06/21/19 AM10:56 LUBA

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

ROSE GILLETTE, ANNETTE BLAIR,
and DONALD BLAIR,
Petitioners,

vs.

LINCOLN COUNTY,
Respondent.

LUBA No. 2018-054

FINAL OPINION
AND ORDER

Appeal from Lincoln County.

Wallace W. Lien, Salem, filed the petition for review and argued on behalf of petitioners. With him on the brief was Wallace W. Lien, P. C.

Kristin H. Yuille, Assistant County Attorney, Newport, filed the response brief and argued on behalf of respondent.

ZAMUDIO, Board Member; RUDD, Board Member, participated in the decision.

RYAN, Board Chair, did not participate in the decision.

REMANDED 06/21/19

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

1 Opinion by Zamudio.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a planning director's decision determining that (1) a
4 1990 farm dwelling approval was no longer valid and (2) petitioners did not have
5 a vested right to construct the dwelling.

6 **FACTS**

7 The subject property is an 80-acre parcel zoned in 1990 and still zoned as
8 Agriculture-Conservation (A-C), an agricultural zone that implements Statewide
9 Planning Goal 3 (Agricultural Land) and is subject to ORS chapter 215 provisions
10 governing exclusive farm use (EFU). In 1990, the A-C zone allowed a dwelling
11 in conjunction with farm use (farm dwelling) on an 80-acre parcel as an outright
12 permitted use, based on certain standards.

13 In 1990, Thayer, petitioners' predecessor-in-interest, applied to the county
14 to approve a farm dwelling on the subject property. On March 7, 1990, the county
15 issued the land use approval (the 1990 Approval), subject to three conditions: the
16 owner must (1) maintain the property's farm tax status, (2) obtain a building
17 permit for the dwelling, and (3) provide a county-approved septic system. The
18 1990 Approval does not include an expiration date.

19 In 1993, petitioners entered into a land sale contract with Thayer, and
20 acquired title to the property in 1994. In the spring of 1994, petitioners
21 constructed driveways to two potential dwelling sites. Petitioners installed a
22 septic system in August 1994. Record 9, 15. Later in the fall of 1994, petitioners

1 constructed a well on the property. After 1994, petitioners made no further efforts
2 to obtain a building permit or construct a dwelling on the subject property.

3 In 2017, petitioners placed the property for sale, advertising that it is
4 subject to a valid land use approval for a farm dwelling and entered into a
5 purchase agreement. However, the buyers cancelled the purchase agreement after
6 the county advised them that the 1990 Approval had expired and was no longer
7 valid. On April 17, 2018, petitioners' attorney sent the county a letter asking for
8 a written determination (1) that the 1990 Approval had not expired and is still
9 valid, or (2), alternatively, that petitioners' activities in 1994 were sufficient to
10 grant petitioners a vested right to obtain a building permit and construct the
11 dwelling, under *Clackamas County v. Holmes*, 265 Or 193, 508 P2d 190 (1973).
12 Petitioners requested that the county authorize a future building permit for the
13 dwelling. Record 8–11.

14 On April 30, 2018, the county planning director responded with the
15 memorandum that is the challenged decision in this appeal. The April 30, 2018
16 memorandum concludes that the 1990 Approval is no longer valid due to
17 intervening changes in the county code standards for farm dwelling approvals,
18 and further concludes that development of a driveway, septic system, and well in
19 1994 were insufficient to establish a vested right to construct the farm dwelling

1 under *Holmes*. After the county clarified that the memorandum was a final land
2 use decision, and not subject to any local appeal, petitioners filed this appeal.[1]

3 **INTRODUCTION**

4 Petitioners' first assignment of error concerns the issue of whether the
5 1990 Approval expired and is valid authority to obtain a building permit.
6 Petitioners raise procedural, legal, findings, and evidentiary challenges to the
7 county's decision in the April 30, 2018 memorandum that the 1990 Approval has
8 expired or is no longer valid.

9 The second assignment of error challenges the county's disposition of
10 petitioners' alternative argument that, even if the 1990 Approval is no longer
11 valid, petitioners have a vested right to construct the dwelling based on *Holmes*.
12 Petitioners raise procedural, legal, findings, and evidentiary challenges to the
13 county's determination that no right to construct the dwelling has vested. The
14 permit validity and vested rights issues are distinct and alternative issues. If the
15 1990 Approval is still a valid basis to authorize construction of the dwelling, then
16 there is no need for the county to resolve petitioners' vested right claim.

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[1] Petitioners filed a contingent motion to transfer this appeal to circuit court, in the event that the county argued or LUBA concluded that the challenged decision is not a land use decision subject to LUBA's jurisdiction. The county does not dispute that the challenged memorandum is a land use decision subject to LUBA's jurisdiction. We are not aware of any impediment to exercise of LUBA's jurisdiction over petitioners' appeal of the April 30, 2018 memorandum.

As explained below, we conclude that remand is necessary for the county to address procedural errors and adopt a new decision that, at a minimum, adequately explains the county's resolution of petitioners' request that the county determine that the 1990 Approval is still valid. Remand will result in a new decision, likely based on a different record and findings. Accordingly, our disposition makes it premature to address most of petitioners' challenges to the decision before us in this appeal. Finally, while the county's determinations regarding permit validity and vested rights present distinct issues, the procedural challenges are identical. Consequently, we will address the first and second assignments of error together, focusing on the petitioners' procedural challenges.

FIRST AND SECOND ASSIGNMENTS OF ERROR

As noted, petitioners' first assignment of error concerns the issue of whether the 1990 Approval expired or remains valid authority to obtain a building permit. Petitioners' April 17, 2018 letter to the county requested that the county determine the validity of the 1990 Approval, arguing that the 1990 Approval "can never expire" because it has no expiration date on its face and no local or state law imposes an expiration date. Record 8. The planning director's April 30, 2018 memorandum does not squarely address that argument.[2] Instead, the planning

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[2] The April 30, 2018 memorandum states, in relevant part:

> "The provisions under the Lincoln County Code utilized during 1990 to authorize the establishment of a dwelling in this A-C zone have been repealed. Because these provisions (the Farm Dwelling)

1 director concludes that, because the county farm dwelling standards in the A-C

2 zone have been amended since 1990, the 1990 Approval is no longer valid.[3] The

3 planning director then goes on to consider, and reject, petitioners' alternative

4 claim for vested rights under *Holmes*.[4]

> are no longer part of our code Lincoln County must turn to the legal doctrine of 'vesting' of the right to determine if the actions undertaken by your family (the installation of a well, a septic system, and a driveway) are sufficient in scope that your family, in effect, acquired a vested right to construct a dwelling at the subject property." Record 2.

[3] In 1993, the legislature adopted a number of changes to the EFU statutes, including those governing dwellings in conjunction with farm use. Thereafter, the Land Conservation and Development Commission (LCDC) adopted more rigorous administrative rule standards for farm dwellings, at OAR 660-033-0135. In 1994, the county adopted corresponding changes to its farm zones. There is no dispute in the present appeal that the subject 80-acre parcel would not qualify for a farm dwelling under the post-1993 changes to the EFU statutes and rules, and under the current county A-C zone.

[4] The April 30, 2018 memorandum states, as relevant:

> "Our legal counsel researched Oregon case law to understand how Oregon courts have ruled in such matters. Case law in Oregon underscores that the question of whether a landowner has proceeded far enough with a proposed construction activity to acquire a vested right is determined on a case-by-case basis. The case law also instructs us that when a property owner develops property to a certain stage, the property owner is said to have acquired a 'vested right' to continue the development. The courts in Oregon, though, have ruled development activities must be 'substantial.'
>
> "Lincoln County's Legal Counsel determined that the development of a septic system, well and driveway at the subject property does <u>not</u> constitute a 'substantial improvement.' No actions were taken

1 Petitioners present multiple challenges to the county's disposition of their
2 request to determine that the 1990 Approval is still valid. The first challenge is
3 procedural. Petitioners argue, based on statutory and local procedural
4 requirements, the county should have processed their request for a determination
5 regarding the validity of the 1990 Approval under procedures that provide for
6 notice, an evidentiary hearing, and a right of local appeal. The second challenge
7 is purely legal. Petitioners argue that, as a matter of law, the 1990 Approval has
8 not expired and is still valid, because it includes no express expiration period,
9 and the county's decision cites no local or state laws that would impose any
10 expiration period on the 1990 Approval. The third challenge is based on
11 inadequate findings. Petitioners contend that the county's memorandum does not
12 adequately explain the county's position that the 1990 Approval has expired or
13 is no longer valid. Fourth, and finally, petitioners argue that the county's
14 conclusion that the 1990 Approval has expired or is no longer valid is not
15 supported by substantial evidence.

16 Similarly, under the second assignment of error, petitioners present
17 procedural, legal, findings, and evidentiary challenges to the county's conclusion
18 that petitioners do not have a vested right under *Holmes* to construct the dwelling.

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toward construction of the core purpose of the development (the establishment of a dwelling pursuant to Case File #1-FD-90). As such, it is Lincoln County's position that development rights (the dwelling right) did not vest at the subject property." Record 2–3 (underscoring in original).

1 As relevant here, petitioners repeat their arguments that under applicable
2 statutory and local procedural requirements the county was required to process
3 their vested rights claim under procedures that provide for notice, an evidentiary
4 hearing, and a right of local appeal.

5 We turn first to the procedural issue that is common to both assignments
6 of error. Petitioners argue that local provisions implementing ORS 215.416
7 require the county to have provided notice and an evidentiary hearing, and the
8 right of local appeal, in issuing the challenged decision. In relevant part, ORS
9 215.416 sets out required procedural requirements for county processing of
10 applications for "permits," which are defined at ORS 215.402(4) as the
11 "discretionary approval of a proposed development of land under ORS 215.010
12 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or
13 county legislation or regulation adopted pursuant thereto." Under ORS 215.416,
14 when an applicant submits an application for a permit, a county must generally
15 provide notice and an evidentiary hearing on the application or, if it makes an
16 initial decision without a hearing, the opportunity to appeal the initial decision to
17 a *de novo* evidentiary hearing before a different review body.

18 On appeal, petitioners do not cite or discuss ORS 215.402(4), or present
19 any argument as to why their April 17, 2018 letter to the county should be viewed
20 as an application for a "permit" as defined at ORS 215.402(4). Petitioners' April
21 17, 2018 letter requested that the county make two determinations: (1) that the
22 1990 Approval is still valid and authorizes construction of the dwelling or,

1 alternatively, (2) that petitioners have a vested right under *Holmes* to construct
2 the dwelling. We note that the first request to determine that the 1990 Approval
3 is still valid probably does not constitute a request for the county to issue a
4 "permit" decision as defined at ORS 215.402(4). Such a request does not involve
5 the "discretionary approval of a proposed development of land," but is instead a
6 request for an interpretation of an existing permit.

7 Nonetheless, we understand petitioners to argue that, even if their request
8 to determine whether the 1990 Approval is still valid is not an application for a
9 "permit" and not subject to ORS 215.416, the county committed procedural error
10 in failing to provide petitioners a right to locally appeal the May 30, 2018
11 memorandum to the planning commission. Petitioners argue that Lincoln County
12 Development Code (LCDC) 1.1210(1) and (2) set out two procedural paths, one
13 for "ministerial" decisions, at LCDC 1.1210(1), and another for "permit"
14 decisions at LCDC 1.1210(2). We understand petitioners to argue that if the
15 challenged decision is not a "permit" decision it must therefore be processed as
16 a "ministerial" decision, in which case LCDC 1.1210(1)(e) specifies that "[a]ll
17 actions of the [planning] division may be appealed to the Planning Commission
18 or other hearings body designated by the Board of Commissioners[.]"[5] Petitioners

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[5] LCDC 1.1210, Review Procedures, provides, in relevant part:

> "The review of applications received under the provisions of this chapter shall be conducted according to the following procedures:

1 contend that the county denied them the right of local appeal of the planning
2 director's determination that the 1990 Approval was no longer valid.

3 The county response brief does not directly address petitioners' arguments
4 regarding LCDC 1.1210(1)(e), but we understand the county to argue that the
5 procedures governing review of a "ministerial" application do not apply because
6 petitioners did not file an "application" of any kind. The county contends that had

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> "(1) Procedure for action by the division on ministerial applications not subject to notification requirements:
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> > "(a) The property owner or authorized agent shall submit an application to the division.
> >
> > "(b) Upon determination that the application is complete, the division may refer the application to affected cities, districts, local, state or federal agencies for comments.
> >
> > "(c) Within 10 days of determining an application complete, or such longer period as mutually agreed to by the division and the applicant, the division shall approve, deny or, at the director's discretion, refer the application to the Planning Commission for consideration.
> >
> > "(d) The applicant shall be notified in writing of the division's action.
> >
> > "(e) All actions of the division may be appealed to the Planning Commission or other hearings body designated by the Board of Commissioners pursuant to LCC 1.1267.
>
> "(2) Procedure for action by the division on applications for permits as defined in ORS 215.402(4): * * *"

1 petitioners filed a building permit application based on the 1990 Approval then
2 the county would have processed it under the procedures for ministerial review
3 at LCDC 1.1210(1), which would have entailed providing an opportunity for
4 local appeal to the planning commission. We understand the county to argue that,
5 because there was no "application" of any kind before it, the planning director
6 instead employed an apparently *ad hoc*, informal decision-making process that
7 does not provide for local appeal.

8 The county is correct that the two procedural pathways specified in LCDC
9 1.1210(1) and (2) govern only "applications," and that LCDC 1.1210(1) governs
10 only "ministerial applications." On initial receipt of petitioners' April 17, 2018
11 letter, the county might reasonably have concluded that the letter did not
12 constitute an "application" for purposes of either LCDC 1.1210(1) or (2), and
13 informed petitioners that the county would not take any action unless and until
14 petitioners submitted a written application in the form and manner required by
15 the county, and presumably after paying the appropriate application fee. The
16 county did not do so, but instead proceeded to follow an informal process where
17 it issued what purport to be final determinations that (1) the 1990 Approval is no
18 longer valid and (2) petitioners do not have a vested right under *Holmes* to
19 construct the dwelling.

20 County planning staff undoubtedly receive and respond to all kinds of
21 written requests, and presumably not all those requests qualify as "applications"
22 for purposes of LCDC 1.1210(1) or (2). It is possible that the county code or

practice allows the county to resolve some of these requests informally without treating them as "applications" for purposes of LCDC 1.1210(1) or (2). However, even if so, it is not clear to us that the requests for the two legal determinations in petitioners' April 17, 2018 letter are the kind that can be processed without the procedural protections of either LCDC 1.1210(1) or (2).

As explained above, a determination whether a permit has expired does not, in itself, concern the discretionary approval of the proposed development of land and hence would not constitute a "permit" decision within the meaning of ORS 215.402(4). A request to make that determination, in isolation, would not be subject to the procedural requirements of LCDC 1.1210(2), although the county might well conclude that, if the request is treated as an "application," the application should be processed under the procedures for a "ministerial" decision at LCDC 1.1210(1). However, even if that is the case, petitioners' April 17, 2018 letter also included, in the alternative, a request for a vested rights determination, and the county chose to address and resolve that vested rights claim.

Resolution of petitioners' alternative claim for a vested right determination does involve the "discretionary approval of a proposed development of land," and thus would constitute a "permit" decision as defined at ORS 215.402(4). Vested rights claims are a species of nonconforming use, and determinations of vested rights are subject to the same general doctrines as verifications of nonconforming uses, including the doctrines of discontinuance and abandonment. *Fountain Village Development Co. v. Multnomah County*, 176 Or

1 App 213, 31 P3d 458 (2001), *rev den*, 344 Or 411 (2002). Nonconforming use
2 verifications are "permit" decisions subject to the requirements of ORS 215.416.
3 ORS 215.130(8). Consequently, any county determination on a vested right claim
4 must be processed under procedures consistent with ORS 215.416.

5 For whatever reason, the county chose to consider and resolve petitioners'
6 vested rights claim using a procedure that is not consistent with the requirements
7 of ORS 215.416. That was procedural error. It is true that petitioners share some
8 responsibility for that error. Petitioners did not submit anything labeled or easily
9 identifiable as an "application" for a "permit," and at no point during the brief
10 proceedings below did petitioners request that the county provide notice and a
11 hearing or opportunity for local appeal, or otherwise request that their requests
12 be processed under either LCDC 1.1210(1) or (2). Nonetheless, the county is
13 ultimately responsible for identifying and following the correct procedural path
14 given the nature of the land use requests before it. Because the county chose to
15 address and resolve petitioners' vested rights claim, it was incumbent on the
16 county to recognize that resolving such a claim triggers the procedural
17 requirements that apply to a permit decision.

18 At various points in the response brief, the county argues that petitioners
19 waived some of the issues raised in this appeal, by failing to raise those issues
20 with sufficient specificity during the proceedings below. The county's "raise it
21 or waive it" argument is based on ORS 197.763(1), which applies only to land
22 use decisions where the local government provides a hearing on a land use

1 application, such as a hearing on a permit application.[6] Here, the county provided
2 no hearing or any other type of public process, and thus the preservation
3 requirements of ORS 197.763(1) do not assist the county on appeal.

4 We conclude that remand is necessary for the county to determine and
5 follow the correct procedural path given the nature of the land use requests
6 pending before it. Given the nature of the vested rights claim, we see no other
7 option but for the county to process that claim under the procedures at LCDC
8 1.1210(2), governing "permit" applications. Because the county has already
9 chosen to accept, process and resolve petitioners' two claims presented in the
10 April 17, 2018 letter, we believe the county no longer has the option of refusing
11 to consider those claims unless and until petitioners submit a formal land use
12 application.

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[6] ORS 197.763 provides, in relevant part:

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:
>
> "(1) An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

1 The foregoing disposition will result in a new evidentiary proceeding
2 culminating in a new decision based on new findings and evidence. Accordingly,
3 there is no need to address petitioners' remaining legal, findings, and evidentiary
4 challenges to the April 30, 2018 memorandum. However, the following
5 observations may be helpful on remand.

6 First, as noted, the antecedent issue of whether the 1990 Approval is still
7 valid should be addressed and resolved prior to taking up petitioners' alternative
8 claim for vested rights. If the county concludes that the 1990 Approval is still
9 valid, there is no compelling need to resolve the vested rights claim, although the
10 county may choose to do so in the alternative, in order to provide a complete
11 adjudication.

12 Second, petitioners argue that the county's conclusion that the 1990
13 Approval is no longer valid is inadequate and unexplained. *See* n 2. We generally
14 agree with petitioners on that point. As noted, the county's conclusion that the
15 1990 Approval is no longer valid rests solely on the fact that the A-C zone
16 standards for farm dwellings have changed since 1990. However, the county did
17 not provide a legal basis for that conclusion. If there are applicable local or state
18 provisions that would operate to invalidate the 1990 Approval based on a
19 subsequent change in the applicable approval standards for farm dwellings, no
20 party cites them to us.

21 In its response brief, the county argues that OAR 660-033-0140 might
22 apply to support the county's conclusion that the 1990 Approval is now expired

1 or invalid. OAR 660-033-0140 became effective on August 7, 1993, and in
2 relevant part supplies a four-year expiration period for permit approvals of
3 residential development on agricultural land, along with standards and limits for
4 extending such permits.[7] One problem with the county's argument is that OAR

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[7] OAR 660-033-0140 provides, in relevant part:

> "(1) Except as provided for in section (5) of this rule, a discretionary decision, except for a land division, made after the effective date of this division approving a proposed development on agricultural or forest land outside an urban growth boundary under ORS 215.010 to 215.293 and 215.317 to 215.438 or under county legislation or regulation adopted pursuant thereto is void two years from the date of the final decision if the development action is not initiated in that period.
>
> "(2) A county may grant one extension period of up to 12 months * * *
>
> "(3) Approval of an extension granted under this rule is an administrative decision, is not a land use decision as described in ORS 197.015 and is not subject to appeal as a land use decision.
>
> "(4) Additional one-year extensions may be authorized where applicable criteria for the decision have not changed.
>
> "(5)(a) If a permit is approved for a proposed residential development on agricultural or forest land outside of an urban growth boundary, the permit shall be valid for four years.
>
> > "(b) An extension of a permit described in subsection (5)(a) of this rule shall be valid for two years.

1 660-033-0140 applies by its terms only to decisions "made after the effective date
2 of this division," which was August 7, 1993. OAR 660-033-0140(1). Because the
3 1990 Approval was issued prior to August 7, 1993, it is not at all clear that OAR
4 660-033-0140 operates to supply an expiration period for the 1990 Approval.
5 Nonetheless, on remand, the county should consider, if raised, the applicability
6 of OAR 660-033-0140(1), and any other authority cited to it regarding expiration
7 periods that might apply to the 1990 Approval.[8]

8 Finally, if on remand the county reaches the vested rights claim, we
9 generally agree with petitioners that the county's findings, quoted in full at n 4,
10 are too summary to adequately explain the county's conclusion that petitioners
11 have failed to demonstrate a vested right under *Holmes* to construct the dwelling.
12 We note that the analysis required under *Holmes* and its progeny is a fairly
13 complex, multi-factor analysis. The brief findings on this point in the April 30,
14 2018 memorandum do not attempt to undertake that relatively complex, multi-
15 factor analysis. The county also may consider whether the county's
16 nonconforming use regulations apply to the petitioners' asserted right to
17 construct a farm dwelling on the subject property.

> "(6) For the purposes of section (5) of this rule, 'residential development' only includes the dwellings provided for under ORS 215.213(3) and (4), 215.284, 215.705(1) to (3), 215.720, 215.740, 215.750 and 215.755(1) and (3)."

[8] The county also cites LCDC 1.1620, the local implementation of OAR 660-033-0140, which the county apparently adopted in 1994.

1 Other than the foregoing comments, we express no opinion on the merits
2 of petitioners' remaining legal, findings, and evidentiary challenges, or the
3 county's responses thereto.
4 The first and second assignments of error are sustained, in part.
5 The county's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2018-054 on June 21, 2019, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Kristin H. Yuille
Lincoln County Counsel
225 West Olive Street, Room 110
Newport, OR 97365

Wallace W. Lien
Wallace W. Lien PC
PO Box 5730
Salem, OR 97304

Dated this 21st day of June, 2019.

	Denise Seaman
Sara L. Urch	Denise Seaman
Staff Attorney	Executive Support Specialist