

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS May 11 1 52 AM '82

OF THE STATE OF OREGON

3 RONALD A. FORMAN and)
4 JULIE A. FORMAN,)

5 Petitioners,)

6 v.)

7 CLATSOP COUNTY,)

8 Respondent,)

9 and)

10 MILTON O. BROWN, RAYMOND)
11 KITTLESON and SPORTS ACRES,)

12 Respondents.)

LUBA No. 82-006

FINAL OPINION
AND ORDER

13 Appeal from Clatsop County.

14 Nicholas D. Zafiratos, Astoria, filed a petition for review
and argued the cause for petitioners. With him on the brief
were Zafiratos & Roman.

15 Timothy V. Ramis, Portland, filed a brief and argued the
cause for respondents Brown, Kittleson & Sports Acres. With
him on the brief were O'Donnell, Sullivan & Ramis.

17 COX, Referee; REYNOLDS, Chief Referee; participated in the
decision.

18 Dismissed.

5/11/82

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioners seek review of a Clatsop County Board of
4 Commissioner's Resolution and Order dated December 30, 1981.
5 By that order the county made a determination Respondents
6 Brown, Kittleson and Sports Acres had a vested right to
7 continue a nonconforming use at a complex known as Sports Acres
8 near Elsie, Oregon. Petitioners seek to overturn that decision
9 claiming that respondents have not established a vested right.

10 ALLEGATIONS OF ERROR

11 Petitioners set forth five allegations of error as follows:

- 12 1. "The Board of Commissioners erred in granting a
13 vested right to a nonconforming use since the
14 area was not zoned for such a use prior to the
15 enactment of the ordinance."
- 16 2. "The Board of Commissioners erred in granting a
17 vested right to a nonconforming use since the
18 Clatsop County Planning Commission had no
19 authority to interpret Section 4.060(1)(a)(22) of
20 the ordinance to allow recreational vehicle
21 facilities and tent camping to be included in the
22 zone."
- 23 3. "The Board of Commissioners erred in granting a
24 vested right to a nonconforming use since the
25 interpretation of the zoning ordinance by the
26 Clatsop County Planning Commission was
quasi-judicial in nature and the requirements of
Fasano were not applied."
4. "The Board of Commissioners erred in granting a
vested right to a nonconforming use since there
was no substantial evidence in the record
attributing the expenditures to the proposed
project as opposed to the prior nonconforming use
and no substantial evidence of good faith."
5. "The Board of Commissioners erred in granting a
vested right to a nonconforming use since there

1 is no substantial evidence to show that the
2 building permits, if any, or other permits, met
3 the L.C.D.C. goal standards or that the use would
4 have no greater adverse impact on the
5 neighborhood."

4 FACTS

5 Respondents Milton O. Brown and Raymond Kittleson purchased
6 the original Sports Acres complex sometime in 1978. The
7 complex comprised some 50 acres and consisted of a swimming
8 pool, tennis courts, tracks and athletic fields. Shortly
9 thereafter, respondents acquired an option to purchase an
10 additional 238 acres adjacent to the Sports Acres property in
11 order to provide for participant housing facilities. Under the
12 zoning ordinance then in existence, the zone governing the
13 additional property (General Farm and Forestry) allowed a
14 "resort-type residential establishment when associated with
15 recreational or group-oriented activities on the premises" and
16 their accessory uses (Section 4.060(1)(a)(22) of Ordinance
17 66-2). The Clatsop County Planning Commission was asked by
18 respondent's attorney to interpret the aforesaid provision as
19 it related to Sports Acres and the additional property and on
20 June 5, 1979, the Planning Commission issued its
21 interpretation. The planning commission opined that the
22 aforesaid provision allowed tent and recreational vehicle
23 sites, and storage facilities on the entire 288 acres because
24 resort-type or group oriented activities would be taking place
25 on the premises. On August 31, 1979, Respondents Brown and
26 Kittleson exercised their option to purchase the additional

1 property and began development activity.

2 On July 23, 1980, the Board of Commissioners adopted the
3 Elsie-Jewell Community Plan which changed the zoning on the 288
4 acre Sports Acres complex property by designating 27.5 acres of
5 it Agriculture/Forest-20 Acres and the balance
6 Agriculture/Forest-10 Acres. This change in zoning rendered
7 non-conforming the uses then under and proposed for development.

8 Respondents then sought a determination that they had
9 acquired a vested right to complete the recreational resort
10 residential facilities on the property adjacent to the original
11 Sports Acres. After public hearings, the Board of County
12 Commissioners of Clatsop County found that a vested right had
13 been acquired. On December 30, 1981, the Board entered
14 findings describing its decision.

15 DECISION

16 The petition for review is dismissed. This Board has taken
17 the position in prior cases that it does not have jurisdiction
18 over vested rights issues. In the case of Union Oil Company v.
19 Clackamas County, _____ Or LUBA _____ (LUBA No. 81-134,
20 3/15/82), we said after review of Eagle Creek Rock Products,
21 Inc. v. Clackamas County, 27 Or App 371, 356 P2d 150 (1976),
22 rev den (1977); 1000 Friends of Oregon v. Bd. of County Comm'rs
23 of Clackamas County, 29 Or App 67, 564 P2d 1080 (1977) and
24 Eklund v. Clackamas County, 36 Or App 73, 583 P2d 567 (1978),
25 that the power to declare the existence or non-existence of a
26 vested right rests with the circuit court.

1 In the case before us, the Clatsop County Board of
2 Commissioners made a decision that a vested right exists to
3 continue the activity respondents had undertaken. As we said
4 in Union Oil, supra, (Slip Opinion, page 9):

5 "On a practical level, we realize the county must
6 make a determination as to whether it believes a
7 nonconforming use or a vested right exists in order to
8 grant or deny an application for a building permit.
9 The county determination on such an application 'is
valid and binding unless and until a contrary decision
is made by some other tribunal, such as a circuit
court.'" Citing 1000 Friends of Oregon v. Clackamas
County, 29 Or App at 620. (Emphasis added).

10 The "some other tribunal" language taken from 1000 Friends
11 supra is susceptible to interpretation, but we do not believe
12 an interpretation which would place the determination of a
13 vested right within the authority of the Land Use Board of
14 Appeals, as argued by respondents herein, is warranted.

15 The Land Use Board of Appeals is limited in its
16 jurisdiction to review of "Land Use Decisions." Oregon Laws
17 1979, ch 772, sec 4, as amended by Oregon Laws 1981, ch 748.
18 ORS 197.015(10)¹ defines "land use decision" as:

19 "(10) 'Land use decision' means:

20 "(a) A final decision or determination made by a
21 local government or special district that concerns the
22 adoption, amendment or application of:

23 "(A) The goals;

24 "(B) A comprehensive plan provision; or

25 "(C) A land use regulation; or

26 "(b) A final decision or determination of a
state agency other than the commission with respect to

1 which the agency is required to apply the goals."2
2 (Emphasis added).

3 The determination a vested right exists does not concern
4 the adoption; amendment or application of the goals, a
5 comprehensive plan or a land use regulation. A vested right
6 determination is a judicially recognized deviation from those
7 standards. As the Court of Appeals held in Eklund v Clackamas
8 County, 36 Or App 79, while discussing the concept of vested
9 rights in the context of a non-conforming use:

10 "It follows that a non-conforming use continues in
11 derogation of local zoning provisions, local
 comprehensive plans and state-wide goals."

12 Although Eklund was decided prior to the establishment of
13 this Board, the Court's analysis and holding indicate that
14 no "land use decision" was made in this case. Since no
15 "land use decision" was made, the Land Use Board of
16 Appeals can not be the "other tribunal" contemplated by
17 the Court in 1000 Friends of Oregon v Clackamas County,
18 supra.³

19 The proper place to appeal Clatsop County's "voidable"
20 decision that a vested right exists is to the Circuit
21 Court, not to this Board. Eagle Creek Rock Products,
22 Inc., supra; 1000 Friends of Oregon, supra; Eklund, supra;
23 Union Oil, supra.

24 Dismissed.

FOOTNOTES

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"The definition of 'land use decision' appeared in Oregon Laws 1979, ch 772, sec 3 prior to the amendment of Chapter 772 by Oregon Laws 1981, ch 748, which repealed sec 3. We are assuming that the definition of "land use decision" now set forth in ORS 197.015(10) was meant to replace the repealed section 3; however, the legislature appears to have failed to cross reference ORS 197.015(10) to the remaining unamended portions of this Board's statutory birth certificate, Oregon Laws 1979, ch 772." Wyatt v. Antelope, _____ Or LUBA _____ (LUBA No. 82-024, 1982).

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ORS 197.015(11) defines "land use regulation as:

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"(11) 'Land use regulation' means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan. 'Land use regulation' does not include small tract zoning map amendments, conditional use permits, individual subdivision, partitioning or planned unit development approvals or denials, annexations, variances, building permits and similar administrative-type decisions."

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The fact that 1000 Friends, supra was decided some two years before the legislature established LUBA should not pass without notice. The classic definition of "tribunal" is the "seat of a judge" or "a seat or court of justice." Blacks Law Dictionary, (Revised Fourth Edition 1968); American Heritage Dictionary (New College Edition 1979), respectively. LUBA does not fit within those definitions.