BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

COLUMBIA RIVER TELEVISION, INC., Petitioner, vs. MULTNOMAH COUNTY, Respondent, and TEUFEL HOLLY FARMS, INC., Intervenor-Respondent.	LUBA No. 92-050 FINAL OPINION AND ORDER

Appeal from Multnomah County.

Steven A. Moskowitz, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Moskowitz & Thomas.

Peter Livingston, Portland, filed a response brief and argued on behalf of respondent.

James Stuart Smith, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Davis Wright Tremaine.

KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 9/30/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals an order of the board of commissioners determining that a Community Service use designation approved for the subject property in 1984 remains valid.

MOTION TO INTERVENE

Teufel Holly Farms, Inc. moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

In 1984, intervenor's former tenant, Greater Portland Broadcasting (Greater Portland), was granted a Community Service use designation for the purpose of authorizing construction of a television tower and transmission building on intervenor's property. Design review approval from the county was obtained for the project, and building permits were issued for the construction of the tower and transmitter building during 1984. Greater Portland began construction of the structures, but apparently ran into financial difficulties and was unable to complete construction. Eventually, intervenor foreclosed Greater Portland's interest in the property.

In 1991, Cascade Video of Oregon, Ltd. (Cascade) requested an interpretation of the Multnomah County Code (MCC) that the Community Service use designation approved

for the property in 1984 remains valid. The planning commission determined that designation continues to be valid. Petitioner appealed the planning commission decision to the board of commissioners. The board of commissioners affirmed the planning commission's decision, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

In this assignment of error, petitioner argues the application for the requested interpretation was not signed by intervenor, who is the record owner of the property, as required by MCC 11.15.8210(A), which provides:

> "An action, unless otherwise specifically provided by this Chapter, may only be initiated by order of the Board, a majority of the entire planning commission or by application of the record owner of the property which is the subject of the action or the authorized agent of the record owner." (Emphasis supplied.)

Petitioner argues it was error for the county to process the requested interpretation in the absence of an application initiated by the property owner.

Intervenor cites the testimony in the record of the property owner's (intervenor's) attorney stating the request for the interpretation of the MCC was made at the property owner's suggestion and with its consent. Record 26. We believe this is adequate to establish that the applicant was acting as the agent of the property owner when it requested the interpretation of the MCC, in compliance with MCC 11.15.8210(A).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The challenged decision determines the Community Service designation of the property remains valid, notwithstanding the passage of several years since that designation was first approved. The reason the applicant sought a determination concerning the validity of the Community Service use designation is that MCC 11.15.7010(C), in effect in 1984, provided that the designation would expire within two years, unless "substantial construction" occurred within that period of time.[1] This, and some of the following assignments of error, are aimed at establishing that substantial construction has not taken place and, therefore, that the county erroneously determined the Community Service designation remains valid.

Under this assignment of error, petitioner seeks to establish, that in determining whether "substantial construction" has occurred, the county erroneously considered construction expenses made under the authority of certain building permits. Petitioner argues the building permits which authorized the disputed construction were invalid when issued. Petitioner points out that in the

[1]There is no dispute that the 1984 version of the MCC contains the standards applicable to the applicant's request. However, as we note under the third assignment of error, the county also utilized the 1990 version of MCC 11.15.7010 to guide its interpretation of the meaning of the 1984 version of that same section. We refer to the 1984 version as MCC 11.15.7010 (1984) and the 1990 version as MCC 11.15.7010 (1990).

order approving the Community Service use designation for the subject property, the county imposed a condition of approval requiring the applicant to record a "letter of intent" pursuant to MCC 11.15.7035(B)(6)(f)(i).[2]

---

[2]We have not been furnished with a copy of MCC 11.15.7035(B)(6)(f)(i) (1984). However, MCC 11.15.7035(B)(6)(f)(i) (1990) states that "if a new tower is approved, the applicant shall be required as [a] condition * * * of approval to [r]ecord the letter of intent required in MCC .7035(D)(5) * * *."

Further, MCC 11.15.7035(D) (1990) states:

> "An application * * * shall contain at least the following information before it is complete:
>
> "* * * * *
>
> "(5) Letter of intent to lease excess space on the tower structure and to lease additional excess land on the tower site when shared use potential of the tower is absorbed, if structurally and technically possible.
>
> "A reasonable pro rata charge may be made for shared use, consistent with an appropriate sharing of construction, financing and maintenance costs. Fees may also be charged for any structural or RF changes necessitated by such shared use. Such sharing shall be a condition of approval if approval is granted.
>
> "(a) The applicant shall describe what rate of charges are [sic] reasonably expected to be assessed against HPTV shared users, FM shared users, land based mobile and common carriers, and microwave shared users.
>
> "(b) The applicant shall base charges on generally accepted accounting principles and shall explain the elements included in the charge, including but not limited to a pro rata share of actual site selection and processing costs, land costs, site design, construction and maintenance costs, finance costs, return on equity, and depreciation."

While MCC 11.15.7035(D) (1990) suggests an application is not complete until a letter of intent is recorded, the requirements specified for the

Specifically, the condition of approval states:

> "Before building or land use permits are issued, the applicant shall provide evidence that the letter of intent required in MCC 11.15.7035(B)(6)(f)(i) has been recorded * * *." Supplemental Record 32.

Petitioner contends the 1984 applicant's failure to record a "letter of intent" invalidates the building permits issued for the disputed construction. Petitioner reasons that if those permits were invalid, any expenses made toward construction of the tower and transmitter building under those permits cannot be considered to determine whether "substantial construction" occurred.

A "letter of intent" was never recorded pursuant to MCC 11.15.7035(B)(6)(f)(i). However, we do not see any connection between the "substantial construction" requirement of MCC 11.15.7010 and the failure to record a "letter of intent." Permits were issued and construction began pursuant to those permits. Nothing in the MCC, or the 1984 condition of approval, states that a "letter of intent" must first be recorded for construction to qualify as "substantial construction." The only issue is whether the construction that occurred under those permits is "substantial" within the meaning of MCC 11.15.7010. At

---

letter of intent in MCC 11.15.7035(D)(5), as well as the statement in MCC 11.15.7035(B)(6)(f)(i) (1990) that if a new tower is approved, a condition of approval "shall" require the recording of a "letter of intent," make it reasonably clear that recording a letter of intent is not a precondition of a "complete" application.

most, the failure to record a "letter of intent" might provide a basis for future remedial or corrective action with regard to the permits that were issued allowing construction on the subject property. However, whatever that remedial or corrective action may be, the failure to record a "letter of intent" does not mean that the construction actually completed pursuant to those permits must be ingored in determining whether the "substantial construction" requirement of MCC 11.15.7010 is satisifed. Petitioner's argument that a "letter of intent" was never recorded provides no basis for reversal or remand of the challenged decision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner asserts the "substantial construction" standard of MCC 11.15.7010 (1984) is impermissibly vague.[3] The county determined MCC 11.15.7010 (1984) should be interpreted as follows:

> "The present code language is not directly applicable to this case because the 1984 wording

[3]Specifically, petitioner asserts the substantial construction standard violates the due process clause of the Fourteenth Amendment to the United States Constitution. However, petitioner does not develop this argument. It is well established that this Board will not review undeveloped constitutional arguments. Kegg v. Clackamas County, 15 Or LUBA 239, 247 n 10 (1987); Constant v. Lake Oswego, 5 Or LUBA 311 (1982). Consequently, we treat petitioner's argument under this assignment of error as contending the substantial construction standard violates ORS 215.412(8), which requires that approval or denial of a permit be based on standards established in the local code.

> was later amended in 1990. However, today's standards do provide some guidance in how the 1984 code provision should be applied. The present standard states, in part, that determination of substantial construction or development includes Final Design Review approval and expenditure of at least ten percent of the dollar cost of the total project value under a building or other development permit." Record 12.

The Court of Appeals stated in Lee v. City of Portland, 57 Or App 798, 802, 646 P2d 662 (1982), that to satisfy a statutory requirement identical to ORS 215.412(8), local standards need only be "clear enough for an applicant to know what he must show during the application process." See also Oswego Properties v. City of Lake Oswego, 108 Or App 113, 119-20, 814 P2d 539 (1991). Here, we believe the substance and import of the county's "substantial construction" standard is clear, and the explanation of the application of this standard in the findings is equally clear. The county interpreted MCC 11.15.7010 (1984), by referring to the nearly identical language of MCC 11.15.7010 (1990), and the definitional standards contained therein concerning the elements of "substantial construction." Such a construction of MCC 11.15.7010 (1984) is not inconsistent with its language or context. See Clark v. Jackson County, 313 Or 508, 515, ____ P2d ___ (1992).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

> "The county erred in its construction of the vested rights theory, upon which the concept of substantial construction is based."

Under this assignment of error, petitioner argues the county erred by failing to apply a traditional vested rights analysis to the substantial construction requirement of MCC 11.15.7010 (1984).

The county determined:

> "[Petitioner] contends the substantial construction standard requires consideration of factors applied by courts in 'vested rights to continue' cases. These factors include consideration of the good faith of the developer, the kind of project involved, location of the development, abandonment, the portion of the project completed, the costs to complete, and the total cost of the project. In vested rights cases, the issue is whether construction activity, lawful when begun, can continue to completion after adoption of regulations prohibiting the proposed use.
>
> "Nothing in the [MCC] supports [petitioner's] claim that the factors relevant in 'vested rights to continue' cases are relevant to determine whether a permit should be cancelled because the permit holder failed to perform substantial construction within two years. The [board of commissioners] rejects [petitioner's] claims that the planning commission failed to consider vested rights factors when applying MCC 11.15.7010[(1984)]. While such factors could be applied, nothing in the [MCC] requires they be applied." (Emphasis in original.)

This interpretation of MCC 11.15.7010 (1984) is consistent with both its words and context. Therefore, we may not reverse or remand the challenged decision on the basis that the county's interpretation of MCC 11.15.7010 (1984) means the county need not utilize a traditional vested rights analysis in applying that standard. Clark v.

Jackson County, supra.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

In this assignment of error, petitioner argues the record does not contain substantial evidence to support the county's determination that more than ten percent of the total project cost has been expended and, therefore, that substantial construction has occurred on the property.

The county determined the total tower project cost is $1.3 million. The county determined that 19% of the total tower project cost has been expended, and this constitutes substantial construction.

Petitioner cites testimony to the effect that another construction firm would not have expended as much money as the applicant's construction firm is alleged to have expended in completing the visible improvements on the property.[4] Petitioner cites testimony that the property does not appear to have many improvements on it at all.[5]

---

[4]Petitioner does not specifically contend that the expenditures claimed to have been made by the applicant in 1984 were not, in fact, made. Rather, petitioner argues that if those costs were actually paid by the applicant, it paid too much money for the work actually performed on the site.

[5]Petitioner also cites testimony that the total tower project cost might be greater than $1.3 million because that figure may not include certain items. However, this testimony is equivocal and does not indicate how much greater the total tower project cost would be if these additional items were actually not included in the applicant's $1.3 million total tower project cost estimate. Accordingly, petitioner's evidence in this regard does not so undermine the applicant's evidence of the total tower project cost as to make the applicant's evidence unreliable.

Intervenor maintains that most of the expenditures made toward the total tower project cost are attributable to site preparation work that is not necessarily physically visible on the site. Intervenor cites evidence that a $1.3 million contract was signed with a construction firm and that three categories of duties specified in that contract were completed.

The choice between conflicting believable evidence belongs to the county. Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988); Vestibular Disorders Consult. v. City of Portland, 19 Or LUBA 94 (1990). We conclude a reasonable person could have concluded, based on the evidence cited by the parties, that 19% of the total tower project cost has been expended. Accordingly, we will not disturb the county's choice here.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner states the planning commission referred to petitioner during the local appeal proceedings as the "applicant" rather than the appellant. Petitioner contends this establishes the county impermissibly shifted the burden of proof on the request from the applicant to petitioner.

We fail to understand how addressing a local appellant as an applicant establishes that the local government impermissibly shifted the burden of proof. The final decision correctly identifies the applicant. It also refers

to petitioner as the appellant, and attempts to respond to the arguments it made below concerning alleged errors. We see no evidence that the burden of proof was impermissibly shifted below.

The sixth assignment of error is denied.

The county's decision is affirmed.