BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

METROPOLITAN SERVICE DISTRICT, Petitioner, v. CLACKAMAS COUNTY, Respondent.	LUBA No. 80-083 FINAL OPINION AND ORDER

Appeal from Clackamas County.

E. Andrew Jordan, Portland, filed the Petition for Review and argued the cause for Petitioner Metropolitan Service District.

Michael E. Judd, Oregon City, filed the brief and argued the cause for Respondent Clackamas County.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

REVERSED 12/30/80

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

REYNOLDS, Chief Referee.

FACTS

Metro challenges Order No. 80-1295, referred to as RUPA III, adopted by Clackamas County on June 17, 1980. The order adopts several amendments to the Clackamas County Comprehensive Plan and amends the zoning designations for certain areas covered by the plan. Metro challenges the new plan and zone designations for two areas, areas "6" and "8."

Area 6 is a 188 acre area located southeast of Oregon City and adjacent to the regional urban growth boundary. RUPA III merely re-zones area 6 for 2 acre minimum lot sizes. The designation of "rural" in the Clackamas County Comprehensive Plan was effected by previous action of the board of county commissioners, RUPA II (Order No. 80-1205; See Exhibit "D", area R-23 Abernathy Creek). Area 8 is a 678 acre area also located southeast of Oregon City. RUPA III designates this area as rural and zones the area for 5 acre mimimum lot sizes.

Both area 6 and area 8 consist of agricultural land within the meaning of Goal 3. Clackamas County did not, however, take an exception to Goal 3 in its re-zoning of area 6 or in its comprehensive plan designation and re-zoning of area 8. For area 6 the county relied upon its previous determination in RUPA II that the land was committed to non-farm uses. For area 8 the county concluded that there existed a vested right to develop the entire 678 acre area as 5 acre parcels and, because of this vested right, conformed the comprehensive plan

designation and zoning in accordance therewith.

ASSIGNMENTS OF ERROR

Metro argues that the zone change for area 6 and the plan and zone changes for area 8 violate Goal 3 by allowing residential development on agricultural land and Goals 11 and 14 by providing new housing and services outside the UGB. Metro also argues that the changes violate Goal 2 because RUPA III lacks sufficient findings to justify the designations and because the designations are inconsistent with pre-existing county plan criteria.

Clackamas County defends its action differently with respect to each area. With respect to area 6, Clackamas County takes the position that its decision in RUPA III to re-zone this property to RA-2 was consistent with the comprehensive plan designation, which designation was made in RUPA II. Accordingly, the county takes the position that its RA-2 zoning is proper if the comprehensive plan designation of this area in RUPA II was proper. With respect to area 8, the county's sole defense for zoning of this area for 5 acre minimum lot sizes is that the owner has a vested right to develop the property in accordance with such plan and zoning designations. The county asserts the issue of whether the owner has a vested right is presently before the Circuit Court and the county will reconsider its zoning decision at the conclusion of that case. The county asks this Board not to rule on the validity of these plan designation and zoning for area 8 but rather remand these

portions of the RUPA III decision to the county with instructions that the county institute proceedings to re-evaluate the plan designation and zoning of area 8 upon the issuance of a final decision by the Circuit Court on the vested rights issue.

OPINION ON THE MERITS

1. Area 6.

Area 6 was designated "rural" with "no action" taken with respect to its proper zoning as part of the rural comprehensive plan designation for Abernethy Creek in RUPA II. This Board in 1000 Friends of Oregon v. Clackamas County, ___ Or LUBA ___ (LUBA No. 8-075 and 80-076, 1980) invalidated the rural plan designation for a large portion of the Abernethy Creek area. We are uncertain, however, whether area 6 in RUPA III was included by petitioner 1000 Friends of Oregon in their challenge to the Abernethy Creek area, inasmuch as petitioner excluded from their challenge to this area "the small ownerships at the extreme eastern end of the area and in section 4 bordering Waldo Farm ('no action')." While Clackamas County has conceded in its brief in the present case that invalidation of the plan designation for Abernethy Creek in 1000 Friends of Oregon v. Clackamas County, supra, would cause the RA-2 zoning for that area in RUPA III to fail, we are uncertain whether our order invalidated the rural plan designation for the area involved in this appeal. Hence, we must again review the findings for the Abernethy Creek area in

the present appeal was committed to non-farm/non-forest uses, Clackamas County could properly have relied upon that comprehensive plan designation and subsequently zoned the property for non-farm/non-forest uses. A zoning ordinance need not be shown by the county to independently conform to the statewide planning goals provided that the zoning ordinance is shown to conform to the comprehensive plan and the comprehensive plan in turn is shown to conform to the statewide goals. See 38 Op Ag 1834 at 1839-1840. In this case, however, Clackamas County's comprehensive plan designation for this area adopted in RUPA II does not conform to the statewide goals, particularly, Goal 3. Accordingly, inasmuch as Clackamas County made no attempt to demonstrate in its finding for area 6 in the present case that the zoning conformed to the statewide planning goals, but instead relied upon a comprehensive plan designation for the property which we conclude does not conform to the goals, the county's zoning designation must fail.

2. Area 8.

The county's sole jusification for designating area 8 as rural in RUPA II and simultaneously zoning this property for 5 acre minimum lot sizes (RRFF-5) is that the county has determined that the owner of this area has vested right to develop the area. Although the county has, in its finding for area 8, committed itself to re-examining the zoning for this area at the conclusion of the Circuit Court's determination on the vested rights issue, this Board must nevertheless decide

whether the county was entitled to rely upon a finding that the owner of the area had a vested right as a basis for now designating the area for non-farm/non-forest uses.

The county, citing 1000 Friends of Oregon v. Marion County, LCDC No. 75-006 (1977), argues that LCDC

> "...clearly recognized that a vested right to a development can be the basis for an exception to the agricultural and forest goals, and that the two issues are not distinct as urged by petitioner."

Clackamas County quotes the following from the Marion County opinion as support for this proposition:

> "Another form of 'commitment' could consist of significant, earlier public decisions, such as the approval and recording of a subdivision upon which construction has been started. Such construction might be the laying of a water or sewer line specifically designed in size to permanently serve the subdivision." 1000 Friends of Oregon v. Marion County, supra, page 6.

It may be, as Clackamas County contends, that under some situations the facts giving rise to a determination that land is "committed" to non-farm/non-forest uses would also give rise to a finding that there is a vested right to develop the property. It does not necessarily follow, however, that this will always be so or even be so in the majority of cases. A determination that land is "committed" to non-farm/non-forest uses must be based upon consideration of the following factors: (a) Adjacent development, (b) Parcel size and ownership, (c) Public services, (d) Neighborhood and regional characteristics and (e) Natural boundaries. See 1000 Friends of Oregon v. Board of County Commissioners of Clackamas

County, ___ Or LUBA ___ (LUBA No. 80-060, Slip Opinion at 13). A determination of whether a vested right exists, on the other hand, depends upon whether the property owner has expended substantial sums of money in developing the property. See Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973). Thus, a determination of whether a vested right exists focuses more on actual development on or the amounts expended in developing a piece of property. Whether that property is "committed" to non-farm/non-forest uses depends upon whether the property is so surrounded by development that farm or forest uses on the property are impossible. It may be that these two concepts will overlap in a situation such as where a developer develops a subdivision in phases and has expended substantial sums toward completion of the third phase. By virtue of development of the previous phases the third phase may be committed to non-farm/non-forest uses. The developer may also have a vested right to develop the third phase because of sums of money expended in anticipation that the third phase would also be developed. But we think this is an exceptional situation. Thus, we conclude that the county's determination that a vested right may exist for this property is not the equivalent of a finding that the property is committed to non-farm/non-forest uses.

Other than the argument set forth above, Clackamas County has cited the Board to no authority that holds that a determination that a vested right exists on a piece of property

is sufficient justification to enable the county to zone the property for the use for which the vested right exists. In our view, a vested right only gives the owner of the land the authority or right to develop the property regardless or inspite of the zoning. It does not also give the owner the right to have the property zoned in accordance with the vested right. In this sense, the use established under a vested right is akin to a non-conforming use. See Clackamas County v. Holmes, supra. Accordingly, we hold that Clackamas County's comprehensive plan designation of rural and RRFF-5 zoning for area 8 solely on the basis that the county had determined that the owner had a vested right to develop this property was in error.

Reversed.

RUPA II to determine whether the findings as a whole demonstrate commitment of the area to non-farm/non-forest uses. We conclude that they do not.

Although we cannot tell from reviewing the finding in RUPA II for Abernethy Creek which parcels identified therein are the same parcels involved in area 6 in the present appeal, we do know that the present appeal involves 188 acres consisting of 4 parcels with an average parcel size of 47 acres. There are only 2 dwelling units with an average of 1 per 94 acres. The agricultural soil suitability for the area is 75% Class III or better. With this information, we can look at the finding for Abernethy Creek in RUPA II to determine whether there is anything in that finding which might indicate why the county concluded that this 188 acre sub-area of Abernethy Creek could possibly be determined to be committed to non-farm/non-forest uses. While the finding in RUPA II for Abernethy Creek, a 700 acre area, states that "the area is completly surrounded by developed rural areas...[and]...is bordered by rural areas...which have a total of over 500 houses," the finding fails to explain why surrounding rural development makes farming within the 700 acre area and more particularly within this 188 acre sub-area impossible. See; 1000 Friends of Oregon v. Clackamas County and 1000 Friends of Oregon v. Clackamas County, ___ Or LUBA ___ (LUBA No. 80-060, 1980).

Had Clackamas County properly determined in RUPA II as part of amendment of its comprehensive plan that area 6 involved in