

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JAN 13 3 40 PM '86

3 GARY L. HANLEY and)
WALLACE HUECKER,)
4) LUBA No. 85-056
Petitioners,)
5) FINAL OPINION
vs.) AND ORDER
6)
CITY OF SALEM,)
7)
Respondent.)
8)

9 Appeal from City of Salem.

10 Wallace W. Lien, Salem, filed the petition for review and
argued the cause on behalf of petitioners. With him on the
11 brief were Paulus, Rhoten, Brand, Lien & McDonough.

12 Paul A. Lee, Salem, filed a response brief and argued the
cause on behalf of Respondent City of Salem.

13 DUBAY, Referee; KRESSEL, Chief Referee; participated in the
14 decision.

15 BAGG, Referee, Dissenting.

16 REMANDED 01/13/86

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

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Petitioners appeal the city's refusal to sign a Department
4 of Environmental Quality statement acknowledging that a
5 proposal to install septic tanks is compatible with applicable
6 land use regulations.

7 FACTS

8 Petitioners own 9.88 acres outside the city limits but
9 inside the Salem Area Urban Growth Boundary. The property was
10 divided into seven parcels by four partitions between 1981 and
11 1984.¹ The property is zoned Suburban Residential by the
12 county and is designated Developing Residential in the Salem
13 Area Comprehensive Plan (SACP). Each of the parcels is larger
14 than the one acre minimum lot size allowed in the Suburban
15 Residential zone.

16 Petitioners applied for septic tank permits for five
17 parcels in early 1985. Each parcel was evaluated and approved
18 for septic tanks by the county. In accordance with the state
19 Department of Environmental Quality (DEQ) requirements, onsite
20 sewage disposal permits may be approved only if the proposal is
21 compatible with the acknowledged comprehensive plans of
22 affected planning jurisdictions or with statewide planning
23 goals. Although the city and county have no agreement giving
24 the city authority to approve septic tank permits outside city
25 limits, petitioners requested the city's approval to satisfy
26 DEQ requirements. The city denied the request. Petitioners

1 appeal this denial.

2 FIRST, THIRD AND FOURTH ASSIGNMENTS OF ERROR

3 The first assignment of error alleges the decision is in
4 furtherance of an unlawful moratorium on construction. ORS
5 197.505 defines a moratorium as follows:

6 "As used in ORS 197.505 to 197.540, 'moratorium on
7 construction or land development' means engaging in a
8 pattern or practice of delaying or stopping issuance
9 of permits, authorizations or approvals necessary for
10 the subdivision and partitioning of, or residential
11 construction on, urban or urbanizable land. It does
12 not include actions engaged in, or practices in
accordance with a comprehensive plan or implementing
ordinances acknowledged by the Land Conservation and
Development Commission under ORS 197.251, nor does it
include denial or delay of permits or authorizations
because they are inconsistent with applicable zoning
or other laws or ordinances."

13 Petitioners contend a septic tank permit is a necessary
14 step for residential construction on their property. The
15 record indicates the property is not served by any sewer
16 system, and none are proposed for at least twenty years.
17 Annexation to the city is unlikely in the foreseeable future.
18 Record 4. Petitioners complain that the city's decision stops
19 issuance of an approval necessary for development otherwise
20 allowed by the county zoning ordinance. Petitioners add that
21 the refusal is part of a pattern or practice of preventing
22 construction under the aegis of an unwritten city policy. They
23 urge us to invalidate the practice under ORS 197.560(2).

24 The city denies the allegation that the decision is based
25 on an unwritten policy. However, the staff report attached to
26 the city's order supports petitioners' allegations. The report

1 recites a history of prior proceedings regarding the same
2 property, noting the city council "had a policy of denying
3 applications for septic tanks outside the city limits but
4 within the UGB...." Record 4. Further, one of the city's
5 findings refers to another partition application then being
6 processed, stating:

7 "City staff has recommended to Polk County that the
8 partition be denied based upon the current 'no septic
tanks in the UGB' policy."

9 The record also includes a memo from the city's Director of
10 Community Development. In part, the memo states:

11 "In 1983 Council reiterated the policy (Council
12 meeting of May 2, 1983 regarding Fitzmaurice property)
13 and directed staff to continue its present policy
prohibiting septic tanks within the Urban Growth."
Record 117 (emphasis supplied).

14 These portions of the record and findings adopted by the
15 council are evidence of a "pattern or practice of delaying or
16 stopping issuance of permits, authorizations or approvals
17 necessary for...residential construction on, urban or
18 urbanizable land" as described in ORS 197.505. Accordingly, we
19 reject the city's claim that the record does not include
20 evidence of a pattern or practice described in the moratorium
21 statute.

22 The city also defends this assignment of error by
23 contending the city's action is exempted from the definition of
24 a moratorium in ORS 197.505. According to the statute, a
25 construction moratorium does not include actions engaged in, or
26 practices in accordance with a comprehensive plan or

1 implementing ordinance acknowledged by the Land Conservation
2 and Development Commission. The city argues the decision was
3 not based on an unwritten policy but on the SACP and its urban
4 growth policies. The county concludes:

5 "Based upon the facts as found herein, the council
6 concludes the placement of septic tanks to serve the
7 subject property as herein requested would be in
8 conflict with the Salem Area Comprehensive Plan and
9 the urban growth policies found therein." Record 3.

10 However, the statutory exception applies only to actions
11 pursuant to acknowledged comprehensive plans and implementing
12 ordinances. Some geographic areas in the SACP are not
13 acknowledged.² Applicant's property is in one of the
14 unacknowledged areas. The fact the decision may be in
15 accordance with an unacknowledged plan for the area in question
16 does not aid the city in repelling the statutory challenge.

17 Although the city has not formally adopted a policy
18 prohibiting development in the urban growth boundary, the
19 record discloses a pattern or practice that effectively stops
20 residential construction in the urban growth boundary where
21 sewer systems are unavailable. The city's practice of delaying
22 or stopping necessary construction approvals on the basis of an
23 unwritten policy or unacknowledged plan is a moratorium as
24 defined in ORS 197.505.

25 A moratorium on construction may be imposed only if the
26 local government makes the findings set forth in ORS 197.520.
The city's order does not include the required findings, and
the city does not direct our attention to any other portion of

1 the record where the necessary findings are made.

2 Petitioners' third and fourth assignments of error
3 challenge the decision on grounds unrelated to the moratorium
4 statutes. In the third assignment of error petitioners say the
5 county's findings of comprehensive plan violations are not
6 supported by substantial evidence. The fourth assignment of
7 error asserts the city did not use the correct criteria in
8 making its decision. Petitioners say the only applicable
9 criteria are those required by DEQ for controlling consistency
10 between land use regulation and agency actions. Petitioners
11 say the city incorrectly based its decision on an unwritten
12 policy prohibiting septic tanks rather than the SACP and
13 implementing ordinances.

14 We agree with petitioners that the applicable criteria are
15 those specified by DEQ. Since Polk County and the city have no
16 agreement authorizing the city to approve septic tank
17 construction outside the city limits, the matter was submitted
18 to the city only to meet DEQ requirements. DEQ requires a
19 statement of compatibility from appropriate planning
20 jurisdictions for all DEQ decisions. A statement of
21 compatibility is defined by DEQ as:

22 "Affirmation by appropriate local planning
23 jurisdictions that a decision needing DEQ action is
24 consistent with applicable acknowledged comprehensive
25 plans and implementing measures or the Statewide
26 Planning Goals." Land Use Consistency Procedures for
27 DEQ Actions, Section I.C.3.³

As noted above, the city did not base its decision on

1 either an acknowledged comprehensive plan or statewide planning
2 goals, the only two criteria called for by the DEQ procedures.
3 Instead, the city concluded that policies in its unacknowledged
4 (at least for the area in question) comprehensive plan
5 precluded septic tanks on the applicant's property.

6 The city's failure to apply the correct criteria (here, the
7 statewide goals) is grounds for sustaining the fourth
8 assignment of error and remanding the decision. ORS
9 197.835(8)(a)(B).

10 Petitioners's substantial evidence challenge asserts the
11 findings regarding certain comprehensive plan policies are not
12 supported by substantial evidence in the record. In the
13 preceding paragraphs we note the unacknowledged plan policies
14 are not applicable. It would therefore serve no purpose to
15 inquire into the evidentiary support for these findings.

16 SECOND ASSIGNMENT OF ERROR

17 Petitioners here allege the city could not refuse their
18 request because either: (1) the proposed developments are
19 nonconforming uses, or (2) petitioners have vested rights to
20 completion. In addition, petitioners allege the city is
21 estopped from denying the request because of the
22 representations by city officials when the property was
23 partitioned. We reject these arguments for the reasons stated
24 below.

25 A nonconforming use is one which lawfully existed prior to
26 enactment of restrictive regulations and which may be

1 maintained after the effective date of the ordinance, although
2 it does not comply with the use restrictions applicable to the
3 area. Clackamas County v. Holmes, 265 Or 193, 508 P2d 190
4 (1973). The uses protected from newly enacted laws include
5 those that have proceeded towards completion to a significant
6 degree. In such cases, the landowner is said to have a vested
7 right to continue the development. In Clackamas County v.
8 Holmes, supra, the court set forth the indicia of this type of
9 vested right.

10
11 "The test of whether a landowner has developed his
12 land to the extent that he has acquired a vested right
13 to continue the development should not be based solely
14 on the ratio of expenditures incurred to the total
15 cost of the project. We believe the ratio test should
16 be only one of the factors to be considered. Other
17 factors which should be taken into consideration are
18 the good faith of the landowner, whether or not he had
19 notice of any proposed zoning or amendatory zoning
20 before starting his improvements, the type of
21 expenditures, i.e., whether the expenditures have any
22 relation to the completed project or could apply to
23 various other uses of the land, the kind of project,
24 the location, and ultimate cost. Also, the acts of
25 the landowner should rise beyond mere contemplated use
26 or preparation, such as leveling of land, boring test
holes, or preliminary negotiations with contractors or
architects. Clackamas v. Holmes, supra, 198."

20 In support of their claim of a right to install septic
21 tanks for residential construction, petitioners point to their
22 development activities prior to adoption of the SACP and DEQ
23 regulations. According to petitioners, their land acquisition
24 and the later partitioning in accordance with the county
25 ordinances established a right to build on the lots thus
26 created, notwithstanding later restrictions imposed by either

1 DEQ or the SACP. Petitioners also point out their expenditure
2 of \$30,000 in anticipation of using the property for
3 residential development.

4 Since the property is not in actual use for residential
5 purposes, petitioners' rights to continue development, if any,
6 must be measured by consideration of the factors outlined in
7 Clackamas County v. Holmes, supra, quoted above. Although the
8 record shows petitioners partitioned the property in good faith
9 and without knowledge of either city or DEQ restrictions, they
10 do not point to anything in the record bearing on all the
11 factors set forth in Holmes. For example, the record does not
12 show the kind of development proposed, the ultimate cost of the
13 project, the type of expenditures, and whether the expenditures
14 to date could apply to other uses of the land. Although other
15 factors in addition to these may be relevant to vested rights
16 determinations, Clackamas County v. Holmes prescribes these
17 factors as a minimum. See Polk County v. Martin, 292 Or 69,
18 80, n. 7, 636 P2d 952 (1981). Without evidence in the record
19 relevant to these considerations, we are unable to conclude
20 petitioners have established a vested right to continue
21 construction of their development project.

22 Petitioner's claimed right to continue is also based on
23 estoppel. Petitioners contend the city made no objection to
24 the partition proceedings, although the city had the
25 opportunity when asked by the county for approval of the
26 partitioning. Neither did the city inform petitioners that the

1 resulting parcels could not obtain septic tank approvals for
2 residential construction. On one occasion, the city advised
3 the county the city had "no problem" with one of applicant's
4 partitions.

5 If petitioners have rights based on estoppel, the petition
6 for review fails to set forth evidence in the record necessary
7 to establish the claim.⁴ In addition, estoppel does not
8 prevent the local government from enforcing its land use
9 regulations. Clackamas County v. Emmert, 140 Or App 493, 513
10 P2d, 532 (1973).

11 For the above reasons, we conclude petitioners have not
12 established a right to the city's approval of septic tank
13 permits notwithstanding applicable land use regulations. This
14 assignment of error is therefore denied.

15 The decision is remanded. The city must apply the criteria
16 required by DEQ for issuance of a statement of compatibility,
17 i.e., an acknowledged comprehensive plan or the statewide land
18 use goals. In addition, if the city denies the applicant's
19 request, and the denial is based on non-compliance with
20 statewide goals rather than an acknowledged comprehensive plan,
21 the city must also make the findings required by ORS 197.520.⁵

1 Bagg, Dissenting.

2 I disagree with the majority's conclusion that the city has
3 imposed a development moratorium on petitioners' property.

4 To prove existence of a moratorium, petitioners must prove
5 that the city engaged in a pattern or practice of delaying or
6 stopping issuance of necessary permits. While the city refused
7 to agree to a septic tank permit, petitioners have not shown
8 the city would refuse sewer hook-ups if petitioners paid for
9 them.

10 This alternative is more expensive than installing septic
11 tanks. However, without a showing that the expense of other
12 sewage disposal alternatives is prohibitive, I do not believe
13 petitioners have proven that the city has imposed a moratorium.

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1 FOOTNOTES

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4 Petitioners have another partition proceeding pending
5 before the city. The partition, if approved, would create
petitioners' eighth parcel of the 9.88 acres.

6 2

7 LCDC acknowledged the SACP to be in compliance with the
8 statewide land use goals on May 26, 1982. The Court of Appeals
9 reversed and remanded the acknowledgment order as to specified
10 areas. See City of Salem v. Families for Responsible Govt., 64
Or App 238, 668 P2d 395 (1983). Applicant's property is part
of exception area XII, one of the areas subject to the court's
remand order.

11 3

12 The statement of compatibility form furnished by DEQ also
13 reflects the same criteria specified in the definition quoted
14 above. The form has check-off boxes to indicate
compatibility/incompatibility with acknowledged comprehensive
plans or consistency/inconsistency with statewide planning
goals.

15 4

16 "To constitute an equitable estoppel, or estoppel by
17 conduct, (1) there must be a false representation; (2) it
18 must be made with knowledge of the facts; (3) the other
19 party must have been ignorant of the truth; (4) it must
20 have been made with the intention that it should be acted
upon by the other parties; (5) the other party must have
been induced to act upon it. Earls v. Clarke, 223 Or 527,
530, 355 P2d 213 (1960).

21 5

22 ORS 197.540(4) prevents our review of decisions concerning
23 a moratorium on construction for compliance with statewide
24 planning goals.
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