BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT MASON, Petitioner, vs. LINN COUNTY, Respondent, and, MOUNTAIN RIVERS ESTATES, INC., an Oregon corporation, Respondent.	LUBA No. 84-072 FINAL OPINION AND ORDER

Appeal from Linn County.

Stephen C. Hendricks, Portland, and Robert Liberty, Portland, filed the Petition for Review and argued the cause on behalf of petitioner.

Corinne C. Sherton, Salem, filed a response brief and argued the cause on behalf of Respondent Mountain Rivers Estates, Inc. With her on the brief were Sullivan, Josselson, Johnson & Kloos.

No appearance by Respondent County.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee participated in the decision.

REVERSED IN PART, REMANDED IN PART 12/20/84

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

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Opinion by Kressel.

NATURE OF THE DECISION

Petitioner appeals the county's determination that Intervenor Mountain Rivers Estates, Inc. (MRE) has a vested right to complete a planned unit development.

FACTS

Early in 1979, MRE initiated the application process for approval of the PUD in question. Final approval of the 111 unit project,[1] which included exceptions to Statewide Planning Goals 3 and 4, was granted three years later. However, an appeal to this Board resulted in a remand of the county's decision on grounds the resource goal exceptions were inadequate. Mason v. Linn County, ___ Or LUBA ___, LUBA No. 83-036 (1983).

After the remand, MRE renewed its request for final PUD approval. In addition MRE filed an alternative request for a determination that, notwithstanding the governing land use restrictions, it had acquired a vested right to complete the project by virtue of prior, lawful expenditures.

The county addressed the PUD and vested right requests in separate proceedings. In May, 1984, plan and zone changes associated with the PUD were again approved. Hearings on the vested rights claim were held in April, May and June, 1984. Petitioner, whose agricultural land is separated from the site in question by a road, opposed the claim at the hearings. In August, 1984, Order No. 84-470 was adopted, upholding MRE's

vested rights claim. This appeal concerns the validity of Order No. 84-470.[2]

FIRST ASSIGNMENT OF ERROR

Petitioner first contends the county failed to follow appropriate procedures in considering the vested rights claim. The contention has two elements: (1) The county undertook consideration of the claim without the benefit of written procedural rules, in violation of ORS 215.412 and (2) the procedures which were followed were inadequate because they did not provide certain protections normally allowed in civil litigation, e.g., prehearing discovery of documentary evidence, depositions and cross-examination of adverse witnesses.

ORS 215.412 requires the governing body to adopt, by order or ordinance, "one or more procedures for the conduct of hearings." Evidently, no written procedures were in place before respondent commenced the hearings in question.[3] The record does indicate that agreement was reached on a hearing schedule, and a deadline for submission of written evidence.

Petitioner does not explain why the county's failure to adopt a procedural order or ordinance under ORS 215.412 warrants remand or reversal of the challenged decision. See ORS 197.840(8)(a)(B). As we have noted on previous occasions, one who complains of procedural error at the local level must not only demonstrate the existence of error but must also show (1) that a timely objection was made so that corrective measures might be taken and (2) the error was prejudicial to

petitioner's substantial rights. Meyer v. Portland, 7 Or LUBA 184, 190 (1983); Frey Development Company v. Marion County, 3 Or LUBA 45, 50 (1981). Here, neither prerequisite has been satisfied. Petitioner, who was represented by counsel at the county's hearings, has not shown an objection was made to the absence of written procedural rules at any stage of the proceeding. See South of Sunnyside Neighborhood League v. Board of County Commissioners of Clackamas County, 280 Or 3, 10, 569 P2d 1063 (1977). Nor has petitioner demonstrated his interests were prejudiced by the county's ad hoc formulation of procedures.[4] Accordingly, we must reject the first element of the procedural challenge.

Petitioner's second procedural challenge is that the county erred in failing to provide for prehearing discovery (i.e., production of documents relevant to the vested rights assertion and oral depositions) and for cross-examination of representatives of MRE during one of the public hearings held by the county. However, we decline to consider the claims regarding prehearing procedure because petitioner did not assert the alleged rights at the county level. As a result, the claims were waived. South of Sunnyside Neighborhood League v. Board of County Commissioners of Clackamas Co., supra, 280 Or at 10. Meyer v. Portland, supra.

The argument that cross-examination of MRE's representatives should have been allowed during the county's final evidentiary hearing stands on different footing. The

parties agree petitioner's counsel requested permission to cross-examine at least one representative of MRE and that the request was denied.[5] Further, petitioner convincingly maintains his ability to demonstrate the inadequacy of MRE's proof of the vested rights claim was prejudiced by the county's refusal to allow cross-examination. Under these circumstances, we consider the issue properly before us for decision.

As already noted, the legislatively-mandated procedures for county land use hearings are general in nature. Specific procedural requirements for the conduct of hearings are not set forth in the governing statutes or the county ordinance. If petitioner's claim is to be sustained, therefore, it must be grounded on constitutionally guaranteed procedural rights. Anderson v. Peden, 284 Or 313, 315, 587 P2d 59 (1978). See also West v. City of Astoria, 18 Or App 212, 228-29, 524 P2d 1216 (1974) (Schwab, C.J., concurring) (procedures for land use hearings set forth in Fasano v. Washington County Commission, 264 Or 574, 507 P2d 23 (1973) are evidently required by the due process provisions of the state and federal constitutions).

Petitioner's argument in support of his cross-examination request is difficult to follow. As we read the petition, the argument is that denial of the "right" of cross-examination constituted denial of another "right" - the right to offer evidence and argument in rebuttal of the applicant's position. See petition at 16.

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The latter right has been recognized in previous cases involving quasi-judicial land use proceedings. See, e.g., Fasano v. Washington County Commission, supra; Lower Lake Subcommittee v. Klamath County, 3 Or LUBA 55 (1981).

We have considerable difficulty in understanding how denial of cross-examination can be transulated into denial of petitioner's recognized right to offer rebuttal evidence. The two procedural tools are logically distinct. See South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County, 27 Or App 647, 663-664, 557 P2d 1375 (1976); reversed 280 Or 3, 569 P2d 1063 (1977).

We will not attempt to look further into the nature of petitioner's undeveloped argument.

Petitioner may intend to claim that the asserted right to cross-examine MRE's witnesses has constitutional support independent of the amorphous connection to the right of rebuttal. See generally, Note, Specifying the Procedures Required by Due Process, 88 Harv L. Rev 1510 (1975). If this is so, however, we find no discussion in the petition of the constitutional law theory supporting the claim. We will not speculate on the merits of this undeveloped theory.[6] See Megdal v. Board of Dental Examiners, 288 Or 293, 296-297, 605 P2d 273 (1980); Pierron v. Eugene, 8 Or LUBA 113, 118 (1983).

Petitioner's first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner divides the second assignment of error into eight subassignments. Each takes issue with an aspect of the county's decision in relation to the legal tests for vested rights noted in Polk County v. Martin, 292 Or 69, 81, footnote 7, 636 P2d 952 (1981).[7] Before taking up these claims, however, we find it helpful to review the complex factual context in which the county's decision arises. We base this summary principally on the extensive findings of fact set forth in the final order. Other pertinent facts in the record are also mentioned.

1. Summary of Findings of Fact

The property in question (Hale Butte) consists of 252.58 acres, all but 50 of which were acquired in 1966[8] by Marion Towery, now vice president of MRE. Hale Butte was unzoned when it was acquired by Mr. Towery. Between 1966 and 1971, when zoning was first applied to the property, the following activities took place:

(1) 118 acres on top of the butte was cleared and fire break roads were constructed in preparation for surveying the property for later development.

(2) A surveyor was hired to design a road leading from Mason Road, at the southwest corner of the property, to the butte.

(3) A well was drilled to serve as a source of water for later development.

(4) 4,000 lineal feet of Mason Road were improved and the new road referred to in (2) was excavated, compacted and graded to county standards for residential use.[9]

(5) Other land was graded to facilitate drainage of the property.

(6) The entire site was topographically mapped.

(7) A consultant was hired to plan a sewage disposal system for a large scale residential development.

In 1971 the property was zoned F-2, Rural Acreage. This zone permitted residential use outright and imposed a five acre minimum lot size. In January, 1972, the county approved a rezoning and a 15 unit subdivision request on 10 acres of bottomland on the MRE site abutting Mason Road. The rezoning designated the 10 acres as F-3, Rural Residential, authorizing one acre lots (one half acre with public water supply). However, the approved plat was never developed. It was subsequently abandoned in favor of other uses for the property in connection with MRE's larger PUD proposal.

In March, 1972 the county adopted a comprehensive plan, designating the entire site Rural Residential. A new zoning map classified most of the site[10] as ART-5, Agricultural, Residential and Timber use. The zone authorized two single family dwellings on a lot five acres or larger. The total allowable number of units on the unsubdivided portion of Hale Butte thus doubled in relation to the prior zoning.[11]

Between 1971 and 1973 MRE made further expenditures for the water system to serve residential development of the site. Five additional wells were drilled, a pump, mains and pipelines were installed and a well pumphouse was built.

In December, 1972, the state Health Division issued provisional approval for a water system to serve the 15 lot subdivision along Mason Road, as the first of phased development of the site.[12]

Between September, 1975 and July, 1977, MRE installed a 100,000 gallon water storage tank and made other improvements associated with its planned water system.

In July, 1978, the entire site was rezoned at MRE's request from ART-5/SR to ART-2 1/2, thereby increasing the allowable density. The rezoning order acknowledged the landowner's plans for a residential PUD but noted "the indicated PUD must be approved prior to any development." Record at 428.

In February, 1980, MRE submitted a request for Stage 1 approval of a 111 unit PUD at Hale Butte. The request was administratively processed under the county's 1972 zoning ordinance and approved early in 1980.

Stage 2 approval was granted by the county governing body in June, 1980.[13] The Stage 2 approval included exceptions from Statewide Planning Goals 3 (agricultural) and 4 (forest land). Also approved was a preliminary subdivision plat for the property. MRE expended slightly less than $17,000 on professional services for preparation of the Stage 2 application and PUD plan.

In August, 1980 the county adopted a new comprehensive plan, zoning ordinance and land division ordinance. The plan designated the site Rural Residential and adopted exceptions

from Statewide Planning Goals 3 (agricultural land) and 4 (forest land). The new zoning ordinance did not significantly alter the prior zoning regulations affecting the property.

In 1981, after approval of the final street plans by the county engineer, primary and secondary roads for the PUD were graded and graveled at a substantial expense.

In December, 1981, MRE was advised by county planning officials that the goal exceptions for Hale Butte would be reviewed by LCDC in a February, 1982 acknowledgement proceeding. The letter warned that "scrutiny" of the exceptions by LCDC was likely, adding "you may wish to consider this issue in the final development of Mountain River Estates Planned Unit Development." Record at 487. On February 17, 1982, LCDC adopted a continuance order indicating the county's Goal 3 and 4 exceptions for the MRE site were inadequate. Notwithstanding this action, MRE's Stage 3 PUD application was approved by the county planning commission in September, 1982. The approval was appealed to the governing body by Petitioner Mason.

On August 5, 1982, the state Health Division indicated MRE's plan for expanding and improving its water system generally complied with the Division's rules. Two months later the state Department of Environmental Quality issued a Water Pollution Control Facilities permit for MRE's sewage disposal system. The county governing body issued Stage 3 approval of the PUD on December 13, 1982. However, the effect of the order

was stayed pending determination on the Goal 3 and 4 issues. The board further stated that no additional work was to be done on the PUD until the goal issues were resolved.

In March, 1983, the board adopted exceptions to Goals 3 and 4 for the MRE site. However, development of the PUD was again delayed until any appeals of the Board's decision were finally determined.

Petitioner Mason appealed the county's Stage 3 approval of the PUD to the Land Use Board of Appeals (LUBA). Subsequently, LUBA remanded the decision to the county on grounds the resource goal exceptions had not been adequately justified.

2. Final Order

The final order concludes MRE has a vested right to complete "development of a 111 residential planned unit development, previously approved as Case No. S-10-79/80..." despite the restrictions imposed by Statewide Planning Goals 3 and 4. Record at 1.

The final order calculates the total cost of the project as $1,797,980. The total evidently does not include the cost of constructing homes in the 111 unit PUD. MRE's expenditures as of four different dates are set forth in the order as follows:

> July 20, 1971 (first zoning of site - allowing maximum of 60 units on site (1 unit per 5 acre lot)) - $121,164
>
> January 1, 1975 (adoption of statewide goals) - $171,352
>
> February 7, 1982 (issuance of LCDC Continuance Order rejecting Goal 3 and 4 exceptions for the site) - $547,107
>
> September 30, 1982 (filing of appeal of Planning

Commission Stage 3 approval by Mason - $620,206

The order concludes that regardless of which date is used,[14] the expenditures made by the landowner in developing the PUD qualify for protection under the vested rights doctrine set forth in Clackamas County v. Holmes, supra.

The most recent outline of the factors[15] required to be considered under the doctrine appears in Polk County v. Martin, supra and related cases. The factors can be summarized as follows:

> "(1) The good faith of the property owner in making expenditures to lawfully develop his property in a given number; (Original emphasis.)
>
> "(2) The amount of notice of any proposed rezoning;
>
> "(3) The amount of reliance on the prior zoning classification in purchasing the property and making expenditures to develop the property;
>
> "(4) The extent to which the expenditures relate more to the nonconforming use than to the conforming uses;
>
> "(5) The extent of the nonconformity of the proposed use as compared to the uses allowed in the subsequent zoning ordinances;
>
> "(6) Whether the expenditures made prior to the subsequent zoning regulation show that the property owner has gone beyond mere contemplated use and has committed the property to an actual use which would in fact have been made but for the passage of the new zoning regulation;
>
> "(7) The ratio of the prior expenditures to total cost of the proposed use."

We take up petitioner's arguments in connection with these factors below.

Arguments 1 and 2

In his first two arguments, petitioner questions the county's conclusion that MRE acted lawfully and in good faith in incurring the expenditures relied on to support the vested rights claim. If the expenditures were incurred without required approvals or in an effort to "outrace" pending changes in the law, they would not weigh in favor of the vested rights claim. Clackamas County v. Holmes, supra; Polk County v. Martin, supra; Morrel v. Lane County, 46 Or App 485, 612 P2d 304 (1980).

Petitioner's first argument can be broken down as follows: (1) the applicable ordinances prohibited development of the Hale Butte PUD Unit 1, until Stage 3 (final) approval was granted; (2) by the time the county granted Stage 3 approval the developer had already made the improvements later relied on to support the vested rights claim; (3) before Stage 3 approval was granted, the county and MRE were on notice the project conflicted with the statewide goals. Based on these points, petitioner claims the expenditures by MRE should not have been considered lawful and in good faith.

Petitioner's argument relies heavily on Section 28.080 of the Linn County Zoning Ordinance, adopted in 1972. That section provides:

> "Building permits for a Planned Unit Development shall be issued only after final approval by the Planning Commission has become effective in accordance with Section 18.080 and the Linn County Buiding [sic] Official finds that such permits conform to the

approved Planning Unit Development plans approved by the Planning Commission."

A similar provision appears in the county zoning ordinance of 1980 (See Section 26.145(1) 1980 Zoning Ordinance of Linn County).[16]

Petitioner takes the position these provisions render unlawful expenditures by MRE between 1967 and 1982 for roads, water and sewage systems at Hale Butte because Stage 3 approval of the PUD was not granted until 1983. He reminds us the county itself interpreted the ordinance along these lines at various times after 1978, when the property was rezoned to facilitate eventual large scale development.[17] Indeed, the county expressly noted, in its order of March 18, 1983 approving the Stage 3 plan, that improvements made by MRE prior to that date were in contravention of the governing zoning ordinance. The order stated:

"CONCLUSIONS:

"1. Substantial amounts of public facilities have been installed within the Mountain River Estates PUD. Specifically, the main infrastructure e.g. well, reservoir, and transmission piping for the community water system, have been installed. These were completed prior to submission of the PUD request in 1978, and were constructed with the eventual desire to obtain County approval of a planned unit development.

"2. The balance of the improvements have been constructed during the period prior to final plat approval. Provisions of Article 28, Sections 28.110 and 18.090 provide clear direction that no building permits or public facilities construction may take place prior to final approval under Stage III of the PUD procedures. Although provisions of the Land Division

authorize development between the preliminary and final plat approvals, the nature of the planned unit development process is intended to allow conceptual approval of a plan under Stage II prior to requiring the developer to develop final working plans for ultimate development under Stage III."

Petitioner's reading of this portion of the zoning ordinance is at odds with the interpretation made in the final order at issue here. The order notes that the PUD ordinance bars only issuance of building permits prior to Stage 3 PUD approval, and that there are no provisions in the ordinance governing when construction of public facilities and other improvements may take place. In the county's view, that issue is resolved by reading the PUD ordinance in conjunction with the county's subdivision ordinances. Under the PUD ordinances, when a PUD also involves the subdivision of land, the review of the project is to incorporate the applicable provisions of the land division ordinance. See Section 28.010 (1972 ordinance) and 26.020 (1980 ordinance). According to the county, the land division ordinances permit street improvements to be made after preliminary subdivision plat approval and before final plat approval. The relationship between the three stages of PUD approval under the zoning ordinance and the two stages of subdivision plat approval under the land division ordinance are described as follows in the final order:

"Both the 1972 and 1980 PUD ordinances and the 1978 and 1980 subdivision ordinances require that the final plan/plat be consistent with the preliminary plan/plat and any conditions imposed. Therefore, we conclude that the most logical way to integrate these two ordinances is to interpret PUD Stage Two approval to

be equivalent to preliminary plat approval and to interpret them to allow street construction prior to final plan/plat approval, if carred [sic] out pursuant to a final street plan which is consistent with the preliminary plan/plat and has been approved by the County Engineer. This is what was done by MRE in this case, and therefore its 1981 expenditures on road construction were for work legally done. The above interpretation of these ordinance provisions supersedes that made by us in Order No. 83-097, adopted March 18, 1983." Record at 36.

The task of determining the correct interpretation of the ordinance is complicated by the county's contradictory interpretations in the context of the same project. We note also that the above-quoted interpretation refers only to the validity of the street construction work done by MRE, and not to any other improvements considered in the vested rights determination. It does not explain, for example, why MRE's installation of its water system at Hale Butte prior to Stage 2 approval of the PUD conformed to the PUD ordinance.

We will uphold a local government's reasonable interpretation of a local enactment. Fifth Avenue Corp. v. Washington County, 282 Or 591, 581 P1d 50 (1978). However, we are not bound to accept an interpretation simply because it is advanced to us as correct by the local tribunal.

We are unable to accept the county's most recent reading of the PUD and land division ordinances on this question. We are cited to no provision in either document which overrides the explicit prohibition on issuance of building permits prior to Stage 3 (final) PUD approval under the zoning ordinance. That ordinance, taken as a whole, makes it clear that until Stage 3

review is reached, a proposed PUD is largely conceptual in nature.[18] The ordinance indicates that street plans and other proposed uses are finally approved at the Stage 3, not the Stage 2 phase. The entire PUD proposal may be denied at Stage 3 for nonconformance to the governing criteria. See Section 26.135, Linn County Zoning Ordinance. Indeed, until the vested rights detemination was made, this was the county's own view of the appeal process with respect to the Hale Butte project, as portions of the record indicate.[19]

We agree with petitioner that it would be illogical to permit a PUD developer to establish a pattern of roads and other significant support facilities before the approval authority reviewed and finally approved the specific design of a planned unit development. See, generally, Frankland v. City of Lake Oswego, 267 Or 452, 465, 517 P2d 1042 (1973). That approach would virtually make Stage 3 approval of the plan a fait accompli instead of a procedure for complete review of the final project, as the text of the ordinance strongly suggests.

We conclude the county zoning ordinance did not authorize MRE to make the improvements detailed in the challenged final order until Stage 3 approval of the PUD was obtained. This aspect of the petition is therefore sustained and requires reversal of the order. Clackamas County v. Holmes, supra; Morrel v. Lane County, supra.

The foregoing discussion makes unnecessary a lengthy analysis of petitioner's second argument viz. that the Hale

Butte PUD was not a concrete, recognizable project until at least the Stage 1 application was filed (February 1980), so that the right to complete the project cannot be based on expenditures by MRE before 1980. We have held in the preceding paragraphs that many if not most of the expenditures relied on in support of the vested rights claim were made by MRE before it had secured the required approval.

Assuming, arguendo, that MRE's expenditures were lawful, however, we cannot sustain petitioner's second contention. The record indicates MRE's expenditures were in furtherance of a large scale residential project at Hale Butte. Had the requisite approvals been granted, we believe the county could take into account the expenditures in question. Clackamas County v. Holmes, supra; Cook v. Clackamas County, 50 Or App 75, 81-84, 622 P2d 1107 (1980); rev den 290 Or 853.

Third Argument

The county's calculation of expenses incurred by MRE includes a substantial amount of fees for professional services (e.g., design, engineering, legal services) relating to the Hale Butte project. In this argument, petitioner claims the county erred in basing its vested rights determination in part on these expenditures. This was error, in petitioner's view, because the PUD project never received unconditional final approval from the county. In the absence of such approval, claims petitioner, the professional expenses should be attributed only to contemplated use, not actual use of the

property. Under the vested rights doctrine a vested rights claimant must demonstrate the project has "gone beyond mere contemplated use" and has been committed to an actual use which would have in fact been made but for the passage of the new regulation. Clackamas County v. Holmes, supra.

This argument echoes petitioner's earlier claim concerning the physical improvements made by MRE prior to obtaining the required final approval from the county. What we have said in connection with that claim applies here also. Again, however, we note that had the expenditures for roads, sewage and water systems to serve the PUD been lawful (i.e., installed after the required approval was obtained) they would bring the project beyond the stage of mere "contemplated use." Cook v. Clackamas County, supra; Milcrest v. Clackamas County, 59 Or App 177, 650 P2d 963 (1982).

Fourth Argument

Petitioner's fourth argument, in essence, replicates contentions already discussed and accepted by this Board. The PUD in question did not qualify for vested rights protection because it had not proceeded sufficiently far in the approval/development process before there was notice that the governing land use law had changed. Accordingly, we sustain this argument.

Fifth Argument

Petitioner next directs our attention to another of the vested rights factors recognized in the Oregon case law, i.e.,

the extent of the nonconformity of the proposed use as compared to the uses allowed. See Clackamas County v. Holmes, supra. Petitioner claims the 111 unit PUD will be seriously nonconforming with surrounding uses, citing testimony to that effect by various witnesses at the county's hearings.

The county's findings with reference to this vested rights consideration are as follows:

> "Although there is no other project exactly like the proposed MRE PUD in Linn County, there are numerous areas of rural residences at similar overall densities scattered around the county, including in the vicinity of Hale Butte. As part of the basis for its adoption of ordinance 84-291, this board found that the level of development in the proposed PUD would be compatible with adjacent and nearby uses, and those findings are incorporated by reference here. The MRE PUD will provide an [sic] unique example of the continued co-existence of agricultural and rural residential uses on the same ownership, to the benefit of both." Record at 29. (emphasis added).

Petitioner claims there is not substantial evidence in the record to support these findings. We must reject the claim, however, if the record contains evidence a reasonable person would rely on in reaching the quoted determination. Christian Retreat Center v. Washington County, 28 Or App 673, 679, 560 P2d 1100 (1977); rev den (1979).

As a threshold matter, we have difficulty in accepting the quoted finding as adequate demonstration the county considered the factor in question. The finding does not evaluate the relationship of the proposed (nonconforming) PUD with nearby uses in any specific way, and it completely fails to consider

its relationship to conforming (i.e., allowable) uses under the statewide goals.

Apart from the above problems, we have not been cited to substantial evidence in the record supporting the quoted finding. The citations provided by MRE (the county did not file a brief) do not support the vague finding there are areas in the vicinity of Hale Butte having a density similar to the proposed PUD. There may be other relevant evidence in the voluminous record, but we will not search for it.

We sustain the fifth assignment of error.

Sixth Argument

Petitioner next argues the county's findings under the fourth factor set forth in Polk County v. Martin are not supported by substantial evidence. This factor requires consideration of the extent to which the expenditures relate more to the nonconforming use than to the conforming use." The county's findings with respect to this consideration can be summarized as follows:

(1) MRE constructed roads to specifications for residential use, not agricultural or forest use;

(2) Brush clearing done in 1968 was carried out so as to preserve amenities for future residential development, relevant to accommodate resource use;

(3) Although wells and a well house installed on this site might have some usefulness for agricultural purposes the system of 10, 8, 6 and 4 inch mains and the 100,000 gallon water storage tank would only have real use for residential development;

(4) Expenditures for professional services

(surveying, design of water and sewage systems, legal fees for drafting,) would be of no benefit for resource use of the land.

(5) The property is not suitable for farm or forest use; therefore the landowner's expenditures "have value largely for his planned use of the property."

Assuming for arguments sake the improvements listed above were lawfully established, some, but not all of them seem as consistent with uses allowed under Goals 3 and 4 as they are with completion of the PUD project. We refer here to the first two items (road construction and site clearing).[20] We thus do not believe these items were appropriate for inclusion in the vested rights formulation.

We reject petitioner's claim with respect to the third and fourth items. We believe the county's findings show these expenditures are clearly related more to the PUD use than to a resource use of the property.

Finally, the fifth item represents a conclusion of law which this Board has once determined could not be reached based on a similar record. Mason v. Linn County, ___ Or LUBA ___, LUBA No. 83-036 (1983). The county's conclusion relates to the suitability of the property for conforming uses under the goals, an issue pertinent to the applicability of those goals, not to the vested rights claim at issue here.

Based on the foregoing, we sustain petitioner's sixth argument in part. Because the findings concerning roads and site clearing are not adequate to demonstrate these

expenditures are more consistent with the PUD than uses allowed by the goals, they should not weigh in favor of the vested rights determination. A remand is in order.

Seventh Argument

Petitioner next claims the county's findings with respect to the so-called "ratio test" are unsupported by substantial evidence. The test requires consideration of the ratio between the expenditures by the vested rights claimant prior to the change in law and the total cost of the project. Clackamas County v. Holmes, supra. As noted earlier, the county determined the total cost of the Hale Butte PUD was approximately 1.8 million dollars. The county further concluded the ratio test yielded results favorable to MRE's vested rights claim, whether its expenditures were measured when (a) the property was first zoned (1971), (b) statewide goals were adopted (1975), (c) LCDC first advised the county its resource goal exceptions for the Hale Butte site were inadequate (February, 1982), or (d) Petitioner Mason appealed the planning commission's approval of the Stage 3 plan to the county governing body (September, 1982).[21]

Petitioner presents three challenges to the county's application of the ratio test.[22] We sustain only the third challenge, as discussed below.

Petitioner first directs our attention to discrepancies between the county's estimate of the total project cost (1.8 million dollars) and a significantly higher estimate (3.8

million dollars) of the same item made in findings previously adopted by the county in connection with Stage 3 approval of the project. According to petitioner, the discrepancies suggest the county's findings in the present case are not supported by substantial evidence. However, petitioner does not explain why conflicts with previously-made findings undermine the evidentiary support for the vested rights determination in question. We will not speculate on the theory underlying petitioner's claim.[23]

One question raised by the petition in connection with the county's estimate of total costs merits further discussion. We note the final order appears to assume the total cost for the residential PUD should include only costs required to prepare the land for eventual construction of residences. However, in Webber v. Clackamas County, 42 Or App 151, 155, 600 P2d 448 (1979); rev den 288 Or 81, the Court of Appeals indicated that application of the ratio test to a large scale residential project requires inclusion of all development costs in the "total costs" component of the ratio test. Thus, the county's failure to consider the cost of completion of residences and other amenities in the Hale Butte PUD was error. We cannot conclude this aspect of the decision is supported by substantial evidence in the absence of data on this point. Remand of the county's decision is therefore in order.

Petitioner's second challenge to the evidentiary support for the county's estimate of the total project cost concerns

the finding that approximately $100,000 was expended on the project by MRE between 1967 and 1968. The arguments here mirror those discussed in the proceeding paragraphs, i.e., (1) there is a discrepancy between the estimate accepted by the county in this case and the estimate of the same item appearing in the order previously adopted by the county and (2) the evidence of the $100,000 expenditure, consisting of affidavits supplied by MRE, is not substantial evidence. For the reasons stated earlier, we find neither claim persuasive.

Petitioner's final challenge in connection with the ratio test is that the county erred in basing its calculation of MRE's expenses on those made before the developer obtained the required governmental approvals. We have previously sustained this argument. No further discussion is required.

In summary, we conclude the county's analysis of the ratio test is in error. The total cost of the project must include an estimate of the costs of completion of the residences on the 111 homesites, including the amenities associated with the PUD.

Eighth Argument

Petitioner's final argument concerns the date on which MRE was on notice its proposed PUD might conflict with statewide planning goals. The date of this notice is pertinent under the second vested rights doctrine. Clackamas County v. Holmes, supra.

We find it unnecessary to discuss this argument at length.

In our view, the dispositive point is that prior to the county's grant of Stage 3 approval of the PUD, public notice was available that (1) Statewide Goals 3 and 4 prohibited residential development of the site; and (2) the county's exceptions to those goals were inadequate.

Reversed in part, remanded in part.

FOOTNOTES

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1 The county ordinance provides for PUD approval in three stages. The first consists of an administrative review of the general outline of the proposal and a discussion with the applicant of the governing standards. Section 26.120 Linn County Zoning Ordinance. The second stage involves preliminary review of the proposal by the planning commission and the governing body. Id at Sections 26.125 and 26.130. The final stage involves planning commission review of the complete proposal, with appeal available to the governing body. Id at Section 26.135. MRE completed stage one early in 1979. Stage two approval was granted on June 11, 1980. Final approval was granted in March, 1983.

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2 We have jurisdiction over the vested rights determination pursuant to ORS 197.825. See Forman v. Clatsop County, 297 Or 129, 681 P2d 786 (1984).

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3 Section 28.050(3) of the ordinance requires the governing body to "provide an opportunity for the appellant, interested persons and the general public to be heard." However, the ordinance does not elaborate on the procedure to be followed.

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4 We note that another portion of the petition does allege prejudice as the result of the county's failure to provide certain kinds of procedural safeguards, e.g, depositions and cross-examination of adverse witnesses. However, the statute relied on in petitioner's first procedural argument, ORS 215.412, is worded in general terms; it does not mandate adoption of any particular safeguards before a hearing is commenced.

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5 As Respondent County points out, petitioner was permitted to submit written questions to the applicant's witness and the questions and answers were made a part of the county's record. See Linn County's response to petitioner's objection to record at 2. The suggestion seems to be that petitioner waived or withdrew his objection (on the cross-examination issue) by

consenting to the alternate procedure. If this is respondent's point, we disagree. Having raised the objection, petitioner preserved it for purposes of appeal. We are cited to no evidence that the objection was withdrawn.

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[6] We note the Court of Appeals held that cross-examination need not be provided in the context of quasi-judicial plan amendment hearing in South of Sunnyside Neighborhood League v. Board of County Commissioners of Clackamas County, 27 Or App 647, 663-664, 557 P2d 1375 (1976), reversed 280 Or 3, 569 P2d 1063 (1977). However, the weight of that holding is in some doubt in view of the fact that when the case reached the state Supreme Court, it was held the cross-examination issue had not been properly raised and therefore "...was not properly before the Court of Appeals or this court for review," 280 Or at 10.

Moreover, it is by no means clear the Court of Appeal's procedural ruling in Sunnyside would extend to the type of local land use determination (i.e., vested rights) at issue here. When Sunnyside was decided by the Court of Appeals, the understanding was that exclusive jurisdiction to adjudicate vested rights/nonconforming use claims resided in circuit court, where cross-examination is a tool available to the parties. See Eagle Creek Rock Prod. v. Clackamas County, 27 Or App 371, 556 P2d 150 (1976); rev den 278 Or 157 (1977). More recently, when the Court held that legislative changes had empowered local government tribunals to adjudicate vested rights claims, it also took care to note the parties had not questioned whether "...the procedures employed by the county in making its vested rights determination complied with the requirements of due process." Forman v. Clatsop County, 63 Or App 617, 619, n. 1, 665 P2d 365 (1983). We note the circumstances only for the purpose of pointing out that there may be distinctions between vested rights and other types of local land use proceedings from the stand point of requiried procedure. We need not examine those possible distinctions here. But see Jarrel v. Board of Adjustment, 258 NC 476, 128 SE2d 879 (1963) (upholding claim to trial type procedure in local proceeding to determine nonconforming use claim).

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[7] Martin did not involve a vested rights dispute. However, in a footnote the Court reiterated previous case law with respect to the factors to be considered in such a dispute. Since the petition refers to the factors as set forth in Martin, we do also.

[8] The remaining acreage was purchased in 1976.

[9] According to the final order, the landowner opened a quary on the site to provide rock for the street improvement projects.

[10] The 1972 rezoning of MRE's land separately classified the 10 acres previously approved for the 15 unit subdivision. The new classification, SR (Suburban Residential), did not alter the minimum lot size.

[11] The county eliminated the provision allowing two dwellings per lot in 1977. However, the density allowed under the 1972 ordinance was restored in 1978, when the entire site was rezoned from ART-5 to ART-2 1/2.

[12] The approval states "Your plans to supply water to 15 lots in the phase I development of the Mountain River Subdivision...has been reviewed and approved...." Record at 418. It is clear the approved plan did not indicate details of future phases of the project. An April, 1980 comment by the Health Division on MRE's State 2 PUD describes the earlier approval as covering only "water system facilities to serve 15 lots in Mountain River Estates." Record at 328.

[13] The June, 1980 order indicates that no opposition was received at the Stage 2 hearings. However, it is also noted that shortly after Stage 2 approval was granted, Petitioner Mason complained he had not received notice of the hearings. Petitioner's request for rehearing of Stage 2 approval was denied, but he was assured his concerns could be raised at the Stage 3 proceedings.

[14] The county evaluated the stages of the project under the vested rights factors as of four different dates due to its uncertainity as to when the project in question became nonconforming, i.e., impermissible because of the restrictions imposed by the statewide planning goals.

[15] As the Court of Appeals noted in Eklund v. Clackamas County, 36 Or App 73, 81, 583 P2d 567 (1978), "[n]one of these factors is predominant; they are merely guidelines in assessing the evidence and deciding the issue."

[16] A prohibition on development prior to approval of a planned development dates back to the county's 1969 Interim Zoning Ordinance.

[17] For example, petitioner notes that following the 1978 rezoning order, the county advised MRE that a condition of approval was that "the indicated PUD must be approved prior to any development." The same quote was made on other occasions as the project took shape.

[18] We recognize that ORS 92.040 and the county land division ordinance bind the county once preliminary subdivision plat approval is granted. Bienz v. City of Dayton, 29 Or App 761, 768-67, 566 P2d 904 (1977). As we read the Linn County PUD Ordinance, however, it is Stage 3, not Stage 2, which is most analogous to the preliminary plat phase of subdivision development.

[19] For example, correspondence between the county and MRE shortly after Stage 2 approval was granted indicated that the approval was of the "plan in concept" and that actual location of houses, roads etc. would be reviewed at Stage 3. Also, Petitioner Mason was advised by county planning officials that the county's failure to notify him of Stage 2 hearings would not be prejudicial because he could raise objections to the specific of MRE's project at the Stage 3 level.

[20] Indeed, petitioner points out evidence in the record indicating that the road system installed by MRE would have utility in a tree farming operation. Record at 607-09.

[21] As noted earlier, the county's final order (understandably)

reflects doubt as to when the governing land use law (the statewide goals) rendered the Hale Butte PUD nonconforming. For purposes of this aspect of the petition, it is sufficient to note that MRE concedes it had at least constructive notice of the legal obstacles the goals presented to its project in February 1982 when LCDC rejected the county's goal exceptions. See Brief of Participant at 22.

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[22] Of course, we recognize this factor need not be considered if the improvements in question were not lawful when installed, a conclusion we have reached in this case. Our discussion of this issue is nevertheless required however by ORS 197.835(9).

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[23] Although petitioner places emphasis on the discrepancies between the two orders adopted by the county, he does point to one portion of the record containing conflicting evidence on the total cost issue. Evidently, petitioner's engineering expert gave a substantially higher estimate of the total cost of the PUD's sanitary sewer system than did the expert for MRE. The county resolved the conflict in favor of MRE because of its expert's "greater experience with the project and the conditions on the site." Record at 20.

Petitioner attacks the county's finding on this point on grounds it is not supported by substantial evidence. However, the challenge must be rejected. The mere existence of a conflict in the evidence for local decisionmakers provides no basis for intervention by this Board under the substantial evidence test. The county could reasonably rely on the expert evidence offered by MRE; we cannot say the conflicting evidence cited by petitioner compels a different result under the substantial evidence test. Metropolitan Homebuilders of Portland v. Metro, 54 Or App 60, 63, 633 P2d 1320 (1981).

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT MASON, Petitioner,	)	LUBA No. 84-072
vs.	)	ORDER ON REMAND
LINN COUNTY and MOUNTAIN RIVER ESTATES, INC. Respondents.	)	

The Court of Appeals has remanded this case to the Board. In pertinent part, the Court's opinion states:

> "Respondent's first asignment of error under his cross-petition also turns on LUBA's disposition of MRE positions that presuppose that the development that occurred was permitted. Although LUBA reversed the county's decision in its ruling on the lawfulness issue, LUBA concluded that its resolution of some of the other issues required a partial remand to the county for further proceedings on those issues. Respondent argues that LUBA's resolution of the lawfulness issue renders the other issues moot and that LUBA's disposition should have been an outright reversal rather than a partial remand. MRE acknowledges that 'practical effect of LUBA's reversal * * * [renders] moot the issue remanded to the County.' MRE argues, however, that ORS 197.835(9) requires LUBA to 'decide all issues presented to it when reversing or remanding a land use decision.' MRE also points out that one of the issues that LUBA remanded to the county involved the sufficiency of the county's findings and that OAR 661-10-070(1)(b)(C)(i) requires a remand under those circumstances.
>
> "It is futile for the county to consider on remand how other issues might affect the vested rights determination when LUBA and we have held that a condition precedent to the existence of a vested right is absent. Moreover, the requirement of ORS 197.835(9) that LUBA decide all issues does not mean that LUBA must base its disposition on an appeal on moot issues. See Perkins v. City of Rajneeshpuram, 68

Or App 726, 686 P2d 369, rev allowed 298 Or 238 (1984). ORS 197.835(1) provides that LUBA 'shall adopt rules defining the circumstances in which it will reverse rather than remand a land use decision that is not affirmed.' The decision to remand the county's order in part is for LUBA to make in the first instance. On the cross-petition we remand the order for LUBA to reconsider in the light of this opinion, whether a partial remand to the county is necessary. Accordingly, it is unnecessary for us to address the remaining assignments under the cross-petition." 73 Or App at 340-41.

Based on the foregoing, the portions of our former opinion ordering remand of the county's decision are vacated. The decision is reversed.[1]

Dated this 3rd day of October, 1985.

Laurence Kressel
Chief Referee

FOOTNOTES

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[1] On September 26, 1985 a member of the Board conducted a conference with all counsels by telephone. Counsels were in agreement that entry of an order of reversal was the appropriate action at this time.