BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

UNION OIL COMPANY OF CALIFORNIA, Petitioner, vs. BOARD OF COUNTY COMMISSIONERS OF CLACKAMAS COUNTY, Respondent.	LUBA No. 86-007 FINAL OPINION AND ORDER

Appeal from Clackamas County.

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

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

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

AFFIRMED 05/29/86

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

Opinion by Bagg.

NATURE OF THE DECISION

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

FACTS

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

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

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

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

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

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

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

> "The County erred in relying upon only a portion of the nine vested right elements enunciated by the Supreme Court in Holmes.[3]
>
> "The County erred in excluding from the 'substantial expenditure' test the acquisition cost of Union's property and other related expenses.
>
> "The County erred in finding that Union's expenditures were not related to the proposed development."
>
> "A. 'Substantiality' is determined based upon the entire amount of funds expended, undiminished by any other factor.
>
> "B. All of Unions expenditures 'have relation to the completed project.'
>
> "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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "land cost alone does not qualify as an expenditure which would confer vested rights because the land is ordinarily usable under the new restrictions to the same extent as it was under those effective at the time the permit was issued. The fact that land may not be as valuable when used for the purposes to which 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Whether Union was the victim of federal regulation has no bearing on the "substantiality of expenditures" issue. In 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

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

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

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

Assignments of Error 1, 2 and 3 are denied.

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

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

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

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

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

Holmes and later decisions give little guidance as to how the "kind of project" and location criteria are to be interpreted. Although the weight to be given these factors 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

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

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

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

FIFTH ASSIGNMENT OF ERROR

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

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

The county's denial of petitioner's claim of vested right is sustained.

FOOTNOTES

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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.

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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.

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3 Petitioner makes two subarguments under this first assignment of Error.

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

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

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

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4 The Court stated the test as follows:

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

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

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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).

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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).

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

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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.