BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

UNITED STATES CELLULAR
OPERATING COMPANY OF MEDFORD,
Petitioner,

vs.

KLAMATH COUNTY,
Respondent.

LUBA No. 2006-179

FINAL OPINION
AND ORDER

Appeal from Klamath County.

John Blackhurst, Medford, filed the petition for review and argued on behalf of petitioner. With him on the brief were Zachary W. Light and Kellington, Krack, Richmond, Blackhurst & Glatte, LLP.

W. Daniel Bunch, County Counsel, Klamath Falls, filed the response brief and argued on behalf of respondent.

RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

REVERSED 03/08/2007

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner U.S. Cellular appeals a decision by the Klamath County Board of Commissioners affirming a hearings officer's denial of a conditional use permit to construct a cellular communications facility.

FACTS

Petitioner applied for a conditional use permit (CUP) to construct a monopole tower to support a cellular communications facility on an approximately 2,400 square foot portion of a 61-acre parcel of land zoned Exclusive Farm Use (EFU). The proposed tower is 140-feet tall and includes a cellular communications antenna. The proposed location for the tower and the antenna is approximately 3.4 miles from the middle of the Klamath Falls Airport and over two miles from the end of the airport's main runway. Supplemental Record 1, 5. The proposed tower is located within the county's "Airport Safety Overlay Zone," and is specifically within a "precision instrument approach zone" as that term is used in Klamath County Land Development Code (KCLDC) Article 58.010.[1] Record 68.

In accordance with 14 CFR §77.13(a)(2), petitioner filed an application with the Federal Aviation Administration (FAA) seeking a determination as to whether the proposed tower would be a hazard to air safety.[2] The FAA conducted an aeronautical study as

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[1] KCLDC Article 58.010 provides in relevant part:

> "Safety zones include all land lying underneath or within approach zones, transitional zones, horizontal zones and conical zones as they apply to the City of Klamath Falls Kingsley Field. Such safety zones are shown on the Kingsley Field Airport Master Plan 1987-2005, adapted by the City of Klamath Falls, January 1988. The safety zones are defined as follows:
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> "A. Precision Instrument Runway Approach Zone - A surface 1,000 feet wide at the end of Runway 32 and expanding uniformly to a width of 16,000 feet 50,000 feet from the end of the primary runway surface. The centerline of the surface is the continuation of the runway centerline."

[2] 14 CFR §77.13 provides in relevant part:

required by 14 CFR §77.31 *et seq*, *see* n 6, and issued a "Determination of No Hazard to Air Navigation" (FAA Determination), finding that:

> "[T]he structure does not exceed obstruction standards and would not be a hazard to air navigation [provided certain conditions regarding marking and lighting were met if petitioner voluntarily installed such marking and lighting.]" Record 99.

Petitioner also sought a determination from the Oregon Department of Aviation (ODA) regarding the proposed tower. The ODA determined that notice to the FAA was required, and found that the proposed tower "does not exceed any Obstruction Standards of OAR 738-070-0100 and would not be a hazard to air navigation." Supplemental Record 8. Petitioner's consultant also prepared an analysis of the effect of the proposed tower on air traffic, and the analysis concluded that the tower would not adversely affect low altitude flight paths or visual flight rule (VFR) routes in the area. Supplemental Record 5.

The hearings officer conducted a hearing on the CUP application. Opponents of the proposed tower, including a pilot testifying on behalf of the Oregon Air National Guard, other private pilots, representatives of the Oregon Pilots Association, and the director of the

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> "(a) [E]ach sponsor who proposes any of the following construction or alteration shall notify the Administrator in the form and manner prescribed in § 77.17:
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> "* * *
>
> "(2) Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:
>
> "(i) 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each airport specified in paragraph (a)(5) of this section with at least one runway more than 3,200 feet in actual length, excluding heliports.
>
> "(ii) 50 to 1 for a horizontal distance of 10,000 feet from the nearest point of the nearest runway of each airport specified in paragraph (a)(5) of this section with its longest runway no more than 3,200 feet in actual length, excluding heliports.
>
> (iii) 25 to 1 for a horizontal distance of 5,000 feet from the nearest point of the nearest landing and takeoff area of each heliport specified in paragraph (a)(5) of this section."

airport testified in opposition to the application, citing safety concerns in the event that flight outside of the normal flight path or flight by VFR was required due to weather or other conditions.[3]

The hearings officer denied the application, finding that the proposed tower posed a safety concern under KCLDC Article 58.[4] Petitioner appealed the hearings officer's decision to the board of county commissioners (BOC), and BOC affirmed the decision, finding:

> "A. There are feasible locations in the vicinity of the subject property that can fully accommodate [petitioner's] identified need for an additional tower to serve their customers. Developable land is available to meet this need in locations that better promote air safety and that better promote the public interest.
>
> "B. The expert testimony offered by local aviation experts provides substantial evidence that the application does not meet the criteria in [KCLDC] Article 58.020[(A)](6)."[5] Record 1.

This appeal followed.

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[3] Some opponents questioned the accuracy of the FAA Determination based on their concern that the FAA Determination did not take into account approaches using VFR routes. Record 42, 57-58, 71, 72.

[4] The hearings officer adopted the findings and analysis set out in the county planning staff's report, except to the extent that the findings and analysis were inconsistent with his additional findings. Record 38, 132-34.

[5] KCLDC Article 58.020(A) provides:

> "Safety Hazards - No land use is permitted within any airport safety zone defined in Section 58.010 that;
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> "(1) Creates electrical interference with navigational signals or radio communication between the airport and aircraft;
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> "(2) Interferes with a pilot's ability to distinguish between airport lights and other lights; or
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> "(3) Results in glare in the eyes of pilots using the airport;
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> "(4) Impairs visibility of the airport by means of smoke or other visual impairments;
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> "(5) Attracts concentrations of birds within 10,000 feet of the airport; or
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> "(6) In any other way creates a hazard or endangers the landing, takeoff, or maneuvering of aircraft using the airport."

SECOND ASSIGNMENT OF ERROR

We begin with petitioner's second assignment of error because it addresses a threshold issue. Petitioner assigns error to the BOC's finding that the application does not comply with KCLDC Article 58.020(A)(6), arguing that the FAA Determination preempts an inconsistent finding by the county that the proposed tower will create a safety hazard under KCLDC Article 58.020(A)(6). Respondent answers that (1) KCLDC Article 58.020(A)(6) is not preempted by FAA rules and is not inconsistent with the FAA regulations governing flight obstructions, and (2) the Federal Communications Act of 1934, as amended, allows the county to regulate the placement of the proposed tower.

A. Federal Preemption and the Supremacy Clause

In *Cipollone v. Liggett Group, Inc.*, 505 US 504, 516, 112 S Ct 2608, 120 L Ed 2d 407 (1992), the Supreme Court explained that federal preemption is based on the Supremacy Clause of the Federal Constitution:

> "Article VI of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land; * * * any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' Art. VI, cl.2. Thus, since our decision in *McCulloch v. Maryland* [citations omitted] * * * it has been settled that state law that conflicts with federal law is 'without effect.' * * *" (Quotations in original.)

The Supreme Court reiterated the strong presumption that "the historic police powers of the states [were] not to be superceded by [a] Federal Act unless that [was] the clear and manifest purpose of Congress." *Cipollone*, 505 US at 517; s*ee also Skydive Oregon v. Clackamas County*, 25 Or LUBA 294, 299-300, *aff'd* 122 Or App 342, 857 P2d 859 (1993) (discussing the heavy burden on a party claiming preemption in light of the strong presumption regarding the state's police powers).

In *A T & T Communications v. Eachus,* 174 F Supp 2d 1119 (D Or 2001), the court summarized the ways in which federal legislation can preempt local regulation:

> "There are three circumstances in which state law is preempted under the Supremacy Clause, U.S. Const. art. VI, cl. 2, by federal law: (1) express

> preemption, where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption, where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption, where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." 174 F Supp 2d at 1122 (citations omitted).

The court described "field preemption" as follows:

> "[Field preemption] is * * * a more potent species, for under field preemption the state regulation is preempted whether or not it actually conflicts with the federal scheme." *Id*.

S*ee also Derenco v. Benj. Franklin Federal Sav. And Loan*, 281 Or 533, 540-41, 577 P2d 477 (1978) (so stating); *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 206 (2004) (discussing "field preemption" of state and local regulation of radio frequency electromagnetic interference).

B. The Federal Aviation Act and the Federal Aviation Administration

The Federal Aviation Act of 1958, 49 USC § 1301 *et seq*, governs construction of the monopole tower at issue in the present case. That act provides: "[t]he United States Government has *exclusive* sovereignty of the airspace of the United States." 49 USC § 40101(a)(1) (emphasis added). The Act requires the FAA to promulgate rules requiring notice to the FAA of the construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure when the notice will promote air safety and the efficient use and preservation of navigable airspace. *See* 49 USC § 44718(a)(1) – (2). The FAA is required to determine whether a construction project poses a threat to air safety. If the FAA determines that a proposed construction project could prove to be a threat to navigable air space, then the FAA must conduct an aeronautical study.[6]

[6] 49 USC § 44718(b)(1) requires the aeronautical study to consider:

The FAA's regulations that implement 47 USC § 44718 are found at 14 CFR §77, which is entitled "Objects Affecting Navigable Airspace." Subpart B requires persons proposing construction of "[a]ny object of natural growth, terrain, or permanent or temporary construction or alteration, including equipment or materials used therein, and apparatus of a permanent or temporary character" of a certain height or in a certain location to give notice of construction to the administrator of the FAA. *See* 14 CFR §77.5 and 77.13. Subpart C prescribes standards to determine whether an object is an obstruction to the use of navigable airspace. 14 CFR § 77.21 *et seq*. Subpart D prescribes how the FAA must conduct the required aeronautical study, and contains a procedure for review of a no hazard determination. 14 CFR §31 *et seq*.

Courts have found that air safety is one aspect of aviation in which the federal regulatory scheme has occupied the field, and have invalidated local ordinances which infringe on the FAA's power to regulate air safety. *See, e.g City of Burbank v. Lockheed Air Terminal*, 411 US 624, 626-27, 935 S Ct 1854, 36 L Ed 2d 547 (1973) (*City of Burbank*)) (local ordinances restricting air traffic due to noise and low altitude are preempted because the federal regulation of air safety is so pervasive that preemption is inferred); *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F2d 1338 (9th Cir 1992)

"(A) the impact on arrival, departure, and en route procedures for aircraft operating *under visual flight rules*;

"(B) the impact on arrival, departure, and en route procedures for aircraft operating under instrument flight rules;

"(C) the impact on existing public-use airports and aeronautical facilities;

"(D) the impact on planned public-use airports and aeronautical facilities; and

"(E) the cumulative impact resulting from the proposed construction or alteration of a structure when combined with the impact of other existing or proposed structures." (Emphasis added.)

(local ordinances requiring approval of construction plans to lengthen runways are preempted).

In a case involving construction of a radio broadcast tower in South Dakota, a federal district court held that the Federal Aviation Act and the rules promulgated by the FAA regarding obstructions into airspace preempted a determination by the South Dakota Aeronautics Commission (SDAC) that a proposed radio tower was a hazard to air safety. In *Big Stone Broadcasting v. Lindbloom*, 161 F Supp 2d 1009 (SD 2001), the plaintiff (a broadcasting company) proposed to construct an 875-foot radio broadcast tower approximately 900 feet south of a "state trunk highway," as designated under rules promulgated by SDAC.[7] Big Stone notified the FAA of the proposed construction according to the requirements of 14 CFR §77, and the FAA conducted an aeronautical study, ultimately issuing a "Determination of No Hazard." Big Stone also applied for and received a construction permit from the Federal Communications Commission (FCC).[8]

At the time the FAA and FCC applications were pending, Big Stone applied for permission from SDAC to construct the tower. SDAC denied the application, finding that the tower would constitute a safety hazard because it would encroach into the protected airspace near a state trunk highway, under SDAC rules. Big Stone challenged the denial, on the grounds that the Federal Aviation Act and the regulations promulgated thereunder have occupied the field of aviation and air safety.

The court reviewed the provisions of the Federal Aviation Act giving the federal government the exclusive sovereignty of over airspace, and also analyzed the

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[7] The applicable state regulation limited the height of structures over 200 feet in height, depending on their proximity to a state trunk highway. *Big Stone*, 161 F Supp 2d at 1012. The claimed purpose of limiting the height of structures along certain state highways was to provide a safe harbor for pilots of small aircraft flying in bad weather, so that they could descend to an elevation low enough to see the ground for navigation purposes and follow a state trunk highway to the nearest town with an airport. *Id.*

[8] 47 USC §319(a) generally requires an applicant for a broadcast license from the FCC to secure a construction permit from the FCC prior to granting the broadcast license.

interrelationship between the FAA and the FCC in regulating and approving the construction, location, and licensing of radio broadcast towers.[9] The court concluded:

> "* * * because of the broad legislative scheme, the detailed regulations adopted pursuant to that scheme, the required cooperation and coordination between the FAA and FCC * * *, the Act and the regulations promulgated in connection with the Act, preempt the field of air traffic and safety as to radio broadcast towers, and, therefore, the SDAC's decision to prohibit construction of the tower in this case is of no legal effect." *Id*. at 1020.

C. The Federal Communications Act and the Federal Communications Commission

The Federal Communications Act of 1934, as amended (the FCA) also governs the construction of the tower. The FCA authorizes the FCC to regulate the construction and placement of "antenna structures." *See generally* 47 USC §301 *et seq*. "Antenna Structures" are broadly defined to include "the radiating and/or receiving system, its supporting structures and any appurtenances mounted thereon." 47 CFR § 17.2(a). FCC rules promulgated under the FCA give the FCC the authority to require the painting and/or lighting of antenna structures when, in the FCC's judgment, such structures constitute or would constitute a "menace to air navigation." The rules also prescribe procedures and standards for construction and registration of antenna structures, in accordance with specific FAA guidelines. *See* 47 CFR § 17.2. For example, the FCC will issue a construction permit for or register an antenna structure only after the FAA has issued a "no hazard determination" under 14 CFR §77. *Id*.

However, the FCC's regulatory authority over antenna structures is not absolute. Subsection 332(c)(7)(A) of the FCA preserves the authority of local and state governments to

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[9] In particular, the court discussed *City of Burbank* and the court's emphasis in that opinion on the interaction between the FAA and the Environmental Protection Agency (EPA) in regulating airport noise. In *City of Burbank*, the court noted that the "pervasive control vested in EPA and in FAA under the [Noise Control Act of 1972] seems to us to leave no room for local curfews or other local controls[,]" and that "[t]he Federal Aviation Act requires a delicate balance between safety and efficiency, and the protection of persons on the ground." *City of Burbank*, 411 US at 638-639.

regulate the placement and construction of antenna structures such as the one at issue in the present appeal. That subsection states in relevant part:

> "Except as provided in [subsection B],[10] *nothing in this Act* shall limit or affect the authority of a state or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless services facilities."[11] (Emphasis added.)

Thus, except as specifically provided in subsection (B) of 47 USC §332(c)(7), *see* n 10, nothing in the FCA itself restricts local and state governments from regulating the placement and construction of "personal wireless services facilities" such as the proposed monopole.

D. Analysis

Respondent argues that the FCA allows the county to prohibit construction of the proposed tower. While it is true that Subsection 332(c)(7)(A) of the FCA provides that local governments can regulate the placement and construction of towers, the FCA preserves local

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[10] Subsection B lists the limitations on the authority of local governments to regulate the placement of personal wireless services, and states in relevant part:

> "(B) LIMITATIONS.
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> "(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof:
>
> "(I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> "(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> " * * *
>
> "(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

[11] 47 USC §332(c)(7)(C)(i) defines "Personal wireless services facilities" as "facilities for the provision of personal wireless services." "Personal wireless services" are defined as "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services." 47 USC §332(c)(7)(C)(ii).

authority to regulate such construction only with respect to the requirements of the FCA, with specified exceptions. Subsection 332(c)(7)(A) does not purport to preserve local authority to regulate towers if such authority may be preempted by other federal laws, such as the Federal Aviation Act.

The detailed coordination between the FAA and FCC regarding construction and registration of antenna structures such as the proposed tower, and previous decisions holding that Congress intended to preempt the field of regulating air safety suggest that Congress left no room under the Federal Aviation Act for the county to regulate such a structure based solely on air safety concerns. Moreover, although the holding in *Big Stone* was specific to radio broadcast towers, we see little distinction between South Dakota's attempt to prohibit construction of a radio tower near a state trunk highway located in a state-designated safety zone based on air safety concerns, and the county's denial of petitioner's application to build a personal wireless services facility in a county-designated safety zone based on air safety concerns.

In the present case, petitioner provided the notice required under 14 CFR §77.13 to the FAA, and the FAA conducted the required aeronautical study. Record 99-101. We assume that the aeronautical study was conducted in conformance with the applicable federal regulations, including, without limitation, consideration of procedures for aircraft operating under VFR routes. *See* n 6. The FAA determined that the proposed facility would not pose a threat to air safety, and issued the FAA Determination. Because the Federal Aviation Act has preempted the field of regulation of the safety aspects of the construction of structures such as the proposed cellular communications facility, the county could not deny the application based solely on safety concerns.[12]

The second assignment of error is sustained.

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[12] If a party disagrees with a no hazard determination under 14 CFR §77, that party may appeal the determination as provided in 14 CFR §77.37.

FIRST ASSIGNMENT OF ERROR

In its first assignment of error, petitioner assigns error to the county's finding that developable land was available in alternate locations that better promote air safety and the public interest. Respondent concedes that the BOC's determination regarding locating the facility elsewhere was dependent on and related to the BOC's concerns regarding air safety. Response Brief 4. Moreover, no party has cited to us, and we can find no applicable criterion in the KCLDC that allows the county to deny an application for a CUP based on a finding that alternate land is available for the proposed use, independent of whether the county also has safety concerns. The BOC's finding relies on air safety concerns, which, as discussed above, are not a permissible basis for county denial of the application.

The first assignment of error is sustained.

The county's decision is reversed.