BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FOUNTAIN VILLAGE DEVELOPMENT COMPANY,
Petitioner,

vs.

MULTNOMAH COUNTY,
Respondent,

and

ARNOLD ROCHLIN,
Intervenor-Respondent.

LUBA No. 2000-051

FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Phillip E. Grillo, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Miller Nash LLP.

Sandra N. Duffy, Deputy County Counsel, Portland, filed a response brief and argued on behalf of respondent.

Arnold Rochlin, Portland, filed a response brief and argued on his own behalf.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 12/13/2000

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a county decision determining that petitioner had no vested right to a dwelling on a 2.96-acre parcel zoned Commercial Forest Use (CFU).

MOTION TO INTERVENE

Arnold Rochlin (intervenor) moves to intervene on the side of the county. There is no opposition to the motion, and it is allowed.

FACTS

The subject property originally included 38 acres and, until 1993, was zoned Multiple Use Forest (MUF). A dwelling on a parcel over 10 acres in size is a permitted use in the MUF zone. At all relevant times, the subject property has been within an area that requires a scenic waterways permit to be obtained from the state prior to any development. No such permit has ever been obtained.

Sometime in 1985, the landowner at the time constructed a concrete bunker on the subject property for the purpose of growing marijuana plants under artificial light. Sometime prior to March 1987, the landowner began constructing a log cabin on top of the bunker without obtaining a building permit from the county. The county issued a stop work order, but then, on application of the landowner, issued a building permit on March 10, 1987.

Construction of the cabin continued thereafter, but the cabin was never completed, and after 1987 no further construction or expenditures toward construction took place. In 1991, the county renewed the building permit, which had expired, but no construction occurred under the renewed permit.

In 1992, federal agents found a number of marijuana plants on the property, and subsequently seized the property, including the cabin. The county acquired title and, on January 7, 1993, changed the zoning from MUF to CFU. A single-family dwelling is allowed only as a conditional use in the CFU zone. The original landowner then reacquired

the property from the county. In a series of transactions in 1993 and 1994, petitioner acquired the 38-acre property, paying approximately $25,000 for the two-acre portion of the property that includes the cabin.[1] In 1994, the county approved a lot line adjustment, which reduced the portion of the property containing the unfinished dwelling to 2.96 acres. The remainder of the property was sold. In 1995, petitioner expended approximately $3,000 to clear soil off the bunker, construct a road into the site, and hire an engineer to assess the integrity of the cabin. However, petitioner made no efforts to complete the cabin for occupancy, because interest rates for second home loans at the time were unfavorable. Between 1995 and 1998, petitioner's efforts were limited to clearing brush, replacing broken windows and maintaining the roof. In 1998, when interest rates fell, petitioner applied for a loan to complete the cabin.

On September 24, 1999, petitioner applied to the county for a determination of the legal status of the cabin. The county issued an administrative decision finding that no right to complete and use the cabin had vested under county code. In the alternative, the county determined that any vested right had been abandoned or discontinued pursuant to the code. Petitioner appealed to a hearings officer. The hearings officer considered petitioner's vesting claim under state law as well as the county code and concluded under both state and local law that any vested right to complete and use the cabin as a nonconforming use had been abandoned or discontinued. Petitioner then appealed to the board of commissioners, which affirmed the hearing officer's decision. The board of commissioners also concluded, based on two memoranda adopted and incorporated into its decision, that petitioner had not demonstrated the existence of a vested right to complete and use the cabin.[2]

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[1]Apparently, in 1986 the landowner illegally sold to an associate a two-acre portion of the 38-acre property that included the cabin site. Petitioner obtained both portions of the subject property by 1994, reuniting both portions in common ownership.

[2]The practice of incorporating by reference documents into the challenged decision is permissible, although it presents the possibility of confusion or conflicting findings. *Gonzalez v. Lane County*, 24 Or LUBA 251,

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner challenges the county's conclusion that no right to complete and use the cabin as a nonconforming use had vested or, if it had, that that right had been abandoned or discontinued.

A. Vested Rights

The doctrine of vested rights in Oregon derives from *Clackamas Co. v. Holmes*, 265 Or 193, 508 P2d 190 (1973). At issue in *Holmes* was a proposed chicken processing plant. The applicants had acquired the property in order to site the plant, and expended substantial sums in preparing the site when it was rural unzoned land. The county then zoned the land in a manner that prohibited the proposed plant. The applicants twice tried unsuccessfully to change the zoning, using the land in the meantime for grazing. Four years after the county zoned the land, the applicants resumed construction of the proposed plant. The county brought suit, seeking to enjoin construction. The applicants argued to the Supreme Court that they had a valid nonconforming use prior to application of the zoning ordinance. The court agreed:

> "The allowance of nonconforming uses applies not only to those actually in existence but also to uses which are in various stages of development when the zoning ordinance is enacted.
>
> > "'* * * When the development has reached a certain stage, the property owner is said to have acquired a "vested right" to continue the development and subsequently to put the use to its intended function. The point in the development of the use at which time the property owner is said to have acquired a "protected use" or "vested

258-59 (1992). In the present case, two of the incorporated documents were drafted by intervenor. As discussed below, the hearings officer's decision and intervenor's documents address and resolve the relevant legal issues in different ways. Although no party argues to us that the pertinent findings and conclusions conflict, discerning the county's position on any particular matter requires culling and reviewing statements from all three documents. Doing so presents the risk of misunderstanding the county's position, by considering statements out of context. That risk is heightened where, as here, some of the incorporated documents were drafted in part as persuasive argument or suggestions to the board of commissioners rather than as findings.

> right" is not easily defined * * *.' Comment, 22 SC L Rev. 833, 839 (1970)." 265 Or at 197.

The court then articulated the test for determining whether an inchoate nonconforming use had vested:

> "The test of whether a landowner has developed his land to the extent that he has acquired a vested right to continue the development should not be based solely on the ratio of expenditures incurred to the total cost of the project. We believe the ratio test should be only one of the factors to be considered. 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. * * *" 265 Or at 198-99 (citations omitted).

The court then applied that test to determine that the applicants had a vested right to construct and use their processing plant. Finally, the court addressed and rejected an argument that the applicants had abandoned the proposed processing plant after the zoning amendment.

In *Eklund v. Clackamas County*, 36 Or App 73, 81, 583 P2d 567 (1978), the Court of Appeals restated the *Holmes* test as follows:

> "The Supreme Court in *Holmes* identified four essential factors to be considered in assessing the evidence of a nonconforming use; (1) the ratio of prior expenditures to the total cost of the project, (2) the good faith of the landowner in making the prior expenditures, (3) whether the expenditures have any relationship to the completed project or could apply to various other uses of the land, and (4) the nature of the project, its location and ultimate cost. None of these factors is predominant; they are merely guidelines in assessing the evidence and deciding the issue."

In *Polk County v. Martin*, 292 Or 69, 81 n 7, 636 P2d 952 (1981), the court clarified that the *Holmes* analysis did not apply to the question of whether a landowner had the right to continue an existing use of the property after enactment of zoning restrictions. Specifically, the court held that the *Holmes* expenditure test did not apply to prevent the

landowner from establishing an existing lawful use, merely because the use did not require capital expenditures. In distinguishing between the determination of vested rights under *Holmes* and the determination of existing nonconforming uses, the court quoted the restatement of *Holmes* in *Eklund* as well as a portion of a law review article that identified, based on review of Oregon cases, four factors that bear on existence of a nonconforming use and seven factors relevant to vested rights.[3]

In the present case, the county concedes that the "substantial expenditure" factor of the *Holmes* test has been met.[4] The hearings officer assumed for purposes of her analysis

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[3]The seven factors include:

> "'(1) The good faith of the property owner in making expenditures to *lawfully* develop his property in a given manner; (Original emphasis.)
>
> "'(2) The amount of notice of any proposed re-zoning;
>
> "'(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 the total cost of the proposed use." 292 Or at 81 n 7, *quoting* Cable & Hauck, *The Property Owner's Shield—Nonconforming Use and Vested Rights*, 10 Will L J 404, 411-12 (1974).

The quoted passage continues:

> "'If the evidence relevant to these factors establishes a "vested right," the property owner may complete his improvements and thereafter use his property in a manner which is a nonconforming use, subject to the restrictions on nonconforming uses discussed above.'" *Id.*

[4]Petitioner submitted evidence that $70,000 was expended towards construction of the cabin prior to December 31, 1987, and that that sum was approximately one-third the total cost of the completed project. If we understand the county's position correctly, it does not dispute that that amount of money was spent or that, considered alone, the ratio of that expenditure to total cost satisfies the "substantial expenditure" factor.

that petitioner had a vested right. However, the county board of commissioners adopted supplemental findings that conclude, for a number of reasons, that petitioner had not established any vested right to complete and use the cabin as a nonconforming use under *Holmes*.

Petitioner challenges the county's reasons for concluding that it failed to establish a vested right to complete and use the cabin under *Holmes*. Most of the county's reasons bear on whether the expenditures for the cabin were made in good faith to lawfully develop the property. Specifically, the county found that (1) the 1987 expenditures were not made for the lawful purpose of establishing a single-family dwelling, but rather to facilitate an illegal marijuana grow operation; (2) petitioner's voluntary conveyance of all but 2.96 acres of the subject property in 1994 effectively rendered the use unlawful, because the putative vested right was for a dwelling on a parcel that exceeds 10 acres, as allowed under the MUF zone, not for a dwelling on a 2.96-acre parcel, which is not a permitted use under the MUF or CFU zone; and (3) at no time has a scenic waterways permit been obtained as required by state law.[5]

We need not resolve petitioner's challenges to the county's findings that no right to complete and use the cabin ever vested. To support a decision denying an application, the county need establish only one adequate basis for denial. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635 (1995). For the reasons expressed below, we conclude

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However, the county's decision appears to find that the cabin was largely constructed prior to issuance of the March 10, 1987 building permit and that petitioner had failed to demonstrate any significant work or expenditure on the cabin pursuant to the permit. Record 49.

[5]In addition, petitioner challenges several other assertions in the county's findings that petitioner argues either misconstrue the *Holmes* factors or are based on considerations extrinsic to *Holmes*. Specifically, petitioner challenges the county's reliance on (1) alleged illegalities in the 1987 building permit; (2) the fact that the 1987 permit has expired; (3) an assertion that building permits under the Uniform Building Code are nontransferable; and (4) an assertion that the 1987 construction was unlawful because the landowner failed to demonstrate compliance with the county's forest zone siting standards.

that the county correctly determined that any right to complete and use the cabin as a nonconforming residential use has been lost.

B. Abandonment or Interruption[6]

1. The County's Findings

The county's decision denied petitioner's vested rights claim because it determined, *inter alia*, that petitioner had lost the right to complete and use the cabin as a residence over the period between 1995 and 1998, by failing to timely resume efforts to complete and use the cabin.[7] The county found the predicate facts for that determination as follows:

> "In May of 1995, Mr. Beardsley of Fountain Village Development Co. hired an excavator to clear soil off of the bunker, cut in a driveway into the hillside to create a route into a part of the underground bunker and hired an engineer to study the integrity of the log cabin for residential use. The cost of fees exceeded $3,000. Mr. Beardsley moved building materials to the site and did work on a retaining wall. Sometime later in 1995, Mr. Beardsley abandoned his plans to complete the log cabin because interest rates for second homes were unfavorable. Mr. Beardsley did not recommence his efforts to finish the log home until the summer of 1998 when he applied for a mortgage loan to finish the log home. No interior work has been done since 1994. Mr. Beardsley cleaned bushes, replaced broken glass in windows and made sure that the roof was sound over time, between his acquisition of the property [in 1994] and the present day. No major efforts to complete the home have, however, been made since 1995." Record 26-27.

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[6]As discussed below, Multnomah County Code (MCC) 11.15.8805(B) uses the term "discontinued" rather than the term "interruption" found in ORS 215.130. We assume, because no party argues otherwise, that the county's word choice is not intended to reflect any difference in meaning. *Tigard Sand and Gravel Inc. v. Clackamas County*, 33 Or LUBA 124, 127 n 1, *aff'd* 149 Or App 417, 943 P2d 1106 (1997) (reading finding of discontinuance as applied to ORS 215.130 to be the equivalent of a finding of interruption); *Warner v. Clackamas County*, 22 Or LUBA 220, 229 n 7 (1991), *aff'd* 111 Or App 11, 824 P2d 423 (1992) (interpreting term "discontinue" in code provision to have the same meaning as "interruption" used in ORS 215.130). Our opinion will use the terms "discontinue" or "discontinuance" in discussing the county's code, and the term "interruption" when discussing the statute or the general concept embodied in the statute and the code.

[7]For purposes of our analysis, we assume that when the zoning changed from MUF to CFU in 1993 petitioner had a vested right to complete and use the cabin. Accordingly, we consider only events after 1993 in our discussion of abandonment and interruption.

The hearings officer considered the issue of abandonment and discontinuance as applied to those facts, under both *Holmes* and MCC 11.15.8805:[8]

> "The applicant's attorney argues that a vested right cannot be a nonconforming use that is subject to abandonment because it is a right that is not yet a 'use.' As a matter of semantics, this is true. The *Holmes* case, however, discusses partially established developments as '*uses* which are in various stages of development.' *Holmes*, 265 Or at 197. The property owners in *Holmes* made their claim of vested rights as a claim that they had established a *nonconforming use*. * * * As a result, it was appropriate for the Planning Director to find that the rules that govern nonconforming uses apply to the applicant's vested rights claim.
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> "MCC 11.15.8805(B) governs the abandonment and [discontinuance] of nonconforming uses. As vested rights are simply a right to complete establishing a nonconforming use, it is logical to find that the rules that govern the loss of nonconforming rights apply to vested rights. The County must regulate nonconforming uses, including vested rights to nonconforming

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[8]MCC 11.15.8805 was amended in 1990. In the present case, the county applied the version applicable in 1999, when petitioner submitted its application. That version provides:

> "(A) Restoration or replacement of a non-conforming use shall be permitted when the restoration or replacement is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the date of occurrence of the fire, casualty or natural disaster.
>
> "(B) If a non-conforming structure or use is abandoned or discontinued for any reason for more than two years, it shall not be re-established unless the resumed use conforms with the requirements of this code at the time of the proposed resumption.
>
> "(C) A non-conforming structure or use may be maintained with ordinary care."

The pre-1990 version of MCC 11.15.8805 provided:

> "(A) A non-conforming structure or use may not be changed or altered in any manner except as provided herein, unless such change or alteration more nearly conforms with the regulations of the district in which it is located.
>
> "(B) In case of destruction beyond reasonable repair as determined by the Hearings Officer, by fire or other causes, a non-conforming structure or use shall not be rebuilt unless it conforms to all requirements of the district in which it is located.
>
> "(C) If a nonconforming structure or use is abandoned or discontinued for any reason for more than one year, it shall not be re-established unless specifically approved by the Hearings Officer.
>
> "(D) A non-conforming structure or use may be maintained with ordinary care."

> uses, as stringently as they are regulated by ORS 215.130. *Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 936 P2d 990 (1997). ORS 215.130 says that nonconforming uses are subject to abandonment. ORS 215.130(10) authorizes the County to establish criteria to determine when a use has been interrupted or abandoned under ORS 215.[130]. Multnomah County has acted on this authorization and established said criteria in MCC 11.15.8805. As a result, it was not error for the County to apply that law to its review of this application." Record 20 (emphasis in original; footnotes omitted).

The hearings officer concluded that even if MCC 11.15.8805 did not apply to her review of petitioner's application, the facts demonstrated that "the applicant's [vested] rights were abandoned" under *Holmes*. Record 21. Further, the county concluded:

> "* * * The evidence in the record supports the County's finding that the single-family use [was] abandoned. All expenditures relied on by [petitioner] to establish the vested right claim were made in 1987. The use was not prohibited until 1993. [Petitioner] abandoned its plans to complete the building for a period over two and one-half years between 1995 and 1998 due to unfavorable financing terms for vacation homes.
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> "* * * * *
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> "* * * The Planning Director was correct in concluding that vested rights may, like non-conforming uses, be abandoned. The facts in this case support a finding of abandonment. It is objectively unreasonable to think that, under any circumstances, that it takes more than eleven years to build a single-family home. It is even more unreasonable for the applicant to insist that the County find that, as argued by its attorneys, that it has the right to complete the cabin at any time in the future, without limit." Record 31-32.

In addition, in the course of discussing the role played by the 1994 lot line adjustment, the county concluded that, even if the 1994 lot line adjustment has the effect of recognizing a legal right to complete and use the cabin, the county must still consider whether petitioner had lost that right through abandonment or discontinuance under the county's code:

> "If the [board of commissioners] * * * finds that the 1994 lot line decision determined the legal status of the cabin, this does not end the [board of commissioners'] inquiry. This is true, as the right arguably determined in 1994 is a nonconforming dwelling use, not a vested right to establish a use in the future. As a result, issues of abandonment and [discontinuance] are

> clearly relevant in this land use review. MCC 11.15.8805. Nonconforming uses are clearly subject to loss under MCC 11.15.8805 if they are abandoned or [discontinued] for a period of more than two years. The evidence shows that [petitioner] decided not to proceed with home completion some time in 1995 and did not resume the cabin completion project until the summer of 1998, a period of more than two years." Record 30.

Finally, as we discuss below, the county's supplemental findings appear to adopt the position that, in addition to abandoning the vested rights claim, petitioner had lost any vested right by interruption or "discontinuance" under ORS 215.130 and MCC 11.15.8805(B).

2. The Parties' Arguments

Petitioner argues that the county erred in applying the principles of abandonment and interruption to determine that petitioner's vested right to complete and use the cabin had lapsed. According to petitioner, the principles of abandonment and interruption derive from statute, specifically ORS 215.130, and therefore those principles apply only to nonconforming uses governed by that provision.[9] Petitioner contends that vested rights and

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[9]ORS 215.130 provides in relevant part:

> "(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * * Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.
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> "* * * * *
>
> "(7)(a) Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.
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> "* * * * *
>
> "(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:
>
> "* * * * *

nonconforming use rights, although similar, are separate rights that are governed by different principles. Vested rights, petitioner argues, are judicially-created *equitable* rights, and are therefore subject only to equitable restrictions, such as the doctrine of laches, and are not subject to legal restrictions such as the principles of abandonment and interruption found in ORS 215.130.

In any case, petitioner argues, ORS 215.130 and MCC 11.15.8805 cannot be applied to vested rights, because those provisions refer to and govern "uses." In cases where the vested rights doctrine applies, petitioner argues, no "use" has yet been established; therefore, ORS 215.130 and MCC 11.15.8805 by their own terms do not apply. Far from being merely a semantic problem, as the county characterizes it, petitioner argues that applying principles of abandonment and interruption to vested rights is a problematic and unfair exercise. Petitioner argues that there is no clear idea or notice regarding what is being "abandoned" or "interrupted" with respect to an uncompleted structure.

Finally, even if the county's code applies, petitioner argues, MCC 11.15.8805(C) expressly provides that nonconforming structures or uses can be maintained through ordinary care. Because it is undisputed that petitioner exercised ordinary care to maintain the uncompleted cabin from 1995 to 1998, petitioner argues, the county cannot conclude under its code that petitioner had lost its vested rights through abandonment or discontinuance. Similarly, petitioner argues that, under nonconforming use law, once a nonconforming use has been established there is no requirement for additional financial commitment or capital investment. If that is the case for nonconforming uses, petitioner argues, it should also be the case for vested rights: once the landowner has in good faith invested sufficient resources towards establishment of a nonconforming use under *Holmes*, there is no legal obligation to make additional expenditures to avoid lapse of that right.

> "(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; * * *"

The county and intervenor (together, respondents) disagree with the foregoing assertions. In their view, a vested right is the right to complete and implement a nonconforming use and, thus, is subject to any restrictions governing nonconforming uses imposed or authorized by statute or common law. Respondents also argue that the *Holmes* decision itself recognizes that vested rights can be abandoned.[10]

With respect to MCC 11.15.8805, respondents argue that ORS 215.130(10) expressly authorizes the county to adopt standards governing the abandonment or interruption of uses, and that the county has done so in MCC 11.15.8805(B). Because a vested right is simply an inchoate nonconforming use, respondents contend, it is appropriate to apply the code provisions governing nonconforming uses to vested rights. Because petitioner failed to take any significant steps toward completion and use of the cabin between 1995 and 1998, respondents argue, the county correctly concluded that it had lost its right to do so, pursuant to MCC 11.15.8805(B).

3. Discussion

The issue before us is whether the county can apply principles of abandonment or interruption, or a similar limiting principle, to extinguish rights that have vested under *Holmes*. The issue is one of first impression in this state.

The starting point for our analysis is, of course, *Holmes*. We generally agree with respondents that *Holmes* and its progeny treat vested rights as an extension of the principles underlying nonconforming uses, *i.e.*, as an inchoate nonconforming use, and not as a distinct entitlement that is immune from all limitations imposed on nonconforming uses. *Holmes*, 265 Or at 197 (allowance of nonconforming uses applies also to uses that are in various

[10]In *Holmes*, the Supreme Court addressed and rejected an argument that the applicants had abandoned the proposed processing plant by using the land for cattle grazing. The court concluded that no abandonment had occurred, because the applicants had twice sought to rezone the property in the intervening four years and had only grazed cattle to keep the land from being idle. 265 Or at 201. Respondents argue that the Supreme Court would not have addressed the abandonment issue unless a vested right can be abandoned.

stages of development); *Milcrest Corp. v. Clackamas County*, 59 Or App 177, 181, 650 P2d 963 (1982) (development of infrastructure for subdivision gave the developer "a vested right in a nonconforming use"); *Eklund*, 36 Or App at 82 (concluding that the petitioners had "established a vested right to complete the project based on a nonconforming use"); *see also* 4 *Rathkopf's The Law of Zoning and Planning*, §50.03, 50-22 (Oregon confers nonconforming use status on partially completed projects where there is requisite good faith reliance coupled with expenditures).[11] Petitioner argues nonetheless that the separate enumeration of factors for establishing vested rights and nonconforming uses in *Martin* supports the view that vested rights differ fundamentally from nonconforming uses. However, the separately enumerated factors in *Martin* bear precisely on the difference between vested rights and nonconforming uses: how each is established. Nothing in *Martin* suggests that once a vested right is established it is treated any differently from other nonconforming uses.

Although it is somewhat awkward to conceive of a vested right as a type of nonconforming *use*, Oregon courts have consistently treated a vested right as a nonconforming use that differs primarily in that the landowner need not establish "actual use." *See Clackamas County v. Holmes*, 11 Or App 1, 501 P2d 333, *rev'd on other grounds* 265 Or 193, 508 P2d 190 (1972) (vested rights are an exception to the "actual use" requirement to establish a nonconforming use, in situations where a property owner has incurred substantial and legally sufficient expense); *Twin Rocks Watseco v. Sheets*, 15 Or App 445, 448, 516 P2d 472 (1973) (as used in ORS 215.130(5), the phrase "use of any

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[11] In discussing *Holmes* and *Eklund*, Rathkopf comments:

> "Although this Oregon line of cases speaks of protecting partially completed land development projects as nonconforming uses, the factual and policy analysis employed therein makes it clear that these situations would be treated as vested rights cases in other jurisdictions. The fact that they are treated under the rubric of nonconforming uses is because Oregon, alone among the states, does not insist that a use have been in 'actual existence' as a definitional prerequisite to nonconforming use status." 50-21, 22 n 19.

building" is a term of art that means an existing building or a building upon which substantial work has been completed); *see also League to Save Lake Tahoe v. Crystal Enterprises*, 490 F Supp 995, 998 (D Nev 1980), *aff'd* 685 F2d 1142 (9th Cir 1982) (construing zoning ordinance term "use" to include partially constructed buildings, for purposes of determining whether failure to continue construction for more than one year after the ordinance was amended rendered a grandfather clause inapplicable).

We also disagree with petitioner that the only restrictions applicable to vested rights are equitable defenses such as laches. Petitioner cites no authority for that proposition, and we can find none. It is true that *Holmes* was an equitable proceeding, because the county had sought an injunction in circuit court. However, the court's analysis did not invoke or even mention equity or equitable principles. Instead, the court appears to have relied upon common law principles developed in cases from other jurisdictions and reflected in treatises and law reviews. It is also significant that the court addressed an argument regarding abandonment. *See* n 10. Petitioner does not argue that abandonment is an equitable principle, or explain why, if vested rights are subject only to equitable defenses, the court nonetheless considered an argument based on abandonment.[12] *See also Milcrest Corp.*, 59 Or App at 183 (on review of declaratory judgment, rejecting argument that the applicant had abandoned its vested right to development of a 440-acre subdivision by modifying its application to include more acreage).

[12]We note also that, prior to *Forman v. Clatsop County*, 297 Or 129, 681 P2d 786 (1984), it was generally understood that common law vested rights cases were heard in circuit court, which are courts of equity. *Forman* held that a vested rights determination under *Holmes* was a land use decision pursuant to ORS 197.015(10), subject to LUBA's exclusive jurisdiction. Petitioner does not explain how and under what authority, in the present framework, a local government could apply equitable defenses such as laches (against itself) in a quasi-judicial proceeding to determine vested rights. Similarly, it is not clear that LUBA has the authority to review or apply equitable doctrines in performing its review of quasi-judicial decisions. *See Nehoda v. Coos County*, 29 Or LUBA 251, 256 (1995) (LUBA lacks authority to reject a properly filed appeal on the basis of the equitable defense of laches).

In our view, vested rights, like nonconforming use rights, may be lost where the holder fails to diligently exercise those rights.[13] Nonconforming uses, in which category we include vested rights, are disfavored, because they exist in derogation of governing zoning ordinances and comprehensive plans. *Fraley v. Deschutes County*, 32 Or LUBA 27, 31 (1996); *Clackamas Co. v. Port. City Temple*, 13 Or App 459, 462, 511 P2d 412 (1973). We can conceive of no reason why a vested right should be treated more favorably than a nonconforming use with respect to the duration of that right or the requirement for diligent exercise. If petitioner's view were correct, the holder of a vested right is in a considerably more secure position than the holder of a nonconforming use, even though the latter may have invested far more capital to complete the use, and may have more to lose if that use is terminated. Further, under petitioner's view, the holder of a vested right can allow the land or structure to sit idle for an extended, perhaps unlimited, period of time, while the owner of a nonconforming use must employ the land or structure even under adverse economic conditions, to avoid loss of that right through discontinuance. Petitioner has not identified any reason in law or policy for such disparate results. As discussed above, a vested right is simply the right to complete development of a nonconforming use. Consequently, we conclude that vested rights are subject to the requirement that the holder diligently exercise those rights: *i.e.* that the holder continue development of the nonconforming use and not abandon or discontinue efforts to complete development of the use.

The next question is what circumstances must occur or, more precisely, what period of time must elapse before failure to continue development of a nonconforming use results in

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[13]In some jurisdictions, this limiting principle is apparently termed "diligent pursuit" when applied to vested rights. *See Twin Rocks Watseco*, 15 Or App at 452 (concurrence discussing a City of San Francisco ordinance that immunizes construction under a building permit from subsequent zoning changes as long as construction is "diligently pursued"); *Snow v. Amherst County Board of Zoning Appeals*, 448 SE2d 606, 608-09 (Va. 1994) (to establish vested right, landowner must demonstrate that he diligently pursued a use authorized by local government permit or approval, and incurred substantial expense in good faith prior to the change in zoning). This holding in *Snow* has apparently been codified. *Searching for Certainty: Virginia's Evolutionary Approach to Vested Rights*, 7 Geo Mason L Rev 983, 1000 (1999).

loss of vested rights. Our foregoing discussion has relied on *Holmes* and related cases, without reference to ORS 215.130 or MCC 11.15.8805. However, for the following reasons, we conclude that the statute allows the county to prescribe the period of time in which the holder of a vested right must exercise that right in order to avoid its loss through abandonment or interruption. The period of time prescribed in MCC 11.15.8805(B) is applicable to vested rights in Multnomah County.

In the course of holding that possession of a building permit was not sufficient in and of itself to grant a vested right to proceed with construction of a use that was later prohibited by an amended zoning ordinance, the court in *Twin Rocks Watseco* interpreted the phrase "use of any building" in ORS 215.130(5) as a term of art that includes a building upon which substantial work has been completed. 15 Or App at 448. In other words, statutory provisions governing nonconforming use rights apply to substantially completed buildings as well as the use of existing buildings. Although that interpretation is *dicta*, it is consistent with *Holmes* and its progeny in treating vested rights as a type of nonconforming use that differs from other types primarily in that the proponent of a vested right need not establish "actual use." The phrase "use of any building" remains in ORS 215.130(5), and the Court of Appeals has never, to our knowledge, disavowed its interpretation of ORS 215.130(5) in *Twin Rocks Watseco*. We conclude, therefore, that the limitations that apply to nonconforming use rights under ORS 215.130 are also applicable to incomplete buildings for which there is a vested right to complete the building.[14]

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[14]One of the stronger arguments to the contrary is that, as petitioner points out, *Holmes* makes no reference to ORS 215.130, even though that statute existed in materially the same form as the current version of the statute at the time *Holmes* was decided. Petitioner argues that the *Holmes* court did not refer to ORS 215.130 because it viewed that statute as inapplicable to vested rights. While it is possible to draw that inference from *Holmes*, there are any number of reasons why the court might not have discussed ORS 215.130, including the possibility that no issue was raised under that statute. Further, the court in *Martin*, 292 Or at 80, discusses its holding in *Holmes* with reference to ORS 215.130:

> "* * * *Holmes* concerns the degree of development which must exist before an owner of partially developed property can be said to have established a 'lawful use' of property under

ORS 215.130(7)(a) provides that any use described in ORS 215.130(5) may not be resumed after a period of interruption or abandonment unless it conforms to the zoning regulations applicable at the time of the proposed resumption. ORS 215.130(10) provides that a local government may adopt standards and procedures to implement the statute, including but not limited to establishing criteria "to determine when a use has been interrupted or abandoned under [ORS 215.130(7).]" ORS 215.130(10)(b). Because we conclude the uses described in ORS 215.130(5) include substantially completed buildings, it follows that such uses may not be resumed after a period of abandonment or interruption, and the county has authority to establish criteria to determine the circumstances under which such uses have been interrupted or abandoned. The version of MCC 11.15.8805 applicable in this case provides that a nonconforming structure or use that is abandoned or discontinued for any reason for more than two years shall not be re-established unless it complies with code requirements applicable at the time of the proposed resumption. Although the county can refine or amplify the statutory requirements of ORS 215.130, the county's nonconforming use regulations must be consistent with that statute. *Marquam Farms Corp.*, 147 Or App at 380. Because ORS 215.130(5), as construed in *Twin Rocks Watseco*, includes substantially constructed buildings as nonconforming uses, the county must apply its nonconforming use regulations consistently with the statute. Consequently, the county in the present case did not err in applying its nonconforming use regulations to a proposal to

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> the statutes [*i.e.* ORS 215.130(5)], so as to use the property as intended even though the use would not be permitted under the zoning law which became effective while the property was being improved."

The above-quoted language does not support the inference petitioner attempts to draw from *Holmes*, and supports the view that statutory nonconforming use provisions are relevant to vested rights.

complete and use a substantially constructed building in a zone where that structure and use are not permitted.[15]

The remaining question is whether the county correctly concluded in this case that, under MCC 11.15.8805, petitioner had abandoned or discontinued the proposal to complete and use the cabin. Petitioner challenges that conclusion, arguing that abandonment requires proof of petitioner's intent to abandon the proposal, and there is no evidence of such intent in the record. On the contrary, petitioner argues, throughout the period 1995 to 1998 petitioner maintained the unfinished structure through ordinary care. MCC 11.15.8805(C). Petitioner contends that such maintenance is sufficient to demonstrate that petitioner neither abandoned nor discontinued efforts to complete and use the cabin. Petitioner also argues that any delay between 1995 and 1998 was reasonable, based on unfavorable financial conditions for second homes during that period. Finally, petitioner argues that applying MCC 11.15.8805 in this case to find that petitioner abandoned or discontinued the use would result in forfeiture of petitioner's vested right, and such forfeiture would be inequitable.

Petitioner is correct that abandonment differs from interruption or discontinuance, and that the difference turns largely on the intent of the landowner to relinquish a known right. *Tigard Sand and Gravel, Inc.*, 33 Or LUBA at 134 (nonuse of quarry for more than one year constituted interruption, while voluntary conversion of property to unrelated use constituted abandonment); *Sabin v. Clackamas County*, 20 Or LUBA 23, 31 (1990) (a

[15]Even if the county were not required to do so by statute, the challenged decision takes the position that the county has authority under ORS 215.130(10) to establish criteria governing abandonment and interruption of nonconforming uses and apply those criteria to vested rights. To the extent that interpretation of MCC 11.15.8805 merely "amplifies" ORS 215.130 and is not inconsistent with that statute or clearly wrong under its own terms, it is presumably entitled to deference under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). For the reasons discussed above, the county's interpretation of MCC 11.15.8805 is not inconsistent with ORS 215.130. Petitioner does not explain why application of MCC 11.15.8805 to a substantially constructed building is inconsistent with the express language, purpose or policy underlying that code provision. ORS 197.829(1)(a)-(c). Petitioner does argue that such an interpretation would be inconsistent with *Holmes*. However, as noted above, *Holmes* expressly contemplated application of the principle of abandonment to vested rights. We see nothing in *Holmes* that would prohibit the county from adopting criteria prescribing the circumstances under which vested rights, like any other nonconforming use, can be lost.

nonconforming use can be "discontinued" by nonuse for a specified period, regardless of intent). Although abandonment requires intentional relinquishment of a known right, such intent can be inferred from the landowner's actions. *See Tigard Sand and Gravel, Inc.*, 33 Or LUBA at 134 (lease of quarry site to another unrelated business evidenced an intent to abandon the site as a quarry).

In the portion of the decision drafted by the hearings officer, the hearings officer uses the term "abandonment" for the most part rather than interruption or discontinuance. It is not clear whether the hearings officer used that term imprecisely to include both concepts, or whether those portions of the decision are intended to refer only to abandonment, *i.e.* intentional relinquishment of a known right. Whatever the case, we agree with petitioner that there is not substantial evidence in the record that petitioner intended to abandon its right to complete and use the cabin during the period 1995 to 1998. The only evidence of petitioner's intent during that period to which we are directed is petitioner's actions to maintain the cabin. Those actions are inconsistent with an intent to abandon the right to complete and use the cabin, and are insufficient to establish such intent.

That does not end our inquiry, however. Other portions of the county's decision arguably conclude that petitioner's failure to continue development of the cabin from 1995 to 1998 resulted in loss of the right to complete and use the cabin through discontinuance:

> "* * * A point of unnecessary dispute arises from the hearings officer's preference for the term 'abandonment.' ORS 215.130 refers to 'interruption or abandonment.' MCC 11.15.8805(B), as authorized by the statute, defines loss of nonconforming use rights as occurring when a use is 'abandoned or discontinued for any reason for more than two years.' The applicant has argued that abandonment implies an intention to stop and not resume. But no one can claim that 'discontinued for any reason' implies an intention, and the consequences are the same. I suggest the [board of commissioners] avoid an unnecessary issue by adding to the findings a clear statement that, abandonment aside, there was a discontinuance of significant development effort for over 2 years. Or, at the least, the applicant has not carried the burden of showing there was not a 2-year discontinuance of substantial effort to finish the development." Record 52 (emphasis in original).

The above-quoted passage was drafted by intervenor, but incorporated by reference and adopted as part of the board of commissioners' decision. Petitioner argues that because the passage *recommends* the adoption of certain findings regarding discontinuance, the county's adoption of the document containing that recommendation should not be construed as an adoption of the recommendation, *i.e.* the county should not be understood to have concluded that petitioner had lost its vested rights by interruption or discontinuance of efforts toward completion, as well as by abandonment. The county and intervenor respond that the board of commissioners effectively adopted the recommendation and therefore found that petitioner had lost any vested right by discontinuance, as well as by abandonment.

This issue illustrates the problems inherent in the practice of incorporating one or more separate documents into a land use decision as findings, without resolving any ambiguities that may arise. *See* n 2, above. There is at least some doubt whether the county intended to adopt the recommendation regarding interruption or discontinuance as an alternative basis for concluding that petitioner has lost any vested rights. However, we conclude that it did. The board of commissioners' order, at Record 13, states that it affirms the hearings officer's decision and adopts additional findings and conclusions. It then describes the document containing the above-quoted passage and adopts it as part of the county's final decision. The above-quoted passage recommends the adoption of certain findings set forth in that passage. Under these circumstances, we conclude that the board of commissioners intended to adopt the recommended findings as its own.

Petitioner argues that its maintenance of the cabin during the period 1995 to 1998 means that the county cannot conclude that petitioner had lost its vested right through discontinuance over a two-year period. According to petitioner, because MCC 11.15.8805(C) allows a nonconforming use or structure to be "maintained with ordinary care," such maintenance during a period of time negates a finding of discontinuance during that period. We disagree. The county's decision views a vested right to complete a

partially completed building to be lost if there is "discontinuance of substantial effort to finish the development" over the requisite two-year period. There is no dispute that petitioner's actions in maintaining the site over the period 1995 to 1998 did nothing to finish the development.[16]

Finally, petitioner contends that its interruption of efforts to finish the cabin within the period 1995 to 1998 was reasonable, given unfavorable interest rates for second homes during that period. Further, petitioner argues that application of MCC 11.15.8805 to its development would result in forfeiture of petitioner's vested rights. Both arguments are based on petitioner's view that a local government's determinations regarding vested rights are governed by equitable principles. However, as discussed above, the county properly applied MCC 11.15.8805 to determine whether petitioner's vested right had lapsed due to discontinuance. MCC 11.15.8805(B) provides that a nonconforming use or structure that is discontinued *for any reason* for more than two years cannot be resumed unless it conforms with the current zoning ordinance. Under that provision, the economic reasonableness of petitioner's failure to finish development of the property or the consequent forfeiture of the vested right to do so is not a relevant consideration.[17]

The first assignment of error is denied.

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[16]*But see Hendgen v. Clackamas County*, 115 Or App 117, 120, 836 P2d 1369 (1992) (short of the point that it is abandoned or discontinued, the intensity of a nonconforming use may be reduced without its being lost). If that principle were applied in the present context, it is arguable that some effort to finish the development during the relevant period, even if relatively insignificant, would suffice to negate a finding of interruption or discontinuance. We need not decide that point, because petitioner does not contend that any effort to finish the cabin was made during the relevant period.

[17]The existence of prudent economic reasons for failing to proceed with a proposed use to the point necessary to acquire a vested right is not relevant in determining whether a right to complete the use has vested. *Union Oil Co. v. Board of Co. Comm. of Clack. Co.*, 81 Or App 1, 9, 724 P2d 341 (1986). Even absent the language in MCC 11.15.8805(B), it is arguable that a similar principle would govern a determination of whether a vested right has lapsed: *i.e.*, the economic reasonableness of the actions or inactions constituting abandonment or interruption would play no role in that determination.

SECOND ASSIGNMENT OF ERROR

ORS 215.416(11)(b) provides in relevant part that the local government may charge the appellant a fee not to exceed $250 for the "initial hearing."[18] Petitioner argues that the county violated ORS 215.416(11)(b) by charging petitioner more than $250 for the hearing before the board of commissioners. Petitioner also argues that it partially prevailed before the hearings officer, and therefore the county is required by ORS 215.416(11)(b) to refund the $250 fee paid for that hearing. Petitioner also requests refund of a transcript deposit of $1,443, because the county did not prepare a transcript.

The county responds, and we agree, that the hearing before the board of commissioners in this case was not the "initial hearing" described by ORS 215.416(11)(b). The "initial hearing" in this case was before the hearings officer. The statute regarding payment of fees or costs for appeal of a hearings officer's decision to the governing body is ORS 215.422(1)(c), which requires only that the fee be "reasonable" and "no more than the average cost of such appeals or the actual cost of the appeal[.]" We also agree with the county that petitioner did not "prevail" before the hearings officer within the meaning of ORS 215.416(11)(b). While the hearings officer agreed with petitioner that the planning director should have considered state law as well as the county's code, the hearings officer and subsequently the board of commissioners denied the sum and substance of petitioner's claim under state and local law. With respect to the transcript deposit, the county's brief concedes that the deposit should be returned and states that the county will do so.

The second assignment of error is denied.

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[18]ORS 215.416(11)(b) provides in part:

> "If a local government provides only a notice of the opportunity to request a hearing, the local government may charge a fee for the initial hearing. The maximum fee for an initial hearing shall be the cost to the local government of preparing for and conducting the appeal, or $250, whichever is less. If an appellant prevails at the hearing or upon subsequent appeal, the fee for the initial hearing shall be refunded. * * *"

The county's decision is affirmed.