

1 BAGG, Referee.

2 In late 1973, Union Oil Company of California purchased
3 property on the southwest corner of the intersection of SE
4 Sunnyside Road and SE 97th Avenue in the Clackamas Area in
5 Clackamas County. In December of that year, the county
6 obtained a building permit to construct a service station on
7 the property, and at that time service stations were a lawful
8 use in the area. Union did not construct the service station,
9 but did invest some \$15,690 for project related costs. The
10 project was not constructed, according to Union, because of
11 federal energy office regulations restricting gasoline
12 allocations. On January 31, 1981, Clackamas County adopted a
13 C3/AC (General Commercial/Activity Center) zoning designation
14 for the property. The C3/AC zoning designation does not permit
15 gasoline service stations. On April 16, 1981, Union reapplied
16 for a building permit to resume the project. The request was
17 denied by the County Department of Environmental Services on
18 the ground that current zoning did not allow service stations
19 and on the additional ground that Union had no "vested right"
20 to build a service station on the property. Union Oil appealed
21 the decision to a hearings officer. The hearings officer
22 rejected Union's claim and the matter was appealed to the
23 county commissioners. The county commissioners adopted the
24 hearings officer's findings and conclusions, thereby rejecting
25 Union's claim and this appealed followed.

26 Respondent Clackamas County moves the Board for an order

1 dismissing the petition for review on the grounds that the
2 petition alleges that Union Oil Company has a "vested right" to
3 a building permit, and matters of "vested rights" are matters
4 for circuit court determination and outside the jurisdictional
5 limits established for the Land Use Board of Appeals. See
6 Oregon Laws 1979, ch 772, sec 3 and Oregon Laws 1981, ch 748.

7 The petitioner responds that the decision was based "in
8 part" on an interpretation of zoning provisions in the
9 Clackamas County Comprehensive Plan. Petitioner argues that
10 nowhere in Oregon Laws 1979, ch 772 (or in Oregon Laws 1981, ch
11 748) is there an absolute prohibition on our power to review
12 matters of vested rights or even a definition of vested right.

13 We believe Eagle Creek Rock Products, Inc. v. Clackamas
14 County, 27 Or App 371, 556 P2d 150 (1976) rev den (1977); 1000
15 Friends of Oregon v. Bd. of County Commissioners of Clackamas
16 County, 29 Or App 617, 564 P2d 1080 (1977) and Eklund v.
17 Clackamas County, 36 Or App 73, 583 P2d 567 (1978) clearly
18 establish that the power to declare the existence or
19 non-existence of a vested right rests with the circuit court
20 and not the local governing body.¹ It is our responsibility
21 to review local government decisions, and if the local
22 government lacks authority to decide a vested rights issue, we
23 have nothing to review. See Oregon Laws 1979, ch 772, sec 3 as
24 amended by Oregon Laws 1981, ch 748; see also Fisher v.
25 Colwell, 51 Or App 301, 625 P2d 1333 (1981). Our claim to
26 exercise a review responsibility rests where there is a local

1 land use decision. With this jurisdiction in mind, we will
2 look at petitioner's petition for review to see what it is we
3 are asked to review.

4 In this case, the petitioner has made two assignments of
5 error. The first assignment of error alleges that the hearings
6 officer erred in concluding that the Union Oil Company had no
7 vested right. The petition outlines an attack on the county
8 decision based upon the following issues: (1) Ratio of
9 expenditures to total costs; (2) good faith; (3) notice of
10 particular proposed zoning change prior to construction; (4)
11 type of expenditures; (5) kind of projects; (6) location; (7)
12 ultimate cost; (8) acts arising beyond mere contemplated use
13 and abandonment. These eight issues are the issues the Supreme
14 Court stated must be addressed when determining whether a
15 vested right exists in Clackamas County v. Holmes, 265 Or 193,
16 508 P2d 190 (1973).² Following the Holmes case, the Court of
17 Appeals made it clear that the exploration of these issues was
18 a job for the circuit courts and not local governments. Eagle
19 Creek, supra. We regard petitioner's first assignment of error
20 as a request for us to instruct Clackamas County that
21 petitioner has a vested right. We are unable to do so because
22 of the holding in Eagle Creek. The county has no power to
23 declare the existence or non-existence of a vested right. The
24 only body with that decision-making power is a circuit court.
25 There is, therefore, no local land use decision for us to
26 review.

1 The second assignment of error alleges

2 "The hearings officer erred in concluding that Union
3 had no continuing rights.

4 "A. There can be no loss of rights with a concurrent
5 finding of an intent to forego such rights.

6 "B. The law does not recognize an involuntary
7 abandonment of use.

8 "C. Zoning ordinances cannot supply a presumption of
9 intent in cases where the presumption is clearly
10 dispelled by the facts.

11 "D. Ordinances providing time-discontinuance
12 limitations only apply to nonconforming (actual)
13 uses."

14 The hearings officer found that the applicant had no right
15 to develop the property as a service station. Citing Section
16 901.01 of the Clackamas County Zoning and Development
17 Ordinance, the hearings officer found that the previously
18 issued building permit had been lost "through non-
19 construction." Section 901.01 provides as follows:

20 "Nothing herein contained shall require any change in
21 the overall layout, plans, construction and size or
22 designated use of any development, building structures
23 or a part thereof, for which official approvals and
24 required building permits have been granted before the
25 enactment of this Ordinance. If such building permits
26 become void and/or a new building permit is necessary,
the proposed construction shall conform with the
zoning regulations."

As a second and apparently independent ground for rejection
of Union's request, the hearings officer found the applicant
did not have a nonconforming use for a service station and
"[n]o use has been made of the subject property as a service
station facility at any time during the years of concern." The

1 hearings officer went on to say that the "only legal theory"
2 which would allow the development is a vested right theory.
3 The hearings officer states that there are no provisions within
4 the Clackamas County Zoning and Development Ordinance which
5 could establish a vested right "without existence of an actual
6 use of the property." In other words, the Clackamas County
7 Zoning Ordinance itself does not contain any provisions for a
8 vested right separate from a nonconforming use.³

9 The hearings officer then discussed Holmes v. Clackamas
10 County, 265 Or 193, 508 P2d 190 (1973) and applied the test
11 outlined in Holmes for the existence of a vested right to the
12 particular property. The hearings officer found that the
13 applicant did not meet several elements of the Holmes test
14 although he did find the property to be "suitable" for the
15 proposed use.

16 Part of the Hearings Officer's order recognized that Union
17 made an expenditure of money in pursuit of the project, but the
18 Hearings Officer concluded that any right that might have been
19 created thereby had been lost through "discontinuance." The
20 hearings officer referred to Section 1206.02 of the Clackamas
21 County Zoning and Development Ordinance which provides

22 "[i]f a nonconforming use is discontinued for a period
23 of more than twelve (12) consecutive months, the use
24 shall not be resumed unless the resumed use conforms
25 with the requirements of the Ordinance and other
26 regulations applicable at the time of the proposed
resumption."⁴

26 The Hearings Officer then quoted ORS 215.130(5) which provides

1 that non-conforming use may be lost after "abandonment."⁵

2 The Hearings Officer appears to use the word "discontinuance"
3 to mean the same as abandonment:

4 "Although, as pointed above, case law does not provide
5 for specific guidelines for loss of a vested right due
6 to lapse of time, ORS Chapter 215 does provide for
7 loss by a discontinuance and the Clackamas County
8 Zoning Ordinances provide for a loss of a
9 non-conforming use by discontinuance for a period in
10 excess of twelve (12) months. The Hearings Officer
11 finds that there has been no abandonment of the
12 proposed service station facility but that the
13 applicant's proposal was discontinued from the time of
14 permit approvals in early 1974 until March 1981, a
15 period of approximately seven years. This seven year
16 non-use would constitute a discontinuance of use and
17 would result in the loss of any vested right acquired
18 by the applicant.

19 "It does not appear to the Hearings Officer that any
20 valid distinction can be made between a non-conforming
21 use and a vested right insofar as the applicability of
22 stated policy that non-conforming uses can be lost
23 through discontinuance and should not be permitted to
24 reestablish except in conformity with existing zoning
25 regulations."

26 The petitioner does not challenge the hearings officer's
27 earlier finding that the previously issued building permit had
28 been lost "through non-construction." The petitioner's letter
29 of April 30, 1981, specifically requests a building permit, and
30 Union Oil is not claiming its original building permit is still
31 active and valid. Union's challenge is rather one directed at
32 what it views as an improper application of a law of
33 nonconforming uses and vested rights.

34 Union seizes on the hearings officer's use of the word
35 "discontinuance" in the above quoted finding. It is this
36 apparent equation of the word "discontinuance" with the word

1 "abandonment" as it appears in the statute that forms the basis
2 for petitioner's second assignment of error. Petitioner's
3 point is that the word "discontinuance" does not include within
4 it the implication of intent to cease a use. Abandonment, on
5 the other hand, includes within it not only the cessation of a
6 use, but the intent to cease the use. Even though petitioner
7 may have discontinued its use, this act does not equal
8 "abandonment" as the word is used in ORS 215.130(7). As the
9 county may not lessen rights which the petitioner may have by
10 statute, petitioner argues the county improperly denied its
11 right to a permit by relying on mere "discontinuance."
12 Petitioner says the county may not substitute "discontinuance"
13 for "abandonment" and remain within the authority granted in
14 ORS 215.130(7).⁶

15 Lastly, petitioner argues that the only authority for the
16 Clackamas County ordinance is state law, and no local ordinance
17 can operate to discontinue a vested right established by state
18 law. Petitioner states the statutes in Oregon only apply to
19 nonconforming uses, and a vested right is not a nonconforming
20 use. In other words, the petitioner is arguing that Clackamas
21 County may not cite statutes controlling nonconforming uses for
22 authority to enact ordinances that control or work to abrogate
23 a vested right.

24 We view petitioner's emphasis on the differences between
25 the words "discontinuance" and "abandonment" to be of little
26 consequence. The hearings officer found that Union had lost

1 its original building permit and, further, that Union Oil had
2 never established a use on the property. The Hearings Officer
3 found that "[t]he only legal theory which could permit the
4 applicant to develop the property with a service station
5 facility at this time would be that the applicant has required
6 a vested right to develop the property as a service station
7 facility." (Emphasis added). The Hearings Officer recognized
8 that vested right is a creation of the courts, with no parallel
9 provision in the Clackamas County code. With no presently
10 valid building permit and no non-conforming use established,
11 whether the developer abandoned the project or discontinued the
12 project, is of no importance. The non-conforming use had to
13 exist in the first place before the issue could become one of
14 "discontinuance" or "abandonment."

15 The Hearings Officer's explanation of the denial of the
16 permit and his discussion of non-conforming uses and vested
17 rights is not something we are able to review. As the county
18 did not have primary jurisdiction to rule directly on the
19 existence of a vested right or a non-conforming use, under the
20 holdings in Eagle Creek Rock Products and Eklund, we have no
21 power to "review" that decision.

22 On a practical level, we realize the county must make a
23 determination as to whether it believes a nonconforming use or
24 a vested right exists in order to grant or deny an application
25 for a building permit. The county determination on such an
26 application "is valid and binding unless and until a contrary

1 decision is made by some other tribunal, such as a circuit
2 court." 1000 Friends of Oregon v. Clackamas Co., 29 Or App at
3 620.⁷ A person angry with the local government's initial
4 decision to issue or not issue a permit must proceed in circuit
5 court for a decision as to whether the use or the rights
6 exist. It is that determination that might then be appealable,
7 but the appeal would not go to the Land Use Board of Appeals.

8 We read the county's order to be a very detailed statement
9 of what the county understands to be the facts of the case and
10 the law applicable. As far as we are concerned, however, the
11 order does not provide a basis for our review and does not give
12 us any authority to examine the county action or rule on the
13 existence of a vested right or nonconforming use.

14 This matter is dismissed.

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FOOTNOTES

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The Eklund case was about a nonconforming use. The court in Eklund stated "[p]rimary jurisdiction to determine the existence of a nonconforming use lies in the circuit court."

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The case discussed whether one had a "vested right" to pursue a "nonconforming use."

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We understand a vested right to be a legal right to a use based on the criteria outlined in Holmes, supra. We understand a nonconforming use to be a use which lawfully existed prior to the adoption of an ordinance restricting or prohibiting the use and which, by statute or local ordinance, is allowed to remain. See Holmes, supra; ORS 215.130; 1 Anderson, American Law of Zoning, Section 6.01 et seq. (2d ed, 1977); 3 Anderson at Section 1907.

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This provision was adopted on December 5, 1979. An earlier provision, in effect from 1973 until December 5, 1979, provided as follows:

"Section 31. If a non-conforming use is discontinued for a period of at least twelve (12) consecutive months, the use shall not be re-established."

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ORS 215.130(5) states:

"The lawful use of a building, structure or land at the time of the enactment of any zoning regulation or amendment thereto, may be continued as such although not in conformity with the zoning regulation, but such non-conforming uses shall not be increased, changed or resumed after a period of interruption or abandonment except in conformity with such provisions as the zoning regulations may provide."

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ORS 215.130(7) states:

"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."
(Emphasis added)

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The court went on to cite the following portion of the Eagle Creek case:

" * * * (1) a suit for declaratory relief instituted by the landowner; (2) a suit for an injunction instituted by the zoning authority or the landowner; or (3) a suit for mandamus by the landowner to compel the issuance of any permits withheld by the zoning authority on the grounds that the landowner was in violation of zoning ordinances. * * * (Footnote omitted.) 27 Or App at 375."

We understand the court in 1000 Friends to view these judicial remedies as exclusive. The "some other tribunal" language is susceptible to broad interpretation, but we don't believe a broad interpretation is consistent with the other cases on the subject of vested rights and nonconforming uses.