

LAND USE
BOARD OF APPEALS

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

MAY 29 4 49 PM '86

1
2
3 UNION OIL COMPANY OF CALIFORNIA,)
4 Petitioner,)
5 vs.)
6 BOARD OF COUNTY COMMISSIONERS)
7 OF CLACKAMAS COUNTY,)
8 Respondent.)

LUBA No. 86-007
FINAL OPINION
AND ORDER

9 Appeal from Clackamas County.

10 Barry L. Adamson, Portland, filed the petition for review
and argued on behalf of petitioner. With him on the brief were
11 Williams, Fredrickson, Stark, Norville & Weisensee, P.C.

12 Michael E. Judd, Oregon City, filed a response brief and
argued on behalf of Clackamas County.

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

15 AFFIRMED

05/29/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a determination that it is not entitled
4 to a building permit based upon its claim of vested right.

5 FACTS

6 In 1973, Union Oil Company of California purchased property
7 to build a service station at the intersection of Sunnyside
8 Road and Southeast 97th in unincorporated Clackamas County.
9 The site is immediately east of I-205 and south of Sunnyside
10 Road and is near the Clackamas Town Center and Kaiser
11 Foundation Hospital. Union's purchase was conditioned upon the
12 property's usability as a service station.

13 In December, 1973, Union obtained a building permit to
14 construct the station. At that time, service stations were a
15 permitted use under county zoning regulations. However, prior
16 to construction, the federal government imposed gasoline
17 allocation regulations. These regulations made it difficult to
18 obtain new fuel allocations for service stations. In Oregon,
19 no allocations were available for new service stations. The
20 restrictions were lifted in January, 1981.

21 Union applied for a new building permit in January, 1981.
22 The company then learned that sometime in 1980, the property
23 had been rezoned. The new land use designation precluded
24 service stations.¹

25 Union appealed the county's denial of the new building
26 permit to this board. Union claimed it was entitled to a

1 permit because it had a vested right to construct a service
2 station. We issued an order dismissing the case, holding that
3 we lacked power to adjudicate questions of vested rights.
4 Union Oil Company v. Clackamas County, 5 Or LUBA 150
5 (1982).² Union did not appeal our order.

6 In May, 1985, Union applied for a building permit, again
7 based upon a vested rights claim. The planning director
8 rejected the application, but the county commissioners
9 overturned the rejection for procedural reasons. In October,
10 1985, the planning director denied Union's claim on the merits,
11 and Union appealed the decision to the county commissioners.
12 The county commissioners voted to deny Union's claim and issued
13 a written order on January 23, 1986. This appeal followed.

14 FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

15 "The County erred in relying upon only a portion of
16 the nine vested right elements enunciated by the
Supreme Court in Holmes.³

17 "The County erred in excluding from the 'substantial
18 expenditure' test the acquisition cost of Union's
property and other related expenses.

19 "The County erred in finding that Union's expenditures
20 were not related to the proposed development."

21 "A. 'Substantiality' is determined based upon the
22 entire amount of funds expended, undiminished by
23 any other factor.

24 "B. All of Unions expenditures 'have relation to the
25 completed project.'

26 "C. Periods of involuntary suspension are not
considered in examining elements concerning
expenditure of funds."

The county's order gives two reasons for denial of the

1 vested rights claim. First, the county found the expenditures
2 in furtherance of a service station were not "substantial."
3 This, in the county's words, was the "crucial issue." Second,
4 the county found that a service station was not appropriate for
5 the area, and development of the property as a service station
6 would "exacerbate existing traffic problems." Record at 8.

7 The county found the total projected development costs to
8 be \$400,000. It cited the applicant's testimony that Union
9 paid a premium for the land. However, the county declined to
10 find the purchase price depended upon use of the property as a
11 service station. The county said:

12 "There appears to be no evidence in the record,
13 however, as to what portion of that amount, if any,
14 might be attributable to potential use of the property
15 as a service station. While it is reasonable that
16 this property costs more than would a similar parcel
17 located elsewhere, it seems likely that premium price
18 might be paid by developers seeking to establish any
19 number of uses which would benefit from this
20 location. Lacking evidence to the contrary, this
21 Board will not assume that any of the purchase price
22 was dependent solely on the possible use of this
23 property for a service station." Record 8 (emphasis
24 in original).

25 The county concluded that only \$5,778 of Union's total
26 expenditures could be tied solely to the proposed use of the
27 property as a service station. The county calculated this
28 amount as follows:

29 "The evidence is that Union expended \$128,678:
30 \$105,192 for purchase of the property; \$7,846 in taxes
31 (1973-81); \$15,690 in other expenses. The important
32 question, though, is the amount of expenditures
33 directly tied to the proposed use of the property as a
34 service station. The taxes on the property would have
35 to be paid no matter what its use. Of the \$15,690.00

1 in other expenses, the survey, appraisal and L.I.D.
2 assessments would likewise be necessary whatever the
3 eventual use of the property, leaving expenses of
\$5,778 directly related to use of the property as a
service station."

4 Petitioner quarrels with respondent's approach to the
5 vested rights issue and its refusal to consider more than
6 \$5,778 directly attributable to Union's plans to build a
7 service station.

8 First, petitioner argues the county did not adequately
9 consider its vested rights claim. Union states that in
10 Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973) the
11 Supreme Court established a nine part test to be applied to any
12 claim of vested right.⁴ The county only applied two of the
13 nine criteria, and Union believes this method is erroneous and
14 requires reversal.

15 Petitioner finds support in the Court's admonishment that
16 all elements "should be taken into consideration." See Holmes,
17 265 Or App 198. Petitioner concludes:

18 "It is reversible error for a local government to rely
19 solely on one element (or a grouping of two or perhaps
three elements) to the exclusion of all others."
Petition for Review at 19.

20 We reject this argument. A claim of vested right is to be
21 decided "on a case to case basis." Holmes, 265 Or App 197. As
22 respondent claims, "the relative importance of the individual
23 criteria will obviously vary based on the facts in any
24 particular case." Brief of Respondent at 3. Indeed,
25 interpretations of the Holmes decision by the Court of Appeals
26

1 characterized the nine elements in the Holmes test as
2 "guidelines." See Cook v. Clackamas County, 50 Or App 55, 80,
3 622 P2d 1107 (1981); and Ecklund v. Clackamas County, 36 Or App
4 73, 81, 583 P2d 567 (1978). None of the Oregon Court of
5 Appeals cases since Holmes have considered all of the Holmes'
6 criteria. Ecklund, supra; Cook, supra; Webber v. Clackamas
7 County, 42 Or App 151, 600 P2d 448 (1979); rev den, 288 Or 81
8 (1979).

9 In this case, Clackamas County found the two unsatisfied
10 elements to be critical and determinative. We hold that the
11 findings under the substantial expenditure test were sufficient
12 to reject the claim.

13 Petitioner next argues that the county's consideration of
14 the "substantial expenditures" element is incorrect because the
15 county failed to consider all the related expenditures
16 (including purchase price) when considering whether the
17 expenditures were "substantial." Petitioner argues that as
18 long as an expenditure is in furtherance of the ultimate use,
19 whether or not the money spent could support some other use is
20 not important. Union states that all of the \$128,678 spent can
21 be attributed to the project and therefore qualifies under the
22 following language in Holmes:

23 In order for a landowner to have acquired a vested
24 right to proceed with the construction, the
25 commencement of the construction must have been
26 substantial, or substantial cost toward completion of
the job must have been incurred." Holmes, 265 Or App
197.

1 Respondent reminds us that the Court in Holmes found a
2 vested right existed in part because the expenses incurred
3 "were substantial and directly related to the construction and
4 operation of the processing plant...." Holmes, 265 Or at 201.
5 (Emphasis added.) The Court also stated that the "type of
6 expenditure" element is to be considered in the light of

7 "whether the expenditures have any relation to the
8 completed project or could apply to various other uses
of the land." 265 Or at 1, 98-199.

9 Similarly, argues respondent, the Court of Appeals said in Cook
10 v. Clackamas County, supra, that certain expenditures were more
11 consistent with the uses for which a vested right was sought
12 than for any other purpose. The Court used this finding to
13 support its conclusion that plaintiff was entitled to a vested
14 right. Respondent argues from these cases that the
15 expenditures must be made for purposes more consistent with the
16 proposed use than other potential purposes. Therefore,
17 according to respondent, land acquisition cost is not
18 considered. Respondent cites no Oregon cases so holding, but
19 cites a leading commentator's view that

20 "land cost alone does not qualify as an expenditure
21 which would confer vested rights because the land is
22 ordinarily usable under the new restrictions to the
23 same extent as it was under those effective at the
24 time the permit was issued. The fact that land may
25 not be as valuable when used for the purposes to which
26 it is restricted by an amendment as it would have been
if the latter had not been adopted is not sufficient,
in itself, to create a vested right to the use of the
land for the formerly permitted purposes." 4
Rathkopf, The Law of Zoning and Planning, Section
50.03(3), (1986).

The Supreme Court in Holmes and the Court of Appeals in

1 Cook clearly viewed the critical test to be a ratio of
2 expenditures in furtherance of the project to the total project
3 cost. The money spent to buy the land is not an expenditure
4 directly attributable to the service station project. The land
5 may be used for other purposes permitted under the county's
6 land use regulations. Although Union says it paid a "premium"
7 price, we are cited to no evidence in the record showing what
8 percent is attributable to the land's potential use as a
9 service station. Without such evidence, we cannot agree with
10 Union that the county erroneously excluded the purchase price
11 from its calculation. Therefore, Union's land purchase cost
12 (and sums spent for taxes) are not part of the Holmes ratio.

13 The next question is whether the ratio calculation may
14 include expenditures consistent with any development of
15 property (including development that conforms to zoning
16 regulations) as contrasted with expenditures for this
17 particular (non-conforming) development. The county found only
18 \$5,778 directly related to use of the property as a service
19 station, and discounted other expenses because they would be
20 incurred no matter what use was sited on the land.

21 We believe it is important to note that the expenditures
22 claimed by petitioner included costs that would be incurred in
23 preparation of any development of this property. In this
24 sense, these preparation costs are like the purchase costs.
25 The money spent makes some enterprise possible, but the
26 enterprise might be permitted under current zoning

1 regulations. Therefore, we find the county was correct in
2 excluding these costs from the substantial-expenditure
3 calculation.⁵

4 In this regard, the Supreme Court's discussion in Martin v.
5 Polk County, 292 Or 69, 636 P2d (1981) is helpful. In Martin,
6 the Court construed Holmes and noted that Holmes found a
7 \$33,000 expenditure to be "substantial" where the landowner
8 spent the sums

9 "to search for a plant site, drill wells, install
10 pumps and arrange for special electrical and
11 irrigation systems incident to the development of the
property for a chicken-processing facility." Martin,
292 Or at 80.

12 The Court found each of these expenditures were directly
13 related to a particular use of the owner's property. The costs
14 were not consistent with other permitted uses of the property.
15 See Holmes, 265 Or at 197-199. See also Ecklund v. Clackamas
16 County, 36 Or App 73, 81, 583 P2d 567 (1978) in which the Court
17 of Appeals said the ratio of expenditures test concerns whether
18 the expenditures have any relationship to the completed project
19 or could apply to various other uses.⁶

20 The remaining issue in the Holmes expenditure analysis is
21 the ratio of the expenses in furtherance of the service station
22 project to the total project cost. The county found the total
23 project cost to be \$400,000. Union claims it spent in excess
24 of a quarter of that total development cost.

25 The \$400,000 figure is incorrect because it includes land
26 acquisition costs. The cost to develop a service station is

1 \$275,000. Record in LUBA No. 81-134, p. 5, 6. If one excludes
2 the purchase price, the ratio of directly related expenditures
3 to the total project cost is \$5,778 to \$275,000, or about 1 to
4 47. This ratio is not "substantial."⁷ We therefore sustain
5 the county in its finding to that effect.

6 Petitioner makes an additional argument. Union believes
7 any consideration of amounts expended in furtherance of its
8 project must take into account that it was prevented from
9 spending additional sums by actions of the federal government.
10 Union states that it

11 "...could not have obtained a gasoline allocation for
12 a service station on the site, even if one had been
13 built. Therefore, Union involuntarily postponed
14 construction." Petition for Review at 22, (emphasis
15 in original).

16 Union says that but for the federally imposed suspension of
17 gasoline allocations, Union would have completed or nearly
18 completed the development.

19 The county's order does not discuss whether Union's failure
20 to construct the station was voluntary or involuntary. The
21 county's order limits its discussion of cost to amounts spent
22 to purchase the property, to prepare it for use and to pay
23 taxes. We do not believe the county was required to do more.

24 Whether Union was the victim of federal regulation has no
25 bearing on the "substantiality of expenditures" issue. In
26 Holmes, the Court quoted, with approval, a New York case
rejecting a plaintiff's claim that he was entitled to a vested
right because he could have made additional expenditures had he

1 not been restrained by Court order from doing so. The Court
2 said:

3 "[3] Nor can the defendants here claim the benefit of
4 what they might have expended to improve the property
5 as a shopping center if the permit were timely issued,
6 if they weren't forced to bring the Article 78
7 proceeding to obtain the permit, and if they weren't
8 subsequently restrained from proceeding with
9 construction for a short time by virtue of the process
10 in the collateral action. While such proof indicates
11 that defendant took every legal step available in
12 order to perfect his use, it is of no assistance in
13 calculating the 'dollars and cents' proof of
14 substantial investment. The most such speculations
15 might accomplish is perhaps to tip the scales in favor
16 of vested rights where the other proof is evenly
17 balanced on the substantiality of the investment."
18 Town of Hempstead v. Lynne, 32 Misc 2d 312, 222 NYS2d
19 526, 530 (1961).

20 In this case, the county has not discounted any of Union's
21 expenditures because of abandonment. All expenditures before
22 the federal government curtailed fuel allocations were
23 considered part of the vested rights claim. We find no error
24 as alleged.

25 Assignments of Error 1, 2 and 3 are denied.

26 FOURTH ASSIGNMENT OF ERROR

"The County erred in concluding that Union failed to
satisfy the 'kind of project' and 'location' elements."

Union argues that the county improperly concluded that the
project did not meet separate elements of "kind of project" and
"location." The county found that it was entitled to look at
the kind of project and its location

"from the point of view of the county and its overall
planning effort rather than the narrower perspective
of the would-be service station operator. Obviously,
the latter sees this location as suitable for its

1 needs. The county, however, has previously determined
2 that service stations and similar automobile-related
3 uses are not appropriate or desirable for this area.
4 In addition, it is likely that development of such an
5 automobile-oriented use at this site would exacerbate
6 existing traffic problems." Record at 8.

7 Petitioner argues the record clearly establishes that the
8 site is immediately adjacent to a major arterial (I-205); that
9 it is adjacent to tourist-related hotel-restaurant complex;
10 that it is within close proximity to the Clackamas Town Center,
11 a heavily automobile dependent shopping center; that the area
12 is lacking in service stations; that development to the east
13 side of I-205 is auto-dependent; and, that

14 "an adjacent motel-restaurant 'desired the proposed
15 service station.'" Petition for Review at 43-44.

16 Petitioner adds that the county's reliance on its
17 comprehensive plan is irrelevant. A vested right is issued in
18 contravention of comprehensive plans and zoning regulations,
19 and the regulations play no part in the vested rights analysis,
20 according to the petitioner. Lastly, Union argues there is no
21 basis in the record for the county's conclusion that a service
22 station would exacerbate traffic problems.⁸

23 Holmes and later decisions give little guidance as to how
24 the "kind of project" and location criteria are to be
25 interpreted. Although the weight to be given these factors
26 will vary from case to case, it is clear that a planning
jurisdiction may consider them in a vested rights analysis.
The greater the conflict between a claimed vested right and the
neighboring environment, the more weight may be given to these

1 factors. Standing alone, however, they are insufficient to
2 warrant refusal to recognize a vested rights claim.

3 In the present case, the conflicts the county finds between
4 the service station and the surrounding area do not seem
5 significant enough to warrant much weight in the vested rights
6 equation. The area is commercial in nature, as is the proposed
7 service station. We note the county board's order does not
8 explain how the service station will conflict with policies in
9 the comprehensive plan and zoning ordinance. Also, respondent
10 agrees with the petitioner that there is no specific evidence
11 in the record about possible adverse traffic impacts, a central
12 point in the county's order about Union's impact on the area.

13 The Fourth Assignment of Error is therefore sustained.
14 However, because of our holdings on the other assignments of
15 error, no reversal or remand is required. Jurgenson v. Union
16 Co. Court, 42 Or App 505, 600P2d 1241 (1979).

17 FIFTH ASSIGNMENT OF ERROR

18 "The County erred in failing to address the remaining
19 four elements set forth in Holmes."

20 This assignment of error repeats that stated in the first,
21 and we believe we have already addressed petitioner's claim.

22 The county's denial of petitioner's claim of vested right
23 is sustained.
24
25
26

FOOTNOTES

1
2
3 1

The site is zoned General Commercial (C-3). C-3 zoning permits service stations, however, the county has applied an "Activity Center" overlay which precludes automobile related uses.

6 2

The Court of Appeals shortly thereafter issued Foreman v. Clatsop County, 63 Or App 617, 665 P2d 365 (1983), aff'd, 297 Or 129, 681 P2d 786 (1984), holding our review authority included vested rights determinations.

10 3

Petitioner makes two subarguments under this first assignment of Error.

12 "A. Holmes requires an examination of all nine vested right elements.

13 "B. Periods of involuntary suspension are not considered in examining elements concerning expenditure of funds."

15
16 We deal with both of these claims during the course of our discussion under this combined assignment of error.

18 4

The Court stated the test as follows:

19 "[T]he commencement of the construction must have been
20 substantial, or substantial costs toward completion of the
job must have been incurred." Holmes, 265 Or at 197; ***
21 "Other factors which should be taken into consideration are
the good faith of the landowner, whether or not he had
22 notice of any proposed zoning or amendatory zoning before
starting his improvements, the type of expenditures, i.e.,
23 whether the expenditures have any relation to the completed
project or could apply to various other uses of the land,
24 the kind of project, the location and ultimate cost. Also,
the acts of the landowner should rise beyond mere
25 contemplated use or preparation, such as leveling of land,
boring test holes, or preliminary negotiations with
26 contractors or architects." Holmes, 265 Or at 198-199
[elements 2 through 8]." Petition at 17.

1
2 The Court rejected a suggestion in Holmes that the
3 plaintiff had abandoned his project, and the issue of
4 abandonment thus becomes the ninth element of the nine-part
5 test. See Holmes, 265 Or App 201.

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

5
Also, petitioner argues that the county commissioners have stated that the location is ideal for a service station. We note, however, that the petitioner's claim is based upon statements by individual county commissioners, not official actions of the county governing body. See Citadel Corporation v. Tillamook Co., 9 Or LUBA 61, aff'd; 66 Or App 965, 675 P2d 1114 (1984); Bennett v. Linn Co., ___ Or LUBA ___ (LUBA No. 85-073, January 16, 1986).

6
A discussion of the Holmes test cited with approval in Martin, supra, appears in Cable and Hauck, "The Property Owners' Shield-Nonconforming use and Vested Rights" 10 Will L. J. 404 (1974).

7
In Holmes, the ratio was calculated to be 1 to 14. The Court considered this amount "substantial."

8
Unlike in Holmes, there was no construction of a water system consistent with a particular use. Rather, Union's expenditures were required before it could proceed to make any commercial use of the land. We understand Holmes and the cases which follow, to require more: that the expenditures bear some direct connection to the project.