant's tri-plex are presently in residential use. The  
26 paramedic operation has used the bottom unit for the past two

1 years. The hearings officer found that during that two year  
2 period no complaints were registered with the applicant or the  
3 city regarding the paramedic's use of the site.

4 The tri-plex is located on a 6,000 square foot site at 2043  
5 NW Kearney, Portland, Oregon. The ambulance service is manned  
6 by two paramedics which remain on site during their 24-hour  
7 shift. The shift changes daily at 8 a.m. There is an  
8 associated shift overlap of only a "couple of minutes." There  
9 is one ambulance unit associated with the use.

10 The surrounding area is a mixture of residential and  
11 commercial uses. The majority of the area is single-family and  
12 multi-family residential. There are a number of commercial  
13 offices in the area, especially medically oriented offices. To  
14 the north of applicant's site is an office. Across the street  
15 to the south is a rehabilitation institute (medical office).  
16 In addition, the Physicians and Surgeons and Good Samaritan  
17 hospitals are located close to the subject property.

18 The application was considered by several bureaus which  
19 approved the concept and suggested limiting conditions. The  
20 planning staff sent a comprehensive report and recommendation  
21 to the hearings officer on October 15, 1982. On October 26,  
22 1982, after considering the staff report as well as testimony  
23 from the applicant and adjoining or nearby property owners, the  
24 hearings officer approved the request subject to seven  
25 conditions one of which would require termination of the use  
26 within two years (with forfeiture of a \$2,000 bond if the

1 termination date is not respected). Several of the conditions  
2 to the use would not disturb the neighborhood. These latter  
3 conditions were provided to address petitioners' concerns.

4 The testimony about the use was mixed; however, the greater  
5 weight of testimony was similar to that of a neighboring  
6 property owner who said she was unaware the ambulance service  
7 had been using the apartment before the subject request brought  
8 it to her attention. The residents of the tri-plex's two upper  
9 units wrote in support of the request.

10 The hearings officer's decision was appealed by the  
11 petitioners to the city council which on December 15, 1982 and  
12 January 6, 1983 considered the planning staff report, the  
13 hearings officer's report and testimony from proponents and  
14 opponents to the request. On January 20, 1983, the city  
15 council approved the application by Ordinance 154188 which  
16 adopted the hearings officer's decision with findings of fact  
17 and conclusions of law.

18 DECISION

19 First Assignment of Error

20 Petitioners claim

21 "By exempting the approved use from applicable land  
22 use criteria, the revocable permit approved by  
23 respondent City of Portland violated the statutory  
24 requirements that discretionary permit approvals be  
based on standards and criteria which implement, not  
waive, the city's Comprehensive Plan and Zoning Code."

25 The standards for granting a revocable permit within the  
26 City of Portland are set forth in Portland Code Section

1 33.98.060. Pursuant to that code section, a revocable permit  
2 alters the regulations or exempts the applicant from provisions  
3 or regulations of the zoning code or map. The revocable permit  
4 procedure was created by the City of Portland in recognition  
5 "of the fact that zoning laws are enacted with general  
6 application in mind and that upon occasion temporary deviations  
7 from the general application may be permitted without detriment  
8 to the zoning laws in general and the neighborhoods surrounding  
9 revocable permits specifically." The code provision  
10 establishes that no vested rights arise to the applicant from  
11 the revocable use. It also states that all revocable permits  
12 are personal to the applicant and shall neither run with the  
13 land nor be transferable upon transfer or change of ownership  
14 or ownership rights to the property. The applicant for a  
15 revocable permit must be either the deedholder or recorded  
16 contract purchaser of the property in question.

17 In order to grant a revocable permit, it is required that  
18 the city shall show, supported by findings and evidence that:

19 "(1) To permit the particular deviation from the Code,  
20 as requested, would result in trivial detriment to the  
21 surrounding properties and not interfere with future  
22 enforcement of the correct zoning standards; and

23 "(2) By its nature, the use is one which can be  
24 terminated and removed upon request."

25 The code also provides that:

26 "All revocable permits may be conditioned to insure  
that they do not disturb the surrounding property and  
otherwise comply with this section."

Petitioners' argument centers around their belief that the

1 above identified code provision violates the requirements of  
2 ORS 197.175(2)(d) and ORS 227.173(1).<sup>1</sup> In essence, the  
3 petitioners' argument is that the general statutory  
4 requirements that land use decisions be made in accord with the  
5 statewide goals and/or a comprehensive plan, prohibit the  
6 issuance of permits which temporarily allow uses at variance  
7 with those standards. Petitioners claim that the standards  
8 enunciated in Portland Code 38.98.060 are deficient and violate  
9 state law in that they allow the city to reduce to "meaningless  
10 dicta" all comprehensive plan policies which are required to be  
11 adopted by the above cited state statutes.

12 We do not agree with petitioners. Temporary permits which  
13 allow uses otherwise proscribed by law have been recognized,  
14 when formally provided for, as legitimate safety valves in the  
15 enforcement of zoning codes. Temporary permits, such as the  
16 one in effect in this case, may not, however, be applied so  
17 that they defeat the purpose of the zoning ordinance. They  
18 must be for uses truly of a temporary nature. 3 Anderson,  
19 American Law of Zoning, Section 19.32 (2d ed. 1977). Oregon  
20 State Bar, Land Use Digest, Section 19.13 (1982).

21 The statutes petitioners cite, i.e. ORS 197.175(2)(d) and  
22 227.173(1) are statements of the common principle of Oregon  
23 land use law. They have as their objective the ensurance of  
24 long term coordinated use of land. That purpose is not  
25 defeated by ordinances or plan provisions allowing temporary  
26 permits such as the revocable permit at issue here. They also

1 do not prohibit use of such permits. For example, in ORS  
2 227.215(3)(d), the state legislature recognized that a city  
3 could provide for exemptions from its zoning ordinances. As is  
4 stated in ORS 227.215, the term development is defined and  
5 regulations of development are set forth. Subsection 3(d)  
6 holds that a development ordinance may provide for "development  
7 which is exempt from the ordinance" itself.

8 Petitioners' basic concept is that there is no room in the  
9 statewide land use program for temporary permits. We disagree  
10 and deny petitioners' first assignment of error.

11 Second Assignment of Error

12 Here petitioners claim that

13 "The council's decision fails to conform to all  
14 applicable comprehensive plan policies in violation of  
15 ORS 227.175(3)."<sup>2</sup>

16 Petitioners' first sentence in their argument is as follows:

17 "ORS 227.175(3) requires that applications for  
18 discretionary permits, as defined in ORS 227.160 to  
19 include this permit, be in compliance with the city's  
20 own comprehensive plan goals and policies."

21 Based on that analysis of the law, petitioners attempt to  
22 establish that the city was required to document conformance  
23 with each of the city's comprehensive plan goals and policies.  
24 Petitioners claim these policies include the Northwest Policy  
25 Plan; Comprehensive Plan Goal 2 - Urban Development;  
26 Comprehensive Plan Goal 4 - Housing; and Comprehensive Plan  
27 Goal 6 - Transportation.

28 We disagree in part with petitioners' premise and deny

1 their second assignment of error given the action taken by the  
2 city. The definition of permit contained in ORS 227.160 is  
3 that of: "discretionary approval of a proposed development of  
4 land under ORS 227.215 or city legislation or regulation."  
5 (Emphasis added). ORS 227,215(1) defines development

6 "(1) As used in this section 'development' means a  
7 building or mining operation, making a material change  
8 in the use or appearance of a structure or land,  
9 dividing land into two or more parcels, including  
partitions and subdivisions as provided in ORS 92.010  
to 92.285, and creating or terminating a right of  
access." (Emphasis added).

10 The use which is subject to the contested revocable permit  
11 is clearly not a building or mining operation. Furthermore,  
12 there is nothing in the record to indicate that the proposed  
13 use will make a "material change in the \* \* \* appearance of a  
14 structure." With reference to the appearance of a structure,  
15 it is clear that the tri-plex appearance will not be altered.  
16 Petitioners do not even claim that the structure will be  
17 altered. That leads us to, by definition, the only other  
18 standard applicable, whether "a material change in the use \* \*  
19 \* of a structure" has occurred. Here petitioners claim the use  
20 of the structure for the purpose of providing a location for  
21 the crew of an ambulance company takes residential property out  
22 of use and puts into use a "commercial" operation.

23 The city's findings include a statement from adopted  
24 policies within the Northwest District Policy Plan for property  
25 zoned AO (the zoning prior to the RH, Residential High Density,  
26 zoning placed on the property in 1981). The policy is



1 apparently still valid because petitioners do not contest its  
2 use and it was a portion of the city's findings. That policy  
3 states:

4 "Maintain and encourage high density residential use.  
5 Permit conversions of existing residential units to  
6 non-residential uses under conditional use provisions  
7 if the use proposed is substantially residential and  
8 if the residential like character of the building is  
9 retained." (Emphasis added).

10 The city found that the

11 "residential/commercial use of this site will not  
12 involve structural changes and the residential  
13 character of the building and area will not be altered  
14 by the removable use. The proposed use is  
15 substantially residential. Thus, the proposal is  
16 consistent with the neighborhood plan."

17 In addition, the city found that

18 "The use of the apartment unit for a paramedic crew  
19 station removes the unit from residential use.  
20 However, the unit is used by the crew for a  
21 residential-living quarters use; thus the housing goal  
22 was partially met. In addition, the use of the site  
23 for crew quarters does not preclude future residential  
24 use."

25 Petitioners take issue with what they consider to be "a  
26 self-serving interpretation" of the comprehensive plan's  
policy. Petitioners fail to recognize, however, that the city  
found under its applicable code provision, i.e. 33.98.060, the  
use will result in such a "trivial" deviation from the code so  
as to not interfere with future enforcement of the code and the  
zoning standards. To the extent that petitioners are arguing  
the use of the property as the ambulance crew residence is not  
trivial, their argument merely is a disagreement with the

1 city's findings. The finding of trivialness of the use change  
2 is allowed by the comprehensive plan and city ordinances and is  
3 supported by substantial evidence in the whole record. For the  
4 foregoing reasons, we deny petitioners' second assignment of  
5 error.

6 Third Assignment of Error

7 Petitioners claim

8 "The challenged ordinance is based on an order which  
9 does not comply with ORS 227.173(2)."

10 Here petitioners address the issue of whether the council's  
11 decision meets the requirements of ORS 227.173(2) which states:

12 "Approval or denial of a permit application shall be  
13 based upon and accompanied by a brief statement that  
14 explains the criteria and standards considered  
15 relevant to the decision, states the facts relied upon  
in rendering the decision and explains the  
justification for the decision based on the criteria,  
standards and facts set forth."

16 Petitioners claim that Ordinance 154188 fails to meet the ORS  
17 227.173(2) standard. We deny petitioners' assignment of error  
18 on the ground that to the extent ORS 227.173(2) applies it has  
19 been met. See discussion infra.

20 Affirmed.

FOOTNOTES

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3 1

ORS 197.175(2)(d) states:

4           "(2) Pursuant to ORS 197.005 to 197.430 and 197.605  
5 to 197.650, each city and county in this state shall:

6           "\* \* \*

7           "(d) If its comprehensive plan and land use  
8 regulations have been acknowledged by the commission, make  
9 land use decisions in compliance with the acknowledged plan  
and land use regulations."

10          ORS 227.173(1) states:

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

15 2

16          ORS 227.175(3) states

17           "(3) The application shall not be approved unless the  
18 proposed development of land would be in compliance with  
19 the comprehensive plan for the city. The approval may  
include such conditions as are authorized by ORS 227.215 or  
any city legislation."