

BEFORE THE BOARD OF COMMISSIONERS OF LANE COUNTY, OREGON

ORDER NO: 17-07-18-08 IN THE MATTER OF ADOPTING SUPPLEMENTAL FINDINGS ON REMAND FROM LAND USE BOARD OF APPEALS OF A BOARD OF COUNTY COMMISSIONER DECISION, ORDER NO. 16-03-15-06, ON THE ISSUE OF WHETHER A VESTED RIGHT EXISTS TO COMPLETE THE DEVELOPMENT OF THE SCHOOL. (PLANNING FILE NO. 509-PA14-05775; APPLICANT: LAURELWOOD ACADEMY).

WHEREAS, on March 15, 2016, the Lane County Board of Commissioners made a determination concluding that a 2005 Special Use Permit for a School has not expired in Department File No. 509-PA14-05775; and

WHEREAS, that action was appealed to the Oregon Land Use Board of Appeals (LUBA) and on September 16, 2016, LUBA issued its decision remanding the County action on one issue raised by petitioners (LandWatch Lane County) as described in the LUBA decision attached as Exhibit "B" and incorporated herein; and

WHEREAS, in response to the LUBA remand, supplemental findings and analysis based on evidence in the record has been prepared containing arguments for a vested right case ; and

WHEREAS, on June 6, 2017 the Board held an on the record public hearing to consider argument from the parties of record and to decide whether or not the applicant has a vested right to complete the development of the school; and

WHEREAS, the Board of County Commissioners has reviewed this matter at a public hearing.

NOW, THEREFORE, the Board of County Commissioners of Lane County **ORDERS** as follows:

1. The findings previously adopted in support of Order 16-03-15-06 are supplemented as described in Exhibit "A" attached and incorporated here by this reference to establish that the evidence in the record confirms the applicant has a vested right to complete the school improvements and to the school use.
2. The Hearings Official's previous decision is reversed and the application to complete construction is approved.

ADOPTED this 18th day of July, 2017.



Pat Farr, Chair
Lane County Board of Commissioners

APPROVED AS TO FORM

Date 7-13-17



LANE COUNTY OFFICE OF LEGAL COUNSEL

ORDER EXHIBIT "A"

FINDINGS IN SUPPORT OF THE COUNTY BOARD ORDER ON REMAND FROM LUBA

This matter has been considered by the County Board on remand from LUBA in *LandWatch Lane County v. Lane County and McDougal Foundation Inc.*, LUBA No. 2016-038 (Sept. 16, 2016).

The County Board heard this matter on June 6; the hearing was limited to issues previously raised in this matter and was limited to evidence already in the record. The applicant provided argument at the hearing. Opponent LandWatch Lane County has not made an appearance in this remand proceeding.

On remand the County Board finds that the developer of the Laurelwood School has a vested right to complete the development and make full use of the school, as originally proposed to and approved by the County. Under the rules that apply to vested rights, and based on the facts of this matter, the test for acquiring a vested right to complete the school has been met.

The County Board also finds that the developer of the school has not lost its vested right to complete the construction due to a one-year lapse in the actual construction of the school facilities.

These findings supplement the findings of the Hearing Official and the County Board previously made in this matter. In the event of any conflict, the findings made here control.

Procedural Summary

LUBA's opinion states the procedural history at pages 1-9. In summary, the applicant started the school construction on EFU land under a county special use permit issued consistent with state law and building permits issued by the county consistent with that land use approval. The County land use approval was issued on May 6, 2005, and it became final on May 23, 2005. Under state law the approval was valid for two years unless extended. The two year approval period extended through May 23, 2005. No extension was applied for. However, while the approval was in effect, the owner applied for a building permit for the first building, a boys dormitory. The building was constructed and the school use began in 2008.

In 2009 and 2010, respectively, the LCDC and the Legislature adopted new restrictions on schools on EFU land. The LCDC adopted a design capacity rule for schools within three miles of an urban growth boundary, which conflicted with the special use permit the county had issued. The Legislature amended the EFU statute to require that schools on EFU must serve primarily residents of the rural area. See LUBA opinion at page 5 for details.

In the initial stage of this county proceeding, the school owner asked for a determination that it had acquired a vested right to complete the school construction and use, notwithstanding the changes in state law, based on its having received permits and made expenditures toward completion. The Director approved the request. On appeal by LandWatch Lane County, the Hearing Official concluded that the original approval was for a school in three phases, that the original land use permit had expired after two years for lack of an extension request, and that there was no vested right to complete the school and the use.

On appeal to the County Board by the school, the Board determined that the county approval was for a single school (not a three-phase school), that the original special use approval had not expired because construction had started during the two-year term of the permit, and, therefore, the use could be completed with more building permits. The County Board did not have to reach the vested rights issue.

LandWatch appealed the County Board decision to LUBA. LUBA applied state law regarding the duration of special use permits on EFU land, and it determined that the original special use permit had expired for lack of an application for extension. What this LUBA holding means is that when a landowner gets a land use approval from the County for a use that is allowed on EFU land, that land use approval will expire after two years by operation of state law, unless the owner applies for an extension during the term of the permit, as provided for in state law. Merely starting development during the two-year term of the land use approval is not enough to allow the County to continue to issue more building permits to complete the use.

LUBA only addressed the issue of the duration of the land use approval. It recognized that there are other theories that the County might invoke as a lawful basis to allow completion and use of the school. One theory was the owner's claim that it acquired a vested right to complete the school use. LUBA explained that the County Board had not addressed the vested rights theory; hence it was something that could be considered on remand. See LUBA's resolution of the First and Third Assignments of Error. LUBA opinion at 10-11.

LUBA also said that the County could consider allowing expansion of the existing school under statutory authority that would recognize the partially completed school as a nonconforming use due to the new restrictions adopted in 2009 and 2010. The statutory authority allows expansion of such nonconforming uses if certain standards are met. LUBA recognized that the school owner in this proceeding had sufficiently invoked this remedy that it could be considered by the County Board on remand. LUBA opinion at 18-19.

APPLICANT REQUEST FOR FURTHER PROCEEDINGS ON REMAND

By letter dated February 23, 2017, the applicant requested that the County resume processing this application following remand from LUBA. Statutory amendments that became effective on January 1, 2016, require that when a request for further processing is made following remand, that the County has only 120 days to make a final decision in the remand proceeding. Extensions of time are not allowed. ORS 215.435.

The applicant requested on remand that the County Board limit the scope of this remand proceeding to the issue of vested rights – that is, the applicant's request that the County Board consider whether the expenditures made toward the school use while the initial land use was in effect, including under building permits applied for while the land use approval was in effect, were sufficient to establish a right to complete the school improvements and school use. That is the issue considered in the balance of this decision.

KEY FINDINGS OF FACT RELEVANT TO THE VESTED RIGHT DETERMINATION

References herein are to the pagination in the county record filed in the LUBA appeal.

A nonconforming use is an existing use that was lawful at the time the law changed. An owner who has an approved use under construction, but not completed at the time the law changes, may have acquired a “vested right” to complete development of the nonconforming use. That is the situation that potentially applies here.

The basic rules for determining whether a vested right has been acquired were initially set out in *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973). The Oregon Supreme Court in *Holmes* listed number of factors that should be taken into account. The Court said:

“Other factors which should be taken into consideration are the good faith of the landowner, whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements, the type of expenditures, i.e., whether the expenditures have any relation to the completed project or could apply to various other uses of the land, the kind of project, the location and ultimate cost. Also, the acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects.”
[265 Or at 198-199]

The above is a general statement of the correct test. Courts have clarified that not every one of these facts may come into play in a particular situation. Furthermore, the County has discretion to weigh the various factors differently. See *Union Oil Co. v. Board of County Comm’rs*, 81 Or App 1, 8, 724 P2d 341 (1986).

Expenditures-Ratio Factor:

We consider the ratio of the expenditures made to the total project cost to be the most important factor to consider in the vested right determination. The key figures related the expenditures factor appear at various locations in the record. However, the most detailed summary appears in the Affidavit of Nadine Waterman, whose job responsibility includes “maintaining expense records for the Laurelwood Academy.” LUBA Record 155.

In the initial proceeding the County Board found that the development proposal was for a single school project in three phases:

The Board finds that the land use at issue here is a single school that has three distinct parts – a men’s dormitory, and administration/classroom building, and a women’s dormitory. If any one of the three parts is not finished, then the school, as anticipated by the owner and initially approved by the County, will not be complete. This is not the kind of use that can be shrunk in size by eliminating one of the three parts, and still be considered to be a complete school project.

LUBA upheld this finding. Slip opinion at 11. Therefore, for purposes of examining the expenditures made in relation to the total project costs, the total project cost is properly considered to be the cost of all three phases in the single school that was approved.

The record shows that the estimated construction cost for the entire school project, including all three phases, was \$6,600,000. LUBA Rec 176.

The Waterman Affidavit shows that the expenditures made during the two-year tenure of the land use approval, under permits issued for the first phase dormitory, totaled \$743,927. The expenses included: Engineer, Architect, Planner, Permits, Building and Operating Supplies, Building Labor, Plumbing, Electrical, Flooring, Drywall, Paving, Lumber, Well/Water System, Septic System, Fire Suppression System, Cabinets, Roofing, and HVAC. LUBA Rec 155.

Based on the above, the ratio of actual expenditures for approved development to estimated cost of the entire project is \$743,927:\$6,600,000. That is a ratio of 1:8.8

There is no ratio that is fixed in law as being a sufficient fraction of the entire project cost to justify there being a vested right. The ratio that was found to be sufficient in the *Holmes* situation was about 1:14. Here the ratio is more than 1:8. Based on this, the expenditure test supports finding a vested right.

Expenditures above are limited to the school use:

The inquiry in *Holmes* also recognizes that expenditures to be counted toward the vested right determination should not include any expenditures that can be considered as benefitting other allowed uses of the property. The phrase in *Holmes* is “whether the expenditures have any relation to the completed project or could apply to various other uses of the land.”

This property is plan designated Agriculture and zoned E-25. Farming is the other use on the property. There is a limited farm use on the property, including fruit and vegetable production. Based on the Waterman affidavit, the expenditures made for the school are discrete to the school. They are not needed for the farming use, and they do not benefit the farming use.

Similarly, expenses related to the farm operation (such as greenhouses, orchards, gardens, and the like) have not been included in the expenditures made for the school and documented above.

In summary, the expenditures summarized above are discrete to the school use. They do include expenditures that actually relate to the permitted farm uses on the property. They do not include expenditures that could benefit the farming uses on the property.

No notice to the property owner of impending regulation change.

The inquiry in *Holmes* also recognizes that expenditures to be counted toward the vested right determination should not include expenditures made by the owner in a race to get vested – that is expenditures made when the owner knows that a change in regulations is imminent. The factor from *Holmes* is “whether or not he had notice of any proposed zoning or amendatory zoning before starting his improvements.”

None of the expenditures being considered here is in this category. All expenditures being claimed in support of this vested right were made prior to May 23, 2007, according to the Waterman Affidavit. As described in LUBA decision, slip opinion 5, that state law changes relevant here, that restricted the scope of the school use allowed on this EFU land, were enacted in 2009 and 2010 by the LCDC and the Legislature, respectively. Based on the timing of the new state law, the owners had no notice of the changing or changed rules during the time their expenditures were being made in in 2005 to 2007.

Physical development of the use.

The vested rights calculation also requires that development be underway. This relates to the factor in the *Holmes* test that the “acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects.” In this situation the owner had a portion of the school complete and in use prior the change in the regulations. That status of the project supports finding a vested right under this factor.

Good faith reliance by the property owner.

The *Holmes* test inquires whether the development done on the project was based on the owner’s good faith reliance on the rules before they changed and the degree to which the development was consistent with the former rules. The record in this matter shows that the development that was done prior to the change in the law was done in compliance with the 2005 land use approval and the county permits issued to implement that land use approval.

No loss of nonconforming use due to break in construction activity.

Having determined that the school had a vested right to complete its development, the question has been raised, by the Hearing Official and LandWatch Lane County, whether the nonconforming use was discontinued due to a break in the construction activity of more than a year.

Lane Code 16.215(5) provides:

(5) Discontinuance of Nonconforming Use. When a non-conforming use of a structure or property is discontinued for a period in excess of one year, the structure or property shall not thereafter be used, except in conformance with the zone in which it is located. (Revised by Ordinance 7-87, 6.17.87; 4-91, 5.17.91)

The Lane Code defines “Use” at LC 116.090:

Use. The purpose for which land, submerged or submersible lands, the water surface or a building is arranged, designed or *intended*, or for which either land or building is or may be occupied or maintained. [*emphasis added*]

The Hearing Official found that there is evidence in the record to support there being continued, uninterrupted use of the school through the years. Decision at 10. However, he also found there was a break in construction activity of more than a year. Based on the break in construction activity, the Hearing Official found that the “Discontinuance of Nonconforming Use” language in LC 16.215(5) was triggered. LandWatch Lane County pressed this same reading of the code in its argument to the County Board.

The issue, therefore, is whether the Discontinuance of Nonconforming Use language in LC 16.215(5) applies to the nonconforming use (which is a school), or to the construction of the nonconforming use, or to both. This is a question of code interpretation.

The answer to the code interpretation question is found in the code definition of “use” quoted above. This definition narrows the scope of the inquiry to the “purpose” for which the land and buildings are arranged, designed or intended. This definition does not encompass construction activity.

In this situation, the use is a school. The letter in the record from school Principal S. Henton to Planner R. Sebba (April 8, 2015) supports a finding that the school use has continued without a discontinuance of a year or more. LUBA Record 485-486. Therefore, the County Board concludes that the vested right to the nonconforming use has not been lost in whole or in part due to any break in the construction activity.

Conclusion

Based on the above, the Board determines that the applicant has acquired a vested right to complete development and use of the original land use that was approved by the county. That is, the applicant has a vested right to complete the school proposal, even though the school as approved is now a nonconforming use due the changes in the state law and the subsequent changes in the county law implementing the state law.