BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PORTLAND CITY TEMPLE, INC., Petitioner, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 83-098 FINAL OPINION AND ORDER

Appeal from Clackamas County.

R. P. Joe Smith, Portland, filed the Petition for Review and argued the cause for petitioner.

Michael Judd, Oregon City, filed a brief and argued the cause for Respondent County.

Richard F. Crist, Oregon City, filed a brief and argued the cause for Respondent/Participants.

DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee participated in the decision.

AFFIRMED 04/13/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion by DuBay.

NATURE OF THE APPEAL

This is an appeal from a Clackamas County Order denying a conditional use permit application for a personal use airport and also denying a request to allow a second residence on tax lot 701, either as a conditional use for a second dwelling or because the applicant has a vested right to occupy the dwelling.[1]

FACTS

Petitioner is a non-profit corporation owning approximately 40 acres of land zoned General Agricultural District (GAD). The property was purchased in May 1969, and was first made subject to zoning regulations the following October. The zone classification then applied was Rural (Agricultural) Single Family Residential District (RA-1). Although the property was occasionally used for aircraft takeoffs and landings since 1968, subsequent litigation resulted in a Circuit Court decision that a pre-existing use as an airstrip was not established prior to the zoning. On appeal to the Court of Appeals, the Circuit Court decree was affirmed.[2]

In 1970 an A-frame house was built on the property, and in 1972 construction of a home and garage was commenced. Building permits were not required for construction until 1974.

The entire 40 acre tract was one tax lot under one ownership until 1971 when a one acre tract on which the A-frame was located was designated tax lot 702. The tax lot was

created when Portland City Temple released all of its interests in the one acre tract to the woman who originally sold the 40 acre tract to Portland City Temple in exchange for a release of security interest on another part of the original 40 acre tract. However, Portland City Temple retained ownership of the A-frame house at the time the rights to the one acre of land were released to the seller. The remainder of the 40 acre tract was designated tax lot 701. The one acre tract (tax lot 702) was then owned by the seller, free of any interest in Portland City Temple.

The A-frame, built in 1970 on tax lot 702, was occupied by a son of the founder of Portland City Temple and the son's wife. Although Portland City Temple did not own the one acre parcel after 1971, the A-frame remained on its original site until it was moved in 1979 from tax lot 702 to tax lot 701. In 1981 Portland City Temple acquired ownership of the one acre tract. Tax lots 701 and 702 are now in the same ownership, and the A-frame is on tax lot 701. The residence of the founder of Portland City Temple is also located on tax lot 701.

Portland City Temple requested the county to consider the corporation as having a vested right to use the A-frame as a residence in its present location and also submitted an application for a second dwelling conditional use permit for the A-frame on tax lot 701. Both requests were denied, and this appeal followed. Our review first considers the assignments of error regarding the residence, followed by the

assignments of error regarding the personal use airport.

I. THE LOCATION OF THE A-FRAME

Petitioner claims the occupancy of the A-frame as a residence has been continuous since construction. Further, petitioner contends that moving the house approximately 150 feet from tax lot 702 to tax lot 701 did not alter the impact on surrounding land, nor was it a dismantling sufficient to constitute a relinquishment of any grandfather rights to continue to occupy the structure.

In 1979, when the A-frame was moved, the county zoning ordinance allowed only one single family residence on the property of petitioner. As there was another residence on tax lot 701 at the time the A-frame was moved, the county viewed the movement of the A-frame to tax lot 701 as establishing a second dwelling in violation of the zoning ordinance.

In the face of the county's assertion the A-frame could not be used as a residence because the zoning ordinance prohibited a second residence on tax lot 701, the petitioner claims a right to occupy the A-frame as a "vested right" or "grandfather right." We understand petitioner, by the use of these terms, to claim a right to continue occupancy of the A-frame as a permitted nonconforming use.

The nature of the nonconforming use doctrine was recently discussed by the Oregon Supreme Court in Polk County v. Martin, 292 Or 69, 636 P2d 952 (1981):

"Early in the history of zoning it became apparent

that the attainment of tidy, homogeneous zones, however sound in theory, would be difficult of achievement because of existing usages of land which did not conform to the master plan and the unwillingness of the owners of such land to sacrifice their imcompatible uses to the "greater good." The result was the decision by many legislative bodies to allow the continuation of existing uses as permitted nonconforming uses. The pattern of such legislation has been to protect existing uses, but such permitted uses are usually defined only in a general way, such as an "existing use" or "lawful use," leaving to the courts the responsibility to define the meaning of "existing use" on a case-by-case basis.

"The result of such legislation and court decisions has been the development of a body of law which permitted nonconforming uses, if the right had "vested" prior to the enactment of the zoning legislation. The terms "vested right" and "existing use" were sometimes used interchangeably, but in either case the right to continue the nonconforming use turned upon such factors as (1) whether the use was actual and existing at the time the zoning restriction became effective, and (2) whether it was a substantial use. Once the landowner established the existence of a nonconforming use, it was often held that a "vested right" existed to continue such nonconforming use. Whether a vested right existed was largely determined by usage. 3 Rathkopf, The Law of Zoning and Planning 58-1 to 58-8, ch 58 (4th ed 1981); 1 Anderson, American Law of Zoning, ch 6, §§6.01-6.10, pp 306-329; 82 Am Jur 2d Zoning and Planning 698, §186." Polk County v. Martin, supra at 74.

The courts have also held nonconforming uses are not favored because, by definition, they detract from the effectiveness of a comprehensive zoning plan. In Parks v. Tillamook Co. Comm./Spliid, 11 Or App 177, 196, 501 P2d 85 (1972), former Chief Judge Schwab stated:

"Accordingly, provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of

nonconforming uses as much as possible." Parks v. Tillamook Co. Comm./Spliid, 11 Or App at 197.

The legislative enactment implementing the nonconforming use principle in Oregon provides:

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted to reasonably continue the use. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted." ORS 215.130(5).

Other provisions of 215.130 enumerate under what conditions a nonconforming use may be restored or replaced and also includes a clarification of the term "alteration."[3]

Before the A-frame was moved from tax lot 702, the dwelling either had the status of a use allowed by the zoning ordinance then in effect, or it was a permitted nonconforming use because its occupancy as a residence predated the implementation of zoning ordinance restrictions against such use. In either event, the removal of the A-frame from tax lot 702 changed the use of that one acre tract. It no longer had a residence on it. It was vacant land. The use of that land for residential purposes was interrupted. ORS 215.130(7) prohibits resumption of an interrupted permitted use unless the resumed use conforms to the requirements of the zoning ordinance in effect at the time of the resumption. This provision applies in the circumstances present here. After the A-frame was removed from tax lot 702, the resumption of use of tax lot 702 for

residential purposes was prohibited unless the resumed use was in compliance with the Clackamas County Zoning Ordinance.

Petitioner's argument, however, does not focus on the use of tax lot 702 for residential purposes but on the peripatetic A-frame. That is, petitioner argues that Portland City Temple used the A-frame for a dwelling before it became subject to zoning ordinance restrictions and continuously occupied the A-frame before and after the move. Petitioner thus claims the use of the A-frame was not interrupted and that Portland City Temple has a vested right to continue the same use at another location. Even if the zoning ordinance prohibits the same use at the new location, petitioner's approach would nevertheless allow continued use of the improvement as a transferred "vested right" or permitted nonconforming use at the new location.

We believe the lawful use of an improvement as a permitted nonconforming use is inextricably tied to the land where the improvement is located. Moving the improvement to another site is a change of use of the land. It follows therefore, that the right to use the A-frame as a residence existed only so long as the A-frame was so used on tax lot 702. Removing the residence from tax lot 702 terminated the lawful use of the A-frame as a residence at that location. Its use at a new location is lawful only if the use is in compliance with existing zoning laws.

Tax lot 702 was purchased by Portland City Temple in 1981, two years after the A-frame was moved. In 1981 the A-frame had

the status of an unpermitted second dwelling on tax lot 701. Although petitioner seems to contend the acquisition of tax lot 702 somehow restores the status of the A-frame as a lawful use, petitioner proposes no theory justfying that contention and cites no legal authority supporting it. We do not find the acquisition of tax lot 702 changed the status of the A-frame as a prohibited second dwelling.

Petitioner also applied to the county for a conditional use permit to allow the A-frame as a second dwelling on tax lot 701. The application was denied. Petitioner argues this matter should be remanded for further consideration by the county under the provisions of a 1983 enactment, §6(4), ch 826, Or Laws 1983. That section sets forth the conditions in which a non-farm dwelling may be established on lands zoned for exclusive farm use. The section is part of a legislative act denominated the "Marginal Lands Bill." We understand that act to allow counties to designate lands as marginal lands when certain criteria have been met. Petitioner, however, does not specify how the new law applies to this matter. The petitioner states:

> "Counsel for petitioner frankly became aware of this statute in preparing his brief, and petitioner does not pretend to know whether it would influence the county commission, or make it appropriate for the county commission, to reconsider its denial of a conditional use permit for petitioner's A-frame."

In the absence of any greater specificity than this of claimed error by the county in denying the application for a

conditional use permit for a second dwelling on tax lot 701, there is no issue for this Board to review.

This assignment of error is denied. The decision of the county that no vested right exists for use of the A-frame as a residence on tax lot 701, and the decision denying the conditional use permit for a second dwelling on tax lot 701, are affirmed.

II. THE PERSONAL USE AIRPORT

Petitioner challenges the order first on the ground it includes erroneous findings regarding compliance with the criteria in the zoning ordinance and comprehensive plan, second on the ground the order is unconstitutional, and last on the ground of federal preemption. We will consider petitioner's arguments in that order.

A. Zoning Ordinance and Plan Criteria

The first argument by petitioner challenges the finding that petitioner's proposed use is not listed as a conditional use in the GAD Zone. The zoning ordinance allows a personal use airport as a conditional use in the GAD Zone.[4] The county made the following finding regarding the extent of the proposed use:

> "This application for a conditional use permit proposes the permanent basing of six aircraft together with additional aircraft being based on a temporary basis. It proposes to utilize a 40' x 90', a 40' x 120' and a 30' x 40' building as hangars or aircraft accessory buildings. The material submitted by the applicant sets forth that there are six staff families connected with the proposed use. The record further reflects substantial evidence of additional aircraft

being located on the property in various states of repair or construction. The applicant is Portland City Temple, Inc., a corporation. The information submitted by the applicant for evaluation of noise contours reflects a projection of 723 annual operations from the landing strip. The application further provides that personal aircraft transportation is an essential requirement of the Portland City Temple, Inc. staff business.

"The use proposed as set forth in the application and as described by the testimony of neighbors and other persons within the area is not a personal use airport as defined by the zoning ordinance but is most similar to commercial aviation not in conjunction with agricultural operations on the subject property." Record at 6-7.

Petitioner challenges the determination the proposed use is not a personal use airport because it is principally based on an erroneous finding about the number of operations anticipated at the airstrip - that is 723 takeoffs and landings per year. Petitioner says this is exaggerated. Further, Portland City Temple has agreed to limit the number of such operations per year.

The findings, however, do not rely solely on the number of operations expected per year. The findings describe the number of aircraft to be permanently based at the airstrip, the number and size of hangars, the additional aircraft located on the property for purposes of repair and construction, and note that personal aircraft transportation is an essential aspect of the business of the Portland City Temple staff. All these factors were the basis of the county's conclusions. Petitioner has not claimed the county erred in relying on those factors, nor does petitioner say the findings were not supported by substantial

evidence. In these circumstances, the findings are sufficient to state a basis for the county's conclusion the proposed use is not a personal use airport permitted by the county ordinance.

Petitioners next turn their attention to the county's findings under §1203.01(B)[5] of the zoning ordinance. That section requires a demonstration that

> "The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features."

Petitioners argue that there is overwhelming evidence the size and shape of the property is suitable for the use and the use would not alter the ability of the surrounding land to be farmed. Petitioner's argument asks us to reweigh the evidence presented to the county commissioners and conclude the petitioners have proven that the site is suitable for the use. We are not able to perform this function. See ORS 197.830(11); Christian Retreat Center v. Board of Comm. for Wash Co., 28 Or App 673, 560 P2d 1100 (1977).

Even if we treat petitioner's argument to be that the findings are not adequate to explain the decision, our view will not change the outcome of this case. As explained above, the county has considered whether this use is indeed a personal use airport permissible under the county's zoning code and has concluded it is not.

Also, the county made findings about the impact of this use

on nearby residential and farming uses. Section 1203.01(D)[6] of the code requires an analysis of the impact of the use on the character of the surrounding area. The findings state there will be interference with other nearby properties and uses because of noise. The findings clearly express, and we believe the record supports, the county's conclusion that there will be adverse impacts from noise on residential and farm uses. See especially findings, 4(b)(1-2), Record pp. 7-8. We conclude the county was correct in finding the proposed use does not meet §1203.01(D) of the county code.[7] Findings supporting a conclusion that any one of the applicable criteria have not been met are sufficient to affirm a denial of a requested land use change. Marracci v. City of Scappoose, 26 Or App 131, 552 P2d 552 (1976); Weyerhaueser v. Lane County, 7 Or LUBA 42 (1982). The assignment of error challenging the decision as not in compliance with the standards of the zoning ordinance and comprehensive plan is denied.

B. Constitutional Issues

The error here claimed is illustrated by petitioner's analogy comparing petitioner and an owner of property next to a legal highway. Such owner may use the highway for access to his property by private automobile, and, according to the analogy, the air itself can be considered a highway for air traffic to and from petitioner's private property. To refuse access to petitioner's property by legally licensed aircraft traveling on the air highway is alleged by petitioner to treat

aircraft owners differently than car owners and is therefore an unconstitutional denial of equal protection of the laws under both Article 1, Section 20 of the Oregon Constitution, or in the alternative, the 14th Amendment to the United States Constitution.[8]

Article 1, Section 20 of the Oregon Constitution provides:

> "No law shall be passed granting to any citizen or class of citizens, priviledges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Assailing governmental actions for violation of the equal protection provisions requires a showing of unequal legal treatment of persons in the same circumstances. However, social/economic legislation may create classifications with different legal consequences and still meet equal protection requirements if there is any rational basis for making the distinction.

> "The classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it...." Savage v. Martin, 161 Or 660, 694, 91 P2d 273 (1939).

We do not find the distinction between the parking of automobiles on private property and use of property for aircraft takeoffs and landings to be arbitrary. Although there may be some similarities in a general sense, as illustrated by petitioner's analogy, the two activities are easily distinguished. For example, the site requirements of land suitable for an airstrip are easily distinguished from the requirements for parking terrestrial vehicles. We therefore

reject petitioner's claim of unconstitutional treatment.

C. Federal Preemption

Lastly, petitioner alleges the county has no legal power to restrict the use of petitioner's land for use as an airstrip because the federal government has preempted the entire field of aviation regulation, removing it completely from county control.

Petitioner's claim can be interpreted to assert that, because of the federal preemption, the county may not regulate personal use airports, and no permit is required. If that is the gist of petitioner's argument, it is not properly at issue here because petitioner has conceded a permit is necessary by making the application. One may not in the same proceeding complain a requested permit was improperly refused and also claim no permit is required in any event. Damascus Comm. Church v. Clackamas Co., 32 Or App 3, 573 P2d 726 (1978); Anderson v. Peden, 30 Or App 1063 569 P2d 663 (1977); Aff'd 284 Or 313, 587 P2d 59 (1978).

Notwithstanding that possible disposition of this assignment of error, we also find there is no well defined doctrine of preemption by the federal government sufficient for us to negate the statute, ORS 215.213(10), authorizing counties to lay down conditions for siting personal use airports. Congress has enacted extensive legislation, principally the Federal Aviation Act of 1958 (49 USC §1301 et seq), to regulate air commerce. The legislation has been held to

preempt some local ordinances restricting air traffic. For example, ordinances restricting air traffic because of noise and low altitude have been held to be preempted by the federal law. See City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S. Ct. 1854, 36 L.Ed.2d 547 (1973); American Airlines, Inc. v. City of Audubon Pk., Ky., 297 F. Supp. 207, (W.D. Ky. 1968). As for ground activities and aspects of airport siting that do not regulate the operation of airborne aircraft, neither federal legislation nor case law precedent support a holding that all local enactments restricting aircraft activities are precluded. The Federal Aviation Act includes a section entitled "Federal Preemption." 49 USC §1305. The language of that clause does not exclude all state exercise of authority and expressly states the act does not limit state proprietary powers and rights.[9]

We note here that petitioner has not pointed to any provision of any federal statute excluding local legislation in the form of a zoning ordinance limiting the location and conditions under which a private personal use airport may be established. There are provisions of the Federal Aviation Act declaring complete and exclusive sovereignity over airspace in the United States.[10] In Praznik v. Sport Aero, Inc., 42 Ill App 3rd 330, 355 N.E.2d 686 (1976), the court considered whether those provisions served to preempt all local legislation affecting airports and said:

"However, the validity of a claim of preemption cannot

be judged by reference to a broad statement about the comprehensive nature of federal regulations under a particular act of congress. (citations omitted)...Unless an intent to preempt is clearly manifested by the entire act, it will not be presumed that a federal statute was intended to supercede the exercise of the power of the state." Praznik v. Sport Aero, Inc., 255 N.E.2d at 694.

Other states have considered related issues and found federal supremacy not to prohibit particular airport activity. For example, in Garden State Farms, Inc. v. Bay II, 136 NJ Super 1, 343 A2d 832 (1975), the Superior Court of New Jersey considered the preemption question in a proceeding brought to attack the validity of an ordinance prohibiting heliport pads in all zones of a city. The court concluded congress did not endeavor to exclude state action in all cases related to aeronautics. The court said:

"Despite the comprehensive effect of federal regulation on air commerce, the states and localities retain power to regulate ground activities not directly involving actual aircraft operation." Garden State Farms, Inc. v. Bay II, 343 A2d at 832.

For these reasons, we do not find petitioner has stated a basis for application of the federal preemption theory to prohibit the county's denial of a conditional use permit for a personal use airport.

The county's decision denying the application for a personal use airport is affirmed.

Affirmed.

FOOTNOTES

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1 Our use of the term "tax lot" is for convenience only. Nowhere in this opinion do we intend the term to acquire more significance than that of a designation for tax purposes. See Resseger v. Clackamas County, 7 Or LUBA 152 (1983).

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2 Clackamas Co. v. Port. City Temple, 13 Or App 459, 511 P2d 412 (1973), Record at 248. The appeals court affirmed on the basis that use of the property for aircraft landing and takeoff before implementation of zoning was too infrequent to establish a permitted non-conforming use.

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3 ORS 215.130 provides in relevant part:

"(6) Restoration or replacement of any use described in subsection (5) of this section may be permitted when the restoration is made necessary to comply with any lawful requirement for alteration in the use. A change of ownership or occupancy shall be permitted.

"(7) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

"(8) Any proposal for the alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be considered a contested case under ORS 215.402 (1) subject to such procedures as the governing body may prescribe under ORS 215.412.

"(9) As used in this section, "alteration" of a nonconforming use includes:

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

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[4] Section 402.06(B) of the Clackamas County Zoning Ordinance states in part:

"B. Public Hearing Review: The following uses may be permitted by the Hearings Officer after a public hearing conducted pursuant to Section 1300, or under the review procedures provided under the specific 800 section, when the proposal satisfies the requirements under subsection 402.06A, above: (11-15-82)

"(10) Personal use airports and helicopter pads, including associated hangar, maintenance and service facilities. A personal use airport as used in this section means an airstrip restricted, except for aircraft emergencies, to use by the owner and, on an infrequent and occasional basis, by his invited guests and by commercial aviation activities in connection with agricultural operations. No aircraft may be based on a personal use airport other than those owned or controlled by the owner of the airstrip."

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[5] "B. The characteristics of the site are suitable for the proposed use considering size, shape, location, topography, existence of improvements and natural features." Section 1203.01(B) Clackamas County Zoning Ordinance.

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[6] "D. The proposed use will not alter the character of the surrounding area in a manner which substantially limits, impairs, or precludes the use of surrounding properties for the primary uses listed in the underlying district." Section 1203.01(D) Clackamas County Zoning Ordinance.

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We are aware of the petitioner's claim that the county's findings really say that no personal use airports may exist in any agricultural zone in the county. We do not agree. The county has explained why the airport is not suitable on this property because of its impact on particular uses nearby. Other areas of the county may be less adversely effected by airport activities.

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In questions of alleged unconstitutional discrimination, the principles are the same under either "priviledges and immunities" provisions of Article I, Section 20 of the Oregon Constitution or the Equal Protection Clause of the 14th Amendment of the Constitution of the United States. Plumber v. Donald M. Drake Co., 212 Or 430, 320 P2d 245 (1958).

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49 USC §1305 provides in relevant part:

"(a) Preemption. (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act [49 USCS §§ 1371 et seq.] to provide interstate air transportation...."

* * *

"(b) Proprietary powers and rights. (1) Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights."

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49 USC §1508(a)